

Article by Dr André Soldner, LL.M. (this article was first published in the IMR management report "Sports Sponsorship & the Law", 2010)

# Ambush Marketing vs. Sponsorship Values at the London Olympic Games 2012

## Sponsoring the Olympic Games

In 2012, the Summer Olympic and Paralympic Games will be hosted in London. Being the biggest sporting event in the world besides the FIFA World Cup 2010, the London Games will also become one of the most expensive sporting events in history.

Usually the refinancing of major sporting events is primarily based on the sale of broadcast and sponsorship rights, merchandising and ticketing. In relation to sponsorship, a special characteristic of the Olympic Games is that the Games operate a 'Clean Venue' policy meaning that the Games venues are free of any branding (with the exception of discreet sports apparel logos on competitors clothing and the official timekeeper, Omega). The lack of television exposure of sponsors means that the organiser, the International Olympic Committee (IOC) has to ensure that sponsors gain the maximum awareness in connection with the Games through other means, e.g. through public awareness campaigns. On the whole sponsors benefit through leveraging the sponsorship rights themselves.

Until the Los Angeles Games 1984, the IOC never had a strategic sponsorship strategy, which resulted in loss-making events such as the Montreal Games 1976. The Los Angeles Games 1984 were the first Games where the IOC granted exclusive rights to sponsors in their respective industry sector and received higher amounts of sponsorship fees in exchange. The sponsorship fee for being an official sponsor of the Olympic Games 2012 is estimated to be in the region of £80m. However, it is not only the exclusive circle of official sponsors, but also other companies, that strive to benefit from the public awareness and worldwide media presence in connection with a major sporting

event such as the Olympic Games. This is the playing field of the phenomenon ambush marketing and its alleged threat to sponsorship values at the Olympic Games.

## What is Ambush Marketing?

Ambush marketing in relation to sports can be broadly defined as any kind of unauthorised action of a party that strives to associate with an event and to profit from it economically. Common synonyms are 'guerrilla marketing' or 'parasite marketing'. These 'ambushers' are often competitors of official sponsors and their intention is to use the public awareness related to major sporting events for their own marketing activities but without investing in the high sponsorship fees. In connection with the Olympic Games, the Vancouver Organizing Committee for the Games 2010 declared: *"Only official sponsors, licensees and government partners of the Olympic Movement in Canada are allowed to suggest an affiliation or connection with the Olympic Movement or any Olympic Games. Unfortunately, those exclusive rights can be infringed by 'ambush marketing' – marketing that capitalizes on the goodwill of the Movement by creating a false, unauthorized association with the Olympic Movement, Olympic Games or Olympic athletes without making the financial investment required to secure official sponsorship rights."*

Ambush marketing measures can range from the unauthorised use of protected signs or terms, to more subtle creative advertising strategies without any use of protected rights. Ambush Marketing can be further categorised into ambush marketing by intrusion, which occurs by sudden one-off activities during an event and ambush marketing by association, which refers to marketing campaigns linked to the specific event and

which are intended to suggest an official authorisation. Well-known examples in the history of the Olympic Games are as follows:

- During the Los Angeles Games 1984 where Fujifilm was the official sponsor, Kodak sponsored the television broadcasts. The two competing companies switched roles in the Seoul Games 1988.
- Visa, the official sponsor of the Albertville Games 1992, was ambushed by its competitor American Express using the slogan "You don't need a 'visa' to go to Albertville" before and during the event.
- A legendary ambush marketing campaign was undertaken by Nike during the Atlanta Games 1996 where Adidas was granted exclusive official rights in the sports clothing category. Nike created a 'Nike-City' and hired billboards in numerous sites close to the venues and distributed banners featuring its 'Swoosh' to the fans in the city. This ambush marketing strategy resulted in a substantial TV coverage for Nike and a public impression that Nike was the official sponsor of the event. Nike achieved at least the same awareness as the official sponsor without the huge investment of a sponsorship fee at an amount of c. US\$50m.
- Furthermore during this event, Linford Christie appeared in a pre-100-metre-competition press conference wearing contact lenses embossed with the logo of his personal sponsor Puma giving them huge publicity.
- During the Sydney Games 2000 Qantas Airlines, competitor of official sponsor Ansett Air, used the slogan "Spirit of Australia" which was very similar to the official Games' slogan "Share the Spirit".

### **Illegal practice or competitive marketing?**

Companies launch extensive marketing campaigns in connection with major sporting events to increase public awareness and to foster their positive image. The goal is to communicate to the consumer attributes such as success, competitiveness, internationality, fair play and commitment via these campaigns. However, as only one player in a specific industry category is granted exclusive sponsoring rights, competitors strive for other possibilities of exploiting the public awareness in connection with an event. Long-standing 'global player duels' between Visa, Mastercard and American Express, between Pepsi and Coca Cola or between Nike and Adidas are just a few examples. Some of these companies have become ambush marketing experts and even appear to prefer to stay in this role for two main reasons. First, ambushers save the high sponsorship fees, which the official sponsors need to pay. Second, ambushers are often granted a

'sympathy bonus' due to their innovative and creative campaigns.

The problems that ambush marketing creates for event organisers and right holders includes the following: the more successful marketing measures of ambushers are, the less valuable is the exclusive right of an official sponsor, which, depending on the event, can cost tens of millions of dollars in rights fees alone. As such, the willingness of potential official sponsors of future events to invest in official rights is considerably reduced. As a result, the sponsorship revenues decline and a cornerstone for financing major sporting events may be eroded. Finally, the value and reputation of the event itself may diminish.

However, any attempt to draw a line between illegal ambush marketing and the protected right of advertising freedom creates a serious challenge. Accordingly, combating ambushing is equally difficult.

Nike, not an official sponsor, released a spectacular three-minute advert prior to the FIFA World Cup 2010 with a number of protagonists such as Ronaldo, Drogba, Cannavaro, Rooney and Ribery. The video was shown on both TV and on the social platform YouTube, where it was viewed more than 14 million times in the first few weeks. The video does not contain any marks, symbols or expressions directly related to the FIFA World Cup 2010. However, there is no doubt that Nike used the worldwide attention in connection with the World Cup to place its spot at its best. Is that already illegal ambush marketing or is such a marketing campaign protected by the right of advertising freedom? Does it comply with fundamental rights to prohibit companies as non-sponsors from releasing sports related advertisements during a major event as well as some months before and after the event? Shall this apply to all non-sponsors or are exemptions inevitable for companies in the sports sector?

On the one hand, it is important to consider the position of the organiser and its interest in monopolising its event and all rights in connection with it. To refund the organiser's investment and to raise revenue, the organiser must be in a position to grant companies exclusive rights for their sponsorship fees. If anyone could exploit the rights in connection with the event without any restriction, official sponsors would no longer be willing to invest in sponsorship fees for such events. For this reason, it is argued that for the protection of the big advertising and sponsoring investments at major sports events 'anti-ambush marketing legislation' needs to be implemented to significantly deter ambushers from associating with such an event without being an

official sponsor. On the other hand, it is important to take into account the principle of freedom of advertising in which companies that are not infringing any laws should not be prohibited from their legal right to launch advertisements and to persuade people to buy their products.

### **Legal protection of exclusive Sponsoring rights**

The overall Olympic brand consists of numerous elements, such as official names, phrases, designs, logos and trademarks in connection with the Games 2012 and the Olympic and Paralympic movement. It enjoys protection as intellectual property under UK law. Whereas various terms, such as '2012', 'The Olympics', '2012 London' and images such as the five interlocking rings, the symbol of the Olympic movement are UK and Community registered trademarks, further protection is granted by copyrights, design rights and passing off legislation.

In addition, and as an official requirement of the IOC within the bidding process regarding the Games 2012, the host country had to implement specific national legislation to combat ambush marketing. In 2006, the UK passed the London Olympic Games and Paralympic Games Act 2006 amending the already existing Olympic Symbol Protection Act 1995 providing the framework to control advertising methods and protect the exclusive rights of official sponsors related to the Games in 2012. Both acts have attracted little attention so far, but this will change rapidly as companies start to develop their marketing strategies in the run-up to the Games 2012. Furthermore, secondary legislation on advertising in the vicinity of the Olympic venues (the 'Advertising and Street Trading Regulations') will be implemented to control marketing measures around the venues of London 2012.

#### **The London Olympic Games and Paralympic Games Act 2006 (The Act 2006)**

The Act 2006 provides a strict regime mainly against ambush marketing by 'association' as it extends the protection granted by intellectual property rights, which is usually based on distinctiveness in relation to trademark. It introduces a London Olympics association right that prohibits the use of any representation in a manner likely to suggest to the public an association between goods or services, or a person who provides goods and services and the London Olympics. Under its broad definition, an association can be made by any advert or merchandise with the combination of words, marks and symbols being judged to determine whether an association has been created. The London Organising

Committee of the Olympic Games (LOCOG) will be the observing body regarding the compliance with the Act 2006.

In relation to the aspect of association, two lists were introduced containing the expressions 'games', '2012', 'twenty twelve', 'Two Thousand and Twelve', 'gold', 'silver', 'bronze', 'medals', 'sponsor', 'summer' and 'London'. A combined use of these expressions such as 'London 2012' or 'Golden Summer 2012' in the course of trade is deemed as a prohibited association with the London Olympics. As the lists are not exhaustive, other expressions, symbols and marks creating an unauthorised association would also breach the legislation. The courts will assess by an overall impression whether an unauthorised association has been made specific cases. It is the burden of the defendant to convince the court that the litigious advertising campaign or individual advert or promotional activity does not create an association with the Games 2012. Examples for possible defences are the use for 'honest commercial practice' (another vague term), strictly editorial and journalistic purposes or private purposes. Infringements can result in a criminal conviction, fines, injunction or damages. The breadth of protection against unauthorised associations with the event granted by the Act 2006, if confirmed by the courts, will lead to an overall event protection that is unique in combating ambush marketing.

#### **Advertising and Street Trading Regulations (Regulations)**

The Regulations which are expected to come into force in late 2010 or the beginning of 2011 aim to protect the Games against ambush marketing by intrusion. The Regulations are mainly aimed at avoiding a scenario such as the 'Nike-City' in Atlanta 1996 and will introduce various protection measures, in particular defining exclusion zones of a certain distance around the venues for a period of some days before the opening ceremony to some days after the end of the Paralympic Games. It is expected that the Regulations will cover all sorts of physical advertising in the vicinity of the 2012 Games venues. Whereas the general principle and the use of the Regulations are clear, scrutinising the Regulations more closely reveals several controversial issues. First, will the 'vicinity' related to road cycling or the marathon event, cover the whole city of London and its suburbs? Second, do the Regulations contain exemptions for existing shop signage and advertising? Furthermore, do the Regulations also encompass private properties? These open issues need to be addressed in the course of the legislative procedure and should be elaborated with the concerned parties.

### **Further protection against Ambush Marketing**

The IOC and LOCOG have used their past knowledge of ambush marketing to introduce further protection measures, in particular with regard to broadcasting and athletes. Contracts with broadcasters will include various restrictions and conditions that competitors of official sponsors shall be not permitted to sponsor the screening of an event. Official sponsors shall be granted matching rights in relation to advertising slots during breaks in the broadcasting. Athletes are required to sign 'Team Member Agreements' that prohibit them from giving non-official sponsors unsolicited publicity during the Games. This is an attempt to avoid scenes such as Linford Christie wearing Puma contact lenses in a press conference or Usain Bolt repeatedly holding up his golden Puma running shoes for the crowd and cameras after his historic 100m victory in 2008.

### **Legal and practical Consequences for the Players**

Aside from the legal regime in South Africa in connection with the FIFA World Cup 2010, the laws protecting the London Games 2012 against ambush marketing are probably the most restrictive in the world. Because the wording of the legislation leaves some room for interpretation and discretion, the practical impact and enforceability still depends largely on legal argument and the courts' assessment in each specific case.

It will be interesting to see whether the courts will follow the 'Zero tolerance' strategy of IOC in relation to unauthorised advertising around the Olympic event and thereby effectively grant overall event protection. The first legal decision in relation to the legislation (and no doubt the IOC's lawyers are already in position to launch an action) might set a precedent for how the law will be interpreted regarding ambush marketing in relation to the Games 2012.

This will be especially important in cases where no legally protected marks, symbols or expressions are used, such as Nike advert run to coincide with the FIFA World Cup 2010.

It is difficult to predict whether courts will judge such spots as unauthorised association under the existing legislation or as a legitimised exploitation of the companies' fundamental right of advertising freedom. It will be the task of the involved parties' lawyers to convince the court of their interpretation in the specific case.

Obviously this legal framework has a different impact on the involved parties. The IOC and the LOCOG will

try to enforce their 'Zero-tolerance' strategy by combating ambushers through legal means. They will also seek to protect their sponsors using practical measures such as through public awareness strategies. The success of the Nike advert on the internet has demonstrated that it is important for the organiser to use the internet as a tool for implementing such strategies. This includes the 'naming and shaming' strategy and monitoring the typical ambushers and their marketing measures.

Non-sponsors have to consider how they could benefit from the 2012 Games and need to be very clear about the chances and risks involved. As most of the sponsorship rights have already been sold, there are few chances for current non-sponsors companies to gain official status. Those companies must, therefore, seek professional advice both legal and marketing experts to assess what potential there is to run legitimate marketing initiative around the 2012 Games. They will also have to consider what the value of such activity would be given the restrictions in place.

Non-sponsors and potential ambushers have to be aware of the risks and legal consequences when infringing any laws and rules relating to ambush marketing. The new legislation draws a very fine line between creative and innovative marketing and illegal advertising.

In order to combat the impact of ambush marketing, it is also important to consider the role of the official sponsors. To maximise the value of their investments, it is vital that they do not merely rely on the direct effects of being an official sponsor. This is especially so regarding the Olympic Games where venue branding is not permitted.

Olympic sponsors are accorded wide ranging rights to associate themselves with the event through use of trademarks and through other resources such as hospitality and tickets. Those brands must utilise the opportunities through innovative and creative marketing campaigns. If they are proactive and create a major activation strategy, ambushers will find that the potential to build public awareness of their brands is significantly reduced. Rights holders have to be realistic, major global brands that don't have sponsorship rights are not simply going to stop marketing and leave the field to those that do. Legislation can prevent unauthorised and unfair claims to a link to the Olympic Games. The best for of defence, however, is to use the massive opportunity granted by having official sponsorship rights.

## Contact



**Dr André Soldner, LLM.**

Associate

T: +49 (0)69 97 11 26 55

E: [andre.soldner@ashurst.com](mailto:andre.soldner@ashurst.com)

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at Ashurst LLP, OpernTurm, Bockenheimer Landstraße 2-4, 60306 Frankfurt am Main T: +49 69 97 11 26 F: +49 69 97 20 52 20; Ashurst LLP, Prinzregentenstraße 18, 80538 München T: +49 89 24 44 21 100 F: +49 89 24 44 21 101 [www.ashurst.com](http://www.ashurst.com).

Ashurst LLP and its affiliated undertakings operate under the name Ashurst. Ashurst LLP is a limited liability partnership registered in England and Wales with Companies House under number OC330252. It is a law firm regulated by, amongst others, the Solicitors Regulation Authority of England and Wales. The term "partner" is used to refer to a member of Ashurst LLP or to an employee or consultant with equivalent standing and qualifications or to an individual with equivalent status in one of Ashurst LLP's affiliated undertakings. Further details about Ashurst LLP and its affiliated undertakings can be found at [www.ashurst.com](http://www.ashurst.com).  
© Ashurst LLP 2010 Ref: 1568986 08 September 2010