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**International Report on Question B : Ambush Marketing Too Smart to Be Good ?  
Should Certain Ambush Marketing Practices Be Declared Illegal and If Yes, Which  
Ones and Under What Conditions?**

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## I. INTRODUCTION

Ambush marketing is not a legal category nor a well circumscribed marketing practice. It is an expression invented by its victims/detractors. “Guerilla marketing”, “parasite marketing”, “piggy-back marketing”, “gorilla marketing” and in relation to TV broadcasts and digital means of communication, “viral marketing” are other expressions to describe the same practice. “Ambush” or “guerilla” have dramatic connotations to warfare and imply morally questionable behaviour. These expressions are not neutral and contribute to the stigmatisation of practices fought by the organisers of large sport events, such as the International Olympic Committee, FIFA and UEFA, to quote the most prominent only.

There have been many definitions of ambush marketing. These definitions usually lack objectivity and fail to take in consideration the endless variety of the phenomenon.

Sandler and Shani defined ambush marketing as *“a planned effort (campaign) by an organization to associate themselves 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>1</sup>. However, ambush marketing is not necessarily planned and its purpose is usually not to be associated with being a sponsor. These are possible inner motivations of ambush marketers. From the viewpoint of the “victim”, what ends up being qualified as ambush marketing are situations of fact that cause some level of confusion as to the association of the ambusher with the event. From the viewpoint of the ambush marketers, major sport events do naturally attract a lot of attention and therefore constitute excellent advertising opportunities.

Ambush marketing was also defined as those practices that precisely do not fall foul of the law<sup>2</sup>. Although our introduction to the questionnaire sent to the National Reporters focused on border line ambush market practices, these cannot be taken as a definition. Such a narrow definition does not match the reality of ambush marketing practices. It also mistakenly assumes that the ambush marketer is skilled in circumscribing the law which is not necessarily true. It is legally and intellectually incorrect as it implies that competitors’ efforts not to fall into the scope of the law are somehow unjustified and therefore does not recognize the self-imposed limits of statutes and the principle of legality. In reality, the scope of the applicable laws is not that clear. Trademark protection is often unavailable against ambush marketing practices and unfair competition protection is usually fact dependant and therefore unreliable.

**For the purpose of this report, we will define ambush marketing as an association with an event and the values it incorporates, without authorisation from the organiser.**

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<sup>1</sup> Sandler D.M., Shani D., Olympic Sponsorship vs. “Ambush” Marketing: who gets the Gold?, Journal of Advertising Research, August/September 1989, Cambridge University Press, pp. 9, 11.

<sup>2</sup> Davis R. N., Ambushing the Olympic Games, ISLR/Pandektis, Vol. III Nr. ½, p. 7, 15.

## II. BACKGROUND AND ISSUES

### A. SPONSORING

Each and every not insignificant sport event may be subject to ambush marketing practices of some sort. Once tolerated, the main sponsors started to complain and claimed full exclusivity over the benefits resulting from their association with the event.

Sponsoring differs from donation. While the corporate donor is motivated by a sense of moral duty and a desire to give something to society, the sponsor expects a return on its investment<sup>3</sup>. Sponsorship has been defined as “*a cash or in kind deal under which a sponsor pays a sponsorship fee to a sport entity (athlete, league, team, event) to support overall organizational objectives and promotional strategies*”<sup>4</sup>. In return, the event organiser makes a number of promises to the sponsor, consisting among others in warranting advertising space, certain privileges and some level of exclusivity.

Sponsoring is particularly important in sports which attracts 90% of sponsoring activities out of a roughly USD 26 billion overall sponsoring activity<sup>5</sup>.

The objectives followed by sponsors can be divided into **marketing objectives** on the one hand and **corporate objectives**. Marketing objectives aim at increasing sales, brand or product awareness by targeting the appropriate customer base and positioning the brand. Corporate objectives are broader and are often referred as the **institutional objectives**: The sponsor wishes to increase awareness of the company, to enhance the company’s image through the association with an athlete or an event which is positively connoted in the public, to enhance employees’ motivation and to display to the public through the sponsorship a sense of responsibility and common concerns. Sponsoring is indeed expected to have positive effects on the company’s image, the public perception of the company in terms of community participation and last but not least on employees’ commitment and loyalty towards the company<sup>6</sup>. Ultimately, institutional benefits should also positively affect sales and profitability. Institutional objectives are usually the most important for the sponsors.

### B. TV BROADCAST AND SPORT ORGANISATIONS

Sponsorship is not the first financial resource of sport organisations. The main sources of funding for major sport events are TV broadcast rights. Sponsoring comes second only and ticketing third<sup>7</sup>. Sponsoring grew in line with the phenomenal increase in TV demand for

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<sup>3</sup> Jeanrenaud C., Sponsorship, in Handbook on the Economics of Sport, Andreff W., Szymanski S. Editors, EE Publ, Cheltenham, 2006, p. 49

<sup>4</sup> Definition by Shank M. D., quoted by Jeanrenaud, op. cit., p. 49.

<sup>5</sup> Jeanrenaud, p. 53; . Moorman A. M., Greenwell T. Ch., Consumer Attitudes of Deception and the Legality of Ambush Marketing Practices, Journal of legal aspects of sport, 15(2) 2005, p. 183

<sup>6</sup> Jeanrenaud, op.cit., p. 50-51.

<sup>7</sup> According to the International Olympic Committee, the revenues generated from these sources for the period from 2001 until 2004 accounted for respectively 53%, 34% and 11% of , the remaining 2% coming from other licensing activities, [http://www.olympic.org/uk/organisation/facts/revenue/index\\_uk.asp](http://www.olympic.org/uk/organisation/facts/revenue/index_uk.asp); This is roughly true in relation to football as well. According to FIFA’s 2006 Financial statements, 58% of its revenues in 2006 came from TV broadcasting rights and 24% from marketing rights, i.e. sponsoring,

sport events. TV constitutes one of the main advertisement outlet and an unparalleled source of visibility for the sponsors.

The sale of TV rights by sport organisations started in the 60s in the United States and in the 80s in Europe. According to certain sources, proceeds from worldwide sports television rights increased by 993 per cent between 1991 and 2001. European TV rights for 2002 was estimated at Euros 19.5 billion out of which 7.8 billion was for football<sup>8</sup>. Sport broadcasts are indeed the most demanded entertainment on TV<sup>9</sup>. Among these sports, football (soccer) comes first in terms of world audience (except for the United States where American football is first) and TV revenues.

That growth was made possible by the progressive liberalisation of the TV market over these years<sup>10</sup>. One of the main change brought by the liberalisation is the introduction of dedicated and pay-per-view channels. That evolution boosted the opportunity for sponsoring. The higher visibility due to very large TV broadcasts allowed event organisers to obtain substantially higher contributions from a usually limited number of sponsors. The FIFA 2007-2014 sponsorship program comprehends six Partners with full exclusivity and specific rights, Sponsors with more limited exclusivity and National Supporters<sup>11</sup>. The necessity to meet TV demand, sometimes led major sport organisations to rethink the format of their championship<sup>12</sup>.

Sport organisations are hierarchically structured. One of the characteristics of sports is the interdependence between players or athletes. The most successful clubs, athletes or organisations cannot steal the market and eliminate the weaker or smaller. In their absence there would be no more games, matches or championships. All share a common interest in remaining in the game and collaborating. This is why athletes, teams and clubs are organised in federations at national and international levels. Rules and financing of federations follows a top down approach, with a redistribution of the proceeds from the sale of the rights. Whilst the national federations usually own the rights pertaining to national events, the international federations own the rights pertaining to international events. The collective selling of rights benefits all participants, as it allows higher prices and therefore higher proceeds even at grass-root levels.

As a result, the upstream side of sport markets, is often characterised by some form of dual “monopoly” system where collective selling meets collective purchasing. In Europe and in relation to international events, the European Broadcasting Union created in 1950 (hereafter “the EBU”), is entrusted with the task to negotiate and purchase rights on behalf of its members to whom it will license such rights. With the multiplication of channels, the introduction of dedicated channels and pay-per-view TV, most of which are not EBU

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[http://fr.fifa.com/mm/document/affederation/administration/2006\\_fifa\\_ar\\_en\\_1766.pdf](http://fr.fifa.com/mm/document/affederation/administration/2006_fifa_ar_en_1766.pdf); FIFA’s overall yearly revenue for the period 2003-2006 reached CHF 3.238 billions.

<sup>8</sup> Bolotny F., Bourg J-F., The demand for media coverage, Handbook on the Economics of Sport, Andreff W. Szymanski S. Editors, EE Publishing, Cheltenham, 2006, fn. 2, p. 132.

<sup>9</sup> Sports are very specific in the meaning that the outcome is live and unexpected, unlike all other entertainments. Sports are unique and ephemeral. In addition, the involvement of the national flag or the supported team adds a strong suspense to the entertainment. Nowadays, reality shows are trying to use the same stimuli, with less success though.

<sup>10</sup> It started in the United States in the 70s with the introduction of pay-per-view programs and reached Europe in the 90s. In 1951 there were four general viewing channels in Europe; in 1991, 143 channels out of which 71 were private and in 1995, 383 channels.

<sup>11</sup> <http://www.fifa.com/aboutfifa/marketingtv/marketing/sponsorship/index.html>

<sup>12</sup> Such as Formula 1 in 2003 and the UEFA in 2003-2004.

members, the EBU is facing competition. This forced the EBU to raise its prices substantially. EBU already lost a number of very important events to competition<sup>13</sup>. It nevertheless managed to keep its hold on the Olympic Games, although EBU's offer for all games between 2000 and 2008 was substantially less than News Corporation's (USD 1.44 billion vs. USD 2 billion). This is explained by the EBU's larger coverage in terms of audience and IOC's policy of keeping the most important event available on free TV. In relation to world events and national competitions, the structure of the upstream side of the sport market usually consists in collective selling and competitive bidding, the outcome of which is even higher figures in terms of price paid by the TV channels for the broadcasting rights. In the football world for example, clubs usually own the rights pertaining to the matches they play and competition exists at the level of TV broadcasters.

### C. AMBUSH MARKETING RELATED ISSUES

Ambush marketing is often qualified as parasitism. But parasitism usually takes place between competitors, whilst ambush marketing does not necessarily involve competitors. Ambush marketing first means association with an event, not with specific parties. Another difference with traditional parasitism is that authorised sponsors did not contribute through their own work or efforts, to the reputation of the event or to the values associated with the event. The sponsor only financed the event (and this in a relatively small proportion as compared to broadcasting rights). The party who created the reputation and who can claim rights over the values associated with the Olympic Games or the World Cup, are the International Olympic Committee (hereafter the "IOC") and the Fédération Internationale de Football Association (hereafter "FIFA"). Therefore the phenomenon is more akin to some sort of free rider issue.

Who created the reputation and value of the event is actually a question in relation to sports as opposed to enterprises in other markets. In relation to the Olympic Games, it is not clear whether the "creator" is the IOC, the National Olympic Committees or the Organising Committees, or whether the created values are the outcome of the work and collaboration between all participating sport federations, athletes, teams or clubs. In some countries, right holders to the Games are the National Olympic Committee and/or the Organising Committee in addition or instead of the IOC. In practice, the reputation of events, like the Olympic Games or the World Cup or whatever large international championship is the outcome of a collective effort. It is because athletes trained and obtained correspondingly sustainable financing, that competitions attracting enormous attention became possible.

Assuming that the IOC, FIFA and others of the same kind are the actual owners of the created reputation, they are the parties who may suffer some ambush marketing practices. The organiser aims at leveraging commercial value from the event and from the emotions and values generated in the public. The ambush marketer interferes in that process and reaps some of that commercial value. So far however, ambush marketing seems to have had little if

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<sup>13</sup> "Formula One Motor Racing, the Motor Cycling Grand Prix World Championships since 1998, the Athletics Grand Prix Meetings (Golden Four), the Gymnastics World Championships, the Ski World Championships and European Championships from 1999, Wimbledon (since 1988), US open (since 1985), Masters Final (since 1987), Grand Slam Cup (since 1990), the Davis Cup Final tennis tournaments, the Rugby World Cup and the Paris to Dakar rally" Commission Decision of 10 May 2000 (Case IV/32.150 – Eurovision) OJ L 151, 24.6.2000, p. 18, 26.

no effect at all on the phenomenal growth in sports revenues. The damage caused to the organisers, if any, may consist in loss of additional revenues only, i.e. those that would have existed if there had been no ambush marketing activity. This is a hypothetical loss because the sponsorship attribution process usually consists in a competitive bid system resulting in optimized prices and revenues. On the other hand, by multiplying references to an event, ambush marketing is actually contributing to its publicity, popularity and fame.

When competitors are affected, the negative effect is some dilution effect on the paid for association between the official sponsor and the event. As far as commercial objectives are concerned the effect should be measurable but the causal link between the ambush marketing practices and the absence of increased sales remains questionable. The situation is more difficult in relation to the institutional objectives: Institutional returns from sponsoring are hardly measurable and therefore effective damage cannot be demonstrated.

It is also unclear whether recognition in the public comes from the mere association with the event or the specific status as official sponsor to the event. Nike is regularly cited as an official sponsor although it is usually not. The requirement by sponsors to exclusivity over the event and the related rights confirms somehow that public recognition comes from the mere association. If public recognition were related to sponsorship, exclusivity would not be necessary because sponsors could only be damaged, if the public properly identified the official sponsors and positively associated the values stemming from the event to sponsorship.

In practice though, it appears that the public does not properly identify the official sponsors. When surveyed, only very famous brands are cited, often in confusion with other famous non-sponsors brands. Less famous companies are not identified as sponsors at all. For instance, a survey made by Global Market Insite, Inc., shows that in relation to the World Cup 2006, only two sponsors were properly identified worldwide, i.e. Adidas and Coca-Cola (38% recognition). Mastercard and McDonald's were also identified but in lesser proportions (24% and 20%). In certain countries, Pepsi was identified as the official sponsor instead of Coca-Cola and Visa was getting a level of recognition as official sponsor almost equivalent to Mastercard. Of course, Nike, not an official sponsor, was identified as an official sponsor in 31% of the cases overall, in some countries at par levels with Adidas (UK and US) or even higher (Brazil). Fujifilm, Hyundai, Toshiba and Yahoo! Managed 8% recognition only.

Moorman and Greenwell questioned past research and carried out their own survey to measure consumers' reaction to ambush marketing. They found out that consumers considered as incorrect and illegal ambush practices referring to the Olympic symbol, only. Other ambush marketing practices such as advertisements posted by a sponsor of a team and not an official sponsor, advertisements by non-sponsors on TV breaks during retransmission of a competition and a sweepstake organised by a non-sponsor with tickets of the competition were given away as prizes, were not considered as illegal<sup>14</sup>.

At first sight, consumers do not appear to be harmed by ambush marketing practices. The issue whether company X is or is not an official sponsor has little bearing to the quality, composition, nature, etc. of a product or a service. So far, no one has reported any consumer organisation asking for legislation to prevent or fight ambush marketing practices. One cannot exclude though that consumers may decide to purchase company X's products under

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<sup>14</sup> Moorman A. M., Greenwell T. Ch., op. cit., p. 183-211.

the mistaken belief that it is an official sponsor<sup>15</sup>. The issue would be to determine how many of such consumers there are, to determine whether the likelihood to mislead consumers is material or not. One cannot exclude that over time, the communication campaigns launched by the main sport organisations contribute, and in particular with the change of generations, to increasing consumers' awareness of official sponsors and thereby the importance of that criterion in consumers' purchasing decisions. With that in mind, ambush marketing remains primarily a B2B issue.

A relatively fundamental question raised by ambush marketing is to determine whether the values associated with the event stemming from the emotions, the pride, the charisma of the athletes, their contribution to the suspense of a competition should not remain public goods. Such a claim opposes any legal recognition of exclusive rights such as those claimed by official sponsors.

Therefore any legal study of ambush marketing practices should first recognize that:

- Overall, ambush marketing practices are better qualified as a free rider issue instead of parasitism;
- competitors are not necessarily affected;
- mainly organisers are affected by ambush marketing practices;
- the values stemming from the event are the outcome of a collective effort;
- the damage, if any, is very difficult to quantify and the causal link between the said damage and ambush marketing practices is very difficult to identify;
- ambush marketing practices mainly concern business relations between undertakings, consumers are rarely affected;
- positive externalities such as the values conveyed by the event, perhaps belong to the public domain.

### III. CATEGORISATION OF AMBUSH MARKETING PRACTICES

Ambush marketing practices can be extremely varied. Therefore a categorization based on reported ambush marketing disputes may be useful to better understand the phenomenon. These categories are not legal categories but types of ambush marketing practices. One practice could for instance fall under two categories. Criteria used to differentiate between categories are not homogeneous which explains the difficulty in legislating against ambush marketing practices.

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<sup>15</sup> How many consumers will open an account with UBS because it is the first official sponsor of Alinghi, Defender in the America's Cup? Among the consumers who bought Ovomaltine since 1923 when it started sponsoring major sport events, how many bought it because it had financially participated to the sport event, how many bought it because it was easily associated with the sport event (congruence of values and purposes) and/or how many bought it because it sounded healthy?

## A. PARASITISM TO THE EVENT

The following examples pertain to parasitism to the event:

- In 1977, the State of Delaware created without authorisation a lottery based on the outcome of the weekly games organised by the National Football League<sup>16</sup>.
- During the 1984 Olympics, Kodak sponsored the US track and Field trials whilst Fuji was an official sponsor of the Games<sup>17</sup>. In 1988, the situation reversed, Fuji sponsored the US swimming team whilst Kodak was an official sponsor.
- In 1988 as well, Wendy's sponsored ABC's television coverage of the games whilst Mc Donald's was an official sponsor<sup>18</sup>.
- During the 1992 Olympics, Nike placed large murals of USA basketball team members Michael Jordan and Charles Barkley on the sides of buildings in Barcelona<sup>19</sup>. Nike was not an official sponsor of the Games.
- Canterbury, a manufacturer of rugby shirts, was the supplier of the All Blacks for many years. The New Zealand Rugby Federation changed supplier. Shortly thereafter, Canterbury issued an advertisement displaying a picture of the 1924 All Black team nicknamed the "Invincibles" with a comment: *"One Jersey more than any other, captures the spirit of rugby"*. Additional texts commented the exploit by the then All Blacks: *"The 1924 Invincibles didn't have big salaries. Just their passion for the game. And Canterbury Jerseys. In their famous British Isles tour the team created a record that still stands today, etc..."*<sup>20</sup>.
- During an Australian-New Zealand rugby match in 2002, two naked men streaked onto the playing field "wearing" a painted-on Vodafone logo<sup>21</sup>. Vodafone was not a sponsor.
- Coors became the official sponsor of the National Football League. It set up a billboard along a highway displaying the NFL logo and giving a daily tally of the number of days until the Super Bowl. Across the highway, a non-sponsor beer company erected its own billboard, showing the tag line "Our Super Parties, Our Beer", on top of a football<sup>22</sup>.

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<sup>16</sup> 435 F. Supp. 1372 (D. Del. 1977) Instead of relying on the common law principles of unfair competition, the court relied on the Lanham Act finding there was confusion. As a result, the appropriate remedy consisted in including a clear and conspicuous statement that the game is not associated with or authorized by the NFL. Similar situation in a later case between the National Collegiate Athletic Association (NCAA) and Coors Brewing Company, where Coors had used tickets for a sweepstake in spite of the small print on the back of the tickets specifying that "this ticket may not be offered in a commercial promotion or as a prize in a sweepstakes or contest", Moorman A. M., Greenwell T. Ch., op. cit. p. 191.

<sup>17</sup> Wei L., Kretschmer M., *Ambush Marketing: A study of strategies and legal responses*, ISLR Pandektis, Vol. 5:3, 2004.

<sup>18</sup> Wei L., Kretschmer M., op.cit.

<sup>19</sup> Davis R. N., *Ambushing the Olympic Games*, ISLR/Pandektis, Vol. III Nr. ½, p. 7, 10.

<sup>20</sup> Hoek J., Gendall Ph., *Ambush Marketing: More than Just a Commercial Irritant?*, Entertainment Law, Vol. 1, No.2, Summer 2002, pp. 72-91.

<sup>21</sup> Wei L., Kretschmer M., op. cit.

<sup>22</sup> Vassallo E., Blemaster K. and Werner P., op. cit., p. 1338.

- During the Atlanta 1996 Olympic Games, Telecom New Zealand issued advertisements in New Zealand newspapers displaying on a full page five words “Ring”, posted and coloured in the same way as the five Olympic rings<sup>23</sup>. Bellsouth was an official sponsor of the Games and a new entrant to the New Zealand telecommunications market.
- A group of hundreds of Dutch fans showed up wearing orange lederhosen displaying the name of the Dutch brewery Bavaria, in Stuttgart, to attend the 2006 World Cup match opposing the Netherlands to Ivory Coast. They were requested to take off their pants before entering the stadium<sup>24</sup>.
- The Austrian Reporter mentions the 20 by 8 meters billboard currently posted on Karlsplatz in Vienna, displaying a red and white three dimensional cube bearing, on its left face a Swiss flag, on the bottom face an Austrian flag and on the front face the “puma” logo. At the bottom right of the billboard bears the puma trademark with a reference to [www.pumafotball.com](http://www.pumafotball.com). Adidas, not Puma, is the official sponsor to the Euro 2008 to take place in Switzerland and Austria.

More arguable examples:

- During the Salt Lake City winter Olympic Games, a farmer was threatened to pay USD 10'000.- as a license fee for creating crop circles in a field in the shape of the 5 interlocking rings<sup>25</sup>.
- During the same Olympics, small shopkeepers were reported to have been brought to court for referring to the Olympic Games.

These last examples show how difficult it is to set limits once sweeping rights are granted to stake holders.

## B. DISPARAGING A COMPETITOR

Disparaging usually comes in addition to parasitism. One example of ambush marketing practices mocking a competitor, perhaps to the point of disparaging the Competitor is the Lillehammer example given with the questionnaire. In reality it appears that the VISA/American Express dog fight was a longer story.

It started in 1992 during the Barcelona Olympics. Visa was an official sponsor and apparently obtained, as part of its sponsorship package, that official Olympic tickets and merchandise vendors only take VISA cards. American Express retorted with a frontal assault against the Olympics in a TV campaign saying : “*The Olympics don't take American*

<sup>23</sup> Hoek J., Gendall Ph., Ambush Marketing: More than Just a Commercial Irritant?, Entertainment Law, Vol. 1 No. 2, Summer 2002, pp. 72, 78.

<sup>24</sup> <http://www.worldcublog.org/wp-print.php?p=1465> The case was decided by the Court of Appeal Amsterdam 23 November 2006, IER 2007, 34 (Bavaria/KNVB): in the absence of specific clause in the tickets terms and conditions, the court decided that the organiser, KNVB, was not entitled to ban access to the stadium to ticketholders wearing Bavaria Beer lederhosen (information provided by Prof. Jan Kabel).

<sup>25</sup> Moorman A., Greenwell T. Ch., op. cit., p. 190.

*Express*". At the same time, American Express started its well known campaign: "*to visit Spain you don't need a visa*". American Express then continued in relation to the Winter Games in Albertville which took place the same year with an advertisement displaying athletes and saying "*if they want to enjoy the fun and games they don't need a visa*"<sup>26</sup>. The fight continued during the 1994 Lillehammer Games with the now famous "*you don't need a visa to go to Lillehammer*".

Perhaps American Express or retailers of tickets and vendors could have taken legal action against the Olympics for foreclosing the market. Whatever the legal answer, American Express chose other means: communication. An intriguing aspect of that example is that, ultimately, ambush marketing may not necessarily prejudice the event. American Express contributed to its publicity and audience as is often the case with ambush marketing practices.

### C. CONFLICTS BETWEEN SPONSORS

Frequently, situations qualified as ambush marketing practices are the outcome of conflicts between sponsors of the athletes or teams on the one hand and sponsors of the event on the other hand. The following are examples of such conflicts.

- Michael Jordan, the famous basket player, at the 1992 Barcelona Olympics wrapped himself into the American flag to conceal the logo of the official sponsor of the Games, he was wearing. He thus managed to keep the benefit gained from his image receiving the gold medal for his own personal sponsor.
- During the 2000 Sydney Olympic Games, Ian Thorpe this time, did the same thing and stepped up to the podium to receive a gold medal wrapped with an Australian flag hiding the name of the official sponsor printed on his track suit<sup>27</sup>.
- The British sprinter Linford Christie appeared at a press conference before the 100 meters final race in the 1996 Atlanta Olympic Games, wearing blue contact lenses with a white Puma logo emblazoned in the middle. The official sponsor, Reebok, was not particularly pleased.
- In 1996, Burger King sponsored the national Olympic team of the United Kingdom whilst McDonald's was an official sponsor of the Olympic Games<sup>28</sup>.
- Visa sold its Olympic rights as a sponsor to Prudential Bank which issued advertisements bearing the Games logo, while a competitor, NationsBank was an official sponsor<sup>29</sup>.

All these examples were qualified as ambush marketing practices. They are however quite different from one to another. In the Prudential Bank/NationsBank, one may wonder who is to blame between the ambush marketer, the official sponsor and the organiser of the sport event.

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<sup>26</sup> Davis R. N., op. cit. p. 9.

<sup>27</sup> Wei L., Kretschmer M., op.cit.

<sup>28</sup> Wei L., Kretschmer M., op.cit.

<sup>29</sup> Wei L., Kretschmer M., op.cit.

#### D. COMPETING EVENTS

Ambush marketing practices may result from the organisation of a competing event, like in the following examples.

- Kodak was an official sponsor of the 1996 Atlanta Olympic Games. Its arch-rival Fuji co-sponsored an elaborate display honouring 100 years of track and field featuring past Olympic athletes alongside next year's hopefuls. The exhibit journeyed around the United States from New-York in November 1995 until the Games in Atlanta in 1996.
- During the 1992 Barcelona Olympics, Nike organised press conferences with the athletes it directly sponsored, in headquarters located away from the Olympic village<sup>30</sup>.

### IV. COUNTRIES WITH SPECIFIC ANTI-AMBUSH MARKETING PROTECTION

#### A. SHORT OVERVIEW OF PROTECTION TYPES

Various legislations were passed to secure some level of control over the wealth generated by mega sport events.

One of the first legislation containing anti-ambush marketing provisions was passed in the United States in 1978. The purpose was not to fight ambush marketing practices but to revamp the United States Olympic program which was in a state of disarray<sup>31</sup>. The Amateur Sports Act of 1978 set forth the legal framework under which the United States Olympic Committee was to operate<sup>32</sup>. Exclusive rights are granted to the United States Olympic Committee (hereafter the "USOC") over the name "United States Olympic Committee", the symbol of the International Olympic Committee consisting of five interlocking rings, the symbol of the International Paralympic Committee, the symbol of the Pan-American Sports Organization, the emblem of the USOC and, last but not least, the words "Olympic", "Olympiad", "Citius Altius Fortius", "Paralympic", "Paralympiad", "Pan-American", "America Espirito Sport Fraternite", or any combination of those words<sup>33</sup>. Only the USOC can authorize use of these terms and symbols. The USOC can file action against any infringer, i.e. user without authorisation of these words or of *"any combination or simulation of those words tending to cause confusion or mistake, to deceive, or to falsely suggest a connection with the corporation or any Olympic, Paralympic, or Pan-American Games*

<sup>30</sup> Davis N. R., op. cit., p. 10.

<sup>31</sup> Davis R. N., op. cit., p. 19.

<sup>32</sup> See 36 USC § 220501 et seq. That act was last modified in 1998 as the "Ted Stevens Olympic and Amateur Sports Act of 1998". Schmitz J. K., Ambush Marketing : The Off-Field Competition at the Olympic Games, 3 Nw. J. of Tech. & Intell. Prop., at <http://www.law.northwestern.edu/journals/njtip/v3/n2/6/>

<sup>33</sup> 36 USC § 220506

activity” or of “any trademark, trade name, sign, symbol, or insignia falsely representing association with, or authorization by, the International Olympic Committee, ...”. Despite a reference to the trademark law for civil enforcement purposes, the criterion as confirmed by the US Supreme Court is not the likelihood of confusion, but the association with the right holder<sup>34</sup>.

Another country to pass legislation dealing with sports in general, is France with the Law on Sports of July 16, 1984, which aims at re-organising, controlling and promoting sport activities. That type of legislation recognizes the political and social role played by sports in general and therefore vests Sport Federations with a public utility mission consisting among others, in organising competitions and championships.

Internationally, the Nairobi Treaty prohibiting registration of the Olympic Symbol as a trademark without authorisation by the International Olympic Committee was signed on September 26, 1981<sup>35</sup>. It was ratified by 44 countries only<sup>36</sup>. Among the surveyed countries, only Brazil and Italy ratified it. Austria, Hungary and Switzerland signed but never ratified the Nairobi Treaty.

Thereafter, the International Olympic Committee started requiring from every Candidate city a demonstration that adequate legislative protection is in force to protect the Olympic Games intellectual property and to somehow prevent ambush marketing during the Games<sup>37</sup>. This led a number of countries to pass legislation to protect the IOC intellectual property. To quote a few only, Australia (the Sydney 2000 Games Indicia and Images Protection Act), China<sup>38</sup>, the United Kingdom and Italy passed such legislation. Depending on the law, rights are vested with the National Olympic Committee or the International Olympic Committee, or both.

The IOC was not alone in lobbying for more protection. FIFA, UEFA and the ICC World Cricket League have similar requests. UEFA for instance lobbied in Switzerland to obtain the introduction in the Swiss Act against Unfair Competition, of a specific provision to fight parasitism. In Hungary a legislation was prepared in preparation for the EURO 2012.

As part of the most stringent legislations, South Africa introduced the Trade Practices Amendment Act 26 of 2001, which amended the Trade Practices Act 1976 and Merchandise Marks Act 1941. The aim was initially to protect the staging of the Cricket World Cup but the scope of the amendment is much broader and may be extended by order of the Minister of Trade and Industry to any other event, as will be the case for the 2010 World Cup. The Amendment prohibits association and intrusion into the event. Under the Amendment it is prohibited to make, publish or display false or misleading statements, communications or advertisements which suggest or imply a contractual or other connection with a sponsored event or the person sponsoring that event. The prohibition is backed up by criminal sanctions consisting in fines of ZAR 4'000.- or up to two years' imprisonment for a first offence and

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<sup>34</sup> See 483 US 522, SFAA vs. USOC.

<sup>35</sup> [http://www.wipo.int/treaties/en/ip/nairobi/trtdocs\\_wo018.html](http://www.wipo.int/treaties/en/ip/nairobi/trtdocs_wo018.html)

<sup>36</sup> [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=22](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=22)

<sup>37</sup> Michalos Ch., Five Golden Rings: Development of the Protection of the Olympic Insigna, [2006] I.S.L.R. Issue 3, Sweet & Maxwell, p. 64 et seq.

<sup>38</sup> China (Decree No.345 of the State Council of the People's Republic of China on February 4,2002, and effective as of April 1,2002, <http://en.beijing2008.cn/98/69/article211986998.shtml>; see also a translation of the text published in the International Sports Law Journal, 2003/1 p.31 and the contribution by Blackshaw I., Beijing Introduces Ambush Marketing law for 2008 Olympics, The International Sports Law Journal 2003/1, p. 29).

finer of ZAR 10'000.- or up to five years' imprisonment for a subsequent offence<sup>39</sup>. The Merchandise Marks Amendment Act 61 of 2002 also prohibits the use of a mark or trademark in relation to the event in a manner which is calculated to achieve publicity for that mark and to derive benefit from the event as well as the mere fact of piggy-backing on the event's publicity. For these provisions to apply, it is not necessary that the ambush marketer tries to suggest a link with the event: it is enough that he takes advantage of it<sup>40</sup>. That obligation is backed up by similar criminal provisions. It appears that New Zealand is about to adopt a similar legislation which prohibits association and intrusion with the event and is backed up by criminal sanctions<sup>41</sup>.

Some of these legislations are limited in purpose and means, whilst others have aims beyond ambush marketing. Among those essentially aiming at ambush marketing, there are mainly two possible approaches. One which focuses on certain means used by ambush marketers and which prohibits unauthorised use of distinctive signs and variations thereof. The other one focuses on the outcome of practice, i.e. the act of taking advantage of someone else's reputation. Whilst the first one is akin to trademark, the second type of which no example is in force in the surveyed countries, is akin to unfair competition. Most often, legislations are incorporating components of both types.

In the following chapter we will examine the few laws passed in the surveyed countries with the aim, directly or indirectly, to fight ambush-marketing practices.

## B. SURVEYED COUNTRIES

### 1. Countries with specific anti-ambush marketing protection

#### a. Protection in the United Kingdom

The main example is the United Kingdom with the Olympic Symbol Protection Act dated 1995 (OSPA) and the London Olympic Games and Paralympic Games Act 2006 (LOGA)<sup>42</sup>. These acts grant exclusive rights to the London Organising Committee of the Olympic Games Ltd. (hereafter LOCOG) and the British Olympic Association, on certain representations such as the Olympic symbol, the Olympic motto and certain protected words, Olympiad, Olympiads, Olympian, Olympians, Olympic and Olympics called the "Controlled Representations"<sup>43</sup>. Third parties are prohibited from using these Controlled Representations

<sup>39</sup> Cornelius S., South African Measures to Combat Ambush Marketing in Sport, The International Sports Law Journal, 2003/1 p.38.

<sup>40</sup> Duthie M., It's just not cricket: Ambushing the ambushers in South Africa, [http://www.freehills.com.au/publications/publications\\_1548.asp](http://www.freehills.com.au/publications/publications_1548.asp)

<sup>41</sup> <http://www.parliament.nz/en-NZ/SC/SubmCalled/a/8/5/a85e55bd53344e93a26f1714719a1499.htm>

<sup>42</sup> [http://www.opsi.gov.uk/ACTS/acts1995/Ukpga\\_19950032\\_en\\_2.htm](http://www.opsi.gov.uk/ACTS/acts1995/Ukpga_19950032_en_2.htm);  
<http://www.opsi.gov.uk/acts/acts2006/60012--a.htm>; <http://www.opsi.gov.uk/ACTS/acts2006/60012--f.htm>;  
<http://www.opsi.gov.uk/ACTS/acts2006/60012--g.htm>.

<sup>43</sup> "3. (1) – A person infringes the Olympics association right if in the course of trade he 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 or a word so similar to a protected word as to be likely to create in the public mind an association with it, (in this Act referred to as "a controlled representation)". Section 3(1) OSPA as amended by Schedule 3, section 3(1) LOGA.

as well as any representation which is so similar to those words in relation to goods or services, so as to create in the mind of the public an association with the Olympic Games and the Olympic Movement<sup>44</sup>.

Prohibited associations are all those which evoke a contractual, commercial relationship, a corporate or structural connection and the provision of financial or other support for or in connection with the Olympic Games or the Olympic Movement<sup>45</sup>. LOGA also extends the protection specifically to the London Olympics and prohibits any suggestion to the public that there is an association between certain goods and services and the London Olympics or their organiser (The London Olympics Association Right). To assess whether there is a prohibited association, a court may take account of the use made of a combination of expressions. For example combinations of the terms, “games”, “two thousand and twelve”, “2012” or “twenty twelve” on the one hand and “gold”, “silver”, “bronze”, “London”, “medals”, “sponsor” and “summer” on the other hand may be considered as suggesting such an association. Note that this is a faculty offered to the judge, not a mandatory test for the application of LOGA. Should the suggestions contained in these guidelines be followed, it may result in sweeping rights granted to the organiser. The type of association suggested may be contractual, commercial, corporate, structural as well as financial, without limitation. The concept is therefore open and very wide. The association here is different from the likelihood of confusion in the sense that the association is mainly effected through the meaning of the words, without respect to their visual or phonetic similarity, and no similarity between the goods or services is required. Therefore the right created and the protection granted are more absolute than trademarks. Such right encroaches on the principle of free availability of descriptive terms.

However, there will be no association in the meaning of LOGA, in relation to any statement which accords with honest practices in industrial or commercial matters and does not make promotional or other commercial use of a representation relating to the London Olympics by incorporating it in a context to which the London Olympics are substantially irrelevant. The

<sup>44</sup> Before the OSPA was enacted, around 50 marks had already been registered bearing the word “Olympic”. Post-1995 applications contrary to OSPA have been refused by the UK Trade Mark Registry. Michalos Ch., *Ibidem*, p. 70.

<sup>45</sup> On the concept of « association », it is worth paying a little attention to the Telecom New Zealand case quoted by Kendall Ch. and Curthoys J., *Ambush Marketing and the Sydney 2000 Games (Indicia and Images) Protection Act: A Retrospective*, Murdoch University Electronic Journal of Law, Vol. 8 Nr. 2 (June 2001), <http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82.html>; Hoek J. Gendall Ph., *op. cit.* fn. 18, p. 72, 78 et seq. In 1996 (at the time of the Atlanta Olympics), Telecom New Zealand had published advertisements in New Zealand newspapers that featured five times the word ring positioned and coloured so as to equate the rings of the Olympic symbol. Bellsouth was an Official sponsor of the 1996 Atlanta Games and a new entrant on the New Zealand telecommunications market. The New Zealand Olympic Association sought an interlocutory injunction alleging that the advertisement suggested an association or connection with the Olympic Movement. The court refused and found that the average reader would not be misled by the advertisement: *“In the end it is necessary for me to make up my own mind, and within that to apply common sense. I accept those who read newspaper advertisements in a closely focused way, at least in the first instance. Those who notice the five coloured “ring” words, then drop their gaze to the next line picking up the reference to Olympics, and then refer back to the five “ring” words, and then make an association with the five rings Olympic symbol, will be mildly amused. It will then seem like a cartoon or a clever device. It is the sort of situation where one pauses for a moment to laugh, and acknowledge the lateral thinking involved. However, it is a long way from that brief mental process to an assumption that this play on the Olympic five circles must have been with the authority of the Olympic organisation, or through sponsorship of the Olympics. It quite simply and patently is not the use of the five circles as such. There is not a circle in sight, let alone a fern leaf. It is not as though there were five actual circles in the advertisement caricatured in some way, as, for example, with little animals swinging from the tops or peering out. It is not the sort of design like that where the reader would then be likely to pause and say, that seems close to the wind, I suppose they must have got permission for that”*

legislation here shifts the burden of evidence from the organizers to the infringers. Any association is prohibited as long as the potential infringer shows that the statement accords with honest practices in industrial or commercial matters and does not make promotional or other commercial use of a protected word by incorporating it in a context to which the Olympic Games and the Olympic movement are substantially irrelevant<sup>46</sup>.

LOGA allows the Secretary of State to make regulations about advertising of any kind in the vicinity of London Olympics events. When the Report was issued, no such regulation was reported.

Remedies are all remedies under civil law available to the holder of a property right (damages, injunctions, accounts, etc.). The prohibition to use or refer to the controlled representations is backed up by criminal sanctions consisting in fines<sup>47</sup>.

The British Reporter provided examples of practices that can be considered as illicit under OSPA and LOGA. These examples show how broad and effective can be the control of the organiser under that legislation.

- An advert which creates an association with London 2012 through the use of images etc, for example an advert for a company incorporating the company logo, with an image of an athlete holding a torch and a phrase such as “Lighting the Flame”
- a T-shirt using the Olympic symbol reading “Olympic star in the making”, whether sold or given away in a promotion;
- a promotional offer, for example a coffee shop giving away commemorative mugs with wording such as “Celebrating the London Games”;
- a credit card advertised using the colours of the Olympic Rings and athlete imagery;
- a commercial website displaying the Olympic symbol;
- an advertisement outside a public house saying: “Watch the Summer Games on TV here”;

would be considered as illicit.

However, the following examples would not fall under the OSPA/LOGA:

- an editorial newspaper article about the preparation for the Olympic Games;
- an advert for a company supporting an athlete in a general context for example, “X Co., supporting British Fencing”;
- an advert for a rival sponsor to an official sponsor in a city which is not an Olympic venue, without any reference to the Olympic or Paralympic Games.

The British Report also mentions two limit situations:

- a hotel displaying signs “Rooms available in hotel located close to Stratford, the Olympic Park”;
- an advertisement in a local paper saying “Drink X brand – Not the Official Sponsor of the Olympic Games”.

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<sup>46</sup> LOGA Schedule 3 section 4(3)(b)

<sup>47</sup> It is interesting to note that the “*erreur de droit*” may be a defence in a criminal action available to the party who shows that he believed on reasonable grounds that the use of the representation in the manner in which it was used, or was to be used, was not an infringement of the Olympics association right.

*b. Protection in Hungary*

Hungary was a candidate for the UEFA Euro 2012 and therefore had to show that it was able to grant appropriate protection to the championship. Hungary therefore prepared a draft legislation which has a lot in common with the legislation adopted in the United Kingdom. Since the organisation of the Euro 2012 was finally attributed to Poland and Ukraine the proposed legislation never became effective.

Under the proposed legislation, any reference to the UEFA or the championship which would have suggested a contractual, commercial, organisational or financial relationship with the UEFA was prohibited. Standing to sue was granted to the UEFA and the official sponsors. The remedies were those of trademark law. No criminal sanctions were foreseen and no enforcement agency was foreseen.

The proposed legislation would also have created a black-out on all public events or social acts on the sites of the European Championship, including the stadiums, public places around the stadiums and other public places, such as the trains, bus stations, airports, as well as the airspace above such places.

*c. Protection in Italy*

Italy is an interesting example of a short lived legislation, since the “legge a tutela del simbolo Olimpico” (Act Protecting the Olympic Symbol) adopted on August 17, 2005, was introduced for the duration of the winter Olympic Games of Turin only and stated its expiry for the 31<sup>st</sup> of December 2006<sup>48</sup>.

That legislation came in addition to the Nairobi Treaty which had been ratified by Italy on July 24, 1985. It extends the prohibition imposed by the Nairobi Treaty on the registration of the Olympic Symbol to any sign which contains, in any language, a reference to the Olympic symbol, the Olympic Games and the related events, which may indicate a relationship with the organisation or the Olympic Games and events. Any registration containing the words “Olympics” or “Olympiad” is prohibited as well<sup>49</sup>. Usage of the Olympic symbol and other protected sign is reserved to the Italian Olympic Committee, the Committee for the organisation of the 20<sup>th</sup> Winter Olympic Games of Turin and the Agency for the 20<sup>th</sup> Olympic Games<sup>50</sup>. Consequently, advertising, holding for the purpose of trading, offering for sale or otherwise trading and circulating goods or services bearing distinctive signs of any kind which may mislead the consumers about the existence of a licence, authorisation or other form of association between the product/service and the International Olympic Committee and the Olympic Games<sup>51</sup>. In addition, the law contains a prohibition to enter into parasitic trading, meaning parallel activity to those of authorised economic entities (the official sponsors), with the purpose to take advantage of such authorised entities<sup>52</sup>.

The International Olympic Committee and the authorised entities (to use the symbols, etc.) have standing to sue. The act is also backed up by administrative sanctions consisting in fines from Euros 1’000.- up to 100’000.-.

<sup>48</sup> Article 2 para. 4 of the Act Protecting the Olympic Symbol.

<sup>49</sup> Article 1 of the Act Protecting the Olympic Symbol.

<sup>50</sup> Article 2 para 1 of the Act Protecting the Olympic Symbol.

<sup>51</sup> Article 2 para. 2 of the Act Protecting the Olympic Symbol.

<sup>52</sup> Article 2 para. 3 of the Act Protecting the Olympic Symbol.

Apparently no case applying the Act Protecting the Olympic Symbol is reported.

## 2. Countries with Legislation Designed to Promote the Organisation of Sport Events

### a. France

France introduced the Law on Sports on July 16, 1984 (No 84-610), last modified on July 13, 1992 (No 92-652), to re-organise, control and promote sport activities. As a result, the Sports Federations are vested with a public utility mission consisting among others in organising competitions and championships<sup>53</sup>.

With a view to encouraging the organisation of sport events, the Law endows organisers with exclusive rights on the exploitation rights of sports activities and sports events. In the absence of legal definition, the meaning of the exploitation rights were disputed. Certain publications defended the view that they should be limited to audiovisual rights. Courts held different views. The Tribunal de commerce of Nanterre interpreted the statute to include all exploitation rights without limitation<sup>54</sup>. The Cour de cassation referred to the “fruit of the loom” and to the right to the image resulting from the event<sup>55</sup>. The exploitation rights were held by the Tribunal de Grande Instance of Paris to include sweepstake games resulting in the condemnation of Voisin Desclaux for its “Tour de France” sweepstake<sup>56</sup>.

Broadcasting rights part of the exploitation rights include exceptions for informational purposes. Brief extracts of sport events may be freely broadcasted by other services. The notion of brief extracts has been defined by the courts under the influence of the practice initiated by the “Conseil supérieur de l’audiovisuel”, to excerpts lasting 20 to 30 seconds broadcasted during news programs, including sporting news, provided they identify the source.

Enforcement of such rights follow the general principles of civil liability set forth in article 1382 of the French Civil Code. Standing to sue is granted to Sports Federations and Organisers of sporting events.

The Law on Sports also contains an absolute protection of the Olympic national emblem and depositary of the motto, hymn, the Olympic symbol and the terms “Olympic Games” and “Olympiads”. Anyone registering as a trademark, reproducing, copying, appending, removing or modifying the emblems, hymn, symbol and terms mentioned in the above paragraph without the consent of the French National Olympic and Sports Committee shall incur the criminal sanctions set forth by the French Code on Intellectual Property consisting in up to 2 years imprisonment and 124’000 Euros for counterfeiting the trademark<sup>57</sup>.

<sup>53</sup> See Decision by Conseil d’Etat dated November 19, 1997, pursuant to a request by Nike France, Reebok France, Mizuno France and Puma France to cancel a decision from the French National Football League consisting in modifying the sponsorship system for the football clubs belonging to the first and second divisions.

<sup>54</sup> Tribunal de commerce de Nanterre, December 12, 2002, ACO and ASAACO vs. Dragoon Editions, CCE février 2003 commentaire n014, note C. Caron. Implicitly confirmed in Tribunal de Grande Instance of Paris, January 28, 2004, FFT vs Hospitality Group.

<sup>55</sup> French Cour de Cassation, Com. March 17, 2004, Andros vs Motor presse France, CCE 2004

<sup>56</sup> Tribunal de Grande Instance of Paris, First Instance Court, March 30, 2005.

<sup>57</sup> Article L. 716-9 of the French Code on Intellectual Property.

b. Brazil

Brazil apparently also adopted in 1998 a law to re-organise and promote sports, the “Lei Pelé”. Section 87 of that legislation appears to be protecting the names, symbols and identifiers of sport organizers without registration. It affords absolute protection to organizers who can oppose the use of their name or symbol without prior authorization.

## V. COUNTRIES WITHOUT SPECIFIC PROTECTION

In addition to the specific anti-ambush marketing legislations adopted in certain countries and in the countries without specific legal protection against ambush marketing, event organisers and sponsors may try to fight ambush marketing through other legal principles. Unfair competition is of course playing a fundamental role among the various legal means available against ambush marketing practices. In order to have a full view of the issues, a review of the available intellectual property laws, mainly trademark and copyright, advertisement law and consumer protection, broadcasting regulations and other principles possibly available in certain countries is necessary.

### A. TRADEMARK LAW

A commonly held view is that trademark law is simply irrelevant because ambush marketers carefully avoid referring to trademarks. Court practice however shows that users of ambush marketing technique are not always subtle and often refer to protected trademarks. The situation may be relatively clear and does not require long developments when ambush marketers are referring to competitors’ trademarks. In such cases, the likelihood of confusion is obvious and protection is straightforward. In practice though, we have not found any such example, except perhaps the famous American Express-Visa example<sup>58</sup>. In reality, ambush marketers refer to the event itself, possibly to the name of the event organiser. In these cases claiming protection under trademark law is less obvious.

#### 1. Restricted Registration

Only the Olympic logo benefits from special trademark protection.

The Nairobi Treaty adopted on November 26, 1981, prohibits registration of symbols competing with the Olympic Symbol<sup>59</sup>. As a result, State parties committed not to issue or to register, or to invalidate registration of any sign consisting of or containing the Olympic Symbol consisting in the five interlaced rings in blue, yellow, black, green and red arranged in that order from left to right. Article 2 of the Nairobi Treaty grandfathers existing registrations, which explains why, in certain countries, a number of Olympic related trademarks are still registered. Because of the abandonment in sovereignty imposed by the treaty, few countries ratified it. It thus remained largely ineffective<sup>60</sup>.

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<sup>58</sup> The reference made by American Express was to the generic word “visa” though, not to the trademark.

<sup>59</sup> [http://www.wipo.int/treaties/en/ip/Nairobi/trtdocs\\_wo018.html](http://www.wipo.int/treaties/en/ip/Nairobi/trtdocs_wo018.html)

<sup>60</sup> See Michalos Ch., op. cit., p. 66-68; For the State parties to the Nairobi Treaty see

France is granting similar but more extended protection to the Olympics' emblem, motto, hymn and the words "Olympiads" and "Olympic Games".

Among the surveyed countries, Brazil is the only country which introduced specific trademark provisions to prevent the registration of signs similar to the names of sporting, artistic, cultural or other officially recognised events in general.

## 2. Article 6ter of the Paris Convention

In spite of their significant political role and impact, sport organisations are not international organisations. Only the Olympic National Committees have been sometimes assimilated to organisations entrusted with governmental tasks<sup>61</sup>. As a result, event organisers cannot claim protection under article 6ter of the Paris Convention<sup>62</sup>.

Basic and universal tenets of trademark law is that trademark protection is granted only in relation to trademarks that are distinctive of certain goods and services, provided they are not descriptive or generic and do not cause confusion with others trademarks<sup>63</sup>. This leads to several questions in relation to event organisers: Validity of all-round registrations, absence of distinctiveness, relative nature of the risk of confusion (unless there is identity of signs and products)<sup>64</sup>.

## 3. All-Round Registrations

For the purposes of sponsoring and merchandising, event organisers register an enormous amount of trademarks in relation to the events they organise (so-called "event trademarks"). To take recent examples only, the community trademark "Olympic Games" has been registered in the 42 existing classes and "London 2012" was registered in the UK and as a

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[http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=22](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=22)

<sup>61</sup> See SFAA vs USOC, 483U.S.522,556

<sup>62</sup> Art 6ter

*"1. (a) The countries of the Union agree to refuse or to invalidate the registration, and to prohibit by appropriate measures the use without authorisation by the competent authorities, either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view.*

*(b) The provisions of subparagraph a, above, shall of equally to armorial bearings, flags, other emblems, abbreviations, and the names, of international intergovernmental organisations of which one or more countries of the Union are members, with the exception of the armorial bearings, flags, other emblems, abbreviations, and names, that are already the subject of international agreements in force, intended to ensure the protection.*

*(c) no country of the Union shall be required to apply the provisions of subparagraph b, above, to the prejudice of the owners of right required in good faith before the entry to force, in that country, of this convention. The countries of the Union shall not be required to apply the said provisions when the use or registration referred to in subparagraph (a) above, is not of such a nature as to suggest to the public that a connection exists between the organisation concerned and the armorial bearings, flags, emblems, abbreviations, and names, or if such use or registration is probably not of such a nature as to mislead the public as to the existence of a connection between the users and the organisation.*

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<sup>63</sup> See 15 USC § 1051 and 1052 (Lanham (Trademark) Act) ; Art. 1, 7, 8, of EU Council Regulation 40/94 EEC of December 1993, on the Community Trademark (OJEC N. L 11 of 14.01.1994, p. 1); Art. 2, 3 and 4 of the First Directive 89/104/EEC of the Council, of 21 December 1988, to Approximate the Laws of the Member States Relating to Trademarks; Article L 711-1 and 711-2, L 713-2 and L 713-3 of the French Intellectual Property Code.

<sup>64</sup>For an example see article 7 of the EU Council Regulation 40/94 EEC of December 1993, on the Community Trademark (OJEC N. L 11 of 14.1.1994, p. 1).

Community trademark in every single class. It is certain that the International Olympic Committee or the National Olympic Committees will not enter into the production of products in all these classes, even indirectly. In practice though, these registrations are valid.

Internationally, evidence of use as a requirement at the time of registration has disappeared. Art. 6 of the Paris Convention, does not allow restrictions to registration based on use. The United States have modified the Lanham Act in 1988 to comply with the Paris Convention<sup>65</sup>. More recently, art.15 (3) of the TRIPS Agreement provides that actual use of a trademark cannot be a requirement to the registration of a trademark. Current evolution goes in the same direction<sup>66</sup>. In Germany the Bundesgerichtshof confirmed that the registration of “WM 2006 and “Fussball WM 2006” for 850 products was not in bad faith and therefore valid<sup>67</sup>: The registration was not made to damage a third party but with a view to protect the trademark in relation to all listed products and services.

Currently therefore, as long as the usual five year deadline for making use of a registered trademark has not lapsed, trademark protection is available. For an example concerning sport activities, the OHIM found that the “Sporting” Portuguese football club could not oppose the later registration by Nestlé of the community trademark “sporting” in relation to foodstuffs and beverages, for failure to prove actual use of the registered trademark. Had the Portuguese football club merchandised goods in relation to products corresponding to classes 30 and 32, the opposition would have been granted<sup>68</sup>.

#### 4. Distinctiveness

A number of examples show that distinctiveness in relation to trademarks issued by event organisations, may be a problem.

The OHIM rejected all requests for declaration of invalidity for lack of distinctiveness filed by Ferrero oHGmbH against the community trademarks “WM2006”, “Germany 2006”, “World Cup Germany”, “World Cup 2006”, “World Cup 2006 Germany” registered by FIFA<sup>69</sup>. The OHIM found that the said trademarks did have distinctive character in relation the goods and services for which they were registered. Trademarks earned immediate distinctiveness in relation to class 41 including the organisation of sport events, upon their

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<sup>65</sup> However, a registration in the US is still based upon an intent to use and conditional upon subsequent filing of a statement of use, see 15 USC § 1051.

<sup>66</sup> Article 3(7)(ii) of the Trademark Law Treaty expressly prohibits the contracting parties from introducing in their legislation a requirement for the furnishing of evidence at the time of the application and throughout its pendency of an indication of the applicant’s carrying on of an industrial or commercial activity, as well as the furnishing of evidence to that effect. Article 3(7)(iii) prohibits under similar conditions the requirement of an indication of the applicant’s carrying on of an activity corresponding to the goods and/or services listed in the application, as well as the furnishing of evidence to that effect. (The EU has signed but not ratified the Convention. The TLT is in force in the US, France, Germany, the United Kingdom, Spain, Japan, Australia, Switzerland to mention some of the most important industrialised countries, [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=5](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=5)).

<sup>67</sup> Decisions of April 27, 2006, I ZB 96/05 and I ZB 97/05, <http://www.bundesgerichtshof.de/>

<sup>68</sup> OHIM Decision on opposition No B 649 337, of 30/06/2006.

<sup>69</sup> OHIM Decisions of the Cancellation Division of 28/10/2005, Reference Number 969C 002155521, 970C 002153005, 971C 002152635, 972C 002152817, 968C 002047843. The said trademarks had been registered in almost all classes. All these decisions are currently under appeal.

announcement. These decisions are currently on appeal with the board of appeal of the OHIM<sup>70</sup>.

The German trademark division of the Bundespatentamt, the Bundespatentgericht and the Bundesgerichtshof reached different conclusions from OHIM in relation to the trademarks “WM 2006” and “Fussball WM 2006”<sup>71</sup>. In relation to a large number of products and services pertaining to entertainment, cultural activities, organisation of sport events, travel services, publicity, management of sport facilities, food lodging and entertainment for visitors, the trademark “WM 2006” was considered as inherently descriptive of the event itself and therefore not a valid trademark<sup>72</sup>. Despite the factual monopoly of FIFA on the event, the relevant public would see in the registered trademark only a reference to the event and not to the source. Therefore an essential element of the trademark was missing, distinctiveness. Otherwise, “WM 2006” could be a valid trademark in relation to all products and services not directly and not indirectly related to the event itself. In relation to “Fussball WM 2006”, the Bundesgerichtshof found that trademark always descriptive of the event and therefore not distinctive.

The two cited German cases also hold the view that event trademarks do not differ from regular trademarks. They may be registered, provided a link to the origin of certain products and therefore some level of control by the trademark owner on the quality of the corresponding products and services are demonstrated<sup>73</sup>.

Slightly similar questions were raised in relation to the word “olympic”. Courts sometimes wondered whether “olympic” should be considered as a reference to antique traditions or to the Olympic Games. Considered as a reference to antique traditions, “olympic” is a generic word which cannot be protected. If however, the reference is to the Olympic Games then the issue is whether the word and all values generated by it, were effectively appropriated by the International Olympic Committee through financial, organisational and promotional efforts or

<sup>70</sup> Note that Ferrero is now an official sponsor of the Euro 2008 to take place in Switzerland and Austria, <http://www.uefa.com/competitions/euro/organisation/kind=262144/newsid=515783.html>.

x/BGH decisions of April 27, 2006, IZB 96/05 and IZB 97/05

<sup>71</sup> The trademarks had been registered for approx. 850 goods and services. Decisions of April 27, 2006, I ZB 96/05 and I ZB 97/05, <http://www.bundesgerichtshof.de/>.

<sup>72</sup> IZB 97/05, p. 15

<sup>73</sup> I ZB 97/05 page 20 et seq. and IZB 96/05 pp. 20 et seq. *“Nach diesen Grundsätzen kann auch der Veranstalter eines Sportereignisses als Markeninhaber Lizenzen an Dritte (Sponsoren) vergeben und sich die Möglichkeit der Kontrolle der Qualität der von den Sponsoren mit seiner Marke gekennzeichneten Waren oder Dienstleistungen vorbehalten. An die Schutzfähigkeit einer solchen Marke sind jedoch keine anderen und insbesondere keine geringeren Anforderungen zu stellen als bei sonstigen Marken. Die Bezeichnung, die der Veranstalter durch Sponsoren als Marke benutzen will, muss demnach wie jede andere Marke über eine hinreichende Unterscheidungskraft verfügen (§8 Abs. 2 Nr. 1 MarkenG). Das bedeutet, dass sie auch im Falle der Verwendung durch Sponsoren in dem Sinne auf den Veranstalter hinweisen muss, dass der Verkehr diesen für die Qualität der unter der Kennzeichnung angebotenen Ware oder Dienstleistung verantwortlich macht. Daran fehlt es, wenn der Verkehr lediglich einen beschreibenden Zusammenhang der einzelnen Waren oder Dienstleistungen mit dem benannten Ereignis herleitet oder die Bezeichnung aus sonstigen Gründen allein mit dem Ereignis als solchem in Verbindung bringt. Daher kann der Bezeichnung des Ereignisses nur in ihrer verfremdeten Verwendung herkunftshinweisende Kraft zukommen. Wer seine Leistung zum Ereignis – als Sponsor oder als Veranstalter, als Warenlieferant oder als Diensteanbieter – unter Benennung des Ereignisses mit registerrechtlichem Schutz herkunftshinweisend bezeichnen möchte, hat hierzu eine von der blossen Beschreibung des Ereignisses unterscheidungskräftig abweichende oder diese ergänzende Angabe zu wählen“* I ZB96/05 §22, p. 21-22

not<sup>74</sup>. The OHIM considered that Olympic was a reference to the Olympic Games and the outcome of the efforts, investments and work of the IOC<sup>75</sup>.

## 5. Likelihood of Confusion

Trademark protection is only granted when there is likelihood of confusion. As a result of the specialty principle, likelihood of confusion does not only requires similarity between the trademark and the contested sign, but similarity between the goods or services at stake. Absolute protection is only granted when there is a full identity between the distinctive signs on the one hand and the products and services on the other hand<sup>76</sup>. Unless it is registered in all classes, as it is now often the case, these products or services for which the trademark of the event organiser are registered, are unlikely to be similar to those of the ambush marketer. As a result, courts may find that there is no likelihood of confusion between an ambush marketing campaign and the trademark of the event organiser.

It is only when the trademark is held to have a specific reputation that the protection may be extended beyond the products or services for which it has been registered<sup>77</sup>. Article 16(3) of the TRIPS Agreement makes it mandatory to WTO Members to grant protection to well known trademarks in the meaning of Article 6bis of the Paris Convention, beyond the goods or services for which the trademark was registered, provided that use of the trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the trademark and provided that the interest of the owner of the registered trademark is unlikely to be damaged by such use<sup>78</sup>. Article 16(3) does not indicate

<sup>74</sup> See in the United States, *San Francisco Arts & Athletics v. U.S.O.C.*, 483 U.S., 522, although within the framework of the US Amateur Sports Rights Act granting specific protection to the Olympic symbol, emblem, etc.: *“When a word acquires value as the result of organization and the expenditure of labor, skill, and money by an entity, that entity constitutionally may obtain a limited property right in the word. Congress reasonably could conclude that the commercial and promotional value of the word “Olympic” was the product of the USOC’s talents and energy, the end result of much time, effort, and expense. In view of the history of the origins and associations of the word “Olympic”, Congress’ decision to grant the USOC a limited property right in the word falls within the scope of trademark law protection, and thus within constitutional bounds”*.

<sup>75</sup> Opposition Decision No 3461/2004 (Olympic, Community trademark vs. CompUlympics applied Community trademark) *“Considering that the word “Olympic” has been used as the title of the Olympics for more than a century and the popularity and success the games enjoy, it may be concluded that there is a high degree of recognition of the sign “Olympic” internationally, by the public at large”*.

<sup>76</sup> Article 5 (1) (a) of First Directive 89/104/EEC of the Council, of 21 December 1988, to approximate the laws of the Member States relating to trademarks: *“(1) The registered trademarks are conferring 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 trademark in relation to goods or services which are identical with those for which the trademark is registered;”*

See also recital 10 in the preamble to the First Directive 89/104/EEC. In the Arsenal case, the European Court of Justice relied on article 5 (1) (a) to prevent Mr Reed to sell scarves bearing the name “ARSENAL FC” on scarves of its own production. As a result, labels designating the scarves produced by Arsenal FC as originals, placed by Mr. Reed, was insufficient to avoid infringement of the trademark belonging to Arsenal. The ECJ added: *“Where a third party uses in the course of trade a sign which is identical to a validly registered trademark on goods which are identical to those for which it is registered, the trademark proprietor is entitled, in circumstances such as those in the present case, to rely on Article 5(1)(a) of the Directive to prevent that use. It is immaterial that in the context of that use, the sign is perceived as a badge of support for or loyalty or affiliation to the trademark proprietor”*. ECJ judgment of 12 November 2002, Arsenal Football Club plc and Matthew Reed, Case C-206/01, para. 62.

See also

<sup>77</sup> See Art. 16(3) of the TRIPs Agreement granting extended protection to well known marks in the sense of Art. 6bis of the Paris Convention; Art. 5(2) of the First Directive, although not mandatory.

<sup>78</sup> See Abbott F., Cottier Th., Gurry F., *The International Intellectual Property System: Commentary and Materials*, Kluwer, 1999, Part Two.

what level of fame is required, but makes the “connection” a condition to its application<sup>79</sup>. The precise meaning of this concept is unclear though.

Unlike Article 16(3) of the TRIPS Agreement, Article 8(5) of the Council Regulation 40/94/EEC, provides that a trademark which has acquired reputation in the Community or in the Member States where it is registered may successfully oppose the registration of a subsequent trademark applied for different goods or services. The resolution of the issue remains within the framework of the likelihood of confusion. However, the higher the distinctiveness of a trademark, the lesser is the requirement of similarity in goods or services.

Most of the authorities found that trademarks registered by sport organisations had a reputation extending the scope of the protection beyond registered goods or services. The OHIM found that the trademark “Olympic” had reputation in the meaning of article 8(5) of the Council Regulation 40/94/EEC<sup>80</sup>. In France trademarks such as “Roland-Garros”, “Olympiques”, Jeux Olympiques”, “Dakar”, “Tour de France” were all recognised as famous trademarks under article L. 713-5 of the French Code on Intellectual Property. It is only in relation to less famous trademarks that the specialty principle was strictly applied<sup>81</sup>. In other words, trademark may provide effective protection against most egregious ambush marketing practices, provided the event organiser or the event is especially famous.

## 6. Other Trademark Protection

Some of the surveyed countries have provisions that appear like variations of the protection for reputable trademarks.

In the Benelux countries, Article 2.20.1 d) of the Benelux Convention regarding Intellectual Property dated February 25, 2005, allows any holder of a distinctive sign to oppose any use other than in relation to the products or services which it identifies, when such use, in the absence of justification, takes advantage of the distinctiveness or repute of the said sign or trademark. There may be a justification only when such use is necessary to make business. For instance, Levi Strauss successfully prohibited the advertisement “501 jeans for 501 francs”. However, more recently, a reference to football club names as part of a gambling scheme was approved. Similarly Daewoo was entitled to use the slogan during the Euro 2000: “Daewoo sponsort 2000 Euro”<sup>82</sup>.

<sup>79</sup> Staehelin A., Das TRIPS-Abkommen: Immaterialgüterrechte im Licht der globalisierten Handelspolitik, 2. Aufl., Stämpfli, Bern, 1999, p. 98.

<sup>80</sup> Opposition Decision No 3461/2004, p. 8 The high reputation attached to the word “Olympic” was for the services of sporting activities, organisation and management of sporting events and not the numerous goods and services claimed for in the registration of “Olympic”. When assessing the “*detriment to distinctiveness or repute*”, the OHMI did not try to assess whether there was any intent to take unfair advantage of the name, but relied on the reputation of the trademark and the opinion polls concerning the sponsorship of the Olympics: “*The study indicates both extremely strong public support for corporate sponsorship of the Olympic Movement and strong disapproval of those who attempt to undermine it through sabotage marketing*”, p. 11; Opposition Decision No 81/2000 (based on the French TM registration OLYMPIC vs. the semi-figurative TM FAMILY CLUB Belmont Olympic). In Opposition Decision 301/2001, OHMI allowed the registration of ASTRAL OLYMPIC for swimming pools, against the French TM claimed by the French NOC, L’Arc Olympique.

<sup>81</sup> See for instance the OHIM Opposition Decision Nr. B 649 337 of 30/06/2006 concerning the application for a Community trademark “Sporting” by Nestlé and the opposition raised by a Portuguese football club called “Sporting”. In relation to all goods dissimilar to the beverage produced by Nestlé, the opposition was declared unfounded.

<sup>82</sup> Prés. Rb. Amsterdam, 26 June 2000, *IER*, 2000, p. 275.

Article 6 of the Finnish trademark law protects well known trademarks against unauthorised use which can be detrimental to the repute or takes advantage of the repute of a well known mark without due cause and acceptance.

In Brazil, certain activities which would usually be held as infringing trademark law, can be found as licit, in application of Article 132 item 4 of the Brazilian Intellectual Property Law. A retailer of electrical appliances would be entitled to advertisements such as, “*buy a TV and watch the football World Cup*”, because that would not be considered as a commercial exploitation or an attempt to free ride on a registered trademark.

## B. COPYRIGHT

A few reports mention the protection sometimes available against ambush marketing practices under copyright. Copyright law may indeed cover the official logo of the event or event organiser, the official mascot of the event, the emblem, the anthem and other possible pieces of music composed in relation to the event. In Australia for instance, copyright was successfully used by the Sydney Organisation Committee in 2000 to enjoin the use of a poster on behalf of the Animal Liberation Tasmania Inc which showed a caged hen with the five Olympic rings depicted as eggs below<sup>83</sup>. Surprisingly, no argument was raised and the court did not examine the issue of parody or criticism.

Copyright protection is however not available any more to the Olympic logo, created in 1913 by Baron de Coubertin. Baron de Coubertin indeed died in 1937. However, the mascot and specific logo created on the occasion of each game are protected by copyrights provided they display a sufficient degree of originality.

## C. UNFAIR COMPETITION

### 1. International Framework

Article 10 bis of the Paris Convention provides that

*“the countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition”*

and that acts of unfair competition are

*“any act of competition contrary to honest practices in industrial or commercial matters”*.

This principle is followed by a few examples. The Paris Convention does not define the honest practices.

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<sup>83</sup>[http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal\\_ct/1998/792.html?query=Sydney%20Organising%20Committee%20for%20the%20Olympic%20Games](http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal_ct/1998/792.html?query=Sydney%20Organising%20Committee%20for%20the%20Olympic%20Games)

The TRIPS Agreement however, does not contain provisions on unfair competition law. It only provides that State members shall comply with certain provisions of the Paris Convention, including article 10bis CUP<sup>84</sup>.

## 2. EU Framework

Within the European Union, the most important texts are Directive 84/450/EC<sup>85</sup> and Directive 2006/114/EC<sup>86</sup>. Both apply to B2B disputes. Directive 2006/114/EC codifies all changes brought to Directive 84/450/EC<sup>87</sup>. It harmonises comparative advertising and sets up minimum and objective criteria for determining whether advertising is misleading. In relation to misleading advertisements, Member States may adopt provisions ensuring more extensive protection for traders and competitors<sup>88</sup>. Although technically Directive 2006/114/EC will only enter into force on December 12, 2007, most of its contents are already in application.

In both Directives, **misleading advertising** is defined as “*any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor*”. In other words, an advertising is misleading if 1) it is deceptive or likely to deceive, 2) it is likely to affect the consumers’ economic behaviour or injures or is likely to injure a competitor and, 3) there is a causal link between 1) and 2). In support to the decision making process, article 3 contains a non-exhaustive list of elements to be taken into consideration for the evaluation of an advertising. For the purpose of ambush marketing practices, particular attention should be paid to Art. 3 lit. c): In determining whether advertising is misleading, one should consider “*the nature, attributes and rights of the advertiser, such as his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions*”. To a large extent, this means an assessment of the likelihood of confusion<sup>89</sup>.

However, Art. 3 lit. c) of Directive 2006/114/EC does not refer to ambush marketing practices. One can defend the view that associating oneself, a company or its products with an event in order to benefit from the values attributed by the public to the event, may be considered as a self-attributed qualification in the meaning of Article 3 lit. c). But the attribution of quality is only indirect: The ambush marketer does not try to pass off as the event organiser. Moreover, it is not certain that the ambush marketing practice would be held

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<sup>84</sup> See Art. 2.1 of the TRIPS Agreement, [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_03\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm)

<sup>85</sup> Council Directive 84/450/EC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ L 250, 19.9.1984, p. 17.

<sup>86</sup> Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376, 27.12.2006, p. 21.

<sup>87</sup> The Directive 84/450/EC had been successively modified by Directive 97/55/EC of the European Parliament and the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, OJ L 250, 19.9.1984, p. 17, Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”), OJ L 149, 11.6.2005, p.22.

<sup>88</sup> Article 8 of Directive 2006/114/EC.

<sup>89</sup> Henning-Bodewig F., *Unfair Competition Law: European Union and Member States*, Kluwer, ICLS Vol. 18, The Hague, 2006, p. 38

as a rationally perceivable representation containing an objectively verifiable factual core which can be regarded as misleading advertising<sup>90</sup>. The association with the event is indeed implicit. Last but not least, to be illicit, the advertisement must be able to affect the consumers' behaviour or to injure a competitor. Ambush marketing are primarily concerning B2B relationships and therefore have little impact per se on consumers. One cannot exclude though that ambush marketing practices be held to affect the economic behaviour of certain consumers, in particular where the quality as official sponsor may lead the consumer to buy a product or to take a service. Although the concept is the same in Directive 2006/114 and 2005/29, it is qualified in Directive 2005/29 only as "*using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transaction decision that he would not have taken otherwise*". That qualification, which significantly raises the burden of evidence, should apply to misleading advertising under Directive 2006/114 as well. To our view it is therefore unlikely, that an ambush marketing practice will ever have the ability to appreciably impair the consumers' judgment bearing in mind that the relevant consumer is a "*reasonably well informed and reasonably observant and circumspect average consumer*" and not a particularly irrational one. This should require that official sponsoring is a key element in the consumer's decision making. As far as the alternative condition is concerned, we know that the prejudice caused to a competitor is hard to identify. To illustrate how opinions on such point may differ, the learned Belgian Reporter believes that an advertisement such as the one displayed by Pepsi-Cola during the 1996 Atlanta Olympics and using a picture of Marie-José Pérec, winner of the 400 meters, with the phrase "Marie-José Pérec, official representative of an unofficial Atlanta drink", could be prohibited under Directive 2006/114/EC.

Besides its contribution to the definition of misleading practices in general, Directive 2005/29/EC does not directly tackle ambush marketing practices. The references to sponsoring activities contained in article 6 para 1 lit.c) concern quite a different situation, i.e. when a product benefits from support by a sponsor or official organisation. None of the black listed practices (Annex I to the Directive) concern ambush marketing.

As far as **comparative advertising** is concerned, its definition in Directive 2006/114/EC is extremely wide: "*any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor*". It is enough that a competitor is identified for a campaign to be comparative in the meaning of Art. 2 (c). There is no need for a real comparison as confirmed by the ECJ<sup>91</sup>. Under Art. 4 of the Directive, comparative advertising is permitted when the conditions defined in the Directive are met. The purpose is to support comparative advertising as a means for informing consumers and actually enhancing competition. According to lit. (d) comparative advertising is permitted when "*it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor*". It is also permitted when "*it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products*" (lit. (f)), "*it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name*" (lit. (g)), "*it does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor*" (lit. (h)). To some extent, the introduction of comparative advertising in Directive 97/55/EC limited the ability of Member States to prohibit certain practices considered as misleading.

<sup>90</sup> Henning-Bodewig F., op.cit., p. 37

<sup>91</sup> ECJ 25 October 2001, in the Case C-112/99 Toshiba vs Katun, ECR I-7945, c. 31, 37 and 40

An open question is therefore whether the mere reference to a competitor's trademark implies an appropriation of the values attached to such trademark or distinctive sign. In the case of *Toshiba vs. Katun*, the European Court of Justice had to analyse the interplay between illicit misleading advertising and licit comparative advertising. It concerned a reference made by Katun a producer of copiers' spare parts, to reference numbers of Toshiba copiers. The ECJ first found that this constituted comparative advertising<sup>92</sup>. According to the ECJ, a reference to a trademark may be illicit only "*if the effect of the reference to them is to create, in the mind of the persons at whom the advertising is directed, an association between the manufacturer whose products are identified and the competing supplier, in that those persons associate the reputation of the manufacturer's products with the products of the competing supplier*".<sup>93</sup> In order to determine whether such an association may be made by the public, account should be taken of the overall presentation of the advertising at issue and the type of persons for whom the advertising is intended<sup>94</sup>.

The answer is not easy and the above mentioned jurisprudence is not all that clear as to the definition of comparative advertising. In light of the above *Katun* case, one may conclude that ambush marketing practices containing a mere reference to a third party's trademarks or other distinctive sign is unlikely to be considered as comparative advertising<sup>95</sup>. If one reaches the opposite conclusion, then the absence of necessity for the reference to the third party's identifier is likely to prevent the application of article 4 of Directive 2006/114/EC.

In conclusion, except for references to trademarks, one can only say that a protection against more subtle ambush marketing practices under Directive 2006/114/EC remains quite uncertain. It is unlikely that Directive 2006/114/EC provides wider protection against ambush marketing practices than the legislation of the Member States.

### 3. National Framework

To present the various solutions proposed in national unfair competition laws or related principles, we will start with the general clauses and principles and will then only examine the specific provisions concerning parasitism, misleading practices and disparaging practices.

#### a. General Principles of Unfair Competition

General principles of unfair competition are often stated at the beginning of legislation against unfair competition or stem from civil liability principles. We will examine both in the following paragraphs. A fundamental distinction will be made though between, countries which somehow require a competitive relationship or otherwise restrict court access to competitors, and those without such requirements. That limitation implies indeed that

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<sup>92</sup> Because "*the conditions required of comparative advertising must be interpreted in the sense most favourable to it*", specifying "*the product number of the equipment manufacturer alongside a competing supplier's product numbers enables the public to identify precisely the products*" and because, "*such an indication does however constitute a positive statement that the two products have equivalent technical features, that is to say, a comparison of material, relevant, verifiable and representative features of the products within the meaning of Article 3a(1)(c) of Directive 84/450 as amended*".

<sup>93</sup> *Ibid.*, c. 60.

<sup>94</sup> *Ibid.*, c. 60.

<sup>95</sup> Note that Member States cannot extend the definition of comparative advertising with a view to protect traders or competitors, see Art. 8(1) of Directive 2006/114/EC.

organisers of sport events will not be able to refer to such general principles of unfair competition to combat ambush marketing practices.

#### Countries Restricting Protection to Competitors

The only but economically significant surveyed countries which restrict unfair competition to acts between competitors are Brazil, Germany, Italy and Austria.

Article 195 of the **Brazilian** Industrial Property Law prohibits any act that violate the acceptable common practices in the commercial field. The Brazilian Report contains a few examples of practices which took place during the World Cup 2006, that could be qualified as ambush marketing practices but did not lead to legal action by FIFA. One is the advertising by a TV and electronic appliances store, displaying various television sets each with a picture of a football team and the comment “*to better watch the World Cup, a wide screen is much better*”. Two other examples simply contained pictures of members of the Brazilian national football team. The last example is an advertisement for furniture displaying an helicopter view of a furnished room with little arrows and circles between the different pieces of furniture, to indicate possible movements and positioning of users, like a football game tactic chart.

In **Germany**, article 3 of the German Unfair Competition Act of 3 July 2004, prohibits activities which might considerably impair competition to the prejudice of competitors, consumers or other market participants. The interpretation is functional in the meaning that the purpose of the act is to protect the freedom of economic activities and decision making. The scope of the Unfair Competition Act is limited to activities for the purpose of competition, which means activities aimed at furthering the sales or purchase of goods or services for its own or someone else’s benefit. In principle, there is no need for a competition relationship. In practice however, standing to sue appears to be limited to those who are able to demonstrate such relationship, thereby implicitly excluding event organisers. An example of application of the German blanket norm was the decision by the District Court of Frankfurt am Main at the time of the football World Cup in Germany in 2006, prohibiting the sale of stuffed toy animals dressed with shirts decorated with footballs and bearing the words “Germany 2006” or “2006 Germany”<sup>96</sup>. Although the practice could be falling under specific provisions concerning parasitism (section 4 paragraph 9 of the UWG), the court applied the blanket provision.

The **Austrian** Act Against Unfair Competition, which was inspired by the previous German Unfair Competition Act and the previous Swiss Act Against Unfair Competition also appears to require some competitive relationship, (“Handeln zum Zwecke des Wettbewerbs”). Under section 1 of the Austrian Act Against Unfair Competition, “*competitive practices which are contrary to public policy*” are illicit. That general clause was applied against a sport team which breached its obligations towards the sponsor<sup>97</sup>. According to the Austrian Reporter, by extension, such general clause could be used against athletes advantaging their sponsor over the official sponsor.

In all these countries, recourse to unfair competition provisions is of limited help against ambush marketing campaigns. Only competitors may actually take action against the ambush marketer.

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<sup>96</sup> LandesGericht Frankfurt a. M., 8 September 2005, Nr. 8 0 98/05.

<sup>97</sup> OGH 19.02.2005, 4 Ob 220/05 « FC Red Bull Salzburg ».

### Countries without Competitive Relationship Requirement

None of the other countries has a requirement preventing the event organisers from having recourse to unfair competition protection.

Finland, Spain, Switzerland have unfair competition statutes with a blanket clause and specific provisions. Section 1 of the **Finnish** Act on Unfair Trading Practices prohibits all practices which can be deemed to be against fair business practices or otherwise unfair towards other traders. Under that provision the organiser of an event could take action against the promoter of an ambush marketing campaign. In **Spain**, the Act Against Unfair Competition of 1991, inspired from the German and the Swiss Acts Against Unfair Competition, contains a general clause prohibiting any commercial conduct which is “*objectively contrary to the requirements of good faith*”. The organiser of an event would have to prove that the promoter of an ambush marketing campaign is taking “unduly” advantage of the efforts made by the organiser of the event. Apparently, the standard is relatively high and it is not easy to prove unfair practices under the general clause. The **Swiss** Act Against Unfair Competition, is also based on a general provision aiming at practices which are deceiving or otherwise contrary to good faith. The underlying criterion is the proper function of competition, i.e. a functional criterion. There is no case to be reported of ambush marketing practices under that provision.

In **Belgium**, article 93 of the Act on Commercial Practices and Consumer Information and Protection of 14 July 1991, prohibits any act against honest commercial practices, through which one undertaking may or does affect the professional interests of other undertakings. That provision could be used against ambush marketing practices. In **France**, unfair competition provisions are based on general principles of civil liability: articles 1382 and 1383 of the French civil code. Anyone has standing to sue. It is enough to show a fault, a damage (possibly in the form of a commercial disturbance) and a causal link.

In the **United Kingdom**, the common law tort of passing off may be used to protect the goodwill developed by an event organiser in connection with a sporting event. The conditions are (1) the presence of goodwill attached to goods and services in the mind of the public by association with the identifier used by the event organiser (2) a misrepresentation by the defendant likely to lead the public to believe that the goods and services offered by are the goods and services of the plaintiff and (3) that the plaintiff is likely to suffer damage by reason of the misrepresentation. In the United States and probably in most common law countries, the view prevail that most common law and statutory remedies simply do not encompass common ambush marketing practices<sup>98</sup>.

In **Hungary**, a single piece of legislation governs at the same time unfair competition and antitrust. Under the general clause contained in the Act on the Prohibition of Unfair Competition and Restrictive Market Practices, it is “*prohibited to conduct economic activities in an unfair manner, in particular, in a manner violating or jeopardizing the lawful interests of competitors and consumers, or in a way which is in conflict with the requirements of business integrity*”. That sweeping clause is applicable to ambush marketing practices.

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<sup>98</sup> Moorman A. M., Greenwell T. Ch., op. cit., p. 188; Hoek J., Gendall Ph., op. cit., “*In summary, ambush marketing will only ever be a commercial irritant because it has no status outside of marketing jargon*”, p. 89. For a relatively short but complete review of the situation in a number of common law countries, see Vassallo E., Blemaster K., Werner P., An International Look at Ambush Marketing, The Trademark Reporter, Vol. 95, Nov.-Dec. 2005, p. 1338 et seq.

b. Specific Provisions

Parasitism

The **French** jurisprudence created a parasitism doctrine on the basis of public liability principles. The theory of parasitism is applicable to whoever takes advantage of another's representation without authorisation. It is applicable even if the victim is not a competitor. The reputation of the sport event itself is apparently protected. That theory was successfully applied in several sports related cases<sup>99</sup>. In the Henri Maire case, a flame, a medal and the word "olympisme" was reproduced on a bottle of red wine. Despite the absence of use of the rings, the motto or any distinctive symbol in their protected form, the reproduction was held as tendentious and therefore illicit under the parasitism doctrine: *"Even if the Olympic Symbols are not used in their protected form or in the way the CNOSF officially uses them, reproducing the colours of the Olympic rings, constitutes a tendentious presentation, and the combination of these colours with other Olympic symbols, flame and medal, will create confusion in the public's mind. This is undeniably the purpose which the Henri Maire company intended to achieve by trying therefore to place itself in the furrow of the Olympic games/Events, the historical importance of which is safeguarded by the promotional and financial efforts of the CNOSF, without which the reference to the centenary of the Olympic Games and to the Olympic games, would have had less impact on the public. (...) The financing of its activity which is destined to promoting the sports in accordance with the principles of Pierre de Coubertin is in part assured by the licences granted in relation to these games. Therefore, by using the Olympic symbols in a tendentious way, for the purpose of profiting from the fame of an event, which is protected by the efforts of the CNOSF, the Henri Maire company has committed an act of parasitism and diverted, without consideration, the returns which the CNOSF is entitled to expect as a result of its effort to safeguard the image and fame of the Olympic Games"*. Apparently, the decision does not examine whether the fame and reputation of the games are the fruit of the CNOSF or those of the ICO or the Olympic Movement. In conclusion, depending on the fame of the event, the doctrine of parasitism may relatively easily apply.

In **Belgium** too, parasitism grew as a theory from the general prohibition of acts against honest commercial practices. Under the most recent case law, such parasitism is subject to four conditions: 1) the copied service or product is the outcome of efforts and investments by the owner and the resulting good or service must be sufficiently original, 2) the product or service has an economic value, 3) the imitator or copier must take advantage of the other's investments or efforts and 4), the imitator or copier must not have made any creative effort to distinguish its own product or service from the one of the copied provider<sup>100</sup>. As explained by the Belgian Reporter, it is relatively unlikely that such parasitism doctrine will be applicable to ambush marketing practices, as they do not usually include a copy of a specific product or service and are distinguishable from those from which it is copied. Similarly, the mere fact of purchasing publicity slots surrounding a sponsored event would not constitute parasitism, because the mere fact of associating one's name to a specific event and therefore benefit from its goodwill is not in itself reprehensible, unless all above mentioned conditions are fulfilled.

The **Italian** principles on unfair competition, resulting from Legislative Decree 67/2000 supplementing Legislative Decree 74/1992 on comparative advertising, prohibit the

<sup>99</sup> Cour d'appel de Paris, November 20, 1995, Fédération française de tennis, PIBD 1996 III 71 ; Tribunal de grande instance de Paris, October 4, 1996, CNOSF vs Henri Maire ; Tribunal de Grande Instance de Paris, 10 September 1997, PIBD, 1997, 642, III, p. 586 « Tour féminin organisation ».

<sup>100</sup> Cour d'appel de Bruxelles, 18 September 2003, Auteurs & Médias, 2005, p. 121.

appropriation of qualities belonging to a competitor. The principle is not subject to a likelihood of confusion test. It is enough that one associates itself with the products or services of a competitor. According to the Italian Report, only competitors appear to be entitled to avail themselves from that principle.

Section 4 para 9 of the **German** Act against Unfair Competition covers the imitation of the goods or services of a third party if that may deceive consumers as to the source of the product or if it exploits a competitor's reputation. As a result, it appears that this is hardly applicable to ambush marketing practices which usually would not deceive consumers as to the source of the said product and do not exploit a competitor's reputation. Ambush marketing practices usually aim at taking advantage of the event, not the sponsors. It is only when the reputation of the official sponsor is the target of the parasitic practice that such provision would apply. Nevertheless, it is apparently on that basis that FIFA obtained from the District Court of Hamburg an order enjoining Ferrero from using logos referring to the "World Cup"<sup>101</sup>. Section 9 of the **Austrian** Act against Unfair Competition prohibits the usage of any distinctive sign - that it be specifically protected by intellectual property or not - against any use which may cause confusion.

In **Spain**, two provisions may be assimilated to parasitism. These are Article 6 of the Act against Unfair Competition which defines as "*unfair any behaviour which is capable of confusing customers regarding the activity, services or the business of third parties*", and Article 12 of the same Act which sets limits to the freedom to copy. Accordingly, the right to imitate lapses when it leads to an unjust exploitation of the reputation or the commercial efforts of another undertaking. According to the Spanish Reporter, the incriminated practice must reach a certain intensity for these provisions to apply. This is why the Spanish Reporter doubts that they are applicable to ambush practices.

In **Switzerland**, the provisions of article 3 lit. c) and e) of the Swiss Act against Unfair Competition may somehow be classified under the "parasitism" umbrella. Lit. c) prohibits practices consisting in bearing incorrect titles or professional distinctions, whilst lit. e) prohibits incorrect, deceitful, disparaging or parasitic comparative advertising.

More simply, article 6 of the **Hungarian** Act on the Prohibition of Unfair and Restrictive Market Practices appears to prohibit the use of a competitor's distinctive signs in the course of business.

### Misleading Practices

The **French** civil code provisions on public liability applicable in unfair competition cases, may also be applicable in misleading advertising cases, provided there is a likelihood of confusion.

Section 5 of the **German** Act against Unfair Competition deals with different types of misleading practices including comparative advertising. Apparently, all ambush marketing campaigns which aim at creating the incorrect impression that the advertising company is an official sponsor would be falling under that provision. The advertisement must have an impact on the public. The mere fact that an offer may attract the attention of the public is sufficient. The relevant public is the average addressees of the targeted group, a reasonably

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<sup>101</sup> Landesgericht Hamburg, 25 October 2005, Nr. 312 0 353/05. Note the apparent contradiction with the two decisions by the BGH of April 27, 2006, I ZB 96/05 and I ZB 97/05.

informed, observant and circumspect public, whose attention may vary depending on the circumstances<sup>102</sup>.

In **Austria**, section 2 of the Act against Unfair Competition prohibits the making of any deceptive representations, among others “*about ... the manner of procurement or the source of supply of goods*”. Comparative advertising is allowed provided it does not constitute deceptive advertising. It is the perception of such type of advertising on the public which is relevant to determine whether the advertising is misleading or not. Apparently, the relevant public is a reasonably informed, observant and circumspect average consumer. Like in Germany, the advertising must be capable of influencing the commercial behaviour of the relevant public.

Untrue or misleading statements concerning another’s business or trading activities, including irrelevant or inappropriate information would be prohibited by section 2 of the **Finnish** Unfair Trade Practices Act, provided they can affect demand or supply in a way detrimental to the business of the aggrieved party. Apparently, the relevant average consumer under Finnish law is not someone particularly circumspect or careful and the standard followed by courts in relation to the second condition is relatively low.

In **Switzerland**, Art. 3 lit. b) of the Act against Unfair Competition prohibits undertakings from giving deceitful or wrongful information about themselves.

In the **United Kingdom**, the doctrine of passing off (see p. 32 above) is applicable. It requires a deceptive element, intentional or unintentional. An advertisement must be likely to deceive which will happen in most circumstances where false claims were made.

#### Disparaging Advertising

Usually, the surveyed countries do not have provisions dealing specifically with disparaging advertising. Disparaging advertising often falls in the general clause with the above mentioned limits when a competitive relationship is required.

In **Austria** most disparaging advertising will be decided on the basis of the general clause. Similarly, **German** law does not contain specific provisions on disparaging advertising. In **Finland** too, cases of disparaging advertising will be handled under the general clause of the Unfair Trading Practices Act or under section 2 regarding misleading advertising. In **Spain**, disparaging a competitor would fall under article 9 of the Act against Unfair Competition, provided it constitutes a false statement.

In **Italy** again, as part of Legislative Decree 67/2000 supplementing Legislative Decree 74/1992 regarding comparative advertising, disparaging a competitor would constitute unfair comparative advertising.

Article 3 lit. a) and e) of the **Swiss** Act against Unfair Competition may apply to disparaging advertising. Lit. a) prohibits disparaging a competitor by way of untrue, incorrect or disparaging statements and lit.e) prohibits disparaging comparative advertising.

In situations where the ambush marketing campaign is somehow mocking a competitor or its products or services, it will be a matter of degree to determine whether or not the advertisement is illicit.

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<sup>102</sup> Henning-Bodewig F., op. cit., p.130.

### Enforcement

In all surveyed countries, civil remedies including injunctions, damages and often the disgorgement of profit are available to aggrieved parties. Therefore the initiative of a judicial intervention is left to the private parties.

In **France**, the General Direction for Competition and Suppression of Fraud (“DGCCRF”), may be used to state the infringement by way of administrative law.

In **France, Belgium and Switzerland** some infringements of unfair competition principles are backed up by criminal sanctions. These are rarely applied though.

**Hungary**, perhaps because the relevant statute deals at the same time with antitrust and unfair competition issues, the civil courts in civil suits may impose a fine on the infringing party which shall be not higher than 10% of the company’s net sales revenues realised during the preceding financial year.

Obviously, none of the surveyed legislation contains provisions that are specific to ambush marketing practices, to facilitate enforcement. One must note that the Hungarian civil fine may have serious dissuasive effects on promoters of ambush marketing campaigns as it efficiently deals with situations where damages can hardly be proven.

## D. ADVERTISEMENT REGULATIONS AND CONSUMER PROTECTION

The fight against ambush marketing practices primarily concerns B2B practices and not B2C practices. As a result, advertisement and consumer protection legislations do not aim at ambush marketing practices. They may nevertheless be used to combat ambush marketing practices particularly where a higher degree of protection is granted by such legislations to consumers.

Since there is no specific international framework dealing with consumer protection, we will limit our presentation to the EU framework and the national legislations.

### 1. EU Framework

On the basis of article 153 of the EC Treaty, the European Parliament and the Council introduced the Unfair Commercial Practices Directive No 2005/29/EC<sup>103</sup>. The objective of the directive is to eliminate the barriers to the functioning of the internal market represented by national laws on unfair commercial practices and to provide a high common level of consumer protection, by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices<sup>104</sup>. The Unfair Commercial Practices Directive should be implemented by June 12, 2007. However, for a six year period as from June 12, 2007, Member States shall be able to continue applying more restrictive or

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<sup>103</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”).

<sup>104</sup> See fn 101 above, Article 1 and Recital 23.

prescriptive provisions to ensure that consumers are adequately protected against unfair commercial practices<sup>105</sup>. We are not aware of the status of the implementation.

Article 5 of the Unfair Commercial Practices Directive prohibits commercial practices which are contrary to the requirements of professional diligence and materially distort the economic behaviour of the targeted group in the meaning that the ability of such target customers to make an informed decision and take a transactional decision is impaired. The benchmark customer is the average customer who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, unless the commercial practice at stake is addressed at a particular group of consumers such as children, in need for protection<sup>106</sup>. Typically unfair, are misleading commercial practices or particularly aggressive marketing methods. In all these cases, the focus is on the consumer's ability to make an informed decision. Targeted practices are those aiming at influencing consumers' transactional decisions<sup>107</sup>. The impact on other enterprises is not the object of the Unfair Commercial Practices Directive.

Annex I to the Directive 2005/29/EC, contains a list of all practices which are in all circumstances unfair and illicit. Such practices can be deemed unfair without a case-by-case assessment against the provisions of Articles 5 to 9<sup>108</sup>. These practices do not concern ambush marketing though. Moreover, it is unlikely that ambush marketing practices have such an impact on consumers as to distort their economic behaviour in the meaning of Articles 2(e) and 5 or cause them to take a transactional decision that they would not have otherwise taken in the meaning of Articles 2(k) and 6 or 7.

## 2. National Legislation

Few reports mention such legislations aimed at protecting consumers.

In **France**, the French Consumption Code prohibits false and misleading advertising in a way applicable to situations of ambush marketing: misleading claims in advertisements may be sanctioned under Article L. 121-1. That legislation may be set in motion by the DGCCRF and the Directorate-General of Food of the Ministry of Agriculture and the Department of Metrology of the Ministry of Industry. Provisions on the protection of consumers are backed up by criminal sanctions.

In **Belgium** it appears that the standards for admission of misleading advertising are relatively high. The requirement is that the misleading advertising is capable of influencing the consumer's behaviour.

Article 6(b) of the **Spanish** Advertising Act of 1988 prohibits confusion and the unjustified use of the appellation, logos, trademarks of a third party. In the latter case, no likelihood of confusion is apparently required. The said act also prohibits advertising contrary to good trading practices. That Act may be enforced in front of a private Commission devoid from effective jurisdictional powers, the Advertising Autocontrol Jury ("Jurado de Autocontrol de la Publicidad"). That Commission found that Burger King did not act unfairly, or against the provisions of the Advertising Act, when organising a free distribution of tickets to attend the

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<sup>105</sup> Article 3 para. 5 and Article 19.

<sup>106</sup> See Recital 18 and Art. 5 para. 3.

<sup>107</sup> See Recital 6, 7.

<sup>108</sup> See Recital 17.

football World Cup in France in 1998 with purchases of hamburgers. Burger King had not used any trademark belonging to FIFA, but only the expression “World Cup of France 1998” which was not registered in Spain. In the view of the Spanish Reporter this illustrates how ambush practices would hardly fall under any legislation, except in the case of usage of a protected trademark.

In the **United Kingdom**, the Misleading Advertising Regulations of 1988 confers to the Office of Fair Trading (hereafter the “OFT”), the power and duty to prosecute misleading advertising which is likely to deceive the addressees and therefore is likely to affect their economic behaviour or, for those reasons, is likely to injure a competitor. These provisions might be used against ambush marketers. The OFT, may grant an injunction in relation to such misleading advertisements.

## E. OTHER PRINCIPLES

These are the provisions of surveyed countries which do not fall into the previous categories but which may constitute a possible basis for action against the promoters of ambush marketing campaigns. The two main categories of such “other principles” are those pertaining to the inference into an exclusive relationship on the one hand and those belonging to the protection of possession or property on the other hand.

### 1. Protection of Exclusive Relationships

In **Belgium**, an interesting theory, which we would translate as complicity in a third party violation of its contractual obligations (*tierce complicité à la violation d’une obligation contractuelle*), was mentioned by the Belgian Reporter in answer to the suggestion that sponsors may be competing against each other, the sponsor of the athlete versus the sponsor of the event, leading one to try to convince the athlete to violate pre-existing obligations. That theory allows to hold liable a party who knew or was able to know about the valid and pre-existing contractual obligation of another party and who consciously participated in violating such contractual obligation. It was apparently applied in cases of violation of exclusive agreements, violation of distribution agreements and else<sup>109</sup>. It appears that the burden of evidence is high as the good faith of the third party (the accomplice) is initially presumed. It is therefore relatively unlikely that such theory be applied, for example against the legitimate sponsor of a team or an athlete when referring to the performance of his sponsored team or athlete during a sport event.

Article 4 of the **Swiss** Act against Unfair Competition also prohibits the enticement to breach a contract with a view to conclude another contractual relationship. One may wonder whether the organiser of a sport event does not act against that provision when requiring at the time of the registration, athletes not to wear or display the logo or trademark of their personal sponsor.

Similarly, on the basis of Article 423 of the Swiss Code of Obligations, one party may obtain disgorgement of profits made by a third party who interfered in the legal sphere of the claimant<sup>110</sup>. This is typically applicable in relation to exclusive contractual relationships.

### 2. Protection of Property/Possession

In **Germany**, the right of the owner to control the use of the premises it owns (right to an undisturbed possession) can be used against certain ambush marketing practices. For instance, the owner of a stadium, the owner of the airport or a train station may prevent, using Sections 905 and 1004 of the BGB, ambush marketers from distributing in these spaces flags, t-shirt or other materials to be displayed by the audience in the stadium. The same principles would apply to the air space above stadiums.

Another interesting possibility under German Law, also based on possession, is the right of the tenant to prevent impairment of business (Section 823 and 1004 BGB). This principle

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<sup>109</sup> See Belgian Report, p. 5-6; Fagnart J.-L., *La tierce complicité et les usages honnêtes en matière commerciale*, RDC 1989 pp. 481-482; Merchiers Y., *La tierce complicité de la violation d’une obligation contractuelle. Fin d’une incertitude*, RCJB, 1984, p. 379.

<sup>110</sup> See ATF 126 III 69, SJ 2000 I 187; SJ 2000 I 421.

was apparently used during the 2006 World Cup to enforce a ban on unofficial sponsor advertisements within a radius of 1 km around the stadium<sup>111</sup>. It assumes of course that the organisers and the authorities have contractually agreed on such exclusivity.

## F. BROADCASTING REGULATIONS

Only the French and the Austrian Reports mentioned broadcasting regulations as a set of rules to be potentially considered in relation to ambush marketing activities. This sector of business activities is indeed key in the development of sponsoring and therefore in the rise of ambush marketing practices. Without the leverage provided by television broadcasting, world or regional events such as the Olympic Games, the World Cup of the Champion's League, base ball World Championship, American Football etc. would never have reached such a dimension and economic importance<sup>112</sup>.

There are no international agreements regarding broadcasting regulations which have a direct impact on ambush marketing activities. At EU level, the Television without Frontiers Directive does contain a few clauses on sponsoring activities, however mainly with a view to safeguard the editorial independence of the broadcaster<sup>113</sup>. It does not contain provisions directly concerning ambush marketing.

The Television without Frontiers Directive must nevertheless be mentioned for its impact on the market and the limits set to the freedom to market the event for broadcasting purposes. Its Article 3a provides that "*each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television*". Currently, the Olympic Games, the World Cup (FIFA) and the Champions' League Tournament (UEFA) are considered as event of a major importance in the meaning of that provision.

In Europe as opposed to the United States, TV rights are negotiated by the EBU on behalf of a large number of broadcasters from Europe, North Africa and the Middle-East. To prevent ambush marketing practices, the EBU imposes on its members not to insert virtual advertising into the signal without the prior consent of the event organiser and to observe the contracts entered into with the advertisers or sponsors of the event<sup>114</sup>.

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<sup>111</sup> For instance the Dutch supporters were enjoined from wearing « Bavaria » beer T-shirts during the Netherlands-Ivory Coast football match.

<sup>112</sup> See above II.

<sup>113</sup> Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 552, 30.07.1997, p. 2; Art. 17(a) and (c); see also articles 10 et seq. requiring that publicity be readily recognizable and separate from other parts of the programme, etc..

<sup>114</sup> EBU Memorandum on Virtual Advertising issued by the Legal Department of the EBU, 25.5.2000, para 11 : « No virtual advertising may be inserted in the signal without the prior agreement of the event organizer, and no virtual advertising should break any existing contract with advertisers or sponsors of the event ». The following explanation says: "This protects the contractual relationship between the parties involved in the event and, in particular, prevents ambush marketing".

In France, as a result of the French law on Sports dated July 16, 1984, each sport federation has authority to exploit the broadcasting of the matches/events of the official competitions. Part of the prerogatives of public power are delegated to the Federations. This right even extends to the broadcasting in France of events organised abroad<sup>115</sup>.

## G. SOFT LAW

In the past, principles edicted by professional associations and enforced through advertising commissions sponsored by the industry played a significant role in the supervision of advertising and compliance with unfair competition law principles. The decision made by the “Jurado de Autocontrol de la Publicidad” in Spain, referred to above in V. D. 2 above, is a good example.

The role of such rules is sometimes recognised by legal texts. For example the Unfair Commercial Practices Directive 2005/29/EC applicable in B2C situations provides in article 6 para. 2 lit. (b) that is misleading a commercial practice involving non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where the commitment is not aspirational but firm and the trader indicates in commercial practice that he is bound by the code. The other conditions set forth by the Directive remain of course applicable.

The most recent and significant development in this respect is the Consolidated ICC Code of Advertising and Marketing Communication Practice published in August 2006. According to the ICC, “*the ICC Code sets a high ethical hurdle that is well beyond legal requirements*”<sup>116</sup>. The code is very much based on ethical principles and aims at creating marketing communications which are legal, decent, honest and truthful (Article 1)<sup>117</sup>. The ICC Code in this respect, significantly contrasts with unfair competition legislation based on functional criteria, trying to find the balance between protection and “laissez-faire” for the purpose of the good functioning of the market. It is only indirectly that the Code contributes to create efficient markets and to bring benefits to the population. The Code is self-regulating, but the ICC suggests that it be used by Courts as a reference document within the framework of applicable legislation and therefore recommends its adoption and use world-wide.

The Code covers ambush marketing practices, through the first chapter on General Provisions on Advertising and Marketing Communication Practice and a Chapter B on Sponsoring Activities. As part of the general provisions, clauses regarding honesty in advertising (art. 3), truthfulness (art. 5), the prohibition of denigration (art. 12) and misleading comparison (art. 11) are of course relevant to ambush marketing practices. Article 15 prohibits more specifically the exploitation of goodwill: “*Marketing communication should not make unjustifiable use of the name, initials, logo and/or trademarks of another firm, company or institution. Marketing communication should not in any way take undue advantage of another firm’s individual’s or institution’s goodwill in its name, brands or other intellectual property, or take advantage of the goodwill earned by other marketing campaigns without prior consent*”.

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<sup>115</sup> Cour de cassation, March 1, 1994. appeal by the French Football Federation against La Cinq.

<sup>116</sup> <http://www.iccwbo.org/icciiifc/index.html?cookies=no>

<sup>117</sup> Consolidated ICC Code of Advertising and Marketing Communication Practice published in August by ICC, Document No 240-46/330.

In chapter B on sponsoring activities, the Code directly prohibits ambush marketing activities. Article B3 pertaining to Imitation and confusion provides that “*Sponsors and sponsored parties, as well as other parties involved in a sponsorship, should avoid imitation of the representation of other sponsorships where such imitation might mislead or generate confusion, even if applied to non-competitive products, companies or events*”. Article B4 covers “ambushing” of “sponsored properties”, “*no party should seek to give the impression that it is a sponsor of any event or of media coverage of an event, whether sponsored or not, if it is not in fact an official sponsor of the property or of media coverage*”.

The ICC Code should constitute a new basis for the work carried out by the various commissions sponsored by the economy and serving as a watch dog for the observance of loyalty in commercial practices. Although non-binding, decisions or recommendations issued by such commissions may influence State courts.

## VI. LIMITS TO THE EXCLUSIVE RIGHTS OF ORGANISERS AND OFFICIAL SPONSORS

The issue is to determine in which circumstances the exclusive rights of organisers or official sponsors should give precedence to the rights of participants, or other sponsors. The issue is one of a conflict of rights.

Contractual freedom allows to a great extent the organiser of an event to impose rules

- on the public through terms and conditions attached to the sale of tickets,
- on athletes or teams by conditioning participation to a competition to signing specific terms and conditions restricting the freedom of athletes,
- on its own members (federation).

There are limits however, imposed by the freedom of movement of workers (Art. 39 of the EC Treaty), the freedom of movement of services (art. 49 of the EC Treaty), constitutional rights relating to economic activities, the freedom of expression (art. 10 ECHR), etc.. Can the ambush marketer avail itself of certain defences resulting directly from intellectual property or other specific statutes, or from fundamental freedoms. For instance, is the mere fact of mocking a competitor through an advertisement the expression of freedom of thought or denigration? Should that question be resolved within the application of unfair competition law or by reference to higher ranking principles? When an athlete is forced to refrain from displaying the name, logo etc. of its own sponsor during a competition to the profit of the competition’s official sponsor, is this conflict to be resolved within contractual freedom, antitrust, unfair competition or higher ranking principles?

These issues are still relatively unexplored. Writings on ambush marketing are usually more driven towards fighting ambush marketing for the benefit of sport. Writings and decisions on antitrust issues have usually focused on issues pertaining to the transfer of players, collective bargaining of TV rights and a few abuse of dominance cases in relation to the exploitation of rights related to an event. None really focused on sponsoring activities and the exclusivity granted to sponsors. As a result, not much was reported on these issues in the surveyed countries.

Therefore, we will limit our contribution to bringing up these questions.

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## A. FUNDAMENTAL FREEDOMS?

### 1. Anti-Ambush Marketing Statutes

The issue may be particularly relevant in relation to anti-ambush marketing statutes. Here the protection is granted in relation to signs beyond trademark protection and without respect for the risk of confusion between the products and services.

The issues raised by the the dissenting judges in the US Supreme Court case SFAA vs. USOC, show that it is necessary to set limits to the very broad protection granted by these statutes<sup>118</sup>. The case was about a not-for-profit Californian association intending to promote the “Gay Olympic Name”. The United States Olympic Committee brought suit for injunctive relief based on the US Amateurs Sports Rights Act of 1978. The Federal District Court granted the USOC summary judgment, the Court of Appeals affirmed and the SFAA brought the case to the Supreme Court. SFAA argued that reserving the word “Olympic” for the USOC violated the first amendment as it prevented the SFAA to express a political statement about the status of homosexuals in society, through the organisation of the “Gay Olympic Games”. The Supreme Court found that the Amateurs Sports Act only restricted the manner in which the SFAA might convey its message. However, it did not prevent it from calling its games the “Gay Games”. The incidental restriction to the SFAA’s rights was therefore proportionate<sup>119</sup>. This was one of the points on which two of the judges dissented. Not only was the USOC actually representing governmental interests and therefore was subject to governmental action scrutiny, but the authority granted to it under the Amateurs Sports Rights Act over use of the word “Olympic” far surpassed that provided by a standard trademark. According to the dissenting opinion, “*the Court ignores the serious First Amendment problems created by its interpretation*”. (...) “*The statute is overbroad on its face because it is susceptible of application to a substantial amount of noncommercial speech, and vests the USOC with unguided discretion to approve and disapprove others’ noncommercial use of “Olympic”. Moreover, by eliminating even noncommercial uses of a particular word, it unconstitutionally infringes on the SFAA’s right to freedom of expression*”<sup>120</sup>.

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<sup>118</sup> 483 U.S. 522 (1987).

<sup>119</sup> 483 U.S. 522, 538. “*The image the SFAA sought to invoke was exactly the image carefully cultivated by the USOC. The SFAA’s expressive use of the word cannot be divorced from the value the USOC’s efforts have given to it. The mere fact that the SFAA claims an expressive, as opposed to a purely commercial, purpose does not give it a First Amendment right to “appropriate to itself the harvest of those who have sown”.* *International New Services v. Associated Press*, 248 U.S., at 239-240. *The USOC’s right to prohibit use of the word “Olympic” in the promotion of athletic events is at the core of its legitimate property right*”, p. 542.

<sup>120</sup> 483 U.S. 522, 562. “*The Amateur Sports Act is substantially overbroad in two respects. First, it grants the USOC the remedies of a commercial trademark to regulate the use of the word “Olympic”, but refuses to interpret the Act to incorporate the defenses to trademark infringement provided in the Lanham Act. These defenses are essential safeguards which prevent trademark power from infringing upon constitutionally protected speech. Second, the Court construes 110(a)(4) to grant the USOC unconstitutional authority to prohibit use of “Olympic” in the “promotion of theatrical and athletic events”, even if the promotional activities are noncommercial or expressive*” 483 U.S. 522, 563.

Such issues may crop again in countries adopting over broad protection for event organisers<sup>121</sup>. In the UK, LOGA contains a list of defences inspired by trademark law based on fair use<sup>122</sup>.

## 2. Fundamental Freedoms

As a matter of principle, the fact that ambush marketing campaigns are commercial in nature does not prevent an argument to be made on the basis of fundamental rights, such as the freedom of speech or of press<sup>123</sup>. This is true in the United States and in all countries party to the European Convention on Human Rights. In the United States, provided an advertising does not infringe trademark law, it may stand behind the protections of the First Amendment<sup>124</sup>. According to the European Court of Human Rights, in Article 10 of the ECHR, “*no distinction is made in it according to whether the type of aim pursued is profit-making or not*”. As a result article 10 was declared applicable to the publicity made by an attorney containing its name, profession, address and telephone number published in various periodicals<sup>125</sup>. Restrictions to the freedom of expression are valid provided they are based on a law, justified by public interests and proportionate. Typically justified restrictions are those aiming at preventing unfair competition and untruthful or misleading advertising<sup>126</sup>. Moreover, the restriction must be the fact of a governmental authority. In the case of ambush marketing practices, the conflict is usually among private parties and therefore not subject to fundamental freedoms arguments. It is only in countries where National Sports Federation are entrusted with public powers that a party may directly complain for violation of certain

<sup>121</sup> Matarirano G., 2010 FIFA World Cup – The Proverbial Own Goal?, <http://www.bowman.co.za/LawArticles/Law-Article.asp?id=1554103715>

<sup>122</sup> This for instance includes allowing use of a protected sign, such as the use by a person of his own name or address, the use as indications concerning the kind, quality, intended purpose, value, geographical origin, time of production of goods or rendering of services or other characteristics of goods or services, use necessary to indicate the intended purpose of a product or service, use in publishing or broadcasting reports on sporting or other event forming part of the London Olympics, in publishing or broadcasting information about the London Olympics, incidental inclusion in a literary or artistic work, inclusion in an advertisement for a publication or broadcast of the kind set forth above.

<sup>123</sup> On the freedom of opinion, article 19 of the Universal Declaration on Human Rights of 10 December 1948: “*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*”; article 10 of the European Convention on Human Rights of 1950: “*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*”; article 16 of the Swiss Constitution: “*The freedom to express opinions and to inform are warranted. Everyone has the right to freely make an opinion, to express and disseminate its opinion. Everyone has the right to freely receive information, to procure such information from the generally available sources and to disseminate such information*”.

<sup>124</sup> Vassallo E., Blemaster K., Werner P., An International Look at Ambush Marketing, *The Trademark Reporter* Vol. 95, 2005, p. 1338, 1343.

<sup>125</sup> “*In the instant case the impugned notices merely gave the applicant’s name, profession, address and telephone number. They were clearly published with the aim of advertising, but they provided persons requiring legal assistance with information that was of definite use and likely to facilitate their access to justice*” para. 36, ECHR Judgment Casado Coca of 24 February 1994.

<sup>126</sup> See ECHR Judgment of 24 February 1994, para. 51.

freedoms. In Switzerland, fundamental rights may have the so-called horizontal effects of fundamental freedoms, in the sense that such fundamental freedoms will be taken into consideration when interpreting the relevant statutes in disputes between private parties.

The issue will thus usually be resolved at the level of the application of the trademark law or unfair competition law. In most cases, there will not be any competing use of a distinctive sign as a trademark and therefore no issues of trademark law when a sign is simply mentioned in an article or contribution. For instance under the Swiss Trademark Act, there will be no conflict with the exclusive rights granted to trademark holders under article 13.

In relation to Unfair Competition, and provided the controversial advertising or publication may have an effect on competition in general, issues of freedom of expression for instance will be dealt within the parameters of the Swiss Act Against Unfair Competition. For instance, a leaflet warning consumers on the possibility to catch the mad cow disease when eating beef meat was considered as subject to the Swiss Act Against Unfair Competition, but not contrary to its specific clauses<sup>127</sup>.

In other words, it is often within the interpretation of the applicable intellectual property or unfair competition laws, that the issue will be resolved.

### 3. Economic Freedom

The conflict between economic freedoms will usually be resolved at the level of statute interpretation. Contractual freedom shall prevail within the limits set forth by the prohibition on certain unfair terms and antitrust for instance.

In the case of Switzerland, attention should be paid to article 27 of the Swiss Civil Code protecting personality and as a result economic rights of an individual. Article 27 protects parties from excessive obligations and may be set in motion when the economic destiny of an individual is in danger or in the hand of a third party. In such cases, contractual obligations to do or to refrain imposed on the person who is dependent on the other party may be declared void or more simply reduced. An example in the field of sports, perhaps not the clearest application of article 27 CCS, is the decision made by the Swiss Supreme Court in a transfer of player case: the rule under which players have to wait for a formal authorisation from their club to be transferred in another club was putting the players in a state of complete dependency towards their club and employer<sup>128</sup>. It is however hard to imagine a situation of complete dependency toward a sponsor, in particular a sponsor of a sport event.

## B. ANTITRUST LIMITS?

### 1. Generalities

Sports are different from other industries as far as application of antitrust rules are concerned. The sports market is partly governed by the “rules of the game”, those regulating the sport activity itself. These rules are conditioning the market. In addition, sports are characterized

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<sup>127</sup> ATF 123 IV 211, 216.

<sup>128</sup> ATF 102 II 211

by interdependence between the competing teams, clubs or athletes and by a pyramidal structure culminating in a world championship. That interdependence modifies the structure of the market. As a result, the position of the different parties involved is not easy to determine and antitrust issues in sports do not easily fit into the usual antitrust categories. This does not mean that sports activities are per se exempted from rules governing the market. These activities are subject to such rules as evidenced by the practice of courts in the United States, in the European Union (largely limited in the first time to the articles 39 and 49 of the EC Treaty), and in the Member States<sup>129</sup>. In the EU, it is only recently with the Meca-Medina case, that application of articles 81 and 82 to sports issues was confirmed<sup>130</sup>.

In relation to sponsoring activities though, these issues, pertaining to the scope of application of antitrust, are largely irrelevant. There is no or very little issue of interplay between the rules of the game and the rules of competition law in relation to sponsoring activities. Sponsoring activities are part of the “exploitation market” as identified by Parrish<sup>131</sup>. In the Helsinki Report, the Commission confirmed application of competition rules to sports and sponsoring:

*“it is likely that there would be a ban on the practice of a sporting organisation using its regulatory power to exclude from the market, for no objective reason, any economic operator which, even though it complies with the justified quality or safety standards, has not been able to obtain a document from this organisation certifying to the quality or safety of its products”* and

*“sponsoring agreements that close a market by removing other suppliers for no objective reason are prohibited”*<sup>132</sup>.

Competition law does not directly challenge the structure of sports economics, only its consequences. Hence in the Helsinki Report and regarding the de facto monopoly of the

<sup>129</sup> ECJ judgment of 11 April 1996, joined cases C-51/96 and C-191/97: *“it is clear from the judgments in Walrave and Koch and Bosman, cited above, that the Community provisions on the free movement of persons and services not only apply to the action of public authorities but extend also to rules of any other nature aimed at regulating gainful employment and the provision of services in a collective manner. The abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy”* para. 47. *“... sporting activities and, in particular, a high –ranking athlete’s participation in an international competition are capable of involving the provision of a number of separate, but closely related, services which may fall within the scope of Article 59 of the Treaty even if some of those services are not paid for by those for whom they are performed”* para. 56. *“For example, an organiser of such a competition may offer athletes an opportunity of engaging in their sporting activity in competition with others and, at the same time, the athletes, by participating in the competition, enable the organiser to put on a sports event which the public may attend, which television broadcasters may retransmit and which may be of interest to advertisers and sponsors. Moreover, the athletes provide their sponsors with publicity the basis for which is the sporting activity itself”* para. 57 (We underline).

<sup>130</sup> *“In holding that rules could thus be excluded straightaway from the scope of those articles solely on the ground that they were regarded as purely sporting with regard to the application of Articles 39 EC and 49 EC, without any need to determine first whether the rules fulfilled the specific requirements of Articles 81 EC and 82 EC, as set out in paragraph 30 of the present judgment, the Court of First Instance made an error of law”* §33, ECJ judgment of 18 July 2006, David Meca-Medina and Igor Majcen v. Commission, Case C-519/04 P., ECR 2006 p. I-06991.

<sup>131</sup> Parrish distinguishes between three different markets, the exploitation market (sponsoring, broadcasting, merchandising), the contest market (the sporting contest itself and its organisation) and the supply market (market in the buying and selling of players), see Parrish R., *Sports law and policy in the European Union*, Manchester University Press, p. 111.

<sup>132</sup> Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework – The Helsinki Report on Sport -, 10/12/1999, COM(1999) 644 final, [http://europa.eu/eur-lex/en/com/rpt/1999/com1999\\_0644en01.pdf](http://europa.eu/eur-lex/en/com/rpt/1999/com1999_0644en01.pdf), p. 8.

Sporting Federations, the Commission specified that “*operations within economic dimensions should be founded on the principles of transparency and balanced access to the market, effective and proven redistribution and clarification of contracts, while prominence is given to the specific nature of sport*”<sup>133</sup>. In other words, as long as certain rules are met regarding public procurement and re-distribution of proceeds, the structure will not be challenged. The European Council fully endorsed the Helsinki Report, stating that “*the sale of television broadcasting rights is one of the greatest sources of income today for certain sports. The European Council thinks that moves to encourage the mutualisation of part of the revenue from such sales, at the appropriate levels, are beneficial to the principle of solidarity between all levels and areas of sport*”<sup>134</sup>

In practice and in relation to sponsoring activities the main issues are the conflicts between the sponsors. Conflicts may arise from the impossibility for an athlete to display the name, logo or else of his own sponsor. Sometimes, conflicts may arise not between the sponsors but within a federation, i.e. between the federation and its members, or between federations, i.e. for example between the AFL and the NFL in the United States. The legal issue in terms of antitrust is always foreclosure of access to the market.

## 2. Competition Between Sponsors

The issue is to determine whether the event organiser may prevent an athlete or a team from displaying its own sponsor’s name and logo. Behaviour such as the one quoted at the beginning by Linford Christie wearing contact lenses with a white Puma logo during an interview during the Olympics, is a good example. Could the Olympics enforce terms and conditions imposing on athletes not to display their own sponsors? Would that be contrary to antitrust? If yes, could such an infringement be exempted or considered as prevailingly pro-competitive under a rule of reason analysis?

Very much like the joint selling arrangement of broadcasting rights, the exclusive selling of sponsoring rights restricts competition in the sense that it determines prices and all other trading conditions on behalf of all athletes, teams or clubs participating to the major event and who cannot trade in such rights or only in a limited manner<sup>135</sup>. It may in this respect be held as a horizontal agreement between the athletes, teams or clubs and the involved associations. In the UEFA decision on joint selling arrangements, the Commission held that such joint arrangements were not a necessity for the existence of a pan-European football competition as evidenced by differing systems within the European Union, and therefore were subject to article 81(1) of the EC Treaty<sup>136</sup>. It nevertheless found that the benefits generated by the joint arrangement outweighed its negative effects and therefore was justified. In all likelihood the same conclusions could be reached in relation to the exclusive selling of sponsorship packages.

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<sup>133</sup> Ibidem, p. 9.

<sup>134</sup> Annex IV, para 14, to the Presidency Conclusions to the Nice European Council Meeting of 7, 8 and 9 December 2000.

<sup>135</sup> See Commission decision of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 – Joint selling of the commercial rights of the UEFA Champions League), OJ L 291, 8.11.2003, p. 25. UEFA was not considered as being the sole holder of the commercial as it argued, but as a co-owner. Had it been considered as the sole owner of the rights there would have been no antitrust issue, N. 122 p. 45.

<sup>136</sup> Ibidem N. 133 p. 46.

As to the question whether the usage of that exclusivity and the possible/likely dominant position resulting thereof could be held as an abuse, the Meca-Medina case suggests that complaints are likely to be made on the basis of competition law. In the Meca-Medina case, two swimmers had been tested positive for Nandrolone. The International Swimming Federation decided to suspend them for 4 years, a sanction which was reduced to 2 years by the Arbitral Tribunal for Sport. Meca and Medina complained to the Competition Direction of the European Commission on the basis of articles 81 and 82 of the EC Treaty. The Commission rejected the complaint and the First Instance Tribunal confirmed. The European Court of Justice found that the rules concerning anti-doping were not per se outside of the scope of Articles 81 and 82<sup>137</sup>. Contrary to anti-doping rules which are pursuing legitimate objectives consisting in securing the proper conduct of a competitive sport and to ensure healthy rivalry between athletes, exclusive attribution of exclusive sponsoring rights is not inherent to the organisation of the sport competition and necessary to ensure that sporting events take place and function properly. As a result, there is a strong probability that the restraint be subject to antitrust rules<sup>138</sup>. Similar arguments to those reviewed in the UEFA Champions' League would certainly be made in relation to the exclusive sponsorship rights with a view to obtain an exemption.

### 3. Fights Between Federations and their Constituency (clubs, teams or athletes)

The French "Conseil de la Concurrence" took an important decision on October 7, 1997, sentencing the French National Football League and Adidas to a fine, pursuant to French law and articles 81 and 82 of the Treaty of Rome<sup>139</sup>. In April 1995, the French National Football League decided to modify article 315 of the first and second divisions championships regulation, in order to specify that the teams participating to such championships were now on and as from the 1995/1996 season, obliged to wear the outfits provided by the National Football League. At the same time, it entered into a five years exclusive agreement with Adidas, under which Adidas would provide all such outfits to the first and second divisions clubs and would finance the National Football League up to 60 millions French Francs. In exchange, Adidas had exclusive exploitation rights on all competitions, etc. As a result, a number of clubs had to either terminate or simply refuse to honour their own sponsorship agreements. Some of the excluded sponsors appealed to the "Conseil d'Etat" from the decision by the National Football League to modify article 315<sup>140</sup>. The excluded sponsors and others also complained to the "Conseil de la concurrence". The "Conseil de la Concurrence" analysed the foreclosure effects of the said exclusive agreement. The relevant markets were defined as the football outfit and the replicas market<sup>141</sup>. On the French football shoes market, the "Conseil de la concurrence" stated that Adidas held a dominant position. In light of the public interest mission vested in the French National Football League it is not the principle of the agreement which was at stake but its contents, i.e. whether the clauses it contains had a restrictive object or effect. In light of 1) Adidas position on the market, 2) the

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<sup>137</sup> Cf fn. above, para 27.

<sup>138</sup> Cf fn. above, para 40-56.

<sup>139</sup> Decision Nr 97-D-71 of October 7, 1997 following a complaint by Asics France, Uhlsport France, LJO International, Le Roc Sport, VIP France, Puma Franc, Mizuno France, ABM Sport France, W. Pabisch, Lotto France, Nike France, Noël France and Reebok France.

<sup>140</sup> Decision by the Conseil d'Etat dated November 19, 1997, stating that the decision to modify article 315 of the said regulation was not justified by the public interest vested in the National Football League and therefore had to be cancelled.

<sup>141</sup> The market definition in that decision may seem arguable. The sponsorship market and in particular by means of sport outfit, is another market on which the contract has effects, as argued by Nike and Asics in front of the Cour d'Appel de Paris, June 29, 2000 (BOCCRF no 10, October 12, 2000).

fact that the agreement was not the outcome of a public tender, 3) its duration foreclosing access to the market to Adidas' competitors, 4) the priority option given to Adidas at the end of the agreement (English clause allowing Adidas to match third parties' offers), and 5) the actual evidence of effects on the football clubs sponsorship decisions, the "Conseil de la concurrence" held that the agreement was illicit in the meaning a.o. of article 81 (85 at the time) of the Rome Treaty. The option clause itself was held to be an abuse of a dominant position.

A year later, in a similar but different matter, the "Conseil de la concurrence" came to similar conclusions but defined the market differently. The dispute was about the French Fencing Federation (hereafter the "FFF") and its relationship with a supplier of fencing shoes and outfit. The FFF had initially refused to consider that supplier as the exclusive sponsor of the FFF because it was not in a position to provide the same technical services, i.e. to provide and maintain the electric stages, to repair swords, etc. It also refused to allow this provider to have a stand displaying its products during a junior championship, to display its name and details on the web site of the FFF (with other suppliers) and altogether excluded it from a competition after exchanges with the exclusive sponsor. In parallel, it had entered into a four year duration with automatic renewal exclusive agreement with the main supplier of fencing equipment in France, for the provision of technical services during competitions. The relevant market considered by the Conseil de la Concurrence was the market for the provision of exhibition space on which the FFF held a dominant position<sup>142</sup>. Consequently, the FFF was enjoined to eliminate the automatic renewal clause, to limit the duration of the agreement to 2 years and to issue public tenders for the market.

Another example is the dispute between the National Football League (NFL) and a football team, the Dallas Cowboys. NFL sued the Dallas Cowboy because it had independently negotiated a sponsorship with Pepsi-Cola, to replace Coca-Cola, an NFL Properties sponsor, at the Dallas Cowboys stadium. Slightly later, the Dallas Cowboys made a deal with Nike, to paint its trademark swoosh on the Cowboy's stadium. Basically, the Dallas Cowboys wanted to do business by themselves instead of through the NFL. This was a direct threat to the NFL' hegemony. Legally speaking, the dispute had antitrust implications because the NFL Properties contract could be held as a restraint of trade. To our knowledge, the case was settled.

That last example has a number of similarities with the requirements by the FIFA to remove the trademark and logo of stadium sponsors during the World Cup 2006 in Germany. Compensation was paid to the stadium sponsor.

#### 4. Can Other Sponsors Complain?

The question is whether other sponsors can complain about the exclusivity granted to the official sponsor. The answer is likely to be negative. As expressed by the Commission in the Helsinki Report and confirmed in the above FFF decision, what matters is whether the tender process and attribution process gave a fair opportunity to the other sponsors to bid<sup>143</sup>.

<sup>142</sup> Decision Nr 98-D-31 of May 13, 1998 concerning restrictive practices in the field of fencing.

<sup>143</sup> Idem in France: "*Considérant que si la conclusion d'un accord exclusif entre la FFSB et un fournisseur de boules et accessoires n'est pas en soi contraire aux dispositions de l'article 7 de l'ordonnance du 1<sup>er</sup> décembre 1986, non plus que le fait pour la FFSB de permettre à ce producteur de bénéficier, dans le cadre d'un tel accord, de facilités d'accès aux lieux de compétition et de publicités dans la revue officielle de la Fédération, en contrepartie d'une aide technique et du versement d'une dotation financière, un tel accord se trouve visé par ces*

These are the conclusions apparently reached by the Commission in relation to the exclusive sponsorship agreement notified by the Danish Tennis Federation. As long as the selection process is open, based on objective criteria and the duration of the exclusivity limited, the mere fact of conceding exclusive rights to a limited number of sponsors appears to be licit. According to the notified agreement, Penn Slazenger and Tretorn tennis balls had the exclusivity in Denmark for three years on all competitions organised by the Danish Tennis Federation. The official sponsors were entitled to apply a sticker on their packaging indicating “DTF Official Balls” and to promote them as “selected by” or “approved by” the Danish Tennis Federation. The use of other brands were formally prohibited by the Danish Tennis Federation and if a match within a tournament was not played with an “Official Ball”, the match was declared lost for the party who suggested not to use the selected balls. After the Commission notified a statement of objections a number of changes were made. The prohibition on the use of other brands and related sanctions were abandoned. All manufacturers were entitled to bid and the best bid would win. Contracts were made for one year only and the “Official Sticker” was abandoned<sup>144</sup>. As a result the agreement was exempted.

## VII. EXAMPLES AND ASSESSMENTS BY THE NATIONAL REPORTERS

### A. EXAMPLES

In order to test the scope of the legislations applicable against ambush marketing practices, a number of questions were asked to the Reporters whether certain practices were or not to be considered as illegal.

*Is any reference made to the event within a certain radius, not necessarily using the official name or logo of the event/organizers/sponsors, considered as prohibited ambush-marketing? Would that be applicable to any type of business or only to competitors of the official sponsors?*

#### Countries with specific protection:

The answer to this question in relation to the Olympic Games is pending in the United Kingdom: the Secretary of State has not made the regulations conferring exclusive rights in the vicinity of the venue and therefore it is not possible to determine whether a specific territorial extension to the exclusivity provided to the sponsors via the Olympic Committee will be implemented or not. In France, the French reporters think that it would be considered as illicit without limitation concerning competitors or the organisers.

#### Countries without specific protection:

In most of the other surveyed countries and in the United Kingdom outside of the scope of the specific Olympic protection, such practice was considered as legal provided no reference was made to the trademarks of the involved parties. In Germany, a specific ban may be

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*dispositions lorsque les conditions dans lesquelles il a été négocié ou les clauses qu'il contient ont pour objet ou peuvent avoir pour effet de fausser ou de restreindre, directement ou indirectement, le jeu de la concurrence sur le marché des boules et accessoires destinés à la pratique du sportboules » Décision by the French Competition Council no 97D90 of December 9, 1997 (« Boules lyonnaises »).*

<sup>144</sup> Notice pursuant to Article 19(3) of Council Regulation No 17, Case No IV/F-1/33.055, OJ C 138/6, 9.5.96.

implemented in agreement with the organisers, based on the authorities' right of possession on the public domain. In Hungary, that type of practices would have been illegal under the proposed legislation. The Hungarian Reporter also believes that such type of practice could fall within the general clause of the Act on the Prohibition of Unfair and Restrictive Market Practices.

*Are marketing events or advertisements using athletes, referring to the sport practiced during the event also considered as prohibited ambush-marketing?*

Countries with specific protection:

In the United Kingdom, such advertisements during the Games could be prohibited depending on the association made with the Games. In the absence of words referring to the Games or in relation to pictures which do not originate from the Games, there should be no prohibited association in the meaning of LOGA/OSPA.

Countries without specific protection:

In all the other countries which addressed the question and in the United Kingdom outside of the scope of the specific Olympic protection, that type of practice was not considered as illegal. In Belgium for instance, Bertolli the Italian Olive Oil producer, had posted the following licit advertisement during the 2006 World Cup: *"If Italy wins over Ghana on June 12, Bertolli reimburses your groceries bought on that day"*.

In Brazil, Banco Santander launched an advertising campaign during the 2006 World Cup displaying the names and images of various soccer players of the Brazilian "Futebol" team. Although this was an indirect but clear reference to the World Cup event in Germany, it would not be considered as illicit according to the Brazilian Group.

*Are marketing event or advertisements indirectly referring to the event during the event, or directly referring to the event before or after the event, also considered as prohibited ambush-marketing?*

That question tried to assess the legality of a relatively indirect reference to the event taking place at a time close to the event.

Countries with specific protection:

In the United Kingdom, depending on the content of the indirect reference to the Games, this could constitute a prohibited association. The issue is not so much the chronological relationship but the association. In France such type of practice is also likely to be found illicit.

Countries without specific protection:

In all the other surveyed countries, the situation was considered as unlikely to be falling under principles of unfair competition. The reason is probably the low intensity of the possible infringement, due to its indirect nature. The German Report indicates that advertisements with football pictures during the World Cup 2006 would not have been considered illegal. In the United Kingdom and outside of the specific Olympic protection, this would not be illegal unless there is a trademark infringement (likelihood of confusion) or this is held as constituting passing off.

*Is the preparation and sales of products, such as pastries, food products, etc. reproducing the logo or other images of the event, constituting ambush-marketing?*

Countries with specific protection:

In the United Kingdom, this is likely to be considered as an illicit association in the meaning of OSPA/LOGA. The association with protected signs is relatively clear. In France, that would be considered as illicit.

Countries without specific protection:

Most of the reports including the United Kingdom, indicate that this is likely to be illicit as it includes usage of the symbols protected by trademark law or copyrights.

The Austrian reporter indicated that this could be prohibited under trademark law, provided it creates a likelihood of confusion. On the other hand, the Austrian Reporter thinks that a small bakery should be authorised to create a new “Salzburg Euro 2008” cake.

The special protection granted by article 2.20.1d) CBPI in Belgium would also make that kind of practice illicit. In addition, any unauthorized usage of a trademark would be considered as dishonest practices under article 93 LPCC. In Brazil too, the specific protection granted by the “Lei Pelé” would make it illicit.

In Hungary this would clearly have been illicit under the proposed legislation. In its absence, the Hungarian Reporters found that it was unlikely to be found illicit under the trademark act or considered as unfair under the current provisions of the Act on the Prohibition of Unfair and Restrictive Market Practices.

*Are disclaimers sufficient to prevent a qualification of a campaign as prohibited ambush-marketing?*

Countries with specific protection:

In the United Kingdom a disclaimer would be inherently contrary to the purpose of the LOGA/OSPA and therefore is unlikely to be effective.

Countries without specific protection:

It appears that in Germany, Spain and Switzerland a disclaimer would not be efficient. In the other countries the answers were more positive and nuanced. The Belgian Report referred here to the Arsenal case cited above (N. V.A.5., fn.75), in which the mention “originals” to differentiate the Arsenal flags produced by Arsenal from those produced by Mr. Reed was considered as inoperative. This should explain why under Belgian law, disclaimers are likely to be inoperative. This being said, one must note that the Arsenal case concerns identical products and trademarks, a situation deserving absolute protection under Regulation 40/94 and Directive 89/104.

Another interesting example is offered by art. 132, item IV of the Brazilian IP law, under which one is entitled to use another one’s trademark to promote its own products provided it is “*without commercial exploitation or without intent to get a free ride on the trademark’s reputation*”. As a result a disclaimer is likely to be effective in Brazil.

*During the event, the sponsor of a team/athlete, congratulates the said team/athlete for its performance during the event. Could this be or has this been considered as prohibited ambush-marketing?*

Countries with specific protection:

In the United Kingdom, this would be considered as creating an association with the Games and would be prohibited. Same in France.

Countries without specific protection:

In Brazil, Finland, Germany, Hungary, Spain and Switzerland, this would be considered legal. The Austrian Report does not exclude that this could fall under the general clause of the Act Against Unfair Competition. In Belgium, if the sponsor knows about the contractual obligations undertaken by the athlete, the sponsor could be held liable on the basis of the complicity to breach contractual obligations theory. In the United Kingdom, this would be considered as licit, unless there is a trademark infringement or passing off which is unlikely because in the absence of false statement.

*Assuming that there are no contractual or other provisions preventing or prohibiting display of sponsors specific to an athlete/team, can the official sponsor reward the athletes who do not show/display the logo, the name or else of their own sponsor?*

Countries with specific protection:

Because there is no use of words or logos protected under LOGA/OSPA, there is no association in the meaning of the law and therefore no infringement and such practice would be licit. Same in France.

Countries without specific protection:

In most of the surveyed countries, this would be likely to be found as illicit, either on the basis of the general clause of unfair competition or as a result of interference in another party's affairs. For instance in Belgium, this could fall under the complicity to breach contractual obligations. The burden of evidence of the official sponsor's knowledge of the obligations of the athlete might be lesser because affiliation of athletes to sponsors is public knowledge. In Germany, this could be held illicit under section 4 N. 10 of the Unfair Competition Act as an impediment to a competitor. In the United Kingdom though, this would not be considered as illicit because there is no use of protected identifiers.

*Is the organisation of a parallel event in the same town, region or country, or covering the same type of activity, possibly falling into anti ambush-marketing provisions?*

Countries with specific protection:

Unfortunately, in the United Kingdom the Secretary has not yet issued the regulations geographically extending the exclusivity granted to the organisers no answer is available. In France, this would not be considered illicit.

Countries without specific protection:

In all the other countries to the exception of France perhaps, this would not be considered as illicit. The Belgian Reporter indicates that if the copied event displayed a high level of originality, then such a situation could perhaps be caught under the parasitism theory of the unfair competition law. In France as well, would the parasitism theory be applicable to such sorts of situations as evidenced by the "Tour féminin organisation"<sup>145</sup>.

*Is the purchase of TV slots for advertisements around the broadcasting of the event possibly considered as ambush-marketing and therefore prohibited?*

Countries with specific protection:

In France, that would be licit.

<sup>145</sup> Tribunal de Grande Instance de Paris, 10 September 1997, PIBD, 1997, 642, III, p. 586.

Countries without specific protection:

In all of the countries without specific protection, this would be considered as licit. Should however the said ambush marketer purchase all of the slots available to broadcast the same advertising, that conduct could, in Austria and Germany, be considered as an illicit impediment to trade (section 4 N. 10 of the Austrian Act against Unfair Competition; section 4 N. 10 of the German Act against Unfair Competition).

*Is the sponsoring of another broadcast such as an historic, news or talk-show, regarding the event, possibly considered as ambush-marketing and therefore prohibited?*

Countries with specific protection:

In the United Kingdom, that type of broadcasting is likely to fall within the exceptions contained in LOGA/OSPA. However, the publicity that would surround such broadcast could be constitutive of an association with the event and therefore fall within the provisions of LOGA/OSPA.

Countries without specific protection:

In most of the surveyed countries, this would be considered as licit. Where illicit as a result of the reference to a third party's trademark, that use would be likely to be justified as long as in accordance with honest practices.

## B. ASSESSMENTS OF THE CURRENT LEVEL OF PROTECTION

Based on the practice of the Austrian Courts, the **Austrian** Reporter deems the current Austrian Act Against Unfair Competition to be sufficient to tackle ambush marketing practices that are seen to be unfair. It does not need to be supported by additional provisions, perhaps because article 9 para 3 of the Act covers designations and identifiers that are not protected by specific IP laws. The Austrian Reporter also thinks that small enterprises should have a right to promote their products, possibly using a reference to the event. The Austrian Reporter doubts that the macro-economic advantages resulting from such sports events are as important as mentioned by the politicians and the media. For instance, the macro-economic advantages resulting from the construction of a 35'000 spectators stadium in Klagenfurt, an 85'000 inhabitants town in Austria, can be questioned.

The **Belgian** Reporter believes that overall, intellectual property rights are properly protecting the organisers of sport events against the most egregious ambush marketing practices. The EU and Belgian protection against misleading and certain comparative advertisings as well as the theory of parasitism, offer good safeguards against ambush marketing practices. Other ambush practices can be efficiently avoided through appropriate contractual arrangements. The Belgian Reporter is not convinced of the efficiency of the process consisting in allowing the sponsors to monopolize all externalities resulting from the event. The Belgian Reporter believes that the sponsors' main interest consist in obtaining exclusivity and keeping all competitors away, instead of maximising visibility.

The **Brazilian** Group believes that the principles laid down by unfair competition and unlawful enrichment are efficient means to fight ambush marketing practices. They nevertheless call for a specific legislation referring to China, Australia and South Africa. The Brazilian Group also believes that leaving some externalities to the public and non-official sponsors is economically more efficient, subject to certain conditions. Interestingly, the

Brazilian Group also insists on cultural differences to explain the different attitudes of FIFA on the one hand and the Confederaçao Brasileira de Futebol on the other hand in confrontations with ambush marketing practices. The first one sends cease and desist notices and prosecutes infringements whilst the second appear to tolerate association with the events they organise. This may also be due to the very different type of organisation of sports in Brazil on the one hand and many other countries on the other hand. There are many competing tournaments in Brazil whilst in most of the countries, football federations are following a single unified structure.

The **British** Reporter believes that OSPA/LOGA are not creating exclusive rights not foreseen by intellectual property law but only go further than existing laws by creating stronger, more easily enforceable rights. The British Reporter also believes that the OSPA/LOGA do not allow the sponsor to internalise all positive externalities associated with the games. The British Reporter provides a list of such other externalities which is very exhaustive compared with the economic literature in this respect, including the possibility to sell products and services to the organisers of the Games, to service the numerous spectators travelling to the UK for the Games, the transport and other infrastructure created for the Games, the regeneration of deprived areas and re-vamping of existing venues and the associated venues and the general boost to the economy.

The **French** Reporter is satisfied that the mix of legislation in France is able to tackle ambush marketing practices. Doubts are expressed in relation to the scope of article 10 ECHR.

The **Finnish** Reporter notes the absence of cases of ambush marketing partly due to the absence of major sport event in Finland. He believes that the Unfair Trading Practices Act to be sufficient, although clever ambush marketing practices would probably not fall in the scope of the law.

The **Hungarian** Group is not satisfied with the current contents of the Hungarian Act on the Prohibition of Unfair and Restrictive Market Practices and therefore suggests to amend the Act, to add an example to the list contained in articles 3 to 7, along the following lines: “it shall be prohibited to gain or to try to gain unfair economic advantage by using the advertising activity – especially sponsoring – of third parties without permission, by making or spreading false allegations, or by falsifying facts or by other practices”.

The **Italian** Reporter also believes that the legislation against unfair competition is insufficient. Because of the enormous financial damages created by ambush marketing practices, it would be preferable to have specific prohibitions on ambush marketing.

The **Swiss** Reporters believe that unfair competition protection is sufficient to deal with ambush marketing practices. They also think that small and medium size enterprises cannot play the same game as big enterprises and therefore are de facto excluded from bidding. They should therefore be able to make reference to the event for economic advantage. Similar concerns had been raised by the Austrian Reporter.

## VIII. SYNTHESIS

Austria, Belgium, Finland and Switzerland express satisfaction with the current level of protection provided by trademark and unfair competition legislations. The United Kingdom and France are satisfied with the specific legislations they have, the one in the UK protecting the Olympics only and the one in France granting exclusive rights to all sport federations. Brazil and Hungary wish to see further protection in place to protect the organisers of such events. Italy is an interesting example of a specific legislation adopted in relation to the Turin Winter Games which did not give rise to any court case. We have no means to determine whether this is due to the extreme efficiency or the uselessness of that legislative package, or a little bit of both.

Traditional legal means, i.e. mainly trademark and unfair competition do usually offer legal protection against relatively egregious cases.

### **Trademark protection:**

- Organisers of sport events usually make all-round registrations in all possible classes. That practice not only covers the main trademarks of the event organiser but a large number of expressions referring one way or another to the event, including words that are part of the public domain. The purpose is to prevent association with the event in general. The threat of litigation, justified or not, is considered to have a dissuasive effect on a large number of corporations which otherwise would take advantage of the event to make promotions and probably do not have the means to enter into long and costly legal battles.
- In relation to reputed trademarks, the enhanced protection offered by trademark law provides efficient protection against all ambush marketing practices referring to such trademarks. The absence of requirement to show likelihood of confusion between the products or services provides a high level of protection to the event organiser. In the absence of a common standard of repute however, the level of protection may be inconsistent geographically.
- Distinctiveness issues may subsist in relation to certain terms which should remain in the public domain and freely available. This is the reasoning followed by the Bundesgerichtshof in relation to trademarks filed by UEFA. The same issue was resolved in the advantage of the IOC in relation to the word “olympic”. One cannot exclude that the OHIM Board of Appeal may follow the Bundesgerichtshof in its reasoning, in the appeal made by Ferrero oHGmbH against the decisions refusing cancellation of the disputed community trademarks registered by FIFA.
- Trademark law is not applicable where a trademark is used as a necessary reference (fair use in common law countries and absence of trademark infringement in civil law countries).

### **Unfair competition:**

- It offers efficient protection against the most egregious ambush marketing practices, either through general clauses or more specific prohibitions.
- Less egregious practices will often not be caught by unfair competition. Whether an ambush marketing practice is confusing, misleading or disparaging, is usually a question of intensity highly dependent upon the facts of the case and appreciation by the competent court. Innuendos, a practice well commanded by the most subtle ambush marketers, are always difficult to handle.

- Unfair competition does not offer efficient protection where a competitive relationship is required, as it is limited to the official sponsors and prevents event organisers to file suit.
- Anti-parasitism provisions offer sweeping protection against ambush marketing practices. The functioning is similar to the protection offered to reputable trademarks, except that it is not limited to trademarks. Whilst trademark protection in relation to highly reputable trademarks remains limited to the presence of a trademark infringement and fair use, similar limitations are not necessarily defined in unfair competition laws.

**Specific protection against ambush marketing practices** raises a number of issues.

**Trademark related approach:**

- In differing extents and degree, legislation adopted in the UK and in Italy are akin to trademark law. They consist in creating a new category of trademark with protection beyond the limits imposed by the specialty principle and the likelihood of confusion.
- Association with the event is banned. Association is based on the meaning of certain terms as opposed to their visual and phonetic aspects. Likelihood of association with the event, the event organiser or sponsors may be at contractual or financial level only.
- As a result and contrary to trademark law, such extended exclusivity may create real monopolistic rights over certain terms.
- These legislations are usually limited to one event or event organiser or to major events only.
- Because such legislation focuses on the means used by the ambush marketer and the protected party, the burden of evidence is substantially alleviated.
- The scope of protection is relatively clear where list of protected terms or prohibited associations are defined.
- Limitations are sometimes introduced based on fair use like in the UK. Where no such limitations are introduced conflicts with fundamental freedoms arise.
- Further extensions such as geographic extensions are sometimes added, raising problems in relation to fundamental freedoms.

**Unfair competition related approach:**

- Basically, in the form of anti-parasitism provisions.
- Applicable across the board to all enterprises with reputation. It is not limited to a sector of the economy and therefore offers a consistent general and abstract legislative framework. It offers additional protection to the most successful, though.
- As opposed to trademark related approaches, parasitism focuses on the outcome of a practice, i.e. the act of taking advantage of someone else's reputation. Conditions are (1) a certain level of reputation reached by an enterprise as a result of the work and efforts made by its owner and (2) an unauthorised reference to such enterprise leading to an appropriation of its reputation.
- The burden of evidence in proving repute and appropriation of reputation may remain high depending on the local legal traditions. As a result, the outcome remains fact dependent and relatively uncertain.
- The scope of the protection is less clear than legislation focusing on the means.
- Anti-parasitism does not create monopolistic rights over certain terms but may grant sweeping protection allowing strong corporation to exert market power beyond competitors.
- Anti-parasitism usually does not contain limitations. Therefore issues of conflicts with fundamental freedoms are resolved by way of interpretation of the unfair

competition statute based on the specific fact of the dispute. This may lead to uncertainty.

- The burden of evidence in proving repute may remain high depending on the local legal traditions. As a result, the outcome is more uncertain.
- Official sponsors usually do not have standing to sue when ambush marketers refer to the event.

**Downsides** of specific ambush marketing legislation can be summarised as follows:

- it may often prevent sponsors of athletes to refer to the sport practiced by the sponsored athlete at the time of the event;
- it may affect small enterprises. They are de facto excluded from sponsoring major sport events – who can't pay can't play – and may nevertheless be sued<sup>146</sup>;
- chronological and geographic extension of the exclusivity despite a relatively remote link to the protected event;
- unequal treatment of marketing practices within the geographic boundaries of the specific legislation and without such boundaries.

Therefore, if and when legislating, one of the key issue is **to set clear limits to the specific protection**. If there is a need for legislative intervention, legally speaking, **its purpose should be to reach higher certainty**.

To determine whether legislating is necessary or not, is a **political question**. We will therefore limit ourselves to two comments in this respect. First, ambush marketing practices do not affect consumers. Any legislation is therefore purely for the benefits of B2B relationships and must be assessed within these parameters. Second, where the scope of a legislative intervention is limited to sports, one must be aware that macro-economic returns of mega sport events, have been questioned in the economic literature. They are often over stated (usually a gross calculation and not a net calculation taking into consideration the corresponding decrease in other spending) and sometimes set off by large public spending. The creation of jobs resulting from the organisation and construction of an infrastructure may be detrimental to other sectors of the local industry, unless the economy is depressed. Last but not least, there are usually high follow-up costs to adapt, use and maintain the new infrastructures<sup>147</sup>. The interest is most often political instead of economic.

Another political choice, but this time affecting the legislative technique, is whether the object of additional protection should be the Olympics, all sport events, any sort of event, or parasitism in general. Where a narrow scope is preferred, for instance limited to the Olympics or sports, then one will have to determine why such a sector of the economic activity should deserve legislative attention and protection as opposed to the condemnation of certain practices across the board. Past legislative interventions often focused on the Olympic Games, whose values and resulting contribution to the public good is perhaps more obvious. In terms of economic importance and world attendance though, the Olympics come quite behind the World Cup.

<sup>146</sup> Vassallo E., Blemaster K., Werner P., op. cit., p. 1354

<sup>147</sup> Baade R., The economic impact of mega-sporting events, Handbook on the Economics of Sport, Andreff W., Szymanski S., EE Publ., 2006, p.177 et seq.

We find it interesting to note that the FIFA Public Information Sheet (a guide to FIFA's Official Marks) published in relation to the 2010 FIFA World Cup South Africa, actually focuses on trademark protection instead of other less egregious ambush marketing practices, despite the sweeping protection granted by the South African legislation. This may be explained by the fact that the purpose of the brochure is international whilst the South African legislation is limited to the geographic boundaries of the corresponding Republic. However, nothing prevents FIFA from making recommendations that would include other ambush marketing practices. One may be tempted to see in that approach, a hint to the research carried out by Moorman and Greenwell revealing that ambush marketing practices considered as illegal or most offending by the public are those involving use of trademarks or distinctive signs. The others were perceived as belonging to the rule of the game by the interviewees. Last but not least, it may be that the other and often quite "disparaged" ambush practices may not necessarily be that harmful to the organiser of the event.

We have also seen that **intermediary solutions** could be envisaged. Should the main sport organisations be somehow recognised as international organisations, Art. 6ter of the Paris Convention would be applicable. The main advantage would be to secure a common base for extended protection in 171 countries.

**Non-legislative solutions** can perhaps be improved. For instance it is striking to note that ambushers of certain events are the official sponsors of other events. Sport organisations could and perhaps already do to some extent, require from all official sponsors a complete ban on all ambush marketing practices. Enforcement against infringing behaviour may remain difficult, unless penalties are imbedded in the signed terms and conditions, possibly with a faculty to appeal from the decision by the organiser to an independent commission or arbitral tribunal. A Code of conduct could be adopted similar to the ICC Code of Advertising and Marketing Communication Practice, but based on legal and not ethical principles in order to define precisely the boundaries between what is accepted and not. Not everything should be illegal.

Currently, the effort of the sport organisations consists in educating, in order to change minds and turn accepted practices into bad manners and ultimately, illicit practices. Researches indeed confirm that with new generations past practices are likely to be banned, for the best or the worst. A direct logic consequence of that evolution should be that ambush marketing practices will stop. Who wants to be a black sheep, besides a few enterprises with a mavericks' culture, aiming at a very narrow market. The multiplication of specific legislation may thus turn out to be the confirmation of their uselessness.

## **IX. PROPOSED CONCLUSIONS**

The above report and synthesis allows to draw a few provocative conclusions.

Ambush marketing is not a legal definition. Any definition should be broad enough to encompass the reality of the practices qualified as ambush marketing and to cover practices that are harmful to the event, the event organiser and possibly the official sponsor. **As a matter of fact, ambush marketing should be defined as an association with an event and the values it incorporates, without authorisation from the organiser.**

Ambush marketing **is first of all a B2B issue**. Unless it is demonstrated that consumers are generally aware of official sponsorship and consider such quality as a material determining factor in purchasing decisions, there is no B2C issue in relation to ambush marketing practices.

Ambush marketing is mainly a problem of management of the relationship between the event organiser and the official sponsors. **It should therefore first be resolved by resorting to non-legislative means such as terms and conditions and codes of conducts established in common by the main sport organisations.**

To a large extent, the values associated with sport events such as the Olympic Games or the World Cup are the outcome of collective efforts. **These values may be perceived as public goods, thereby authorising any third party to refer to the event.**

**The balance of the macro-economic benefits and harms** resulting from mega sport events is dependent upon the specific economic situation of the organiser and therefore **cannot be generalised.**

**The current legislative framework places appropriate limits to ambush marketing practices that are felt by the public as offending**, either because they tread on trademark principles or because they are egregious and therefore perceived as unfair. Ambush marketing practices can be held as licit in the absence of reference to a trademark or, where the intensity of the association with the event cannot be considered as misleading, disparaging or denigrating from the point of view of the event organiser or the official sponsors. **In all countries where unfair competition protection is based on a competitive relationship, such requirement should be lifted** to allow the event organiser to take action against ambush marketing practices. That issue though, is not limited to ambush marketing only.

Therefore, the **need for legislative intervention against ambush marketing practices is not established**. Legislating through unfair competition provisions, i.e. against parasitism, should not be decided for ambush marketing purposes, but in light of the interests of reputable enterprises and the economy in general.

**Where specific legislation is adopted** in some form or another, **it is essential that it contains its own limits** in order to preserve the economic and other fundamental freedoms of other players. In particular, room should be made for fair use, criticism and parody.