

ANYONE FOR A GAME OF MONOPOLY™?* A CRITICAL EVALUATION OF THE EVER- INCREASING COMMERCIALIZATION OF MAJOR SPORTING EVENTS PART 1: AN OVERVIEW OF AMBUSH MARKETING IN SPORT

Andre M Louw**

BA LLB LLM

Faculty of Law

University of KwaZulu-Natal, Durban

Daniel Areias

LLB LLM

Candidate Attorney: Bowman Gilfillan Inc

Johannesburg

SUMMARY

This is the first part of a three-part article which critically evaluates the ever-increasing trend of commercial monopolization of major sporting events by sports governing bodies and their commercial partners such as sponsors.

This first part of the article will provide a background description of the various forms of protection against ambush marketing of events, as an area where such increased calls for the creation and ring-fencing of commercial rights to events have been (and remains) at the forefront. The second part of the article will evaluate the legitimacy of such protections (especially in the form of special legislation) critically in the context of such commercial monopolization, with reference to constitutional, intellectual property and competition-law arguments in the South African context, and will conclude with some observations regarding current developments elsewhere.

"[Olympic] Games organizers are required to provide a clean venue. This is not just a venue devoid of the advertising messages and media, but control of all forms of commercial activity, including concessions, franchises, and type of food sold in restaurants. Such agreements will even specify the credit card to be accepted and the brand of soft drink to be served. Once a clean venue has been achieved and sponsor brands installed, the next task is to police

infringements of agreements. To this end special ambush hit squads are used to monitor all venues at which Olympic events are taking place.”¹

“Intellectual property law has always had at its heart the balance of interests between the right holder and the public. Yet the justification for [legislatures] granting these pervasive rights [to sports organizations to combat ambush marketing] is the expense and cultural importance of the major sporting events. It does not seem that sufficient consideration has been given to the appropriate threshold for protection. At some point it has to be possible to say: No, this event does not deserve protection.”²

1 INTRODUCTION

The time of writing appears to be rather trying for some of the major international sports organizations. The International Association of Athletics Federations, along with a number of South African politicians, apparently breathlessly await further fall-out from the Caster Semenya gender-testing row (and we all await an about-turn from Athletics South Africa’s (former?) president Leonard Chuene³ – even Bill Clinton eventually had to recant ...). FIFA is surely dribbling on eggshells awaiting confirmation of the successful finalization of preparations for their 2010 showcase in a country which has not always inspired the greatest confidence on the part of Mr Blatter *et al* (did someone say “Brazil” and “Plan B”?), and international motor sport governing body, the FIA, has just recently managed to rid itself of its long-serving and controversial former president (sadly, nothing will be said here about S&M “tea parties”, prostitutes or swastikas).

In the midst of these challenging times for some of those who run the highest echelons of international sport, the silver lining may be the prospect of an even larger pay cheque for administrators in future. It appears that there are increasing developments regarding the commercialization of major events, which deserve critical consideration in these authors’ view. One aspect of such ever-increasing commercialization relates to the measures that are put in place to combat ambush marketing (which will be the focus of this article). The phenomenon does, however, appear to be more systemic and wide-spread, which might lead cynical observers to question the extent to which sport as a social activity has apparently largely lost touch with the

* With apologies to US trade-mark holders Parker Bros and John Waddington Ltd (licensed manufacturers and distributors of the *Monopoly*TM board game outside the USA).

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¹ Michael Payne, marketing director of the International Olympic Committee, describing one of the legs of the IOC’s strategy to protect the Olympic Games from ambush marketing, in Payne “Ambush Marketing: The Undeserved Advantage” July 1998 15(4) *Psychology & Marketing* 323-331.

² Johnson “Look Out! It’s an Ambush” 2008 2(3) *International Sports Law Review* 24 29.

³ Even though the ASA president and its board were suspended by the South African Sports Confederation and Olympic Committee (SASCOC) in the week of 9 November 2009, at the time of writing it appears that Chuene has yet to publicly and unequivocally accept responsibility for the ASA’s handling of the matter.

fact that it was, until relatively recently still, at least notionally, rooted in “Corinthian ideals” and the much-vaunted “spirit of Olympism”.

Examples of the excesses that have been experienced with the influx of money in sport abound. Commercialization appears to be making a mockery of the “sacred trust” which has traditionally formed the basis for sports governing bodies’ trusteeship over sporting codes,⁴ and big money has also contributed significantly to the increased scrutiny of the activities of such organizations by the media and others. Allegations of greed and corruption have also been leveled at those at the very top in the largest and most elite of these bodies.⁵

It appears that a watershed moment in the commercialization of international sport was the 1984 Olympic Games in Los Angeles, which, despite the “amateur” status of the competition, was the first Games where no public money was required to host the event and where the International Olympic Committee managed to show a more than USD 200 million profit. This was due mainly to the efforts of the President of the Organizing Committee, Peter Ueberroth, who developed different categories of sponsorship and the promise of exclusivity within each level.⁶ The

⁴ It is interesting to note what (it is submitted) may amount to a rather blatant recent example of the way in which the pursuit of profit has assumed a dominant role over the promotion of sport for the greater good: The South African organizers of the 2010 FIFA World Cup apparently experienced difficulty in negotiations with FIFA regarding ticket prices for the event. While the organizers (and other forums across Africa) have insisted that tickets should be affordable to the masses, FIFA have apparently pegged the prices, insisting on the maximization of profits in order to finance their own activities for the four years before the next World Cup. [Ironically, it was reported in the week of 15 February 2010 that FIFA had, controversially, announced drastic cutting of ticket prices for the event through a re-categorization of tickets, reporting as a response to expectations of fewer foreign fans attending the event and in order to fill stadia with local fans.] Apparently, FIFA have emphasized the fact that the event is a FIFA event and that South Africa has little bargaining power in this respect – even to the point of stating that the organization could take away the World Cup if they chose (from a briefing to the parliamentary Portfolio Committee on Sport and Recreation, Cape Town, 14 June 2005). It appears that there is wide-spread dissatisfaction amongst host countries of the FIFA World Cup in respect of the organization’s history of imposing rigid demands on hosts in the interest of maximizing FIFA profits from the event. On a study tour to France by members of the Parliamentary Portfolio Committee on Sport and Recreation (visit undertaken in June 2005, to investigate issues surrounding France’s hosting of the FIFA World Cup in 1998 with a view to preparations for World Cup 2010 in South Africa), members of the delegation were specifically warned by the Director-General of the French Football Federation that FIFA was imposing increasingly rigid regulations in this regard (eg, that the organization would receive all the revenues from televisions rights for the event). The delegation was reportedly advised that South Africa should not agree to a blanket acceptance of all FIFA’s rules and conditions, in order to ensure that the country would derive sufficient economic benefit from the event. See the minutes of the discussion of the Committee, 11 August 2005 <http://www.pmg.org.za/viewminute.php?id=6094>).

⁵ Compare the latest in a number of critical exposes, British investigative journalist Jennings “Foul! The Secret World of FIFA: Bribes, Vote Rigging and Ticket Scandals” 2006 *Harper Sport, London*; and see also (in respect of the International Olympic Committee) Jennings *The New Lords of the Rings Pocket Books* (1996).

⁶ See Crow and Hoek “Ambush Marketing: A Critical Review and Some Practical Advice” 2003 14 *Marketing Bulletin* 2 (also available <http://marketing-bulletin.massey.ac.nz>); Hoek and Gendall “Ambush Marketing: More Than Just a Commercial Irritant?” Summer 2002

professional sports industry in recent decades simply exploded to the point of the astronomical amounts that make up today's sports broadcasting market (internationally, the major source of income for those governing sport). In English football the entry of BSkyB into the market of broadcasting Premier League matches (in 1992) facilitated a phenomenal increase in the TV rights fees. In the 15 year period between 1986 and 2001, the rights fee increased from £6.3 million for a two-year period to £1.1 billion over three years (or from £3.1 million to £367 million per year).⁷ It was announced on 1 March 2006 that Indian sports and media agency Nimbus Communications Limited had concluded a deal with the Board of Control for Cricket in India to acquire the global media rights to all international and domestic cricket played in India until 2010. Nimbus prevailed over media giants such as ESPN Star Sports and Sony Entertainment Television, and paid USD612 million for the media rights.⁸ This agreement was the single biggest commercial deal in the history of cricket, but took only two years to be eclipsed by the more than USD1 billion 10-year broadcasting deal in respect of the phenomenally successful Indian Premier League (or IPL).

And the top international professional athletes also appear to draw those with deep pockets like moths to a flame. While David Beckham reportedly earned in the region of £33 300 *per week* back in 2003 while under contract with Manchester United (over and above his playing salary) *solely for the use of his image on club merchandise*,⁹ Tiger Woods has for a number of years earned by far more income from sponsorship and endorsement deals than from actual tournament winnings (in fact, when Woods won the Australian Masters tournament in November 2009 it was reported that his appearance fee to play in the event significantly exceeded the amount of the winner's cheque). Of course, recent events in Mr Wood's personal life appear to have affected the golf maestro's attractiveness severely to sponsors for purposes of endorsement deals, and have highlighted the importance of so-called "morality clauses" in sponsorship and endorsement contracts.

Rather ironically, recent years have seen the media branching out into the role of participants as broadcasting corporations and networks have

2(2) *Entertainment Law* 72-91 73; and Johnson *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event* (2008) 4.

⁷ See Walters "The Professional Footballers' Association: A Case Study of Trade Union Growth" 2004 *Football Governance Research Centre, Birkbeck, University of London* 2004 17. According to recent reports (see *The Observer* 2007-02-12) at the time of writing BSkyB and Setanta Sports are reportedly paying £1.7 billion to hold the exclusive rights to screen live matches of the English Premiership in Britain for the next 3 years. Broadcasters in 208 other countries have reportedly recently doubled their payments to secure English Premiership rights, to a combined £625 million – my sincere thanks to Ben Challis for providing this information.

⁸ See the report available online on the web site of the Asser Sports Law Centre <http://www.sportslaw.nl> (accessed 2006-03-08).

⁹ See the short article by Braithwaite and Pennington "Image Rights: Do they Exist and Who Should Own Them?" <http://www.sportandtechnology.com/page/0035.html> (accessed 2007-02-27).

purchased clubs and teams.¹⁰ Not to be outdone, sports teams have entered the broadcasting industry to corner an even bigger slice of the economic pie.¹¹ It is now truly clichéd to remark that sport has become big business.¹²

Along with the influx of money has come an attitude of (sometimes rabid) protectionism in respect of the interests of the governing bodies and their commercial partners who bankroll major events. In recent years this has been encountered in the form of the responses by those governing sporting codes to initiatives by private promoters in respect of the establishment of unofficial, “breakaway” leagues and competitions (compare the Board of Control for Cricket in India’s responses to the Indian Cricket League or ICL). These responses have raised competition law and restraint of trade concerns regarding the banning of players as well as efforts to deny access to venues for the hosting of such unofficial competitions.¹³ A related development is the efforts by governing bodies and their commercial partners to protect the commercial exploitation of the publicity value of major events. Commentators elsewhere have criticized the apparently limitless expansion of protection (legislative and otherwise) of the commercial interests of international sports organizations and partners of these – especially in the context of anti-ambush marketing measures, which will be the specific focus of this article – and it appears that current developments in one jurisdiction may point towards the potential for even increased future claims of “monopolies” in major events. The authors view such developments with concern, and it is submitted that what may currently be just a blip on the radar screen should be watched very closely indeed.

Against the background of a largely descriptive overview of the practice of ambush marketing and of the legal bases for protection available to sports organizations and their commercial partners (in Part 1 of this article), the

¹⁰ Rupert Murdoch (Fox, Sky and Star TV networks) has at times had holdings in British and German football clubs, major-league baseball teams in the United States and rugby-league clubs in Australia. Silvio Berlusconi was at one time the principal owner of AC Milan football club, and has also had a major stake in Sportal, the Internet sport company. Canal Plus, the French television station, owned the Paris St Germain football club. See Marqusee “Sport as Apocalypse” <http://www.frontlineonnet.com/fl1716/17161100.htm>. See also Downward and Dawson *The Economics of Professional Team Sports* Routledge (2000) 37.

¹¹ Eg, Manchester United football club and the New York Yankees baseball franchise, both of which have entered the Internet and broadcasting business. See, in general, s 2.5 of the final report of the Sports Directorate of the Netherlands Ministry of Health, Welfare and Sport, entitled *The Balance Between the Game and the Money* (2000).

¹² Philip Knight, founder of the Nike Corporation, characterized sport in the mid-1990s as “the dominant entertainment in the world”. Gratton and Taylor *Economics of Sport and Recreation* (2000) 3 remarked the following in 2000: “Sport is now recognized as an important sector of economic activity, part of the increasingly important leisure industry which accounts for over a quarter of all consumer spending and over 10 per cent of total employment in the UK, and brings in over £20 billion per annum in foreign exchange. Sport is not the largest sector of the leisure industry, but it is among the fastest growing.” In respect of commercialization of sporting competition, Downward and Dawson 36-37 identify sports leagues’ main sources of revenue (historically) as gate receipts, merchandizing, sponsorship, the sale of TV rights, transfer fees and the sale of match schedules to the gaming industry.

¹³ For more on these developments and their legal implications, see Louw “South Africa” in the series *International Encyclopaedia of Sports Law* (September 2009) Kluwer Law International par 353-364, 406-412 and 485-490.

second part of this article will examine criticisms that have been expressed in recent years regarding the sometimes draconian and excessive protections that international sports organizations have been able to impose on the governments of host nations for major events, in respect of the commercial interests of such organizations and of their commercial partners (especially that powerful new animal, the “official sponsor” or “global partner”). It will examine the relevance of what the authors, and others, argue amounts to the creation of commercially-driven monopolies in events, and it will briefly examine the implications and legitimacy of such monopolies in the context of the South African developmental state (with specific reference to the 2010 FIFA World Cup South Africa™ and FIFA’s aggressive anti-ambush marketing campaign, as well as developments re ambush marketing in other jurisdictions).¹⁴ The authors will consider some possible constitutional, competition law and intellectual property-law arguments in the balancing of narrow commercial interests against the public interest in the hosting of major sporting events.

Finally, Part 2 of the article will briefly examine a seemingly unrelated development in another jurisdiction, which, it will be submitted, may hold significant implications for this ongoing process of ever-increasing monopolization of events. The authors will examine a (at the time of writing) draft law in France, which envisages the creation of a “sports event organizer’s right” in the context of the regulation of sports betting. The authors will speculate to what extent such development might serve to create precedent or a model for international sports organizations to claim a “proprietary right to a spectacle” in the future, and how this might contribute to the further monopolization of events and of ring-fencing of the commercial and other value of such events.

Events like the Olympic Games and the football world cup have become powerful brands, and we must consider to what extent these brands that are so fundamentally based (and dependent) on the public’s support of the sport should be protected and advanced, apparently, with very few limitations and with scant regard for the rights and interests of members of the public or for wider societal and developmental goals in the domestic jurisdictions where these nomadic events may encamp at any given time.

2 *AMBUSH MARKETING OF SPORTING EVENTS: SPORTS GOVERNING BODIES 5 – AMBUSH MARKETERS 0*

2.1 *A brief overview of the practice(s) of ambush marketing*

Much has been written in recent years about ambush marketing in a number of jurisdictions, and we will only include a very brief summary here for those

¹⁴ With specific reference to the London 2012 Olympic Games – see the discussion in part 2 of this paper regarding the “London 2012 association right”.

readers who are less familiar with this phenomenon. Duthie¹⁵ has defined this practice as follows:

“‘Ambush marketing’ is the unauthorized trading off the goodwill or exposure of another’s event. It is a form of ‘free-riding’ where an advertiser seeks to associate itself with an event, or just share some of the event’s publicity, without paying for the right to do so.”

Johnson¹⁶ defines it as “a planned campaign by an organization to associate itself indirectly with an event in order to gain at least some of the recognition and benefits that are associated with being an official sponsor”. A more comprehensive description of the type of conduct involved is provided by Townley, Harrington and Couchman:¹⁷

“Ambush marketing, or parasitic marketing, consists, in the sports context, of the unauthorized association by businesses of their names, brands, products, or services with a sports event or competition through any one or more of a wide range of marketing activities. The association is unauthorized in the sense that the controller of the commercial rights of such an event, usually the relevant governing body, has neither sanctioned nor licensed it, either itself or through its commercial agents. The term *ambush* has been applied because of the tendency for such activities to be devised by competitors of official sponsors or suppliers of sports events and to take place during the build up to or during the event itself; thus maximum commercial impact is achieved. The activity is often carefully planned to take advantage of inadequacies in an event’s commercial program and real or apparent loopholes in the legal protection available to event owners and sponsors.”¹⁸

¹⁵ “It’s Just Not Cricket: Ambushing the Ambushers in South Africa” 2003 11(1) *Sport and the Law Journal* 171.

¹⁶ 7.

¹⁷ “The Legal and Practical Prevention of Ambush Marketing in Sports” 1998 15(4) *Psychology & Marketing* 333; and see also Vassallo, Blemaster and Werner “An International Look at Ambush Marketing” November-December 2005 95 *The Trademark Reporter* 1338 1339 *et seq.*

¹⁸ For further description of what constitutes ambush marketing, see also Chapter 2 (“Definition, Extent and Effects of Ambush Marketing”) in Scaria (ed) *Ambush Marketing: Game Within a Game* (2008) 28 *et seq.* The long-awaited Safety at Sports and Recreational Events Bill (the 2005 version – at the time of writing it appears that a significantly revised 2009 version of this Bill is in circulation, although to the authors’ knowledge at the time of writing this Bill has not yet been passed into law) contains provisions regarding ambush marketing of sports events. Ss 19 and 22 of the Bill provide for safety and security planning for events and security measures, amongst which are contained certain provisions relating to ambush marketing (*eg*, regarding a prohibited and restricted item policy in respect of access points, a spectator and vehicle search policy, and the enforcement of an ambush marketing policy within a stadium or venue and its precinct, which is designed to protect, amongst others, the proprietary and commercial interests of an event organizer and an accredited event sponsor). The Bill defines ambush marketing as follows: “[A]n intentional act or an attempt on the part of a person which utilizes or attempts to utilize the commercialization, publicity or public interest in an event arranged, organized or sponsored by others to obtain an unauthorized and unpaid for commercial benefit from, or association with, an event, without any official involvement or connection with such event.” Par 1.1.6 of the City of Johannesburg 2010 FIFA World Cup South Africa By-Laws (for broader discussion of these By-Laws, see Part 2 of this article) contains the following definition: “‘Ambush Marketing’ means marketing, promotional, advertising or public relations activity in words, sound or any other form, directly or indirectly relating to the Competition, and which claims or implies an association with the Competition and/or capitalizes or is intended to capitalise on an association with, or gains or is intended to gain a promotional benefit from it to the prejudice of any sponsor of, the Competition, but which is undertaken by a person

Ambush marketing practices are generally distinguished as taking one of two forms, namely association and intrusion cases.¹⁹ Ambush marketing by association occurs where a marketer misleads the public into thinking it is an authorized sponsor associated with an event (the ambush marketer's conduct is aimed at or has the effect of creating the impression in the minds of the public that the ambush marketer or his product or brand is in some way associated with the sporting event, most commonly an impression that it is an official sponsor of the event). Clearly, this type of ambush marketing would usually constitute (at least in theory) "passing off" in the traditional sense.²⁰ In the South African context, the 2006 FIFA World Cup in Germany saw an association ambush complaint by FIFA to the Advertising Standards Authority (hereinafter "ASA")²¹ against electronics giant LG Electronics (Pty) Ltd, which had run a competition in terms of which the winners could win a trip to the final of the FIFA World Cup in Germany. The competition was advertised with extensive use of allusions to the event, even though LG was not an official event sponsor. LG withdrew the allegedly offending promotional material and the matter was viewed by the ASA as resolved (without a finding on whether such conduct in fact constituted ambush marketing in terms of its Sponsorship Code).²²

Ambush marketing by intrusion occurs when a marketer makes use of the publicity surrounding an event to give exposure to its own brand, trademarks, *etcetera*. The ambush marketer attempts to ride on the coat-tails, as it were, of the event and of the interest and publicity it generates. This can be done in a myriad ways; for example, through in-store promotions, advertising in the different media, competitions offered to consumers, *etcetera* (*ie*, such conduct is not limited to activities at the relevant stadium or venue). One example of intrusion ambushing that is often cited is that of the unauthorized use of airspace at an event by for example using a branded blimp to "intrude" in such airspace and advertise a product or brand which has no official connection with the event or its official sponsors.

which has not been granted the right to promote an association with the Competition by FIFA and whose aforesaid activity has not been authorized by FIFA."

¹⁹ See Dean "Legal Aspects of Ambush Marketing" 11 February 2000 *Legal City* <http://www.legalcity.net> (accessed 2007-02-15); Kelbrick "Ambush Marketing and the Protection of the Trade Marks of International Sports Organizations – A Comparative View" 2008 41(1) *CILSA* 24 26.

²⁰ Scaria 29 describes ambush marketing, from a theoretical perspective, as referring to "a company's attempt to capitalize on the goodwill, reputation and popularity of a particular event by creating an association with it ..." – classic passing off language. See, more generally, the discussion in paragraph 2 2 5 below.

²¹ S 3.7 of the ASA's Sponsorship Code (available on the internet) defines ambush marketing as follows: "The attempt of an organization, product or brand to create the impression of being an official sponsor of an event or activity by affiliating itself with that event or activity without having paid the sponsorship rights-fee or being a party to the sponsorship contract."

²² Article 11.1 of Clause 10 of the ASA Sponsorship Code provides that "no organization, other than an official sponsor, may directly or by implication create an impression that its communications relate to a specific event or create an impression that they are an official sponsor of such event"; and Article 11.1.4 of Clause 10 provides that "[n]o organization, other than an official sponsor ... may launch event-related sales promotions to give the impression of sponsoring such event". See the article by Schimmel and Green "Ambushed by a Ticket?" June 2008 *Without Prejudice* 17-18.

Because intrusion ambushes do not require deception of the public, the burden of proof in intrusion cases may be considerably more difficult to discharge. However, at a more fundamental level, which is relevant to the question of whether or the extent to which legal regulation (especially by means of legislation) is appropriate, it should also be noted that cases of intrusion “ambushing” may in fact involve conduct that is not legally or ethically questionable.²³ As has been noted:

“Many writers regard the distinction between the narrow and broader definitions [i.e. including intrusion cases] of ambush marketing as important. Ambush marketing in the narrow sense commonly contravenes intellectual property and/or trade practices laws, giving a cause of action to the event organizer. In contrast, ambush marketing in the broad sense includes many activities that do not infringe any intellectual property rights or make any misrepresentation as to sponsorship. Furthermore, these activities may involve the use of rights that have been purchased legitimately and at considerable expense. Examples of this broader form of ambush marketing include sponsoring a participating team or athlete, sponsoring the stadium or broadcast, engaging in a campaign that coincides with the event, purchasing advertising time during or around the event broadcast, or giving away tickets in promotions or contests ... Given broader definitions of the phrase, the naming of conduct as ‘ambush marketing’ should not be seen as automatically suggesting that such activity is unethical or ‘wrong’. This is a crucial point, as the word ‘ambush’ may seem pejorative ... To the extent that government elects to intervene in these commercial activities and relationships, decisions need to be made about the appropriate level of legislative intervention.”²⁴

In fact, the person commonly credited with coining the term “ambush marketing”, Jerry Welsh,²⁵ was apparently at pains to acknowledge this aspect:

“Though today’s world considers ambush marketing as something akin to commercial theft, [Welsh] disagrees with this view and explains that in the world of modern marketing, sponsor and ambusher are not moral labels to be assigned by the self-appointed arbiters of ethics, but merely the names to be given to two different and complementary, though competing roles played by competitors vying for consumer loyalty and recognition in the same thematic space. According to him, the roots of ambush marketing can be found in the escalating prices and the ‘distressed imagery of category-exclusive sponsorships’²⁶

²³ Compare, *eg*, the finding of the Delhi High Court in India in the matter of *ICC Development (International) Ltd v Arvee Enterprises & Philips* 2003 (26) P.T.C. 245 (Del.), where Philips had offered ICC Cricket World Cup 2003 tickets in a promotional campaign. The court held that there was no likelihood of confusion that Philips was a sponsor of the event, and dismissed passing off and unfair trading claims. In respect of the practice of ambush marketing, the court held that this practice was distinguishable from passing off, as there is no element of deceit in ambush marketing but merely opportunistic commercial exploitation of an event. The court held that this is not contrary to the public interest, and that as long as an official sponsor’s trade marks are not used, ambush marketing is not illegal and in line with commercial advertising as free speech in terms of the Indian Constitution – see Vassallo *et al* November-December 2005 95 *The Trademark Reporter* 1347.

²⁴ See the *Ambush Marketing Legislation Review*, a report prepared by Frontier Economics Pty Ltd, Melbourne, for IP Australia and the Australian Government’s Department of Communications, Information Technology and the Arts (October 2007) 13-14.

²⁵ The marketing strategist who was manager of global marketing for American Express in the 1980s.

²⁶ As per Scaria 30.

Welsh has also been quoted as stating that competitors of official sponsors have “not only a right, but an obligation to shareholders to take advantage of [major] events”, and that “all this talk about unethical ambushing is ... intellectual rubbish and posturing by people who are sloppy marketers”.²⁷

In the context of South Africa and its anti-ambush marketing legislation,²⁸ it is important to note that marketing or promotional practices by business entities that, normally, would not be viewed as unethical or illegal but which may fall under the category of intrusion ambushing are prohibited and criminalized. Section 15A(2) of the Merchandise Marks Act²⁹ provides, in the context of the use of trade-marks in relation to protected events, that nobody may use a trade-mark “in relation to such event in a manner which is calculated to achieve publicity for that trade-mark and thereby to derive special promotional benefit from the event”. The reach of this provision (and of the potential criticism against its application to what may otherwise constitute perfectly legitimate conduct) should be clear. Also, there may be a “catch-22” type scenario at work in the context of an event such as the 2010 FIFA World Cup (which is such a protected event): The required elements for liability in terms of this provision, namely use of a mark “in relation to” an event, in a manner “calculated to achieve publicity” and to “derive special promotional benefit” from such event, might cast the net far too wide when considered against the backdrop of the publicity “carpet-bombing” by FIFA, sponsors, the local organizers and the South African government which has been such a feature of planning for the event since the awarding of the bid. Also, one must consider the potential liability of existing sponsors who engage in what may variously be referred to as conflict marketing or involvement in sub-category sponsorship (eg, an existing team or individual athlete sponsor, with vested rights in terms of existing sponsorship agreements).³⁰ While the point will be made below that event organizers can guard against such “ambush marketing” by means of contractual arrangements with participant teams *etcetera*, it should be clear that anti-ambush marketing measures such as the above-mentioned legislation can quite conceivably outlaw the legitimate exercise of contractual rights which such a sponsor may have paid for very dearly.

Too many commentators elsewhere have started to express doubts over the legitimacy of the apparently sacrosanct nature of the commercial interests of event organizers and sponsors for one to accept blindly the legitimacy of such stringent protection against, especially, “intrusion ambushers”. It should also be remembered – for what it’s worth – that a prime reason for the evolution of “ambush marketing” in the last few decades has been the adverse effect of rising sponsorship costs and developments in the practice of selling category exclusivity of sponsorships (*ie*, a number of

²⁷ Crow and Hoek 2003 14 *Marketing Bulletin* 5 (quoting from Meenaghan “Ambush Marketing – A Threat to Corporate Sponsorship” 1996 38 *Sloan Management Review* 103-113.

²⁸ See the discussion below and in Part 2 of this article.

²⁹ See below.

³⁰ See fn 44 below and the *Travellex* dispute referred to in fn 45 below.

sponsors who may in the past have paid actively for rights to sponsor events have found themselves out in the cold due to contractual requirements of exclusivity and the exclusion of potential competitors of top-line sponsors). It is important to consider the implications of strong anti-ambush marketing protection against the backdrop of the “grey zone” of illegitimacy of conduct that may constitute intrusion ambushing, in an evaluation of the legitimacy of legal protection against ambush marketing (especially in the form of such legislation). This issue will be considered in more detail in the second part of this article.³¹

Ambush marketing first came to prominence (following an attempt to ambush at the 1996 Comrades marathon) in South Africa during the 2003 ICC Cricket World Cup, which was officially sponsored by *inter alia* Pepsi. The event saw much-publicized instances of anti-ambush marketing measures aimed at protecting official event sponsors, which included the controversial instance of a spectator being escorted from a match at the Centurion Park stadium for opening a can of Coca Cola.³² Ironically, the situation in 2003 was diametrically opposite to what had happened at the 1996 cricket World Cup, where Coca-Cola was an official event sponsor and Pepsi launched a massive advertising campaign (with extensive use of the slogan “Nothing official about it”), which included concluding sponsorship agreements with individual players who took part in the event (*eg*, iconic Indian batsman Sachin Tendulkar). Events at the 1996 ICC World Cup came to be known as the “Cola wars”. While Coca-Cola was a sponsor of the event, hot air balloons were launched at cricket grounds bearing the branding of their rivals, Pepsi. Between that event and the 2003 World Cup, Pepsi had become one of cricket’s “Global Partners”, the top bracket of sponsors, by signing a seven-year deal with Rupert Murdoch’s Global Cricket Corporation.³³ As Pepsi’s conduct has been described – “the poacher had turned gamekeeper” – and the organizers of the 2003 event were obliged to stamp out ambush marketing in favour of event sponsors such as Pepsi.³⁴

As Cloete *et al* have observed,³⁵ the justification for legal measures to combat ambush marketing – that is, to protect the exclusivity of official sponsors’ rights and the often very substantial commercial outlay in associating with sporting events – is well illustrated with reference to the

³¹ See the discussion in Part 2 of this paper. Consider also, specifically, the discussion of the applicable South African legislation in paragraph 2.2.6 below: S 15A(2) of the Merchandise Marks Act 17 of 1941 specifically makes provision for prohibition of the ‘abuse’ of one’s own trade mark in respect of a designated event.

³² A Johannesburg businessman felt the sting of measures enforced in terms of the new legislation during the tournament at the match between Australia and India on 15 February 2003, when he was evicted from Centurion stadium for drinking Coca-Cola and refusing a request by security personnel to surrender cans of the soft drink (he was, however, subsequently readmitted to the stadium).

³³ The GCC had bought the sponsorship and television rights to ICC events as part of a seven-year deal at a cost of USD550 million.

³⁴ See Hartman *Ali: The Life of Ali Bacher* (2004) 417.

³⁵ Cloete, Cornelius, Blackshaw, Barrie, Le Roux, Singh and Wood *Introduction to Sports Law in South Africa* (2005) 179.

facts of the case of *Motor Racing Enterprises (Pty) Ltd (in liquidation) v NPS (Electronics) Ltd*.³⁶ The appellant was the organizer of the South African leg of the FIA's Formula 1 Grand Prix, and the respondent had agreed to sponsor the event at a cost of R22 million (payable in installments, which extended well beyond the date upon which the event was to take place). The respondent obtained naming rights, the exclusive right to be official sponsor of the race, and that all public references to the race were to indicate the respondent's sponsorship. The appellant, however, took no steps to ensure that public reference to the race referred to the respondent's sponsorship, and also allowed another sponsor to erect advertisements around the track that gave the impression that such sponsor was the official sponsor of the event. The appellant claimed an order for specific performance against the respondent for payment of the outstanding installments, and the respondent raised the defence of the *exceptio non adimpleti contractus*. The court upheld this defence on a finding that the parties' obligations in terms of the sponsorship contract were reciprocal. As Cloete *et al* observe, the end result was that the appellant was liquidated and South African motor sport suffered irreparable harm³⁷ (the country has to date never again hosted a Formula 1 race, although it appears at the time of writing that negotiations have been initiated by a motor sport development company, which was recently established under the auspices of the Gauteng provincial government, to re-introduce the South African Formula 1 Grand Prix at the Kyalami race-track in Johannesburg in the near future). Other examples abound of the impact that ambush marketing can have in respect of the promotional value derived by official sponsors in respect of major events.³⁸

At the time of writing it has been reported that FIFA's expert rights protection unit (established to police the 2010 World Cup event for ambush marketing transgressions) is reportedly investigating more than 300 cases of ambush marketing regarding this event³⁹ and FIFA has to date obtained a number of judgments against ambush marketers in South African courts.⁴⁰

2.2 The available legal bases for protection against ambush marketing

Protection against ambush marketing can be based on a number of common law grounds, on applicable legislation or on straightforward shrewd event planning. These include the following (which will only be evaluated briefly below):

³⁶ 1996 4 SA 950 (A).

³⁷ Cloete *et al* 179.

³⁸ Eg, Vassallo *et al* November-December 2005 95 *The Trademark Reporter* 1340, refer to a survey that showed that three out of five companies most associated with the 1994 Lillehammer Winter Olympics in Norway were not official sponsors, at a time that official sponsors were paying USD 40 million to be so associated with that event.

³⁹ From the report by Naik "Don't Try to Cash in on 2010, FIFA Warns" 3 October 2009 *The Saturday Star* <http://www.security.co.za/fullStory.asp?NewsId=14007> (accessed 2009-10-26).

⁴⁰ Which will be discussed in Part 2 of this article.

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- Regulation of rights to events in the founding documents of the relevant sports organization;
 - the use of contractual regulation (by means of the matrix of sponsorship and event management contracts surrounding an event, and the practice of “saturation sponsorship” by official event sponsors);
 - protection of relevant intellectual property (IP) rights related to the event;
 - ticketing terms and conditions;
 - venue security and (media) accreditation;
 - common-law passing off and unfair competition actions;
 - advertising and sponsorship codes of practice;
 - specific legislation (including umbrella event legislation and *sui generis* event protection); and
 - planning laws (and, for example, municipal by-laws).⁴¹

The following paragraph contains a few brief words on each of these possible bases for protection, by way of background to the critical evaluation of legal responses to ambush marketing (to be undertaken in Part 2 of this article).

2.2.1 Claim of rights in the founding documents of international sports organizations

An international sports governing body is empowered, through the monopoly system of governance which is such a fundamental characteristic of the “European Model” of sports organization,⁴² to claim rights in events which are organized under its auspices by its domestic member federations. As an example, Article 74 (entitled “Rights”) of FIFA’s Statutes⁴³ provides as follows:

“Article 72:

- 1 FIFA, its Members and the Confederations are the original owners of all of the rights emanating from competitions and other events coming under their respective jurisdiction, without any restrictions as to content, time, place and law. These rights include, among others, every kind of financial rights, audiovisual and radio recording, reproduction and broadcasting rights, multimedia rights, marketing and promotional rights and incorporeal rights such as emblems and rights arising under copyright law.

⁴¹ This last mechanism will not be examined here, but Part 2 of this article will include discussion of the ambush marketing provisions contained in the host city municipal By-Laws that will be in place for the 2010 FIFA World Cup South Africa™.

⁴² For discussion of the European Model and of its characteristics and consequences, see Louw “An Anomaly Tolerated by the Law: Examining the Nature and Legal Significance of the International Sports Governing Body” 2007 1 *South African Public Law* 211-255.

⁴³ The August 2009 version of the FIFA Statutes, currently in force at the time of writing. Article 75.1 of the FIFA Statutes provides that “FIFA, its Members and the Confederations are exclusively responsible for authorizing the distribution of image and sound and other data carriers of football matches and events coming under their respective jurisdiction, without any restrictions as to content, time, place and technical and legal aspects”.

- 2 The Executive Committee shall decide how and to what extent these rights are utilized and draw up special regulations to this end. The Executive Committee shall alone decide whether these rights shall be utilised exclusively, or jointly with a third party or entirely through a third party.”

The wide ambit of the rights claimed in terms of this provision should be obvious: Reference is made to “all of the rights emanating from competitions and other events”, to “every kind of financial rights” and “marketing and promotional rights”, and FIFA’s Executive Committee “shall alone decide” how these rights shall be utilized. However, it should be noted that such provisions are only binding on the member federations of the relevant sports organization. Such extensive rights as claimed in the statutes of a sports governing body cannot create legal obligations for third parties (for example, corporations and other business undertakings that have no contractual relationship with the relevant organization or its members). Accordingly, while seemingly significant, such provisions probably hold little sway over the potential conduct of ambush marketers who, by their very definition, have no association with the relevant event.

2 2 2 Contractual regulation of commercial rights to an event

Major sporting events generate a matrix of contracts between the relevant parties, including host nation (and city) agreements, sponsorship agreements, venue management agreements, participation agreements (between event organizers and participating teams or domestic federations), broadcasting rights agreements, *etcetera*. One means for sponsors and commercial partners to attempt exhaustively to ring-fence their commercial interests in an iron-clad web of contracts, is the practice of “saturation sponsorship” (that is, the process of event sponsors securing exclusive rights at all levels of the “stakeholder food chain”). In this way, sponsors acquire a broad portfolio of rights in respect of athletes, teams, event organizers and broadcasters. One component of this practice is ensuring that event regulations and participation agreements (for example, between the organizers of the event and participating teams) restrict the rights that participants may grant to their own sponsors,⁴⁴ including for example restricting the participants’ use and licensing of their image rights during or leading up to the event. Such arrangements are not always easy to implement and may lead to legal challenge from pre-event rights holders in terms of, for example, existing athlete or team sponsorship agreements.⁴⁵

⁴⁴ In order to avoid the negative effects of what is referred to as conflict marketing (*ie*, where publicity gained by *eg*, an official team sponsor detracts from the publicity derived by official event sponsors); while this practice involves official sponsors and is distinguishable from ambush marketing, its impact can be as damaging to event sponsors.

⁴⁵ Compare the ICC’s problems in the run-up to the 2003 ICC Cricket World Cup, in respect of individual players’ personal sponsorships (especially sub-continent players). Compare also the problems experienced in the dispute between the ICC and Cricket Australia in the run-up to the 2007 ICC Cricket World Cup in the Caribbean, regarding the position of Cricket Australia’s own exclusive team sponsor, Travelex (see the report of the ruling of the International Cricket Council’s Dispute Resolution Committee in *Cricket Australia v ICC Development (International) Ltd* May 2007 2 *World Sports Law Review* 61-75.

From the event organizer's perspective and in respect of broadcasting rights agreements (and, this issue will specifically be revisited in the forthcoming second part of this article), it is important to note that South African law (like other jurisdictions)⁴⁶ does not recognize a "proprietary right to a spectacle" in respect of sports events. While such a right to a sports event which is worthy and capable of protection against misappropriation appears to enjoy some form of recognition in the United States of America⁴⁷ and some civil-law jurisdictions provide a measure of assistance to event organizers by providing that copyright in sports broadcasts vests in the event organizer,⁴⁸ in South Africa the rights to broadcast a sporting event or to disseminate news regarding the results and action on the field of play must be protected by means of other mechanisms and/or through a combination of other, recognized, legal rights.⁴⁹ As has been explained in the context of English law, the development of a valuable and viable commercial programme around a sports event necessitates a foundational matrix of different rights, as follows:⁵⁰

- (i) Access rights to the venue: The event organizer must have the right to exclusive possession of the venue and must be able to control access to the venue (see below);
- (ii) contractual restrictions on participants and official event sponsors: Restrictions on participants are aimed mainly at ensuring that the commercial value of the event is not diluted by athletes' personal sponsorship or endorsement deals, while restrictions on official partners are aimed at ensuring that they do not overstep their own contractual rights nor inadvertently assist others in hijacking the goodwill in the event (for example, through ambush marketing); and
- (iii) the creation (by means of contract), protection and enforcement of copyright, trade-mark and other intellectual property rights that may subsist in the elements that go to make up a sports event.

⁴⁶ Notably the UK, Australia and Canada – compare *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) CLR 479; *Australian Broadcasting Corp v Lenah* (2001) 208 CLR 199; *National Hockey League v Pepsi-Cola Canada* (1995) 122 DLR (4th) 412; and see also Wise "A 'Property Rights' in a Sports Event Views of Different Jurisdictions" 1996 4(3) *Sport and the Law Journal* 63.

⁴⁷ On the basis of *International News Service v Associated Press* 248 US 215, 63 L Ed 211, 39 S Ct 68 (1918); *Pittsburgh Athletic Co v KQV Broadcasting Co* 24 F Supp 490 (WD Pa 1937); Lewis and Taylor *Sport: Law and Practice* (2003) 405, 583 and 679; and Johnson 2-3.

⁴⁸ Notably Spain, the Netherlands and France – see the discussion in Hewitt "Commercialization of Major Sports Events: Does the Law Help or Hinder the Event Organizer?" 2005 13(1) *Sport and the Law Journal* 32-33.

⁴⁹ Hewitt 2005 13(1) *Sport and the Law Journal* 32-33, discusses the failed lobby in England by the Association for the Protection of Copyright in Sports for the recognition of copyright in sports events similar to other types of 'works' under the applicable copyright legislation (eg, literary, artistic and musical works), which was rejected in the 1952 Gregory Report (a report of the Committee on Copyright Protection which led to the Copyright Act of 1965).

⁵⁰ See Lewis and Taylor 584.

The major problem for sponsors in respect of “saturation sponsorship” is, of course, the prohibitive cost involved.⁵¹ These rights can be (and usually are) very expensive; exclusivity carries a hefty price tag. It does, however, hold a number of advantages. For example, event (and title) sponsors can avoid the dangers of being upstaged by broadcast sponsors.⁵² In respect of applicable legislative protection in the relevant jurisdiction, other sponsors’ conduct in respect of individual participants or teams might not constitute ambush marketing in terms of the applicable legislation (that is, see section 15A of the Merchandise Marks Act in South Africa,⁵³ which prohibits showing a connection with or deriving publicity from an “event”). In such cases the protection afforded by means of contract might be of value.

Of course, it should be borne in mind that a major impediment to the use of contract to obtain all-encompassing protection against ambush marketing is the role of a principle which is firmly entrenched in South African law, namely privity of contract. Any commercial rights granted or licensed to a party to the relevant contract can only be enforced against the other parties to that contract; while such contracts may create or vest rights for purposes of determining *locus standi* in a civil action against ambush marketers, the contract *per se* does not provide grounds for a contractual claim in this regard.⁵⁴

⁵¹ Note also Scaria’s (30) observation on the practicalities involved: “It is virtually impossible for a sponsor to buy rights to all avenues leading to the public’s awareness of a given sponsorship property. In such situations, all except that which is specifically purchased is up for grabs and this is what ambush marketers capitalize on.”

⁵² Compare the events surrounding the 1991 IRB Rugby World Cup, where Sony was not the event sponsor but was perceived by the public to be the main event sponsor while it was only the sponsor of TV coverage of the event (and had paid much less for these rights than the event sponsors).

⁵³ See the discussion in paragraph 2 2 6 below.

⁵⁴ Apart from the enforcement of guarantees that an event organizer and rights holder may have provided in respect of the exclusivity of rights licensed to, for example, sponsors. It is debatable (and purely speculative here) whether ambush marketing activities might provide a sponsor party to a commercial agreement regarding an event with an alternative claim against the ambush marketer, relating to such contract. It is accepted in our law that “[a] delictual remedy is available to a party to a contract who complains that a third party has intentionally and without lawful justification induced another party to the contract to commit a breach thereof” (*Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 202; and see also *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 1 SA 209 (C)). Our courts generally require the defendant’s actions or conduct in interfering with the contractual rights of the plaintiff to be *intentional* (therefore with the clear intention to interfere with the parties’ contractual rights and cause the plaintiff damage) in order to found liability under this delictual action (*Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 1 SA 577 (A)). Just some examples of specific forms of conduct that may found liability under this delict are the intentional inducement, enticement or instigation of a contracting party to breach the agreement, bribing an employee of a competitor to sell trade secrets, or enticing employees of a competitor to leave its service. The inducement element may, of course, provide some problems to prove in such a scenario. Vassallo *et al* November-December 2005 95 *The Trademark Reporter* 1344-1345 note that ambush marketing may lead to liability in terms of the tort of tortious interference with contractual relations (in the United States). Although this tort has apparently not yet been utilized in this context, the authors refer to the Canadian case of *National Hockey League et al v Pepsi-Cola Canada Ltd* 70 BCLR (2d) 27 (1992), affirmed 59 CPR (3d) 216 (1995), where the possible application of a remedy of this nature was mentioned (although the court held that Pepsi’s conduct did not satisfy the

2.2.3 Control of access to event venues

Access control to events constitutes an effective way to combat some of the practices favoured by ambush marketers. Three aspects of such control can be distinguished, namely contractual control of access to broadcasters by means of broadcasting rights contracts, spectator access control through the means of ticket terms, and media accreditation.

The event organizer must have the right to exclusive possession of the venue (either through rights of ownership or through an agreement of lease or other basis), and must be able to control access to the venue, and to stop unauthorized persons entering the venue and exploiting the commercial value of the event. Where the event organizer is not owner of the venue (for example, as is the case with FIFA and the local stadia for the 2010 World Cup), its agreement with the local organizer or venue owner will include requirements to provide a “clean venue” for the duration of the event.⁵⁵ Access control includes the imposition of terms and conditions of entry (usually imposed by means of contractual provisions incorporated on tickets or by means of prominent notices at the venue) which may be utilized to prevent those who enter the venue from commercially exploiting e.g. footage of action on the field of play obtained through the use of private recording or broadcasting equipment (and also, increasingly, to prohibit ambush marketing, as was the case in respect of ticket terms, for example, at the ICC Cricket World Cup 2007 and the A1 Grand Prix World Cup of Motorsport event in Malaysia).⁵⁶ Such control of access rights to the venue may include accreditation of members of the media or of, for example, sports photographers,⁵⁷ and in the absence of proper contractual control event

requirements for the tort in light of the official sponsor (Coca Cola)’s limited contractual rights on the facts).

⁵⁵ Compare the position in respect of the Ellis Park stadium in Johannesburg. It was reported in June 2008 that the most lucrative stadium-naming rights deal to date in South Africa had been concluded (apparently following two years of negotiation) in respect of the historic Ellis Park rugby stadium, which is now known as the Coca Cola Park stadium. Coca Cola International had apparently paid ZAR 45 million for the naming rights in a four-year deal. The deal does not include the 2010 FIFA World Cup South Africa™, as FIFA has prohibited the use of corporate names for stadia during the event (corporate use will be interrupted during the Exclusive-Use Period when FIFA regulations require a “clean” stadium free of non-FIFA sponsor advertising and marketing rights in terms of the agreement between FIFA and the South African bid committee, and corporate sponsors will not be compensated by FIFA in this regard) – see the report by Moholola “Blow to Corporate Stadium Names” 7 March 2007 *The Sowetan*.

⁵⁶ Clause 14 of the standard Ticket Terms and Conditions for this event, which was held at the Sepang International Circuit, stated that “the Ticket Holder shall not engage in any form of Ambush Marketing (Ambush Marketing is an activity by a party which utilizes the publicity value of an event without having any official involvement or connection with the event) and shall not breach or infringe the rights of any sponsors, suppliers, broadcasters or other parties commercially associated with the event or the venue, nor conduct any unauthorized promotions or other commercial activity”.

⁵⁷ The International Rugby Board’s “draconian” media accreditation rules for the 2007 IRB Rugby World Cup in France came in for much criticism by international press freedom groups. At the time of writing it has been reported that FIFA and local South African media are locked in a stand-off over restrictive terms and conditions imposed by FIFA in respect of media accreditation for the 2010 World Cup event. At issue appear to be provisions in the

organizers may come unstuck and find little sympathy from the law in the event of trespassers.⁵⁸

While it should be remembered that our law requires that such imposed terms as contained in tickets or notices should be clearly brought to the attention of spectators at the time of the purchase of the tickets (for example, reasonable steps should be taken by the event organizer),⁵⁹ such ticket terms can provide event organizers with a powerful tool to combat ambush marketing (or for other related purposes⁶⁰). While individual spectators will rarely engage in attempts to ambush an event, shrewd marketers can use (and have done so in the past) groups of spectators in an ambush marketing campaign. Examples are beermaker Bavaria's "orange lederhosen" campaign amongst Dutch football fans at the 2006 FIFA World Cup in Germany (and the similar Bavaria-sponsored stunt at one of the early matches of the 2010 FIFA World Cup⁶¹), and the practice of "message on hold" advertising (where fans are paid to hold up banners or other forms of messages containing advertising for competitor brands, *etcetera*).⁶² Ticket terms and conditions can also be used to found a basis for cancellation of tickets used in unauthorized competitions (for example, where a non-event sponsor offers tickets to an event as a prize and impliedly creates an impression of association with the event) or to found breach of contract claims against such competition organizers.⁶³

accreditation agreement that would bind publications to the same rules that would bind journalists attending matches and official FIFA events as well as a clause providing that behaviour harmful to FIFA or the Local Organising Committee can be punished by summary withdrawal of accreditation (from a report on www.legalbrief.co.za – 2009-11-25). For more on media accreditation to major sporting events, see the discussion on the role of the fundamental right to freedom of expression in part 2 of this article.

⁵⁸ As in the old English case of *Sports and General Press Agency v Our Dogs Publishing Co* [1917] 2 KB 125 – see Hewitt 2005 13(1) *Sport and the Law Journal* 34.

⁵⁹ See *King's Car Hire v Wakeling* 1970 4 SA 640 (N); *Bok Clothing Manufacturers (Pty) Ltd v Lady Land Ltd* 1982 2 SA 565 (C); and *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (A).

⁶⁰ A popular ambush technique in the United States is to promote a sweepstakes in which event tickets are prizes. To prevent this, the National Collegiate Athletic Association (NCAA) issues tickets to its annual basketball tournament games as revocable licences. Under the terms printed on the back, the ticket may be revoked if it is used as a sweepstakes prize without the NCAA's permission. The NCAA brought state law breach of contract and unfair competition claims against a company that nonetheless gave away the tickets as part of a promotion, but the parties settled before the merits of this approach could be determined.

⁶¹ Which will be discussed briefly in the forthcoming Part 3 of this article.

⁶² See Johnson 11.

⁶³ Vassallo *et al* November-December 2005 95 *The Trademark Reporter* 1341, discuss the argument pursued by the relevant sports event organizer in the matter of *NCAA v Coors Brewing Co*. 2002 US Dist. LEXIS 21059 (S.D. Ind. October 25, 2002), where Coors had used NCAA Men's Basketball tournament tickets as a prize in a promotional campaign. The NCAA claimed that this constituted breach of a revocable licence in light of the wording on the tickets (the matter was eventually settled). In respect of the 210 FIFA World Cup, see Schimmel and Green June 2008 *Without Prejudice* 17:

"FIFA has strict processes around the purchase of tickets, so tickets that are resold, or given away in unauthorized competitions, may well be cancelled. This is because their use is against the General Terms and Conditions relating to the ticket sale, which will have been signed by the person purchasing the ticket. The innocent consumer who believes that he or she has won a ticket to a match may well be

Finally, related to the imposition of contract terms by means of ticket terms or notices, it should be noted that potential ambush marketers may of course also elect to make use of disclaimers in a promotional campaign regarding their lack of official sponsor-status, as a possible means to avoid liability for ambush marketing. The potential efficacy of such disclaimers, however, is open to some doubt.⁶⁴

2 2 4 Advertising and sponsorship codes of practice

Section 3.1 of the Advertising Standards Authority of South Africa (ASA)'s *Sponsorship Code* (a code of conduct for those engaged in sponsorship in *inter alia* sport)⁶⁵ defines "sponsorship" as follows:

"Sponsorship is a form of marketing communication whereby a sponsor contractually provides financial and/or other support to an organization, individual, team, activity, event and/or broadcast in return for rights to use the sponsor's name and logo in connection with a sponsored event, activity, team, individual, organization or broadcast. The objective of investing in sponsorship is to create a positive association between a sponsor's image, product or brand and a sponsored event or activity, team, individual, organization or broadcast, within the sponsor's target market in order to attain marketing and corporate objectives."

The ASA is an independent body established and funded by the advertising industry "to ensure that its system of self-regulation works in the interests of the public". The ASA runs a Sponsorship Dispute Resolution Committee and a Sponsorship Appeals Committee, which consists of members of the signatories to the Code within the advertising industry, and rulings are made by peers. While the Code is not legally enforceable, the ASA may advise persons of their rights and obligations. Rulings by the ASA or a Committee may include orders for the withdrawal of advertising as well as other sanctions on members of the industry (eg, withholding advertising space or referral to a disciplinary hearing).⁶⁶ While this code of conduct is therefore hardly a primary weapon in the arsenal of sponsors, who will need to enforce their rights through the applicable branch of intellectual property law (for example, copyright or trade-mark protection), common-law actions (for example, in cases of passing off) or actions for breach of contract, it does provide a possible avenue for action against persons or organizations within the advertising industry in cases of questionable practices relating to sports sponsorship. This may include cases of ambush marketing.

The ASA hears an average of 4 000 complaints per year, of which approximately 96% are brought by members of the public, and 4% from competitors of business undertakings. Roughly 47% of such complaints

turned away at the stadium. Hence, the initial advertising for the competition could be regarded as misleading."

It was reported on 24 April 2009 that regulations prohibiting the unauthorized promotion and resale of tickets for the 2010 FIFA World Cup had been proclaimed.

⁶⁴ See Vassallo *et al* November-December 2005 95 *The Trademark Reporter* 1355.

⁶⁵ The Code is available on the ASA's web site <http://www.asasa.org.za>.

⁶⁶ See, generally, the provisions of the Code.

relate to instances of alleged misleading claims in advertising. The ASA in 2008 heard a complaint related to (sports) sponsorship (in terms of its Sponsorship Code) in football. The dispute arose out of an advertisement by mobile phone network MTN, which ran a newspaper advertisement during 2007 with the bold heading "Turning Young Men into Bafana Bafana".⁶⁷ Rival mobile telephone network Vodacom, the official national team sponsor, brought a complaint against MTN, claiming that the advertisement infringed Vodacom's sponsorship rights which it had obtained from the SA Football Association (SAFA). It was also alleged that SAFA had registered the word "Bafana Bafana" as a trade-mark for mobile phone services and that Vodacom had been given the right to use the mark in advertising, and that MTN's advertisement constituted infringement of such trade-mark.

The ASA ruled against MTN (which was not an official football sponsor associated with the national team), and the ruling was taken on appeal to the ASA's Sponsorship Appeals Committee. The Appeals Committee upheld the ruling in May 2008, finding that MTN's conduct implied a joint sponsorship of the national football team by MTN and Vodacom, and as such constituted ambush marketing.⁶⁸ The Committee held that MTN was in breach of the Sponsorship Code's provision regarding "Imitation and Confusion", which provides that "imitation of the representation of other sponsorships should be avoided if this misleads or generates confusion, even when applied to non-competitive products, companies or events".

The Committee's ruling has been criticized as being confusing; for example, the Committee's finding that Vodacom could not claim an exclusive right to the use of the words "Bafana Bafana", but that a competitor in the same industry was not entitled to use those words to promote its own event.⁶⁹ It also appears that the Committee ruled that sponsorship is under no statutory control, but solely under the control of the ASA Sponsorship Code, which ignores the role of the relevant ambush marketing legislation.⁷⁰

It is debatable to what extent the ASA Sponsorship Code may serve to address instances of illegitimate sports sponsorship activities in future and, specifically, to what extent its available processes for lodging complaints will serve as a satisfactory avenue for redress for those whose commercial or other interests are affected by such sponsorship conduct or activities.⁷¹

⁶⁷ Referring to the popular nickname of the national football team (and translated, roughly, as "our boys").

⁶⁸ From a briefing by Ms Lillian Mlambo, ASA Communications Manager, Cape Town, 23 June 2008.

⁶⁹ From a report available on *Marketingweb* 5 June 2008.

⁷⁰ Such as the Merchandise Marks Act, 1941 (as amended), which is discussed below.

⁷¹ In November 2009 the ASA rejected a claim in terms of its Advertising Code by SA Rugby against beermaker Windhoek Lager, relating to the use of the (national) colours green and gold in its advertising (and reference to Windhoek Lager as "the green and gold beer"). SA Rugby had claimed that Windhoek had attempted to create the impression of an association with the national team, the Springboks, while Castle Lager had been the official sponsor since 1992. The ASA rejected the claim but advised SA Rugby to submit a claim in terms of the ASA Sponsorship Code. It is expected that, in line with the earlier finding in the Bafana Bafana matter, Windhoek's conduct will probably be found to contravene the Sponsorship Code's "Imitation and Confusion" provisions.

Industry watchdogs such as the ASA are sometimes viewed as mostly toothless bodies, and their role in respect of combating ambush marketing (especially in the light of the other possible measures that are available to sponsors, sports governing bodies and commercial partners) might be a marginal one.

2.2.5 Intellectual property rights and common-law unlawful competition protection

Very little will be said here regarding these two very important potential sources of remedies against ambush marketing, as both intellectual property (IP) rights protection and the common-law action for unlawful competition (specifically passing off) will be examined in more detail in Part 2 of this article, in the context of evaluating the legitimacy of legislative anti-ambush marketing protection in different jurisdictions.

Crow and Hoek⁷² have identified the fact that intellectual property protection against ambush marketing has a limited role in many cases, especially when event organizers or sponsors are confronted with the more imaginative of “ambush” marketing strategies:

“Before the introduction of specific legislation to address the potential for ambush marketing, event owners and sponsors had to rely on trade-mark and fair trading statutes. However, very few ambushers use the exact logos or insignia of the event owner; instead, ambushers typically create alternative devices that connote the event or team without breaching registered trade-marks. The New Zealand ‘Ring Ring’ case⁷³ illustrates the imaginative use of a visual device that, on close reading clearly refers to the Olympic Ring symbol... Similarly, Pepsi’s use of [National Hockey League] teams’ home towns,⁷⁴ instead of the team names themselves, avoided breaching trade-marked names.”

In other cases, of course, where ambush marketers clearly misappropriate intellectual property or infringe on IP rights of event organizers or sponsors,

⁷² 2003 14 *Marketing Bulletin* 11 (also available <http://marketing-bulletin.massey.ac.nz>).

⁷³ In the parody case of *New Zealand Olympic and Commonwealth Games Association, Inc v Telecom New Zealand* (1996) F.S.R. 757 the New Zealand Olympic Association (NZOA) sought an action against Telecom New Zealand regarding one of its highly publicized advertisements. The advertisement, which was published in several magazines and newspapers, featured the word “Ring” in positions strikingly similar to those of the five rings of the Olympic symbol, in the following manner:

**Ring Ring Ring
Ring Ring**

(The word “ring” was used as a play on the ringing of a telephone, in light of the advertiser’s product.) Beneath the word arrangement was the slogan, “With Telecom mobile, you can take your own phone to the Olympics.” The NZOA alleged that the advertisement amounted to passing off because it quite clearly suggested a falsified association between Telecom and the Olympics. The court, in adjudicating upon the issue of passing off, found that the typical newspaper reader tended to browse advertisements and would not read them in a closely focused way. Accordingly, the advert would simply be mildly amusing and seem like a cartoon or clever device to the reader. Further it was held that it is “a long way from brief amusement to an assumption that this play on the Olympic five circles must have been with the authority of the Olympic organization, or through sponsorship of the Olympics”.

⁷⁴ See the *National Hockey League* case referred to in fn 52 above.

relief may be available in terms of such IP rights, in South Africa in terms of mainly the Trade Marks Act⁷⁵ and the Copyright Act.⁷⁶ Organizations such as FIFA have thus prioritized its programme to register trade-marks and otherwise protect the IP rights in its logos, emblems etc.⁷⁷ Generally, event organizers are encouraged to obtain IP protection for relevant material such as emblems, logos, anthems, official event mascots, *etcetera*, through, for example, trade-mark or design registration. Upon acquisition of such rights, organizers can then license the IP for use by official sponsors in terms of the relevant sponsorship agreements.

We will not examine the requirements for registration of trade-marks or the relevant infringement provisions of the South African legislation here, nor the copyright protection of, for example, symbols (or the *sui generis* protection that is available elsewhere for certain well-known symbols such as the Olympic Rings).⁷⁸ The reader is referred to detailed discussion elsewhere.⁷⁹

⁷⁵ 194 of 1993.

⁷⁶ 98 of 1978.

⁷⁷ Compare the following description of initiatives in this regard as available on FIFA's web site <http://www.fifa.com/aboutfifa/marketing/marketing/rightsprotection/index.html>:

"After its sporadic beginnings in 1994 with 258 cases across 39 countries, the problem [of ambush marketing and abuse of IP] first became a major concern when the 1998 FIFA World Cup™ was held in France and 773 infringements of registered marks were discovered in 47 countries. Eight years on, 3,300 rights infringements were uncovered in 84 countries in relation to the 2006 FIFA World Cup™. By contrast, when the 2002 event took place in Japan and Korea, there had been 1,884 cases in 94 countries, and with three-and-a-half years to go until the 2010 FIFA World Cup™, there have already been 127 cases of rights abuses, 70% of them in the host nation, South Africa. 19 of these incidents related to counterfeit products that have been confiscated by South African customs, thus illustrating the efficiency of FIFA's rights protection programme ... FIFA has been implementing its rights protection programme in close collaboration with various authorities – within the host nation and elsewhere – including police forces, customs authorities, patent offices and public prosecutors. More than 150 international specialists help the FIFA rights protection team to register marks and protect them at local level ... FIFA's rights protection programme is founded on national and international mark protection laws and anti-trust laws. The trademarks registered by FIFA bear the ™ insignia to make it easier for users around the globe to recognize that these marks are protected. FIFA has registered a raft of picture and word marks for its many competitions – no easy or cheap undertaking. For the Official Emblem of the 2010 FIFA World Cup™, a total of 1,808 commercial samples were checked in a range of markets so as to avoid any nasty and costly surprises after the mark's registration ... Following months of exchanges between top international legal specialists on intellectual property, it was finally possible to register the definitive design with the relevant patent offices in May 2006 – just before the 2006 FIFA World Cup™ kicked off in Germany. The Official Emblem that was publicly unveiled on 7 July 2006 has since been protected in an unprecedented 153 countries and in several hundred product categories. By comparison, the 'laughing faces' emblem of the 2006 FIFA World Cup™ was protected in 124 nations. Meanwhile, the FIFA World Cup Trophy, the most recognizable sporting trophy in the world, has over 700 mark protection entries in 134 countries."

⁷⁸ Compare the protection of the Olympic symbol in terms of the Nairobi Treaty on the Protection of the Olympic Symbol, 1980, which is administered by the World Intellectual Property Organization (WIPO) – for more on this treaty, see Johnson 99 *et seq.*

⁷⁹ See Johnson Chapters 2 and 3; Kelbrick 2008 41(1) *CILSA* 41 *et seq.*; and see also Chapter 3 in Scaria.

Mention has been made above of the fact that ambush marketing (especially association ambushes) will often constitute passing off under the common law. Where an ambush marketer attempts to deceive the public into believing that it is associated with an event, the event organizer or official sponsor will often have a remedy if it is able to show “the classical trinity of reputation (or goodwill), misrepresentation and damage”.⁸⁰ As the traditional formulation of the wrong of passing off by the then Appellate Division in *Capital Estate and General Agencies (Pty) Ltd v Holiday Inns Inc*⁸¹ provides:

“The wrong known as passing off consists in a representation by one person that his business (or merchandise, as the case may be) is that of another, or that it is associated with that of another, and, in order to determine whether a representation amounts to a passing off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with, that of another ... Whether there is a reasonable likelihood of such confusion arising is, of course, a question of fact which will have to be determined in the light of the circumstances of each case.”

The relevance of the passing off action in the context of ambush marketing is well illustrated by the 1994 judgment of the (then) Transvaal Provincial Division of the High Court in the case of *Federation Internationale de Football Association (FIFA) v Bartlett*.⁸² In this matter FIFA, along with a number of foreign companies involved in the licensing of trade-marks, emblems and other intellectual property associated with the football World Cup, sought relief against the respondent, Bartlett, who had designed a trade-mark in 1965 which consisted of the words “world cup” superimposed on a map of the world device. In 1969 Bartlett had registered the trade-mark in the South African trade-marks registry, in class 25 (for use in respect of “men’s clothing and footwear”) and in class 28 (in respect of “soccer equipment”). In 1989 Bartlett assigned the trade-marks with goodwill to a company of which he was a director, and also afforded the right to exploit the trade-marks between June 1993 and December 1994 to a sportswear marketing and manufacturing company.

The applicants alleged that Bartlett and the other respondents had embarked on a campaign of unlawful conduct in South Africa which was calculated to cause serious irreparable damage to them. It was alleged that the respondents were, by their conduct and in certain correspondence, making misrepresentations to the effect that they held the licensing rights in South Africa in respect of World Cup USA 1994, and that Bartlett was attempting to extract commission and royalty payments from the applicants’ sponsors and sub-licensees. The applicants sought (*inter alia*) the following relief:

⁸⁰ As per Harms JA in *Caterham Car Sales and Coach Works Ltd v Birkin Cars (Pty) Ltd* 1998 3 SA 938 (SCA). For further discussion of the passing off action in the context of ambush marketing, see Johnson par 3-03 to 3-22; and Scaria 67-76.

⁸¹ 1977 2 SA 916 (A) 929; and see also *Premier Trading Co (Pty) Ltd v Sporttopia (Pty) Ltd* 2000 3 SA 259 (SCA).

⁸² 1994 4 SA 722 (TPD); see the brief discussion of this case by Kelbrick 2008 41(1) *CILSA* 32; and see also discussion in the forthcoming part 3 of this article regarding the matter of *FIFA v Metcash Trading Africa (Pty) Ltd* [2009] ZAGPPHC 123.

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- (i) An interdict based on passing-off and unlawful competition;
 - (ii) an order in terms of section 18 of the (then applicable) Trade Marks Act⁸³ to the effect that the words “world cup” contain “matter common to the trade or otherwise of a non-distinctive character”. The applicants sought an order to the effect that an amendment be made of the registered trade-marks by adding a disclaimer stating that “[r]egistration of the trade-mark shall give no right to the exclusive use of the words ‘world cup’ separately and apart from the mark”; and
 - (iii) (in the alternative), an order for the expungement of the Bartlett trade-marks from the trade-marks register on the grounds of non-use in terms of the (then applicable) section 36(1)(b) of the Trade Marks Act.

The court, in evaluating the evidence in respect of the claim based on unlawful competition, evaluated the state of South African law at the time with regard to the practice of character merchandising. The same court had in 1981, in the case of *Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd*,⁸⁴ held that character merchandising was not so well known in South Africa that the court could “without proper evidence in this regard assume that the man in the street will have any knowledge thereof”. In *Bartlett*, the court by way of Joffe J held that markets may have changed in the years since *Lorimar*, and that a mass of evidence was available to conclude that character merchandising had taken hold in South Africa and that the man in the street would have knowledge thereof and would make the link between the merchandising property and the events or circumstances which made it famous (and that such link is established by licensing or a licence).⁸⁵ The court described the practice of character merchandising as follows:

“Character merchandising is defined as being the business of merchandising popular names, characters and insignia in order to enhance the sales of consumer products in relation to which such names and characters are used ... The association of a famous person or character with a consumer product can boost that product’s sales considerably. The fame and popularity of the name or character in question enhances the desirability of the product from the consumer’s point of view. The association between the name or character, which can be referred to as the ‘merchandising property’, and the consumer product is usually created by depicting the merchandising product prominently on the product. A typical merchandising product is the well-known cartoon character Mickey Mouse. As the proprietor of the merchandising property has already invested substantial time and money in developing and popularizing such character, and it is the fame and desirability of the merchandising property which will promote the sale of the goods to which it is applied, the proprietor of the merchandising property charges a royalty of licence fee for the use of his merchandising property. The royalty is payable in terms of a licence agreement under which the owner of the merchandising property authorizes the licensee to utilize the merchandising property in relation to his goods ... It appears that the consumer makes a connection and an

⁸³ 62 of 1963. This Act was replaced by the Trade Marks Act 194 of 1993.

⁸⁴ 1981 3 SA 1129 (T).

⁸⁵ *Federation Internationale de Football Association (FIFA) v Bartlett supra* 738B.

association between the character and its creator or owner and the products featuring the character.”⁸⁶

The court continued to hold as follows:

“Although not constituting character merchandising in the strict sense, licensing the use of properties such as the Barcelona Olympic Games logo, the Olympic rings device, the Davis Cup tennis logo and logos associated with other major international sporting events, such as the World Cup soccer tournament, can be regarded as character merchandising in the broad sense. [W]hen an event like the World Cup soccer tournament is in the public eye, use of the insignia symbolizing such an event in relation to clothing and similar goods will cause the public to believe that such goods have a trade connection with the events symbolized by the insignia. A link is established between the goods featuring the merchandising property and the person who or entity which is the original source of the material which launched the merchandising property on its path to fame and fortune.”⁸⁷

On this basis, the court found that the respondents’ character merchandising conduct *in casu* constituted the delict of passing off, with reference to the definition of passing off as formulated in the earlier case *Capital Estate* case.⁸⁸ The court reiterated that the unlawfulness of passing off, as a form of wrongful competition, is to be found in the fact that “it results, or is calculated to result, in the improper filching of another’s trade and an improper infringement of his goodwill and/or because it may cause injury to the other’s trade reputation”.⁸⁹ On the basis of this the court held that the respondents were guilty of passing off and unlawful competition, sufficient to grant the order claimed by the applicants.⁹⁰

“The evidence clearly established that the applicants and their licensees have a reputation and goodwill in South Africa. This is established by the fact that various prominent retailers ... are anxious to obtain and pay for licences from the applicants for the purpose of manufacturing and marketing clothing bearing the World Cup insignia. Furthermore, by reason of the fact that applicants are engaged in character merchandising, it is sufficient to create in the public’s mind a link between the merchandising product and the applicants. As a result of the conduct of [respondents] the applicants are likely to suffer injury or damage. Firstly, the applicants and their licensees are likely to lose revenue and, secondly, because of the uncertainty created by their conduct, potential licensees are refraining from entering into licensing agreements with the applicants, thereby depriving the applicants of income.”

Accordingly, the court made an order prohibiting the respondents from using the words “world cup” together with the words “1994” and/or “’94” and/or “America” and/or “USA”. The court’s further findings regarding the respondents’ use of the registered trade-marks and of copyright infringement will not be discussed here.

The authors will examine further the relevance of the unlawful competition and passing-off actions in the ambush marketing context in part 2 of this

⁸⁶ *Federation Internationale de Football Association (FIFA) v Bartlett supra* 736E-J.

⁸⁷ *Federation Internationale de Football Association (FIFA) v Bartlett supra* 737B-D.

⁸⁸ *Supra*.

⁸⁹ With reference to *Brian Boswell Circus (Pty) Ltd v Boswell Wilkie Circus (Pty) Ltd* 1985 4 SA 466 (A).

⁹⁰ *Federation Internationale de Football Association (FIFA) v Bartlett supra* 739I-740B.

article, in an evaluation of FIFA's anti-ambush marketing campaign in respect of the 2010 World Cup.

2.2.6 *The applicable anti-ambush marketing legislation in South Africa*

In the run-up to the ICC Cricket World Cup South Africa in 2003 (and under reported pressure from the ICC), South Africa enacted legislation (by means of rather far-reaching amendments to existing legislation) specifically to deal with ambush marketing.⁹¹ In passing, it is worth remarking that the potential pressure to guarantee effective anti-ambush marketing measures that may be exacted by international sports governing bodies over aspirant host cities or even national governments is very real, and may constitute a metaphorical elephant in the corner at many a venue where bids are negotiated or adjudicated. The New Zealand Rugby Football Union failed to secure co-hosting rights to the 2003 IRB Rugby World Cup due to its inability to guarantee "clean stadia" for the event to the IRB;⁹² it is interesting to note that New Zealand subsequently passed much-criticized and very extensive anti-ambush marketing legislation in the form of the Major Events Management Act, 2007.⁹³

The South African legislation can be characterised as "umbrella legislation" (that is, non-event-specific⁹⁴), as opposed to *sui generis*, event-specific legislation that has been passed in other jurisdictions in recent years.⁹⁵

⁹¹ According to one of the drafters of the relevant legislation (the Merchandise Marks Amendment Act, see below), the relevant legislation had originally been prepared with a view to the 1995 IRB Rugby World Cup, but had not found favour with the powers that be and was eventually only passed prior to the 2003 cricket World Cup – from a note posted by Dr Owen Dean on the afro-ip.blogspot (at the time of writing available on the internet <http://afro-ip.blogspot.com/2009/10/fifa-v-metcash-owen-deans-response.html>).

⁹² See Crow and Hoek 2003 14 *Marketing Bulletin* 4.

⁹³ As part of New Zealand's successful bids to host the 2011 Rugby World Cup and the 2015 ICC Cricket World Cup a commitment was given to ensure adequate provisions were in place to protect sponsors. Since the promulgation of the Act three events have to date been identified as protected events, namely the 2011 Rugby World Cup, the FIFA U-17 Women's World Cup and the FIBA U-19 World Championship – see the report by Ironside "Ambush Marketing Law Passes First Test" <http://www.baldwins.com/ambush-marketing-law-passes-first-test> (posted 2009-09-04). The Hon Trevor Mallard, New Zealand's Minister for the Rugby World Cup, was quoted as explaining the need for this legislation as follows:

"[T]he legislation will make New Zealand more attractive to major event organizers. Without it, New Zealand's success when bidding for similar events in the future, may be at risk. It is impossible to host major events these days without enormous financial contributions from large sponsors. These companies will not provide sponsorship dollars if others are allowed to manipulate public perceptions by falsely suggesting a link with these events."

From the undated (last updated 2009-09-16) report entitled "Proposed Ambush Marketing Bill Explained" <http://www.med.govt.nz/templates/MultipageDocumentTOC41944.aspx>.

⁹⁴ Compare also the Major Events Management Act (35 of 2007) (New Zealand).

⁹⁵ Eg, compare the Sydney 2000 Games (Indicia and Images) Protection Act, 1996 (Australia), Law Decree 86/2004 of April 17, 2004 (on the protection of the insignia of "EURO 2004") (Portugal); Law of August 17, 2005 No.167 (Measures for the protection of the Olympic symbol in relation to the Turin 2006 Olympics) (Italy); the London 2012 Olympic Games and

In respect of specifically association ambush marketing, the Trade Practices Amendment Act 26 of 2001 inserted a new section 9(d) into the Trade Practices Act,⁹⁶ whose provision prohibits a person from making, publishing or displaying false or misleading statements, communications or advertisements which suggest or imply a contractual or other connection with a sponsored event or the person sponsoring such event.⁹⁷ The application of this provision is wide, as is illustrated by section 1 of the Act, which defines an “advertisement” to mean the following:

“Any written, illustrated, visual or other descriptive material or oral statement, communication or representation or reference distributed to members of the public or brought to their notice in any manner whatsoever and which is intended to –

- (a) promote the sale or leasing of goods or encourage the use thereof or draw attention to the nature, properties, advantages or uses of goods or to the manner in, condition on or prices at which goods may be purchased, leased or otherwise acquired; or
- (b) promote or encourage the use of any service or draw attention to the nature, properties, advantages or uses of any service or the manner in, conditions on or prices at which any services is rendered or provided.”

More generally (and in order to also address specifically intrusion ambush marketing), the Merchandise Marks Amendment Act 61 of 2002 was promulgated in order to increase the powers of the Minister to regulate the use of trade-marks in respect of *inter alia* sporting events. This amendment followed from (and incorporated) draft legislation which was formulated by the Association of Marketers and submitted to the Department of Sport and Recreation and the Department of Trade and Industry. The main thrust of the Amendment Act was to amend the definition of an “event”, which is defined to include the following:⁹⁸

“[A]ny exhibition, show or competition of a sporting, recreational or entertainment nature which is –

- (a) held or to be held in public;
 - (b) likely to attract the attention of the public or to be newsworthy; and
 - (c) financed or subsidized by commercial sponsorship,
- and includes any broadcast⁹⁹ of such exhibition, show or competition.”

Paralympics Games Act, 2006 (UK); and the ICC Cricket World Cup West Indies 2007 Act, 28 of 2006 (Parliament of the Republic of Trinidad & Tobago, 1 November 2006).

⁹⁶ 76 of 1976.

⁹⁷ Contravention of s 9(d) constitutes a criminal offence and is subject to hefty fines or imprisonment.

⁹⁸ S 1(a) of the Amendment Act. S 1(b) of the Amendment Act provides for the insertion of the definition of a “protected event” (namely an event designated as such by the Minister in terms of section 15A).

⁹⁹ It seems that specific inclusion of “broadcast” in this provision would imply that a competing (or any other) marketer can be prohibited from sponsoring the broadcast of an event; and also from buying advertising slots during such a broadcast (see above definition as read with s 15A (2) and 15A (3) below). Compare the events surrounding the 1991 IRB rugby World Cup as referred to in the text above.

The Amendment Act inserted section 15A in the Merchandise Marks Act 17 of 1941, and provides as follows:

“Abuse of trade-mark in relation to event:

- 15A(1)(a) The Minister may, after investigation and proper consultation and subject to such conditions as may be appropriate in the circumstances, by notice in the Gazette designate an event as a protected event and in that notice stipulate the date –
- (i) with effect from which the protection commences; and
 - (ii) on which the protection ends, which date may not be later than one month after the completion or termination of the event.
- (b) The Minister may not designate an event as a protected event unless the staging of the event is in the public interest and the Minister is satisfied that the organizers have created sufficient opportunities for small businesses and in particular for those of the previously disadvantaged communities.
- (2) For the period during which an event is protected, no person may use a trade-mark in relation to such event in a manner which is calculated to achieve publicity for that trade-mark and thereby to derive special promotional benefit from the event, without the prior authority of the organizer of such event.
- (3) For the purposes of subsection (2), the use of a trade-mark includes
- (a) any visual representation upon or in relation to goods or in relation to the rendering of services;
 - (b) any audible reproduction of the trade-mark in relation to goods or to the rendering of services; or
 - (c) the use of the trade-mark in promotional activities, which in any way, directly or indirectly, is intended to be brought into association with or to allude to an event.”

Section 15A(4) provides that any contravention of subsection (2) is a criminal offence, which offence is punishable by a fine of R60 000 or up to three years imprisonment for a first offence or a fine of R100 000 or up to five years imprisonment for a subsequent offence.¹⁰⁰

The 2010 FIFA World Cup South Africa™ has been declared such a protected event¹⁰¹ in terms of section 15A(1)(a).¹⁰² The Minister’s powers in respect of section 15A were furthermore extended specifically for purposes of the FIFA World Cup 2010, by means of the 2010 FIFA World Cup South Africa Second Special Measures Act 12 of 2006,¹⁰³ in terms of which the duration of protection for the event was extended from the one month period provided for in section 15A(1)(a)(ii) to a period of six months following the

¹⁰⁰ A court finding a person guilty of this offence may also order confiscation of goods in respect of which the offence was committed (eg, promotional material).

¹⁰¹ It should be noted that the protection provided in terms of s 9(d) of the Trade Practices Act (see discussion in the text above) does not require designation of an event as “protected”.

¹⁰² Notice 683 in GG 28877 of 2006-05-25.

¹⁰³ In terms of s 2 of this Act, which provides as follows:

“If the Minister of Trade and Industry declares the 2010 FIFA World Cup South Africa a protected event in terms of s 15A(1) of the Merchandise Marks Act, 1941 ... he or she may, notwithstanding section 15A(1)(a)(ii) of that Act, stipulate by notice in the *Gazette* a date later than one month but not later than six months after the completion or termination of the final competition as the date on which the protection afforded by such a declaration ends.”

end of the event.¹⁰⁴ The Minister has also declared the use of certain words and emblems to be prohibited in terms of the Merchandise Marks Act.¹⁰⁵ The phrases that have been prohibited include “2010 FIFA World Cup South Africa”, “Football World Cup”, “FIFA World Cup”, “2010 FIFA World Cup” and “Soccer World Cup”, and such prohibition relates to use of such phrases in connection with the 2010 event and only applies to “activities connected to 2010 FIFA World Cup South Africa in the area of Football or Soccer 2010 FIFA World Cup”.¹⁰⁶ Furthermore the prohibition does not apply to the media, provided the reportage is fair and not imbued with unscrupulous business enterprising.¹⁰⁷

Further protection is also found in section 29 of the Consumer Protection Act, 2008,¹⁰⁸ which contains provisions regarding the marketing of goods or services, which also prohibits ambush marketing by association with an event. Section 29 of the Act, which is found in Part E (which deals with consumers’ “right to fair and responsible marketing”), provides as follows:

- “S29. A producer, importer, distributor, retailer or service provider must not market any goods or services –
- (a) in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services ...; or
 - (b) in a manner that is misleading, fraudulent or deceptive in any way, including in respect of ... the sponsoring of any event.”

Finally, it should also be noted here that the Counterfeit Goods Act 37 of 1997 provides additional protection, which may also be relevant in combating ambush marketing, while the 2010 event’s designation as a “protected event” in terms of the Merchandise Marks Act might also mean that no person may register any domain name or have content on their web site which is likely to be associated with the event without obtaining authorization from the event organizers.¹⁰⁹ This leads one to consider protection against ambush marketing by means of the internet (or, as it has been called, the practice of “new age” ambush marketing).¹¹⁰

Domain name disputes (in respect of the .za domain names)¹¹¹ relating to “cyber-piracy” or “cyber-squatting” in South Africa are adjudicated in terms of the provisions of the Electronic Communications and Transactions Act 25 of 2002, and the Alternate Dispute Resolution Regulations published in terms

¹⁰⁴ The 2010 FIFA World Cup is scheduled to be played from 11 June to 11 July 2010.

¹⁰⁵ Notice 1791 GG 30595 of 2007-12-14.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ Act 68 of 2008 (at the time of writing not yet in force).

¹⁰⁹ See the article by Glazier “FIFA Threatens World Cup Domain Owner” 5 October 2006 <http://www.itweb.co.za> (accessed 2009-04-08); and Reimers “FIFA Scores its First Goal” February 2008 *Without Prejudice* 31-32.

¹¹⁰ See Gardiner, James and O’Leary *Sports Law* 3ed (2006) 470-472.

¹¹¹ The .za Domain Names Authority (“.za DNA” or “Zadna”) is the organisation that oversees all South African .za top level domain (TLDs) names on the internet. It was established as a section-21 company by section 59 of the Electronic Communications and Transactions Act, 2002. 2nd level domains are administered by other bodies (*ie*, the .co.za domain is administered by UniForum).

of the Act.¹¹² The South African Institute for Intellectual Property Law (or SAIPL) and the Arbitration Foundation of South Africa (AFSA) are currently the only two accredited dispute resolution service providers to the Department of Communications.¹¹³ The ADR procedure entitles any party to lodge a complaint against a .za domain if the domain name “takes unfair advantage of the rights” of that party or “is contrary to law or likely to give offence to any class of persons”. Complaints can be filed against domain names which incorporate registered trade-marks or even trade-marks which are not registered but which are well known. Complaints can also be filed against domain names which amount to hate speech or racism or any other such names which are contrary to public policy. This procedure provides a cost efficient and expeditious resolution of domain name disputes, and disputes filed with SAIPL are normally concluded within two to three months, using on-line procedures, whereas court litigation would take significantly longer (and be more costly).¹¹⁴ The remedies available through the ADR procedure to complainants in domain disputes are limited to the adjudication panel refusing the dispute or transferring the domain name to the complainant. In the case of offensive registration disputes, the remedies are limited to refusing a dispute or deleting and prohibiting the domain name from future registration.¹¹⁵ In both cases, the adjudicator may also refuse the dispute where it constitutes reverse domain name hijacking (an attempt to use the Regulations to prevent a registrant from using a domain name).¹¹⁶ Apart from the above remedies in the ADR process, a matter may also be referred to the High Court, where a complainant can claim in terms of the normal common-law remedies (including for passing off and unlawful competition) or for trade-mark infringement in terms of the Trade Marks Act, 1993.

In respect of sports-related matters (and, specifically, the 2010 Football World Cup), FIFA has apparently been involved in some disputes regarding South African-registered domains. In 2006 the organization was forced to admonish a local businessman who had registered five 2010 World Cup-related .co.za domains for an online travel and accommodation reservation, booking and information service.¹¹⁷ It appeared at the time that there was a

¹¹² The Regulations were published in Government Notice R11666 in GG 29405 of 2006-11-20 (effective 1 April 2007). For more on the Uniform Domain Name Dispute Resolution Policy as administered by the Arbitration and Mediation Centre of the World Intellectual Property Organization (WIPO), see the short article by Blackshaw “Settling Sports Domain Name Disputes” 2005 13(2) *Sport and the Law Journal* 6-9.

¹¹³ See Van der Merwe and Snail “A Brief *Excursus* on the South African Online Alternative Dispute Resolution” <http://www.domaindisputes.co.za/news.php?newsID=30> (accessed 2009-04-08).

¹¹⁴ Information provided by the SAIPL <http://www.domaindisputes.co.za>.

¹¹⁵ Van der Merwe and Snail <http://www.domaindisputes.co.za/news.php?newsID=30> (accessed 2009-04-08) par 4, with reference to the adjudication in the matter of *Gateway, Inc v High Traffic Pro-Life Domains* (D2003 – 0261).

¹¹⁶ *Ibid.* Van der Merwe and Snail <http://www.domaindisputes.co.za/news.php?newsID=30> (accessed 2009-04-08) refer to the matter of *Telkom SA (Ltd) and TDA Directory Operations (Pty) Ltd v The Internet Corporation (ZA2007 – 0005)*, which was the first ruling on “reverse domain name hijacking”.

¹¹⁷ See the article by Glazier 5 October 2006 <http://www.itweb.co.za> (accessed 2009-04-08).

lack of clarity regarding the legal position, as it appeared that FIFA's name and brand were not used, although FIFA's legal representatives were of the opinion that the domains were in contravention of the ambush marketing provisions of section 15A of the Merchandise Marks Act, in light of the "protected event" status of the 2010 World Cup.¹¹⁸ The eventual outcome of this dispute was unknown to the authors at the time of writing. FIFA was again involved in a domain name dispute which was adjudicated by means of ADR by a SAIIPL adjudicator in November 2007. In the matter of *Federation Internationale de Football Association (Fifa) v X Yin*¹¹⁹ the domain name *fifa.co.za* was in dispute, and had to be adjudicated against the background of Regulation 4(1)(b),¹²⁰ which provides as follows:

"A registration may ... be deemed to be abusive where circumstances indicate that the registrant is using, or has registered, the domain name in a way that leads people or businesses to believe that the domain name is registered to, operated or authorised by, or otherwise connected with the complainant."

The registrant's domain name was previously linked to a commercial website which bore many of FIFA's trade-marks, including FIFA, 2010 FIFA WORLD CUP SOUTH AFRICA and 2010 WORLD CUP SOUTH AFRICA. The website published discussion about FIFA and the 2010 World Cup in South Africa, which, as the adjudicator held, lent "an air to the site of (also) a general information source". Hyper links on the site showed its underlying commercial nature, and there were also a number of references to computer games of a "WORLD CUP nature", including at least one such licensed game produced by Electronic Arts. A legend on the site claimed that the site was "a private, non-affiliated website ... we hold no affiliations to FIFA, [the South African Football Association] or the 2010 [Local Organizing Committee], or to any other related body, company or organization".

The adjudicator came to the conclusion that the *fifa.co.za* domain was an abusive registration, as the registration was likely to take advantage of, or be detrimental to FIFA's rights (particularly as one of the funders of the 2010 World Cup tournament in South Africa). It was held that the issue in this regard is not the extent to which the registration will prejudice such licensing and franchising efforts, but the potential for it to do so. On the question of whether the domain name registration has the requisite quality of "unfairness", it was held that the same considerations that the Constitutional Court applied in *Laugh It Off Promotions CC v SAB International (Finance) BV*¹²¹ would not necessarily apply to domain names.¹²² The adjudicator was

¹¹⁸ See the discussion in the text above.

¹¹⁹ (ZA2007 – 0007) <http://www.domaindisputes.co.za/downloads/decisions/ZA2007-0007.pdf>.

¹²⁰ Alternate Dispute Resolution Regulations, published in terms of the Electronic Communications and Transactions Act 25 of 2002; and Government Notice R11666 in GG 29405 of 2006-11-20.

¹²¹ 2006 1 SA 144 (CC).

¹²² The court in the *Laugh it Off* case had held as follows regarding alleged tarnishment of a trade mark:

"The section does not limit use that takes fair advantage of the mark or that does not threaten substantial harm to the repute of the mark, or indeed that may lead to harm but in a fair manner. What is fair will have to be assessed case by case with due

of the opinion that given the infinite proportions of access to the web site in question, and the possibilities of its use (and abuse), a likelihood of substantial economic detriment, cannot be the sole standard for assessing unfairness in the context of domain name disputes. Evidence had also been put forward of an intention on the part of the registrant to continue to avail himself of the benefit and advantage of the use of the mark "FIFA" in a domain name, which was deemed to be unfair. Accordingly, while the website would only have an insubstantial consequence for FIFA, the domain name *fifa.co.za* was judged to be an abusive registration.¹²³

3 CONCLUSION

By way of summary, it is clear that legislative protection against ambush marketing in South Africa is very extensive when compared to certain other jurisdictions.¹²⁴ Especially section 15A of the Merchandise Marks Act is quite far-reaching, making provision as it does *inter alia* for prohibition of the use ("abuse") of a marketer's own trade-mark. It also clearly provides quite substantial protection against ambush marketing, and its real value lies in the fact that it covers both the so-called "association" cases as well as "intrusion" cases (compare the wording of section 15A(2) as quoted above). This has assuaged earlier criticism of the shortcomings of the previously available grounds to combat ambush marketing (such as action under the Trade Marks Act, the Copyright Act, unlawful competition and passing off, *etcetera*) as well as of other suggested legislative amendments at the time.¹²⁵ The template of this far-reaching legislative mechanism has been followed elsewhere¹²⁶ while other jurisdictions have introduced apparently ever-increasing protection by means of statute.¹²⁷

At this point the reader should note that, even in the face of such extensive legislative regulation, ambush marketing protection for major events is usually focused on employing a combination of the above-mentioned protection measures (that is, through contractual arrangements, reliance on intellectual property rights, unfair competition law as well as available legislative provisions). This is best illustrated in the following,

regard to the factual matrix and other context of the case" (*Laugh It Off Promotions CC v SAB International (Finance) BV supra* par 49).

¹²³ From the discussion of this matter in Pistorius "za Alternative Dispute Resolution Regulations: The First Few SAIPL Decisions" 2008 2 *Journal of Information, Law & Technology (JILT)* http://go.warwick.ac.uk/jilt/2008_2/pistorius1 and also <http://www.domaindisputes.co.za>. See also Johnson 90-97 for discussion of domain names in the context of ambush marketing.

¹²⁴ See *eg*, Johnson 234.

¹²⁵ See the article by Dean 11 February 2000 *Legal City* <http://www.legalcity.net> (accessed 2007-02-15).

¹²⁶ Compare the nearly identical wording of ss 25(2) and (3) of the ICC Cricket World Cup West Indies 2007 Act 28 of 2006, which was passed by the Parliament of the Republic of Trinidad & Tobago, 1 November 2006.

¹²⁷ *Eg*, compare the London 2012 Olympic Games and Paralympic Games Act 2006 and New Zealand's Major Events Management Act 35 of 2007, and, more generally, see Chapter 5 in Johnson.

fascinating, “insider’s” description by Dr Owen Dean,¹²⁸ of FIFA’s domestic campaign in this regard in respect of the 2010 football World Cup:

“The first step was to ensure that [FIFA] could make the most of the favourable [legal landscape to protect against ambush marketing in South Africa]. This meant taking comprehensive steps to put measures in place to enable it to assert its rights in connection of the 2010 tournament. This entailed embarking on an extensive trade-mark registration programme covering trade-marks such as SOUTH AFRICA 2010, WORLD CUP 2010. Once the official emblem had been devised, steps were taken to register it widely as a trade-mark as well as a design under the Designs Act. To supplement these measures, application was made to the Minister of Trade and Industry to declare the principal trade-marks associated with the event as prohibited marks under s15 of the Merchandise Marks Act. All these measures were, however, somewhat secondary to the main thrust of its plan of attack which was to utilize the provisions of s15A of the Act which empowers the Minister of Trade and Industry to designate major sporting events as so called ‘protected events’ ... This object was achieved in May 2006, when the Minister of Trade and Industry published a notice declaring the event to be protected. Having done all the ground work for the implementation of its game plan, the next step was to harmonize and synchronize its players with the game plan. This entailed preparing a template for a civil court case to be brought against an ambush marketer. In so doing ground-breaking causes of action and arguments were formulated. In particular, a method had to be devised to enable FIFA to pursue a civil claim against an ambush marketer based on the anti-ambush marketing provisions of s15A of the Merchandise Marks Act, that create a criminal offence.¹²⁹ An unlawful competition argument was formulated utilizing the principle that, in breaching the criminal provisions and thus entering into direct competition with FIFA’s sponsor’s for the 2010 World Cup, ambush marketers were perpetrating conduct which was objectively unlawful, being a criminal offence, and were causing damage to FIFA by prejudicing its relations with its sponsors.”

Accordingly, through the use of a whole arsenal of legal measures, sports organizations can establish a well-oiled and imposing juggernaut in order to pre-empt, discourage or challenge ambush marketing practices. In this regard, educational campaigns are important (compare the distribution of FIFA’s “Public Information Sheet”, containing a guide to FIFA’s protected marks for the 2010 event¹³⁰). Sports organizations are, however, also increasingly focusing their efforts on deploying specialist teams of high profile legal advisors in order to take the offensive to the ambush marketers. FIFA has already, on a number of occasions, been successful in following the litigation route in South Africa in the run-up to the 2010 event.¹³¹ While FIFA appears to have few qualms in doing so in the context of South African

¹²⁸ Owen Dean, partner of Spoor & Fisher (one of the large intellectual property law firms representing FIFA in South Africa), writing in Dean “FIFA Scores Opening Goal” May 2009 *Without Prejudice* 4-5.

¹²⁹ It is very interesting to note that, as Johnson 141 observes, the Explanatory Memorandum to the amendment Bill which inserted s 9(d) of the Trade Practices Act (see above) expressly stated that passing off would not be available under the common law in the event of a breach of trade practices law. It is unclear why or to what extent a similar consideration should not apply in respect of the Merchandise Marks Act.

¹³⁰ Federation Internationale de Football Association (FIFA) *2010 FIFA World Cup South Africa FIFA Public Information Sheet* (a guide to FIFA’s Official Marks).

¹³¹ See the discussion in Part 2 of this article.

business entities attempting to associate themselves or derive benefit from the 2010 event, it should be noted that litigation may not always be advisable for event organizers. A significant practical risk of the litigation route for an organization like FIFA (aside from the costs involved as well as the lengthy duration of such cases) may be the possibility of alienating large corporations who, while not current official sponsors of the relevant event, might want to sponsor the organizer's future events.¹³²

It is, however, the legislation that has in recent years been passed in different jurisdictions (including the above-mentioned South African legislation) that is most problematic in terms of evaluating the legitimacy of what amounts to state-driven measures to protect narrow commercial interests. It should be noted that anti-ambush marketing legislative protection in South Africa and elsewhere is not immune to criticism regarding the reach and scope of the measures imposed and their possible effects on the rights of persons and parties other than event sponsors.¹³³ In particular, it should be noted that the current South African legislative protection in respect of the 2010 FIFA World Cup South Africa™, for example, might be open to constitutional challenge in respect of the effect of restrictions imposed on the rights of others (for example, in respect of the right of freedom of expression, freedom of trade and occupation, and the right of property, as guaranteed in the Bill of Rights).¹³⁴ This is especially poignant in the context of South Africa's developmental state with its high levels of poverty, and the urgent need to encourage alternatives to formal employment (for example, encouraging opportunities for street vendors surrounding major tournaments, although the prevalence of illegal importation of counterfeit goods such as sporting apparel remains problematic).¹³⁵ It should be noted in this context that the sports industry is in various jurisdictions already subjected to limitations or restraints on freedom of contract, specifically in order to promote the public interest. Examples are sports broadcasting regulations which limit the sale of exclusive broadcasting rights in respect of "listed events" that are viewed as being of national interest,¹³⁶ the prohibition of certain prohibited sponsors in respect of events (for example, tobacco sponsorship) and competition-law restraints on the collective selling of broadcasting rights.¹³⁷

¹³² Vassallo *et al* November-December 2005 95 *The Trademark Reporter* 1354, mention this possible risk for event organizers in respect of large corporations.

¹³³ *Eg*, see the discussion of what Phillip Johnson calls horizontal and vertical "creep" in respect of the adoption of new legislation on ambush marketing based on developments in other jurisdictions, in Johnson 2008 2(3) *International Sports Law Review* 24-29 – see the discussion in Part 2 of this article.

¹³⁴ In ss 16, 22 and 25, respectively, of the Constitution of the Republic of South Africa, 1996. See the discussion in Part 2 of this article.

¹³⁵ See the discussion in Part 2 of this article.

¹³⁶ In the South African context, consider ICASA's position paper and regulations on "Sports Broadcasting Rights" Notice 2029 GG 25249 of 2003-07-25, specifically par 3 and 4. At the time of writing, ICASA has conducted hearings with a view to the publication of updated sports broadcasting rights regulations (compare the discussion paper in this regard which was published as General Notice 1238 GG 31483 of 2008-10-02 ("Review of Sports Broadcasting Rights Regulations – Discussion Document, September 2008")).

¹³⁷ See Hewitt 2005 13(1) *Sport and the Law Journal* 35-36.

Against the backdrop of the preceding overview of the practice of ambush marketing and the available grounds for protection, Part 2 of this article will examine critically the scope of protection of commercial rights to sporting events (especially in the form of legislation) in South Africa and other jurisdictions. It will discuss criticism of the apparent trend towards commercial monopolization of major events as expressed by commentators elsewhere. The authors will evaluate the legitimacy of such measures in the South African context with reference to constitutional, intellectual property and competition-law arguments. Finally, the second part of this article will also include some critical evaluation of current developments elsewhere which augur even more extensive potential monopolization of major sporting events in future.

(End of Part 1)