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**California State University, Northridge**

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2012

# Bavarian Blondes Don't Need a Visa: A Comparative Law Analysis of Ambush Marketing

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# **BAVARIAN BLONDES DON'T NEED A VISA: A COMPARATIVE LAW ANALYSIS OF AMBUSH MARKETING**

Gerlinde Berger-Walliser,\* Melanie Stallings Williams,\*\* Björn Walliser,\*\*\*  
and Mark Bender\*\*\*\*

## **ABSTRACT**

This paper describes the problem of ambush marketing: the act of attempting to associate with an event without buying the rights to do so. From the perspective of the organizers and sponsors of large-scale media and athletic events, the problem is significant. More than \$100 billion is spent annually on purchasing sponsorship rights and the associated promotions. For companies who have not paid for such rights to be able to imply an association with these high-profile events dilutes the value of that sponsorship. Despite the size of the problem, however, (and except for the special coverage many countries afford Olympic activities) there is little legal protection against all but the most blatant marketing encroachment.

The paper examines the problem and legal approaches from countries in the EU, North America and Oceania, including the U.S., Canada, the UK, Germany and Australia.

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## INTRODUCTION

Pity poor Budweiser. After Anheuser-Busch paid for Budweiser to be the official beer of the 2010 World Cup, dozens of beautiful blondes disrobed down to their bright orange Bavaria Beer dresses – causing plenty of attention for the rival brewer.<sup>1</sup> There was little Budweiser could do; they'd been ambushed. In a similar tactic, American Express used the “You Don't Need a Visa” to visit the Barcelona Olympics slogan as part of their campaign rivalry with Visa, the official sponsor of the event.<sup>2</sup> Again, the sponsor had been outmaneuvered by a rival. By contrast, another World Cup sponsor, MasterCard, was more successful in defending its rights. They obtained a preliminary injunction against Sprint preventing them from putting the World Cup logo on Sprint's customer cards.<sup>3</sup> Why are some ambush marketing techniques permitted and others not? The answer lies in the nature of the ambush marketing tactics and the relevant jurisdictions.

Corporations pay millions for sponsorship rights of sporting and other events, only to find competitors freeloading on the event. This practice is commonly called ambush marketing, and it promises to increase since new technology has made ambush marketing easier and more readily available to the public, and thus more successful as a marketing strategy.<sup>4</sup>

This paper describes the problem and international legal approaches to the practice of ambush marketing: the act of attempting to associate with an event without buying the rights to do so. It compares the legal framework of selected North American and European markets and

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<sup>1</sup> Ben Klayman, *Ambush Marketing Top Concern for Sports Officials*, www.reuters.com, Sept. 24, 2010, available at <http://www.reuters.com/article/idUSTRE68N3BX20100924>.

<sup>2</sup> Stuart Elliott, *The Media Business: Advertising; Jousting by Mass Marketers is the Newest Olympic Sport*, N. Y. TIMES, July 15, 1992, at D1.

<sup>3</sup> MasterCard International, Inc. v. Sprint Communications Co., 1994 U.S. Dist. LEXIS 3398 (S.D.N.Y. 1994), *aff'd*, 23 F.3d 397, 1994 U.S. App. LEXIS 10982 (2d Cir. 1994).

<sup>4</sup> Steven McKelvey, et al., *Caught in the Web?: The Communication of Trademark Rights and Licensing Policy on University Official Athletic Websites*, 20 J. LEGAL ASPECTS OF SPORT 1, 3 (2010).

Australia, and discusses the extent to which legal protections can be successfully used by sponsor companies and event organizers. The question of whether ambushing is unethical, an “undeserved advantage,”<sup>5</sup> or simply an imaginative business practice,<sup>6</sup> is beyond the scope of this paper. Nor does this paper evaluate the extent to which ambush marketing is actually economically beneficial or detrimental to sponsors, rights holders, and ambushers.

The paper is structured as follows: it first describes the problem by defining ambush marketing and sponsorship and gives an overview of ambush practices. It then compares the legal frameworks in four major sponsorship markets, namely the U.S., Canada, Australia, and the European Union, with Germany and the U.K. as specific examples. From there, conclusions are drawn on the extent to which sponsorship rights are protected in diverse legal and economic environments. Ultimately, this research thus also addresses the question of whether a country’s legal environment constitutes a handicap when bidding to host major international events.

## I. DESCRIPTION OF THE PROBLEM

Global team and event sponsorship spending rose from an estimated \$2 billion in 1984 to<sup>7</sup> \$43.5 billion in 2009.<sup>8</sup> In addition to sponsorship costs, companies then heavily invest in promotional activities in order to leverage those rights. Marketers estimate that the investment in promoting sponsorships equals or exceeds the amount spent to acquire the rights, so that the total

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<sup>5</sup> Michael Payne, *Ambush Marketing: The Undeserved Advantage* 15, 4 PSYCHOLOGY & MARKETING 323 (1998).

<sup>6</sup> Tony Meenaghan, *Point of View: Ambush Marketing: Immoral or Imaginative Practice?* 34 J. ADVERTISING RESEARCH 77 (1994); Denise Doust, *The Ethics of Ambush Marketing* 1 THE CYBER-JOURNAL OF SPORT MARKETING (1997).

<sup>7</sup> Tony Meenaghan, *Sponsorship – Legitimising the Medium*, 17 EUROPEAN J. OF MARKETING 5 (1991).

<sup>8</sup> Simon Chadwick & Nicholas Burton, *Ambushed!*, WALL ST. J., Jan. 25, 2010, § R, at 4.

spent in acquiring and promoting sponsorship exceeds \$100 billion annually.<sup>9</sup> In many cases, brands see their sponsorship diluted by the activities of ambush marketers, and event organizers fear losing their attractiveness for sponsors if unauthorized competitors “free ride” on the event.

Advertisers reportedly see ambush marketing as a top concern. In a recent study by the Chief Marketing Officer Council, 41% of respondents identified ambush marketing as their top concern – higher than concern over counterfeit goods (29 %) or misbehaving athletes (27%).<sup>10</sup> With advertising for sports-related marketing reaching nearly \$100 billion dollars a year,<sup>11</sup> the stakes are high for organizers and sponsors.

Ambush marketing has been described as a collection of activities to associate with an event for which the ambusher has not purchased sponsorship rights. It can include a myriad of forms. It is defined as “a planned effort by an organization to associate itself indirectly with an event in order to gain at least some of the recognition and benefits that are associated with being an official sponsor.”<sup>12</sup> The problem is as old as sponsorship but still relatively recent, since “[c]ommercial sponsorship for marketing purposes has only really developed over the last three decades.”<sup>13</sup> Ambushing first came to the awareness of many during the 1984 Los Angeles Olympic Summer Games when Fuji bought exclusive sponsorship rights, only to see rival Kodak imply its association with the games by sponsoring television broadcasts of the U.S. Olympic track team.<sup>14</sup>

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<sup>9</sup> Simon Chadwick & Nicholas Burton, *The Evolving Sophistication of Ambush Marketing: A Typology of Strategy*, 53 THUNDERBIRD INTERNATIONAL BUSINESS REVIEW 709, 710 (2011).

<sup>10</sup> Ben Klayman, *Ambush Marketing Top Concern for Sports Officials*, [www.reuters.com](http://www.reuters.com), Sept. 24, 2010, available at [www.reuters.com/article/idUSTRE68N3BX2010094](http://www.reuters.com/article/idUSTRE68N3BX2010094).

<sup>11</sup> Simon Chadwick & Nicholas Burton, *Ambushed!* WALL ST. J., Jan. 25, 2010, § R, at 4.

<sup>12</sup> Dennis M. Sandler & David Shani, *Olympic Sponsorship vs. “Ambush” Marketing: Who Gets the Gold?*, 29 J. ADVERTISING RESEARCH 9, 11 (1989).

<sup>13</sup> Tony Meenaghan, *Ambush Marketing: Corporate Strategy and Consumer Reaction*, 15 PSYCHOLOGY & MARKETING 305, 306 (1998).

<sup>14</sup> *Who Will Win the World Cup*, CAMPAIGN, Apr. 21, 2006, at 31.

Sponsorship is frequently defined as “a cash and/or in kind fee paid to a property... in return for access to the exploitable commercial potential associated to that property.”<sup>15</sup> However, a generally accepted definition of sponsorship does not exist,<sup>16</sup> making it difficult to specify where sponsorship ends and where ambush marketing begins. For some observers, sponsorship should involve a “direct investment” in an event.<sup>17</sup> Such a view would distinguish a practice termed “broadcast sponsorship” (the payment of a fee to a media source, often a television network, in order to be identified as the sponsor of the broadcast) from event sponsorship.

A sponsored event is distinguished from other types of communication forms because it “simultaneously attracts, and provides access to, an audience. It differs from conventional advertising in that both message and medium are inextricably linked in sponsorship.”<sup>18</sup> Sponsors may achieve major benefits since “[a]ppreciation and good will are part of the halo effect” of sponsorship.<sup>19</sup> Sponsorship effects are typically measured in terms of sponsor memorization, image transfer to sponsor brands, buying intention for sponsor brands, sponsor sales, corporate wealth, and impact on brand equity.<sup>20</sup>

Ambush marketing is typically considered to be detrimental to both sponsors and to event owners/property rights’ holders. Without paying any fee, ambushers may reap many of the

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<sup>15</sup> LESA UKMAN, THE IEG’S COMPLETE GUIDE TO SPONSORSHIP: EVERYTHING YOU NEED TO KNOW ABOUT SPORTS, ARTS, EVENT, ENTERTAINMENT AND CAUSE MARKETING 1 (IEG 1995).

<sup>16</sup> Björn Walliser, *An International Review of Sponsorship Research: Extension and Update*, 22 INTERNATIONAL JOURNAL OF ADVERTISING 5, 8 (2003).

<sup>17</sup> Christian Derbaix, Philippe Gérard & Thierry Lardinois, *Essai de Conceptualisation d’une Activité Éminemment Pratique : Le Parrainage*, 9 RECHERCHE ET APPLICATIONS EN MARKETING 43 (1994).

<sup>18</sup> Tony Meenaghan, *Ambush Marketing: Corporate Strategy and Consumer Reaction*, 15 PSYCHOLOGY & MARKETING 305, 307 (1998).

<sup>19</sup> *Id.* at 317.

<sup>20</sup> See generally Björn Walliser, *An International Review of Sponsorship Research: Extension and Update*, 22 INTERNATIONAL JOURNAL OF ADVERTISING 5, 8 (2003) (for a review of these effects).

benefits of the official sponsors at the expense of the latter and thereby indirectly decrease the value of event property rights. Sponsors have little interest in paying for sponsorship rights if ambushers receive similar benefits at little or no cost. Studies show, for example, that ambushers are in many cases better remembered by the event audience than are sponsors.<sup>21</sup> At the same time, ambushing can sometimes prove beneficial to official sponsors in as much as it promotes the event and the product category of the sponsors. If, for example, both Coca Cola and Pepsi Cola associate themselves to an event - no matter which is the ambusher and which is the official sponsor - there is the possibility that more cola will be sold (compared to other soft drinks), and that the event will receive more public attention. However, the latter hypothesized effects are little researched and will be excluded from the subsequent considerations. Currently, companies view ambush marketing as a drain against the value of sponsoring an event.

A. *Dominant Forms of Ambush Activities*

Ambushing takes various forms that range from a direct attack of competitors to unintentional associations. The most frequent types of ambushing activities are briefly described in the following section. But companies are so creative in their ambushing strategies that the examples provided are by no means exhaustive. Depending on their budget and competitive strategy, ambushers may combine several of the activities below.

*Predatory Ambushing:* Attacking a sponsor to an event, leaving consumers confused about who officially sponsors the activity. One example noted in the introduction is the American Express television ad of the Barcelona Summer Olympics in 1992. With Visa as the official credit card sponsor of the games, American Express created ads noting, “You don’t need

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<sup>21</sup> Dennis M. Sandler & David Shani, *Olympic Sponsorship vs. “Ambush” Marketing: Who Gets the Gold?*, 29 J. ADVERTISING RESEARCH 9, 13 (1989).

a visa” to visit Spain.<sup>22</sup> Also included would be Pepsi’s 1996 Cricket World Cup campaign of advertisements titled “nothing official about it” in contrast to rival official sponsor Coca-Cola.<sup>23</sup> Other traditional forms include ticket giveaways by non-sponsors.<sup>24</sup>

*Coattail Ambushing*: Associating with an event by sponsoring a participant (e.g. a person or team) of the event. During the 1984 Olympic Games, as noted earlier, Kodak ambushed rival Fuji (the event sponsor) by becoming the sponsor of the U.S. track team (event participants).<sup>25</sup> Tattoo advertising – the act of paying athletes to wear temporary tattoos during the event – would also qualify<sup>26</sup> as would “jockey advertising” where jockeys display advertising on their silks.<sup>27</sup> Another American Express attack on Visa’s official credit card sponsorship of the Olympics occurred when American Express used an athlete wearing his Olympic gold medals in its promotional materials.<sup>28</sup>

*Self-ambushing*: Using status as an official sponsor, but going beyond the scope of the agreed sponsorship. An example would include an official sponsor for broadcasting rights who

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<sup>22</sup> Simon Chadwick & Nicholas Burton, *Ambushed!* WALL ST. J., Jan. 25, 2010, § R, at 4.

<sup>23</sup> Mahul Brahman, *As Competition Gets Fierce, Advertising Gets Even Fiercer*, BUSINESSWORLD, Jan. 2, 2009, <http://www.businessworld.in/index.php/Media-Entertainment/Name-Of-The-Game.html>.

<sup>24</sup> Steven McKelvey et al., *Caught in the Web?: The Communication of Trademark Rights and Licensing Policy on University Official Athletic Websites*, 20 J. LEGAL ASPECTS OF SPORT 1, 24 (2010).

<sup>25</sup> *Who Will Win the World Cup*, CAMPAIGN, Apr. 21, 2006, at 31.

<sup>26</sup> See generally John Vukelj, *Post No Bills: Can the NBA Prohibit its Players from Wearing Tattoo Advertisements?* 15 FORDHAM INTELL. PROP. MEDIA & ENT. J. 507 and Stephen M. McKelvey, *Commercial “Branding”: The Final Frontier of False Start for Athletes’ Use of Temporary Tattoos as Body Billboards*, 13 J. LEGAL ASPECTS OF SPORT 1 (2003).

<sup>27</sup> See generally William P. Barnett, *The Run for the Roses Meets the First Amendment: An Examination of Desormeaux v. Kentucky Racing Commission and the Constitutionality of Prohibitions on Jockey Advertising*, 52 CLEV. ST. L. REV. 371 (2004).

<sup>28</sup> Stephen McKelvey, *An Analysis of the Ongoing Global Efforts to Combat Ambush Marketing: Will Corporate Marketers “Take” the Gold in Greece?* 14 J. LEGAL ASPECTS OF SPORT 191, 192 (2004).

then hands out promotional T shirts at a sporting event. This practice may infringe on the host organization's agreement with another company to sponsor shirts.

*Controversy Ambushing:* Counting on negative publicity surrounding an event. A Canadian gay dating site, ManCrunch, produced an advertisement reportedly knowing that it would never be accepted for broadcast during the 2010 Super Bowl. Reportedly speculating that the controversy would generate more attention, they avoided having to pay the \$2.5 million cost of direct advertising.<sup>29</sup>

*Associative Ambushing:* Using "imagery or terminology to create an illusion that an organization has links to a sporting event or property."<sup>30</sup> At the Chinese Olympics in 2008, Nike (not an official sponsor) made much use of the number 8 – a symbol of good luck in China as well as a symbol used for the games. Similarly, during the 2000 Sydney Olympics, Qantas Airlines promoted the "Spirit of Australia" in a phrase similar to that year's slogan, "Share the Spirit" to the consternation of rival airline and event sponsor Ansett Air.<sup>31</sup> During the 1984 Summer Olympic Games in Los Angeles where Converse was an official sponsor, rival sporting wear manufacturer Nike ran ads with an "I Love L.A." theme.<sup>32</sup>

*Distractive and Insurgent Ambushing:* Using distractions around events for media promotions. Without making specific reference to an event, promoters set up a presence to attract attention. Examples include banners flown over outdoor sporting or entertainment

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<sup>29</sup> Cyd Zeiler, Jr., *Mancrunch Super Bowl Ad is Really Bad. Hoax?* OUTSPORTS.COM., Jan. 29, 2010, available at <http://outsports.com/jocktalkblog/2010/01/29/mancrunch-super-bowl-ad-is-really-bad-hoax/>.

<sup>30</sup> Chadwick & Burton, *supra* note 8.

<sup>31</sup> *Ansett Accuses Qantas of "Ambush Marketing,"* AIRLINE INDUSTRY INFORMATION, Sept. 4, 2000, available at <http://www.allbusiness.com/operations/shipping-air-freight/624704-1.html>.

<sup>32</sup> Lori L. Bean, *Note: Ambush Marketing: Sports Sponsorship Confusion and the Lanham Act*, 75 B.U.L. REV. 1099, 1104 (1995).

venues.<sup>33</sup> During the 2008 French Open, K-Swiss parked a car nearby that appeared to have been smashed by a giant K-Swiss tennis ball.<sup>34</sup>

*Unintentional Ambushing:* When media coverage identifies equipment, clothing or products used by an athlete or company in the event although the manufacturer has not paid for sponsorship. Speedo, often mentioned during the Beijing Olympic Games because of the success of their LZR Racer swimsuits, was subsequently incorrectly identified by consumers as an official sponsor.

*Saturation Ambushing:* Using intensified advertising campaigns around an event, with no direct or indirect reference to the game or activity.

Examining these various forms of ambushing, it appears as if two basic approaches should be separated: activities which may constitute an infringement on intellectual property law (such as the non-authorized use of a logo) also called direct ambushing<sup>35</sup> and the more subtle activities, sometimes referred to as indirect ambushing,<sup>36</sup> for which the legal remedy is less clear.<sup>37</sup> Table 1 summarizes the direct and indirect ambushing activities.

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<sup>33</sup> John Vukelj, *Post No Bills: Can the NBA Prohibit its Players from Wearing Tattoo Advertisements?* 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 507, 518.

<sup>34</sup> Chadwick & Burton, *supra* note 8.

<sup>35</sup> Thomas C. Körber & Rüdiger Mann, *Werbefreiheit und Sponsoring, Möglichkeiten und Grenzen von Ambush Marketing Unter Besonderer Berücksichtigung des Neuen UWG*, GRUR 737, 738 (2008).

<sup>36</sup> *Id.*

<sup>37</sup> Stephen Townley, Dan Harrington & Nicholas Couchman, *The Legal and Practical Prevention of Ambush Marketing in Sports*, 15 PSYCHOLOGY & MARKETING 333, 337 (1998).

Table 1: Direct and indirect ambushing activities.<sup>38</sup>

<b><u>Direct ambushing</u></b>	A company who is not an official sponsor of the event...
Use protected trademarks	... presents itself as the “official sponsor” of an event without having acquired the corresponding rights.
<b><u>Indirect ambushing</u></b>	A company who is not an official sponsor of the event...
Sponsoring the broadcast of an event	... pays a fee to a television channel to become the broadcast sponsor of the event.
Sponsorship of subcategories of the event	... sponsors a person or team participating in the event
Purchase of advertising time around the event	... buys advertising time before, during or after the event
Huge promotional effort which coincides with the event	... invests heavily in promotion activities (advertising and others) while the event is staged
Other (generic references to the event)	... makes indirect reference to the event in promotional activities, such as the use of photographs/images/symbols/themes of places or elements linked to the event

Legal remedies may concern any of the following three factors:<sup>39</sup>

1. Use of logos, emblems and other material eligible for intellectual property protection was used.
2. Availability of legal measures to deal with unfair competition, misleading advertising, false trade designation, street vending, and appropriation of goodwill.
3. Ability of the governing bodies to control the activities of those participating in the event (athletes, media, organizations) and the venue (surrounding areas, airspace).

<sup>38</sup> Adapted from Meenaghan, *supra* note 5 at 80-82.

<sup>39</sup> Meenaghan, *supra* note 5 at 80-82.

## II. COMPARATIVE SURVEY OF LEGAL PRACTICE IN SELECTED COUNTRIES

Successful ambush marketing depends on the law in host countries; what is permitted in some jurisdictions can be unlawful elsewhere. For common law countries, there is generally a combination of common law causes of action that may give companies greater protection from ambush marketing. These include, for example, prohibitions against unfair competition and passing off. Civil law countries, by contrast, have such causes of action codified. Common law and civil law countries both have trademark laws in their statutory systems, although their scope differs as discussed below. What is a constant among all of the jurisdictions (whether their foundation lies in common or civil law) examined below (the United States, Canada, Australia, the United Kingdom and Germany) is that they have each enacted legislation protecting Olympic marketing. That governments often have significant financial stakes in Olympic events is surely a reason for greater protectionism in that area.

### A. *United States*

Under American law, there is little direct protection against ambush marketing. There are two basic challenges to ambush marketing tactics under existing law: one statutory, one in common law. In addition, there are some statutory protections for Olympic sponsors.

#### 1. Statutory Law: Lanham Act and Other Federal Legislation

The first approach falls under the Lanham Act. This federal statute provides protection for misleading advertising. Sections 32<sup>40</sup> and 43(a)<sup>41</sup> of the Act prohibit the use in commerce

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<sup>40</sup> § 32 (15 U.S.C. §1114). Remedies; infringement; innocent infringers by printers and publishers

among states of any registered mark that is likely to cause confusion, mistake or to deceive. This could apply, for example, to companies such as garment manufacturer Quiksilver who created a design featuring the company's logo inside five interlocking circles similar to the five Olympic rings,<sup>42</sup> or to a telecommunication company who used the word "Ring" five times in an ad, together with the slogan "With Telecom Mobile you can take your own phone to the

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(1) Any person who shall, without the consent of the registrant--

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy or colorably imitate a registered mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive. . .

<sup>41</sup> 15 U.S.C. §1125. False designations of origin and false descriptions forbidden

(a) Civil action.

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

<sup>42</sup> Stephen McKelvey, *An Analysis of the Ongoing Global Efforts to Combat Ambush Marketing: Will Corporate Marketers "Take" the Gold in Greece?* 14 J. LEGAL ASPECTS OF SPORT 191, 207 (2004) (The U.S. Olympic Committee successfully stopped Quiksilver from selling the product, claiming that it would "mislead and deceive consumers.")

Olympics.”<sup>43</sup> Section 44 of the Lanham Act<sup>44</sup> extends protections to international agreements involving trademark law if the United States has been a signatory to the treaty.<sup>45</sup> To be successful, a plaintiff would need to show that there was an unauthorized use of a trademark or tradename and that this unauthorized use was likely to cause customers to be confused. There would be no violation of the Act, therefore, if there were no misuse of a protected name or mark. Even if there were an unauthorized use, a petitioner has the burden of showing a likelihood of customer confusion.

One court held that using a tradename was protected speech when included in a news report about the event.<sup>46</sup> The Lanham Act therefore has limited application to most ambush marketing since it is so easily circumvented. Any ambush marketer could avoid violating the act simply by avoiding the use of a trademark. The Lanham Act does not proscribe many of the activities that have been associated with ambush marketing. The Act would not, for example, create any barrier to such classic ambush marketing tactics as purchasing advertising before or after an event, distributing promotional materials at an event, or offering tickets or other prizes associated with an event. As one observer noted, “[t]he difficulty with ambush marketing is that

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<sup>43</sup> Janet Hoek, *‘Ring Ring’: Visual Pun or Passing Off? An Examination of Theoretical and Research Issues Arising from Ambush Marketing*, 5 ASIA-AUSTRALIA MARKETING JOURNAL 33 (1997).

<sup>44</sup> 15 U.S.C. 1126, 1127, “The intent of this chapter is... to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade names, and unfair competition entered into between the United States and foreign nations.”

<sup>45</sup> PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY, July 14, 1967, 21 U.S.T. 1583, translated in G.H.C. Bodenhausen, GUIDE TO THE APPLICATION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY 17 (1968). Article 10bis of the Paris Convention has been incorporated by this section to protect against unfair competition. *See generally*, Patricia v. Norton, *Note: The Effect of Article 10bis of the Paris Convention on American Unfair Competition Law*, 68 FORDHAM L. REV. 225 (1999).

<sup>46</sup> In *WCVB-TV v. Boston Athletic Ass’n*, 926 F.2d 42 (1<sup>st</sup> Cir. 1991) the U.S. Court of Appeals refused to enjoin a television station from using the words “Boston Marathon.” The court held that it would not cause customer confusion to describe the media event since viewers would be unlikely to be confused into thinking that the station was conducting the marathon.

the law is on the side of the ambushers. Purely defined, ambush marketing does not involve counterfeiting or the illegal use of trademarks, tradenames or symbols. Companies simply develop a creative advertising campaign around the event, never use the event logo, trademark or tradename and capitalize by association with the event without paying for official sponsor status.”<sup>47</sup> Even when using trademarks without permission, the practice may be permitted under American law. In *U.S. Olympic Committee v. American Media, Inc.*, the U.S. District Court of Colorado concluded that use of the Olympic marks in promotional media did not constitute commercial speech although it solicited consumers to buy the publication.<sup>48</sup>

Furthermore, it is very difficult for a plaintiff to prove consumer confusion as a consequence of ambush marketing. Consumer behavior research shows that sponsorship targets lack knowledge about different levels of sponsorship and the rights associated to the various sponsors. About one third of the spectators of the 1996 Olympic Games thought that any brand who advertises during the broadcast of the event was an official sponsor.<sup>49</sup> The same study reveals that consumers are not concerned about ambush marketing: about 40% do not feel that the practice is unfair, and more than half state that they are not “annoyed by companies trying to associate themselves with the Olympic Games without being Official Sponsors.”<sup>50</sup> Results are basically confirmed over time and in different sports contexts. For example, most people think that only official sponsors of a Super Bowl may advertise during the broadcast of the event; although this is not the case.<sup>51</sup> According to the same source, 40% of spectators (wrongly) think

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<sup>47</sup> Robert N. Davis, *Ambushing the Olympic Games*, 3 VILL. SPORTS & ENT. L.J. 423, 430 (1996).

<sup>48</sup> 156 F. Supp. 2d 1200 (2001).

<sup>49</sup> David Shani & Dennis M. Sandler, *Ambush Marketing : Is Confusion To Blame for the Flickering of the Flame ?*, 15 PSYCHOLOGY & MARKETING 367, 376 (1998).

<sup>50</sup> *Id.* at 378.

<sup>51</sup> Mark R. Lyberger & Larry McCarthy, *An Assessment of Consumer Knowledge of, Interest in, and Perceptions of Ambush Marketing Strategies*, 10 SPORT MARKETING QUARTERLY 130, 134 (2001).

that the Super Bowl logo may be used by all event sponsors (although only the prime sponsors have this right), and only 20% of viewers are annoyed about Super Bowl ambushers.

In sum, there is a general lack of consumer knowledge and concern about ambushing. Event organizers incidentally contribute to the general confusion inasmuch as they constantly modify sponsor categories and levels. To illustrate, there is a myriad of titles such as “official sponsors,” “official suppliers,” “global, national and regional partners,” “licensees,” “platinum, gold, and silver sponsors,” and the like, which change from one property to the next. Some properties, for example baseball teams, have more than 80 brands “officially” associated as either advertisers or sponsors.<sup>52</sup> Dozens of others advertise on television before, during and after the broadcast of the events.

Consumers do not know which kind of rights correspond to the various brands associated in one way or another to a property. Consumers tend to perceive as an official sponsor the brand whose television commercial they viewed most recently in the context of the event.<sup>53</sup> On those grounds, it seems difficult to prove that it is the ambushing which creates confusion. The myriad sponsorship levels in themselves create confusion.

In addition to the Lanham Act, there is federal legislation that protects trade names and marks related to the Olympics. The Ted Stevens Olympic and Amateur Sports Act (OASA)<sup>54</sup> designates certain Olympic related words and symbols as being the exclusive property of the U.S. Olympic Committee (“USOC”), prohibits their unauthorized use, and subjects the unauthorized user to civil actions and remedies. The United States Supreme Court has held that

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<sup>52</sup> Kirk L. Wakefield, Karen Becker-Olsen & T. Bettina Cornwell, *I Spy a Sponsor. The Effects of Sponsorship Level, Prominence, Relatedness, and Cueing on Recall Accuracy*, 36 J. ADVERTISING, 61, 65 (2007).

<sup>53</sup> Stephen R. McDaniel & Lance Kinney, *The Implications of Recency and Gender Effects in Consumer Response to Ambush Marketing*, 15, 4 PSYCHOLOGY & MARKETING 385, 396 (1998).

<sup>54</sup> 36 U.S.C.S. § 22050 *et seq.*

granting the United States Olympic Committee the exclusive right to use the word “Olympic” did not violate the U.S. Constitution’s 1<sup>st</sup> amendment protection of free speech.<sup>55</sup> However, a federal district court has held that the Act did not prevent conduct that the USOC characterized as “ambush marketing.”<sup>56</sup> In a challenge to a publisher’s distribution of a magazine called OLYMPICS USA, the court found that since the contents were (at least in part) editorial and not commercial, OASA did not prohibit the use of the word “Olympics” in its name. In that the OASA provides protections additional to common law and the Lanham Act, the court held, it must be construed narrowly.<sup>57</sup>

## 2. Common law: unfair competition

Using common law, a company or organization could charge an ambush marketer with unfair competition. Interpretations of the common law right would differ somewhat among the separate states but are, without exception, broader than the protections created by the Lanham Act. In some states, for example California, the law related to unfair business practices is extensive. It has been codified to include any unfair business practice regardless of a showing of loss.<sup>58</sup> In other states, the common law right has been interpreted more traditionally; requiring a showing that false and deceptive practices have deprived a company or organization of its goodwill.<sup>59</sup> The practice is difficult to combat because it may be difficult to show harm, at least

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<sup>55</sup> San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee, 483 U.S. 522 (1987) (regarding the use of the term “Gay Olympic Games”).

<sup>56</sup> U. S. Olympic Committee v. American Media, Inc., 156 F. Supp. 2d 1200, 1203 (2001).

<sup>57</sup> *Id.* at 1209.

<sup>58</sup> California Bus. & Prof. Code § 17200, *construed in* Massachusetts Mutual Life Insurance Co. v. Superior Court, 97 Cal. App. 4th 1282 (2002).

<sup>59</sup> AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 (1995).

in a traditional legal sense.<sup>60</sup> In an economic sense, goodwill and loss can be measured. In practice, however, it is difficult to isolate the specific contribution of a sponsorship or ambush activity on such variables as goodwill, sales or profits. With little exception, economic sponsorship research concentrates on variables such as sponsor (ambusher) memorization or image. Studies show that brand attitudes toward sponsors and ambusher do not systematically differ. Neither does ambushing have a systematic effect on purchase intentions, at least not when measured in laboratory experiments.<sup>61</sup>

Under common law theories, a firm could allege that an ambush marketer engaged in unfair business practices even without misuse of a trademark or a showing of consumer confusion, as would be required for an action under the Lanham Act. Still, however, the activities traditionally associated with ambush marketing generally do not rise to the level of fraud, misrepresentation or otherwise misleading practices normally required for a successful cause of action for unfair business practices. This has left one commentator to suggest that a federal law be created prohibiting ambush marketing practices.<sup>62</sup> Even if such a statute were enacted, however, it would face significant barriers in the American legal system. While commercial speech is less protected than other speech under the U.S. Constitution's first amendment, there are still broad freedoms associated with non-fraudulent commercial speech.<sup>63</sup>

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<sup>60</sup> See generally Jason K. Schmitz, *Ambush Marketing: The Off-Field Competition at the Olympic Games*, 3 NW. J. TECH. & INTELL. PROP. 203 (2005).

<sup>61</sup> Stephen R. McDaniel & Lance Kinney, *The Implications of Recency and Gender Effects in Consumer Response to Ambush Marketing*, 15, 4 PSYCHOLOGY & MARKETING 385, 398 (1998).

<sup>62</sup> Patrick Donohue Sheridan, *An Olympic Solution to Ambush Marketing: How the London Olympics Show the Way to More Effective Trademark Law*, 17 SPORTS LAW J. 27 (2010).

<sup>63</sup> American Law Institute, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1, Illustration 4(d) (1995).

In addition, most ambush marketing efforts are so short-lived as to make the legal system's remedies too sluggish to provide relief.<sup>64</sup>

*B. Canada*

In Canada, there is no law directly prohibiting ambush marketing, with the exception of legislation protecting Olympic marks. The laws most clearly applicable to the practice include common law and statutory prohibitions of "passing off" and common law causes of action related to interference with contractual relations. Under laws prohibiting "passing off," a company could allege that an advertiser improperly implying a relationship to an event was liable for deliberately causing confusion. As cited by the Supreme Court of Canada,

To sell merchandise or carry on business under such a name, mark, description, or otherwise in such a manner as to mislead the public into believing that the merchandise or business is that of another person is a wrong actionable at the suit of that other person... The law on this matter is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by rival traders... The true basis of the action is that the passing off injures the right of property in the plaintiff, that right of property being his right to the goodwill of his business.<sup>65</sup>

However, the court notes

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<sup>64</sup> Lori L. Bean, *Note: Ambush Marketing: Sports Sponsorship Confusion and the Lanham Act*, 75 B.U. L. REV. 1099, 1101 (1995).

<sup>65</sup> *Consumers Distributing Co. v. Seiko Time Canada Ltd.*, [1984] 1 S.C.R. 583, 597 (Can.) quoting SALMOND ON TORTS (17<sup>th</sup> ed.) at 400-01.

The role played by the tort of passing off in the common law has undoubtedly expanded to take the present-day community. The simple wrong of selling one's goods deceitfully as those of another is not now the core of the action. It is the protection of the community from the consequential damage of unfair competition of unfair trading.<sup>66</sup>

The common law tort of passing off is codified in Canada under the Trade-marks Act: “No person shall direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another.”<sup>67</sup> Codification, however, has not expanded the scope of the action; if a plaintiff cannot demonstrate common law passing off, they cannot establish a claim under the statute.<sup>68</sup>

Another approach to challenge ambush marketing is the tort of interference with economic relations. This tort requires that (1) there be interference with the execution of a contract, (2) that the interference be deliberate, and (3) that the interference be direct.<sup>69</sup> This tort provides limited remedies to ambush marketing since it requires that there be a contract in existence and would allow only parties to the contract an opportunity for remedy.

A Canadian court had an opportunity to rule in an early attack on ambush marketing. Coca-Cola entered a \$2.6 million agreement with the National Hockey League to become the official league sponsor. There was no agreement, however, permitting Coca-Cola to advertise during the NHL broadcasts in Canada. In 1990, rival soft drink manufacturer Pepsi then

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<sup>66</sup> *Id.* at 598.

<sup>67</sup> Unfair Competition and Prohibited Marks, R.S.C. 1985, c. t-13, section 7(b).

<sup>68</sup> *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134 (Can.).

<sup>69</sup> *Mark Fishing Co. v. United Fishermen and Allied Workers' Union*, [1972] 3 W.W.R. 641 (B.C.C.A.) (Can.) (further, indirect interference is unlawful only if unlawful means are used).

contracted to have exclusive advertising rights for soft drinks during the broadcast of all “Hockey Night in Canada” games televised by the Canadian Broadcasting Corporation. In refusing to hold Pepsi liable for ambush marketing, the Supreme Court of British Columbia ruled that “the [NHL]-Coke agreement obligates [the NHL], so far as it is able, to protect the rights of Coke from ‘ambush marketing.’ Such an obligation cannot, however, impose on a third party a duty to refrain from engaging in advertising its products in a manner which, although aggressive, is not, by the law of Canada, unlawful.”<sup>70</sup> While the case may simply reflect a controversy that was, on the facts, weak, it illustrates the difficulty ambush marketing victims face in trying to prove that the practice violates traditional common law causes of action. One commenter has called upon Canada to increase statutory protections against ambush marketing.<sup>71</sup>

In anticipation of the 2010 Olympic Games, Canada passed legislation designed to lower the standard of proof needed to obtain an injunction to stop ambush marketing. The Olympic and Paralympic Marks Act<sup>72</sup> prohibits certain marks associated with the Olympics. The Act also prohibits traditional “ambush marketing” conduct, for example, promoting or directing attention to “business, wares or services in a manner that misleads or is likely to mislead the public to believe” that there is approval, authorization or endorsement by an Olympic organization.<sup>73</sup> Notably, the Act permits an interim injunction to issue against alleged infringers even without proof of irreparable harm,<sup>74</sup> a significant departure from the traditional rule. The law came under heavy criticism for including such common words as “gold,” “silver,” games,” 21<sup>st</sup>,” and “2010.” When asked why the government was giving such protection against ambush marketing to the

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<sup>70</sup> National Hockey League v. Pepsi-Cola Canada Ltd., 92 D.L.R 4<sup>th</sup> 349, 369 (BC 1992).

<sup>71</sup> Laura Misener, *Safeguarding the Olympic Insignia: Protecting the Commercial Integrity of the Canadian Olympic Ass’n*, 13 J. LEGAL ASPECTS OF SPORT 79 (2003).

<sup>72</sup> S.C. 2007, ch. 25 (2010), available at <http://laws-lois.justice.gc.ca/PDF/O-9.2.pdf>.

<sup>73</sup> *Id.* at 4(1).

<sup>74</sup> *Id.* at 5(1).

Olympics but not to other large entertainment events, a government official noted, “[r]ock concerts are not publicly subsidized events. Rock concerts do not cost \$2.45 billion.”<sup>75</sup> The government’s financial interest, then, is clearly one rationale given for enacting greater protections against ambush marketing.

### C. *Australia*

Australia operates under a federal system of government, where law making powers are distributed between the federal (or Commonwealth) parliament and the parliaments of the states.<sup>76</sup> Under the constitution, the federal parliament has the exclusive power to make laws on a range of matters, including intellectual property,<sup>77</sup> and concurrent powers over subject matter where both federal and state government are able to enact laws. The states have independent legislative power in all matters not specifically assigned to the federal parliament under the constitution. Federal law applies to the whole of Australia and prevails if there is any inconsistency between federal and state law.<sup>78</sup>

#### 1. Commonwealth Statutes

As with the other common law countries, Australia has legislation to protect trademarks and unfair competition.

#### *Trade Marks Act 1995 (Cth)*

Again, in common with most jurisdictions, Australia has a trademark registration process.

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<sup>75</sup> Ian Austen, *For Vancouver’s 2010 Olympics, Proprietary Words*, N.Y. TIMES, Apr. 2, 2007, at C2.

<sup>76</sup> Australian Constitution s 1, s 109.

<sup>77</sup> Australian Constitution s 51 (xviii).

<sup>78</sup> Australian Constitution s 109.

A registered mark is infringed where another party, without consent, uses a substantially identical or deceptively similar mark, *as a mark* (that is to distinguish products from those of other traders) on products for which the mark is registered. There are wider protections for “well known marks” – essentially preventing use by another party on any (even unrelated) products.

While theoretically applicable to ambush marketing scenarios, the requirement for “use as a mark” to establish infringement, would make practical application of this statute difficult in ambush marketing settings.

#### *Competition and Consumer Act 2010 (Cth)*

Formerly known as the Trade Practices Act 1974, the Australian Consumer Law provisions of this statute provide the most relevant statutory protection from (or regulation of) ambush marketing. In addition to general prohibition on conduct that is, or likely to be, misleading or deceptive,<sup>79</sup> there specific provisions prohibiting conduct that constitutes “a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation.”

These provisions were relied on, unsuccessfully, in a case arising from the use by an airline of an image of a champion long jump athlete.<sup>80</sup> The airline had used images of the athlete, along with their logo and name on posters. The court held that conduct that “merely implies some form of association,” is not likely to have the necessary level of “deceptiveness” to satisfy the requirements of the statute. This decision was made despite the court’s view that

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<sup>79</sup> § 18, Australian Consumer Law (Schedule 2 of the Competition and Consumer Act 2010).

<sup>80</sup> *Honey v. Australian Airlines Ltd* (1990) 18 IPR 185.

[M]any if not most, viewers would have assumed that the respondent had undertaken the task of producing posters of the kind exemplified by the one here in question because it perceived that such activity would enhance its public image and so generate benefits to its commercial operations. But that is quite a different thing from saying that by publication of the poster the respondent was representing that the appellant had approved the use of his photograph and endorsed the activities of the respondent.<sup>81</sup>

*Olympic Insignia Protection Act 1987 (Cth)*

Similar to the laws of the other jurisdictions examined in this paper, Australia provides special protections to Olympic promotions. The Olympic Insignia Protection Act 1987 (Cth) protects the Olympic insignia in a number of ways:

- a. making the Australian Olympic Commission (AOC) the owner of copyright in the Olympic symbol,
- b. making the AOC the owner of certain Olympic designs (for the purposes of the Designs Act),
- c. providing that the Olympic motto, the Olympic symbol and certain other Olympic images (including the Olympic torch and flame) must not be registered as trademarks, and
- d. prohibiting the commercial use of certain Olympic expressions unless the user holds a licence granted by the AOC.

*Sydney 2000 Games (Indicia and Images Protection) Act 1996 (Cth)*

When Australia was awarded the 2000 Olympic Games in 1993, the Australian Senate

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<sup>81</sup> *Id.* at 194.

Legal and Constitutional References Committee undertook an inquiry<sup>82</sup> covering the protection of Olympic insignia and sponsorship for the Sydney Olympics. It was a requirement under the Host City Agreement with the IOC that Australia provide a certain level of legislative protection for the intellectual property and marketing activities of the IOC and the Olympic Games Organising Committee.

Section 3 of the Act lists its objects as:

(1) (a) to protect, and to further, the position of Australia as a participant in, and a supporter of, the World Olympic and Para-Olympic movements; and

(1)(b) to the extent that it is within the power of the Parliament to assist in protecting the relations and ensuring the performance of the obligations of the Sydney 2000 Games bodies with and to the World Olympic and Para-Olympic movements, in relation to the holding of the Sydney 2000 Games.

(2) These objects are to be achieved by facilitating the raising of licensing revenue in relation to the Sydney 2000 Games through the regulation of the use for commercial purposes of the indicia and images associated with the Games.

The definitions sections (8 and 9) of the Sydney 2000 Games Act provide that certain terms are protected, including “Games City,” “Sydney Games,” “Olympics,” “Olympiad.” Also protected are “Sydney 2000 Games images,” defined as “any visual or aural representations that, to a reasonable person, in the circumstances of the presentation, would suggest a connection with the Sydney 2000 Olympic Games.”

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<sup>82</sup> SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE, CASHING IN ON THE SYDNEY OLYMPICS: PROTECTING THE SYDNEY OLYMPICS FROM AMBUSH MARKETING (1995).

Remedies provided for specifically under the Act include injunctions,<sup>83</sup> interim injunctions,<sup>84</sup> corrective advertisements,<sup>85</sup> and damages.<sup>86</sup> Section 47 provides that these remedies are in addition to other remedies provided under state of Commonwealth law, including the Trade Practices Act 1974 (Cth) (now known as the Competition and Consumer Act 2010 (Cth)).

It is difficult to see that either of the Olympic specific statutes (or similar legislation) can effectively prevent ambush marketing much beyond blatant use of protected names or marks. Examples of successful ambushing include Land Rover's use of the slogan "Let the Games Begin" in its advertisements at the time of the Sydney Olympics<sup>87</sup> and an Olympic swimmer's concealment of the official sponsor's logo to aid his personal commercial sponsor.<sup>88</sup> The protection afforded by these *sui generis* statutes seems, in practical terms, to rarely extend beyond existing statute, in particular the Competition and Consumer Act and the Trade Marks Act. Other than some state legislation that governs the use of advertising near sports events,<sup>89</sup> little protection is provided.

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<sup>83</sup> § 43.

<sup>84</sup> § 44.

<sup>85</sup> § 45.

<sup>86</sup> § 46.

<sup>87</sup> Jeremy Curthoys & Christopher N. Kendall, *Ambush Marketing and the Sydney 2000 Games (Indicia and Images) Protection Act: A Retrospective*, 8 MurUEJL (June 2001), <http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82nf.html>.

<sup>88</sup> *Id.* Nike was the official clothing sponsor for the Australian Olympic team, but swimmer Ian Thorpe had a sponsorship agreement with rival Adidas. At the medal presentation ceremony, the swimmer hid the Nike logo under a towel, depriving the team's sponsor of the promotional value.

<sup>89</sup> *See, e.g.*, The Major Sports Facilities Act 2001 (Qld) as amended by Amendment of Major sports Facilities Act 2001 which limits advertising near sports facilities, the major Sporting Events Bill 2009 (Vic) legislation relating to significant sporting events in that state, the Major Events (Aerial Advertising) Act 2007, which prohibits aerial advertising over certain sporting events in the state, and the Major Sporting Events Bill 2009 (Vic) which governs designation of those events eligible for protection as a Major Sporting Event.

#### *D. UK*

As with other common law jurisdictions, the UK relies on a combination of traditional common law causes of action and subsequent legislation protecting intellectual property. With its sponsorship of the 2012 Olympics, it has supplemented this scheme with particular legislation to protect rights associated with the event.

#### *Passing Off*

The common law action for passing off, as discussed in the U.S., Canadian and Australian contexts above, also exists under UK law. It may apply to situations where ambush marketing conduct amounts to a misrepresentation (and relying on the goodwill or reputation of the plaintiff) that there is some connection between the business, goods or services of the defendant and the plaintiff, when in fact none exists, and resulting in some harm. This requirement for goodwill, misrepresentation and damage (or variations on this theme) is often referred to as the “classic trinity” of passing off.<sup>90</sup>

#### *The Consumer Protection from Unfair Trading Regulations 2008*

These provisions, implementing obligations under EU Directive 2005/29/EC,<sup>91</sup> contain a number of grounds that could potentially support action against ambush marketing. Notably, Regulation 5 prohibits “misleading actions,” including:

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<sup>90</sup> *Reckitt & Colman Products Ltd. v Borden Inc.* [1990] 1 WLR 491.

<sup>91</sup> European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, available at [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/ucp\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/ucp_en.pdf)

- Practices that “concern any marketing of a product . . . which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor”<sup>92</sup> or
- Practices that convey an “overall presentation in any way deceives or is likely to deceive the average consumer in relation to [a range of matters including those below], even if the information is factually correct”<sup>93</sup>

These matters include:<sup>94</sup>

- “any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product” or “the nature, attributes and rights of the trader (including approval, affiliations or connections)”<sup>95</sup>

### *Registered Trademarks*

Trademark registration, in the UK context, is, for present purposes, largely similar in key respects to that which has been discussed above in relation to the U.S., Canadian, and Australian law in the area.

### *Legislation Relating to the Olympics*

The U.K. has enacted specific legislation<sup>96</sup> dealing with a range of matters relating to the 2012 London games, including the regulation of marketing (trading and advertising). Under Section 19 (1), the Secretary of State “shall make regulations about advertising in the vicinity of

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<sup>92</sup> Regulation 5(3)(a).

<sup>93</sup> Regulation 5(2)(a).

<sup>94</sup> Regulation 4.

<sup>95</sup> Regulation 6(e) & (f).

<sup>96</sup> London Olympic Games and Paralympic Games Act 2006.

London Olympic events.” These regulations are contained in The London Olympic Games and Paralympic Games (Advertising and Trading) (England) Regulations 2011.<sup>97</sup>

These regulations apply to designated “Event Zones” around Olympic event venues and routes,<sup>98</sup> during and immediately prior to Olympic events, and require parties wishing to trade or advertise in these areas to obtain specific prior authorization from the London Organising Committee of the Olympic and Paralympic Games (LOCOG). The Regulations apply to those directly or indirectly responsible for advertising activity, including those who arrange for advertising, any businesses whose products or services are advertised, and owners, occupiers or managers of land on which advertising takes place.<sup>99</sup> However, there is a defense for people who are unaware of the advertising taking place or who took reasonable steps to prevent it from occurring.<sup>100</sup>

Individuals wearing clothing, tattoos or carrying items bearing branding are exempt from restriction “unless the individual knows or has reasonable cause to believe that he or she is participating in an ambush marketing campaign.”<sup>101</sup> Ambush marketing is defined broadly in the Regulations as “a campaign (whether consisting of one act or a series of acts) intended specifically to advertise [goods, services or persons] in an event zone during the relevant event period or periods.”<sup>102</sup> There are some other exceptions covering such matters as directional

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<sup>97</sup> 2011 No. 2898. There are parallel regulations in Scotland, The London Olympic Games and Paralympic Games (Advertising and Trading) (Scotland) Regulations 2011 and Wales, The London Olympic Games and Paralympic Games (Advertising and Trading) (Wales) Regulations 2011.

<sup>98</sup> <http://www.london2012.com/eventzonemaps>.

<sup>99</sup> Regulation 6, *The London Olympic Games and Paralympic Games (Advertising and Trading) (England) Regulations 2011*.

<sup>100</sup> The London Olympic Games and Paralympic Games Act 2006 § 21(2).

<sup>101</sup> The London Olympic Games and Paralympic Games (Advertising and Trading) (England) Regulations 2011, Regulation 8(1).

<sup>102</sup> *Id.*, Regulation 5(2).

signage, street furniture, government signage.<sup>103</sup>

The London Olympic Games and Paralympic Games Act 2006 also creates the “London Olympics association right.”<sup>104</sup> This is an “exclusive right in relation to the use of any representation (of any kind) in a manner likely to suggest to the public that there is an association between the London Olympics” and the person or entity making the representation. Essentially, this right is infringed if any representation is made that suggests a connection with the games.<sup>105</sup> In determining infringement cases, courts may specifically consider use of expressions as “games,” “Two Thousand and Twelve,” “2012,” and “twenty twelve” when such phrases are used in conjunction with the following words “gold,” “silver,” “bronze,” “London,” “medals,” “sponsor,” or “summer.”

Remedies under Section 22 of the London Olympic Games and Paralympic Games Act 2006 include police powers to “enter land or premises on which they reasonably believe a contravention of regulations under section 19 is occurring” and “remove, destroy, conceal or erase any infringing article” with “reasonable force.” Section 21 sets out financial penalties for infringing, with fines up to £20,000.

The Act directs the UK Government/Intellectual Property Office to formulate policy for addressing ambush marketing at other major sporting and cultural events. The Glasgow 2014 Commonwealth Games are also protected from ambush marketing under specific statute,<sup>106</sup> also adopting an association right.

The Act supplements the Olympic Symbol etc. (Protection) Act 1995 which protects exclusive rights in relation to the use of the Olympic symbol, the Olympic motto and the

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<sup>103</sup> *Id.*, Regulations 7-9.

<sup>104</sup> Schedule 4, § 33.

<sup>105</sup> Schedule 4, § 33(2).

<sup>106</sup> Commonwealth Games Act 2008 (Games Association Right) Order 2009.

protected words.<sup>107</sup> These rights are more akin to traditional trademark rights than are the association rights protected by the subsequent 2006 Act. The rights under the Olympic Symbol etc. (Protection) Act 1995 are infringed where a party uses

- a. a representation of the Olympic symbol, the Olympic motto or a protected word, or
- b. a representation of something so similar to the Olympic symbol or the Olympic motto as to be likely to create in the public mind an association with it.<sup>108</sup>

#### *E. Germany*

Unlike the United States, Canada, and Australia with their common law traditions, Germany is a civil law country. In civil law countries (and in contrast with common law jurisdictions) the predominant legal source is codified law.<sup>109</sup> Legal remedies against ambush marketing under German law, therefore, are limited to statutes and codes. Nevertheless, case law plays a significant role in the interpretation and development of the codified law. Although court decisions in Germany are, following the civil law tradition, not binding, lower courts tend to follow the decisions of the highest German civil court Bundesgerichtshof (BGH), in order not to be overruled. In addition, legal scholarship, although not a source of law, is influential in the interpretation of statutes by the courts and the development of legislation. As Germany is a member state of the European Union (“EU”), certain provisions of EU law are relevant both to the application of German law to ambush marketing activities but also to other EU countries.

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<sup>107</sup> § 1.

<sup>108</sup> Olympic Symbol etc. (Protection) Act 1995, § 3.

<sup>109</sup> See generally J.H. MERRYMAN, *THE CIVIL LAW TRADITION* (2d ed. 1985). For information about the status of a nation’s legal system, see University of Ottawa, JuriGlobe – World Legal Systems Research Group, <http://www.juriglobe.ca/eng/index.php>.

As in the jurisdictions presented above, in Germany, ambush marketing is not illegal as such, and specific statutes aimed at such practices (with an exception for the Olympic Games<sup>110</sup>) do not exist.<sup>111</sup> Thus, in order to stop, prevent, or claim damages for ambushing activities, event organizers and competitors need to rely on general legal provisions from areas such as intellectual property or unfair competition law. Jurisprudence applying those general laws to ambushing is still sparse. The reason for this lack of jurisprudence could be that ambush marketing in Europe is an even newer phenomenon than in the U.S. In Germany, in addition, there is a less developed tradition of using the law as strategic instrument between competing companies. Much of the legal discussion in Germany and other European Civil law countries (such as Switzerland) therefore has evolved around the question of the protection of the event organizer against, for example, illegal use of event trademarks, emblems or logos, or legal protection of the surrounding area, for example in connection with “public viewing,”<sup>112</sup> rather than the protection of the sponsor against the competing ambusher. Nevertheless, some commentators and court decisions have addressed different aspects of ambush marketing, especially in relation to the European Soccer Championship (UEFA EURO) 2008 in Switzerland and Austria<sup>113</sup> and the Soccer World Cup 2006 (FIFA WM 2006) in Germany.<sup>114</sup> Also (to date

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<sup>110</sup> German Olympiaschutzgesetz §§ 3 and 1 protect the Olympic signs such as “olympics”, “Olympic” or “olympia” trademark like. *See generally* Michael Nieder & Oliver Rauscher, *Inhalt und Reichweite des Olympiaschutzgesetzes*, 13 SPURT 237, 239 (2006). The law is considered to be unconstitutional by some scholars, *see* Christoph Degenhart, *Olympia und der Gesetzgeber: Ist ein sondergesetzlicher Schutz gerechtfertigt?*, AFP 103 (2006), and some courts: *see, e.g.* Landgericht Darmstadt, [http://olympiagesetz.de/urteile/LG\\_Darmstadt\\_14O744\\_04.pdf](http://olympiagesetz.de/urteile/LG_Darmstadt_14O744_04.pdf).

<sup>111</sup> Switzerland unsuccessfully tried to establish a specific legal provision against ambush marketing as an unfair business practice, *see* Daniel Thaler, *Ambush Marketing mit der UEFA EURO<sup>TM</sup> – Eine Standortbestimmung*, CAUSA SPORT 2, 160, 163 (2008).

<sup>112</sup> *See, e.g.*, Martin Diesbach et al., “Public Viewing” als Problem des Urheber- und Wettbewerbsrechts – Zu den Beschränkungen öffentlicher Vorführungen von Live-Übertragungen der Fussballweltmeisterschaft 2006, ZUM 265 (2006).

<sup>113</sup> *See, e.g.*, Daniel Thaler, *Ambush Marketing mit der UEFA EURO<sup>TM</sup> – Eine Standortbestimmung*, CAUSA SPORT 2, 160, 163 (2008), Thomas C. Körber & Rüdiger Mann,

unsuccessful) attempts of the UEFA or other sports organizers such as the Olympic Committee, to request countries hosting the event to change their national laws and to incorporate specific provisions against ambush marketing practices have caused some criticism by legal scholars and courts<sup>115</sup> who question the constitutionality of such laws.<sup>116</sup>

With the growing economic importance of ambush marketing in Germany and Europe in general, it is likely that the legal and political discussion and number of court decisions will increase with each major sports or cultural event.<sup>117</sup>

As in the common law jurisdictions discussed *infra*, there are two basic challenges to ambush marketing under German private law: the first applying trademark law, the second based on unfair competition law. For the purpose of this article, we do not address the legal issues related to “public viewing,” the protection of the area surrounding the event, or governmental control of activities of those participating in the event (athletes, media, organizations).

#### 1. Trademark law

One strategy to legally fight ambush marketing in Germany is through the use of trademark law. This would apply to such marketing actions as Quiksilver creating a design

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*Werbefreiheit und Sponsoring, Möglichkeiten und Grenzen von Ambush Marketing unter besonderer Berücksichtigung des neuen UWG*, GRUR 737 (2008), Nils Weber et al., *Der Schutz großer Sportereignisse und darauf bezogener kommerzieller Maßnahmen durch Marken und andere IP-Rechte (Q210)*, GRUR Int 839 (2009)..

<sup>114</sup> See, e.g., Peter W. Herrmann, *Ambush-Marketing anlässlich Sportgrossveranstaltungen. Erscheinungsformen, wettbewerbsrechtliche Bewertung, Gegenmassnahmen*, GRUR, 359 (2006), BGH, GRUR 850 (2006).

<sup>115</sup> See, e.g., Landgericht Darmstadt, [http://olympiagesetz.de/urteile/LG\\_Darmstadt\\_14O744\\_04.pdf](http://olympiagesetz.de/urteile/LG_Darmstadt_14O744_04.pdf).

<sup>116</sup> See generally Thomas C. Körber & Rüdiger Mann, *Werbefreiheit und Sponsoring, Möglichkeiten und Grenzen von Ambush Marketing unter besonderer Berücksichtigung des neuen UWG*, GRUR 2008, 737.

<sup>117</sup> See generally European Commission, *White Paper on sport*, COM (2007) 391, July 2007, available at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007\\_0391en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0391en01.pdf).

featuring the company's logo inside five interlocking circles similar to the five Olympic rings,<sup>118</sup> or a bakery offering "EURO 2008" bread during the European Soccer Championship. In Germany, the predominant source of trademark law is a federal statute, the German Trade Marks Act, in German *Markengesetz (MarkenG)*. It is based on the Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trademarks (so-called Trade Marks Directive).<sup>119</sup> The Trade Marks Directive harmonizes the laws of the EU member states relating to trademarks. The directive does not have direct effect but needs to be enacted as national law by the legislators of each individual EU member state pursuant to article 288 of the Treaty on the Functioning of the European Union (ex Art. 249 TEC).<sup>120</sup> Therefore trademark law in the EU member states is not identical, but instead based on a uniform minimum standard as set down by Directive 2008/95/EC. Many provisions of the directive have been adopted almost literally by national statutes.

Moreover, even if the Trade Marks Directive lacks direct effect, according to the European Court of Justice decisions in *Leur v. Bloem*<sup>121</sup> and *Giloy*,<sup>122</sup> national trademark laws must be interpreted in accordance with the Directive and its economic and political goals. This

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<sup>118</sup> Stephen McKelvey, *An Analysis of the Ongoing Global Efforts to Combat Ambush Marketing: Will Corporate Marketers "Take" the Gold in Greece?* 14 J. LEGAL ASPECTS OF SPORT 191, 207 (2004) (The U.S. Olympic Committee successfully stopped Quiksilver from selling the product, claiming that it would "mislead and deceive consumers.")

<sup>119</sup> 2008 O.J. (L 299) 25, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:299:0025:0033:EN:PDF> (last visited September 6, 2010).

<sup>120</sup> An EU directive only has direct effect, if it has not been correctly transformed into national law or not within the time limit set down in the directive, and is sufficiently clear and precisely stated, unconditional or non-dependent, and confers a specific right for the citizen to base his or her claim on. See *Van Duyn v. Home Office*, 1974 E.C.R. 01337.

<sup>121</sup> 1997 E.C.R. 4161.

<sup>122</sup> 1997 E.C.R. 4291.

explains why German judges and commentators frequently refer to EU law or European Court decisions when interpreting German trademark law.

Trademark counterfeiting that results when the defendant uses the identical or a similar mark owned by the plaintiff on the same type of goods or services and sells those goods or services in direct competition with the plaintiff is addressed in Art. 5 (1) European Trade Marks Directive and the parallel provision in Art. 14 *MarkenG*. According to Art. 5 (1) European Trade Marks Directive:

The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

(a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered;

(b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark

The following, therefore, may be permitted under the Act:

(a) affixing the sign to the goods or to the packaging thereof;

(b) offering the goods, or putting them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder;

(c) importing or exporting the goods under the sign;

(d) using the sign on business papers and in advertising.<sup>123</sup>

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<sup>123</sup> Art. 2 Trade Marks Directive, section 3.

A trademark is defined in Art. 2 Trade Marks Directive and section 3 (1) *MarkenG* as:

“any sign capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.”<sup>124</sup>

One problematic feature with respect to ambushing activities is that they may cause no confusion as to the origin of the goods or services, therefore not falling within traditional trademark prohibitions. This raises the question of the function of the trademark. Traditionally the purpose of a trademark has been interpreted by German courts (and in reliance on a European Court of Justice decision) as an indication of origin.<sup>125</sup> The eleventh recital of the preamble to the Directive states that the function of a trademark “is in particular to guarantee the trade mark as an indication of origin.”<sup>126</sup> Therefore there has to be “identity between the mark and the sign and between the goods or services concerned and those for which the mark is registered.”<sup>127</sup> “For the trademark to be able to fulfill its essential role in the system of undistorted competition which the Treaty seeks to establish and maintain, it must offer a guarantee that all the goods or services bearing it have been manufactured or supplied under the control of a single undertaking

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<sup>124</sup> Art. 2 Trade Marks Directive.

<sup>125</sup> *Arsenal Football plc v. Reeds*, 2002 E.C.R. I-10273, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001J0206:EN:HTML> (last visited September 6, 2010).

<sup>126</sup> 2008 O.J. (L299) 25, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:299:0025:0033:EN:PDF> (last visited August 14, 2010).

<sup>127</sup> *Arsenal Football plc v Reed*, 2002 E.C.R. I-10273, at 50.

which is responsible for their quality, ...”<sup>128</sup> This definition describes traditional counterfeiting, where the goal of trademark protection is to protect the trademark holder against competitors who try to take unfair advantage of the status and reputation of the trademark by selling products or providing services illegally bearing the same or similar signs.”<sup>129</sup> If an ambusher uses the sign of a major event, however, the situation differs: The ambusher typically doesn’t sell the same products or provides the same services as the event organizers, whose service typically consists in organizing the event. By contrast, the ambusher wants to sell products such as sports equipment, soft drinks, cosmetics, or services, which usually are completely different from those of the event organizer, who more typically is in an industry such as banking or insurance. The ambush marketer typically does not want to create confusion on the part of the public as to the origin of the product or service but instead simply profit from the positive image or media coverage of the event. Also, merchandising products or other products commercialized by sponsors - for example the use of an event logo - typically do not imply that the event organizer has control over the quality of the product. Therefore during the 2006 World Soccer Championship in Germany, the German Federal Court denied trademark status to the term “Fussball WM 2006” (i.e. “World Soccer Championship 2006”) and its abbreviation “WM 2006” for which the FIFA had requested registration with the German Patent Office.<sup>130</sup>

Taking into account the need of event organizers, the economic value of the name and signs of important sports or cultural events, and the changing marketing oriented economy, some

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<sup>128</sup> Arsenal Football plc v Reed, 2002 E.C.R. I-10273, at 48, Hoffman-La Roche, 1978 E.C.R. 1139, at 7, and Philips, 2002 E.C.R. I-0000, at 30.

<sup>129</sup> Hoffman-La Roche, 1978 E.C.R. 1139, at 7, and Loendersloot, 1997 E.C.R. I-6227, at 22.

<sup>130</sup> BGH7 167, 278 (“FUSSBALL WM 2006”) (for an English translation of the decision *see* IIC 2007, 867).

scholars have proposed the adoption of an “event-mark.”<sup>131</sup> By contrast with the traditional trademark definition, the function of an event mark is to communicate to the public that products or services commercialized using the name or logo of the event have been authorized by the event organizer and contribute to financing the event.<sup>132</sup>

Even after the decision of the German Federal Court, some commentators in Germany still defend the “event mark.” During the 2008 European Soccer Championship in Switzerland and Austria, the Swiss Patent Office, despite the decision of the German Federal Court and the heavy influence of German law and jurisprudence on Swiss law, registered the “event marks” “EURO 2008,” “EM 2008,” and “Österreich/Schweiz 2008” as trademarks. The idea of an “event mark” will certainly be raised in connection with future events in EU member states. This might give an opportunity to the European Court of Justice to redefine the function of a trademark according to the EU Trade Marks Directive. In order to ensure a uniform application of the EU directive, and pursuant to Art. 267 Treaty on the Functioning of the European Union<sup>133</sup> (ex art. 234 TEC<sup>134</sup>), any domestic court of an EU member state needing an interpretation of a provision in national trademark law based on the Trade Marks Directive may, if it considers that a decision on the question is necessary to enable it to give judgment, request the European Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before the highest court or tribunal of a Member State, that court or tribunal shall bring the matter before the Court of the European Union. A ruling of the court could lead to a uniform legal

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<sup>131</sup> Karl-Heinz Fezer, *Die Eventmarke – Markenschutz für Sponsoring und Merchandising*, FESTSCHRIFT FÜR WINFRIED TILMANN 321, 323 (2003).

<sup>132</sup> Johann-Christoph Gaedertz, *Die Eventmarke in der neueren Rechtsprechung*, WRP 526, 527 (2006).

<sup>133</sup> 2008 O.J. (C 115) 47, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>.

<sup>134</sup> 2002 O.J. (C 325) 33 available at [http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E\\_EN.pdf](http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf).

treatment of this aspect of ambush marketing, at least for the member states of the European Union.<sup>135</sup>

In practice, in Europe, as in the U.S., Canada and Australia, and independent from the legal discussion about event marks or governmental attempts to change the trademark law,<sup>136</sup> it will still be easy for creative marketing managers to undermine trademark protection by simply avoiding an identical or confusingly similar trademark. Marketing campaigns such as American Express's slogan that if "you're traveling to Norway, you'll need a passport but you don't need a Visa"<sup>137</sup> as well as many of the other "indirect" ambush activities mentioned *infra* would probably still be considered being legally permissible even under a trademark law tailored to the needs of event organizers and their sponsors.

## 2. Unfair Competition Law

Unfair competition law in Germany is regulated in the recently revised Act Against Unfair Competition (*Gesetz gegen unlauteren Wettbewerb - UWG*).<sup>138</sup> The Act serves to implement Directive 2005/29/EC of the European Parliament and of the Council of May 11, 2005 concerning unfair business-to consumer commercial practices in the internal market. In the Annex to Section 3 (3) the revised Act features a "Black List" of illegal activities, which can be deemed to be unfair by the courts without a case-by-case assessment or relevance of the illegal

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<sup>135</sup> Switzerland, as home country of many international sports federations, is not a member state.

<sup>136</sup> See, e.g., the Swiss draft of a new Art. 3 e<sup>bis</sup> UWG and the draft of a London Olympics Bill 2012.

<sup>137</sup> Credit Card War Erupts at Olympics: Advertising: IOC accuses American Express Co. of 'Ambush Marketing' in Campaign Aimed at Rival Visa, L.A. TIMES, Feb. 19, 1994, available at [http://articles.latimes.com/1994-02-19/business/fi-24757\\_1\\_american-express](http://articles.latimes.com/1994-02-19/business/fi-24757_1_american-express)

<sup>138</sup> Act Against Unfair Competition (UWG) in the version published on 3 March 2010 (Federal Law Gazette [BGBl.] Part I p. 254. An English language version, available at [http://www.gesetze-im-internet.de/englisch\\_uwg/englisch\\_uwg.html#UWGengl\\_000G1](http://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html#UWGengl_000G1).

activity.<sup>139</sup> With respect to ambush marketing, only a marketing activity where the ambusher explicitly pretends to be official sponsor clearly falls within the list. According to the annex, “making the false statement that an entrepreneur, a commercial practice by that entrepreneur, or goods or services have been approved, endorsed or authorised by a public or private body; or making the false statement that the terms of the approval, endorsement or authorisation have been complied with” is considered to be an illegal commercial practice within the meaning of Section 3 subsection (3). But in practice, express false statements by ambushers purporting to be official sponsors would occur rarely,<sup>140</sup> so that the law has limited applicability.

Whether using a logo or the name of the event in connection with a commercial activity, (for example “Olympic bread”) would constitute a false statement within the Act is less clear. The Act differentiates between false statements and creating a false impression.<sup>141</sup> Consequently the Act, by referring only to false statements, does not encompass creating a false impression through implicit marketing activities. Therefore section 3 UWG does not provide any protection against indirect ambush activities.

From a practical perspective, section 5 (1) N° 4 UWG provides more extensive protection than would be afforded in a common law jurisdiction. It introduced a novel provision referring explicitly to sponsoring activities in German unfair competition law, *vide*:

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<sup>139</sup> N° 17 EU preliminary considerations of the Directive concerning unfair business-to consumer commercial practices, *available at*: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF> .

<sup>140</sup> *See generally* Thomas C. Körber & Rüdiger Mann, *Werbefreiheit und Sponsoring, Möglichkeiten und Grenzen von Ambush Marketing unter besonderer Berücksichtigung des neuen UWG*, GRUR 737, 738, 739 (2008).

<sup>141</sup> *Id.* at 739. *See, e.g.*, no. 9: “making the false statement, or creating the false impression, that goods or services can be sold with legal effect.”

Unfairness shall have occurred where a person uses a misleading commercial practice. A commercial practice shall be deemed to be misleading if it contains untruthful information or other information suited to deception regarding the following circumstances...any statement or symbol in relation to direct or indirect sponsorship or approval of the entrepreneur or of the goods or services...<sup>142</sup>

Compared to the Act, section 5 UWG is broader, as it is not limited to explicitly false statements but includes “information suited to deception.” If an indirect marketing activity creates the impression that the ambusher is an official sponsor, the conduct would fall under section 5 UWG.<sup>143</sup> Nevertheless section 5 UWG requires an “untruthful information or other information in relation to the sponsorship.”<sup>144</sup> Ambush marketing activities that do not cause the impression by the consumer that the ambusher is an official sponsor, but simply “free ride” on the positive image of the event (as many sophisticated ambush activities do) would probably continue to be legally permissible under the revised German UWG.<sup>145</sup>

### 3. *OlympSchG*

Germany enacted a specific Olympic trademark protection statute in 2004 in connection with its (unsuccessful) effort to attract the 2012 Summer Olympics. The so-called Olympia Schutz Gesetz (OlympSchG) protects certain Olympic related words and symbols as the exclusive property of the German national and the International Olympic Committee

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<sup>142</sup> [http://www.gesetze-im-internet.de/englisch\\_uwg/englisch\\_uwg.html#UWGenGl\\_000G1](http://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html#UWGenGl_000G1).

<sup>143</sup> Thomas C. Körber & Rüdiger Mann, *Werbefreiheit und Sponsoring, Möglichkeiten und Grenzen von Ambush Marketing unter besonderer Berücksichtigung des neuen UWG*, GRUR 737-39 (2008).

<sup>144</sup> Nils Weber et al., *Der Schutz großer Sportereignisse und darauf bezogener kommerzieller Maßnahmen durch Marken und andere IP-Rechte (Q210)*, GRUR Int, 839, 844 (2009).

<sup>145</sup> *Id.* at 844; Peter W. Herrmann, *Ambush-Marketing anlässlich Sportgroßveranstaltungen - Erscheinungsformen, wettbewerbsrechtliche Bewertung, Gegenmaßnahmen*, GRUR 359, 365 (2006).

independent from the product or event category with which Olympic signs or words are associated.<sup>146</sup> It is therefore much more far-reaching than general trademark protection laws. Unlike German trademark law, the OlympSchG is not based on harmonized EU law. Therefore not all EU member states have this kind of special Olympic protection.

Because on the one hand the OlympSchG creates an exclusive right for only one event organizer, but not for others, and on the other hand applies to any unauthorized commercial user of an Olympic sign independent of his economic power or area of activity, the statute is considered to be unconstitutional by some German legal scholars.<sup>147</sup> In light of these constitutionality concerns a lower German court has favored a strict interpretation of the statute. In a case involving an advertising campaign by tobacco brand Lucky Strike the court ruled in favor of the ambusher. The billboard advertising presented five cigarette parcels arranged similar to the Olympic rings and accompanied by the text: “the rings are already in Athens.”<sup>148</sup> Nevertheless the statute has not been declared unconstitutional by the German courts.

## CONCLUSION

This study compares legal protection against ambush marketing activities in North America, Oceania and in Europe, exemplified by the U.S., Canadian, Australian, British and German jurisdictions, all of which constitute major sponsorship markets but are embedded in different legal systems. As an overall result, we find that sponsor protection against ambushers varies, although all jurisdictions provided greater protections to Olympic marks.

Two basic types of ambush activities must be distinguished, namely so called “direct”

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<sup>146</sup> Karl Hamacher, *Exklusive Marketingrechte für Sportgroßveranstaltungen und ihre Grenzen am Beispiel von Kennzeichenschutz*, SPORT UND RECHT 55, 56 (2005).

<sup>147</sup> See, e.g., Rasmus Furth, *Ambush Marketing : Eine rechtsvergleichende Untersuchung im Lichte des deutschen und US-amerikanischen Rechts*, 160 GWR 60, 60-67 (2009).

<sup>148</sup> LG Darmstadt, 22.11.2005, NJOZ 2006, 1487.

and “indirect” ambushing activities. In the first case, the infringements on intellectual property law (such as the unauthorized use of a logo), relatively clear cut legal remedies exist and have been used successfully. In the latter case, however, when ambushing is more subtle, legal protection is not easily available. Indirect ambushing “poses a very odd fringe gray area threat because it's not technically trespassing on a trademark. It's not hijacking someone's brand. It's more like they're hijacking the entire event.”<sup>149</sup>

As the EU directive as well as the Swiss example show, there are stronger efforts in Europe to accommodate big event organizers through the creation of specific sponsorship laws. As a consequence, European countries may have a slight advantage in attracting major sports events.

Notwithstanding any legislative efforts, legal protection against ambushers will always be limited. There seem to be no boundaries to the creativity of marketing managers and agencies in coming up with new forms of indirect association, which are impossible to prevent without limiting freedom of commerce and freedom of speech. Thus, calls for the creation of international law to prevent ambush marketing<sup>150</sup> may not be the solution.

Instead, increasingly, organizers are relying on contracts and venue commitments rather than on traditional legal actions to protect advertising rights. The International Olympic Committee, for example, requires that cities bidding to host the Olympics guarantee regulations that will “reduce and sanction” ambush marketing, including limiting street vending and monitoring public transport advertising.<sup>151</sup> In anticipation of the 2012 Olympics, organizers

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<sup>149</sup> Ben Klayman, *Ambush Marketing Top Concern for Sports Officials*, [www.reuters.com](http://www.reuters.com), Sept. 24, 2010, [www.reuters.com/article/idUSTRE68N3BX2010094](http://www.reuters.com/article/idUSTRE68N3BX2010094), (quoting Chief Marketing Officer Council vice president Liz Miller).

<sup>150</sup> James A.R. Nafziger, *The Future of Inter'l Sports Law*, 42 WILLAMETTE L. REV. 861.

<sup>151</sup> Simon Chadwick & Nicholas Burton, *Ambushed!* WALL ST. J., Jan. 25, 2010, § R, at 4. The International Olympic Committee created an anti-ambush kit as part of its anti-ambush campaign

reportedly booked most of London's billboard space.<sup>152</sup>

Also, the consequences of ambush marketing would be reduced if consumers were perfectly informed about sponsorship rights and made a distinction between sponsors and advertisers. Event organizers and sponsors, in a joint effort, could alleviate the problem if they were more uniform in the designation of sponsor status, were more coherent in attributing sponsor rights, provided exclusive rights per product category, and reduced rather than increased the number of sponsors of an event.

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in anticipation of the Beijing games in 2008. Inter'l Olympic Committee, *Marketing Report - Beijing 2008* at 131. *See generally*, Stacey H. Wang, *Note and Comment: Great Olympics, New China: Intellectual Property Enforcement Steps Up to the Mark*, 27 LOY. L.A. INT'L & COMP. L. REV. 291.

*See, e.g.*, Executive Order No. 2009-1, Office of the Mayor, City of Chicago, Mar. 31, 2009 where the City of Chicago agrees to combat ambush marketing as part of its unsuccessful attempt to be named the host city for the 2016 Olympic games.

<sup>152</sup> Joe Daly, *Dutch Brewery Sends In Blondes for World Cup Ambush Marketing Stunt*, THE HUFFINGTON POST, June 17, 2010, *available at* [www.huffingtonpost.com](http://www.huffingtonpost.com). The London Olympic Ass'n Right (LOAR) reportedly gives organizers the power to grant licenses and sponsorships, preventing any unauthorized association with the games.