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

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This Article describes the problem of ambush marketing: the act of attempting to associate with an event without buying the rights to do so. From the perspective of the organizers and sponsors, the problem is significant. More than \$100 billion is spent annually on purchasing sponsorship rights and the associated promotions. For companies that have not paid for such rights to be able to imply an association with these high-profile events dilutes the value of that sponsorship. Despite the size of the problem, however (and except for the special coverage many countries afford Olympic activities), there is little legal protection against all but the most blatant marketing encroachment. This Article examines the problems and legal approaches from countries in the European Union, North America, and Oceania, including the United States, Canada, the United Kingdom, Germany, and Australia.

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I. INTRODUCTION

Pity poor Budweiser. After Anheuser-Busch paid for Budweiser to be the official beer of the 2010 World Cup, dozens of beautiful blondes disrobed down to their bright orange Bavaria Beer dresses, causing plenty of attention for the rival brewer.¹ There was little Budweiser could do; they'd been ambushed. In a similar tactic, American Express used the "you don't need a Visa" to visit the Barcelona Olympics slogan as part of their campaign rivalry with Visa, the official sponsor of the event.² Again, the sponsor had been outmaneuvered by a rival. By contrast, another

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

2. Stuart Elliott, *Jousting by Mass Marketers Is the Newest Olympic Sport*, N.Y. TIMES, July 15, 1992, at D1.

World Cup sponsor, MasterCard, was more successful in defending its rights. They obtained a preliminary injunction against Sprint, preventing Sprint from putting the World Cup logo on its customer cards.³ Why are some ambush marketing techniques permitted and others not? The answer lies in the nature of the ambush marketing tactics and the relevant jurisdictions.

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

This Article describes the problem and the international legal approaches to the practice of ambush marketing: the act of attempting to associate with an event without buying the rights to do so. It compares the legal framework of selected North American, European, and Oceanian markets and discusses the extent to which legal protections can be successfully used by sponsor companies and event organizers. The question of whether ambushing is unethical, an “undeserved advantage,”⁵ or simply an imaginative business practice⁶ is beyond the scope of this Article. Nor does this Article evaluate the extent to which ambush marketing is actually economically beneficial or detrimental to sponsors, rights holders, and ambushers.

The Article is structured as follows. It first describes the problem by defining ambush marketing and sponsorship and gives an overview of ambush practices. It then compares the legal frameworks in four major sponsorship markets, namely, the United States, Canada, Australia, and the European Union, with Germany and the United Kingdom as specific examples. From there, conclusions are drawn on the extent to which sponsorship rights are protected in diverse legal and economic environments. Ultimately, this research also addresses the question of

3. MasterCard Int'l, Inc. v. Sprint Commc'ns Co., No. 94 Civ. 1051 (JSM), 1994 U.S. Dist. LEXIS 3398, at *13 (S.D.N.Y. 1994), *aff'd*, 23 F.3d 397 (2d Cir. 1994).

4. Steve McKelvey, Sheranne Fairley & Mark D. Groza, *Caught in the Web?: The Communication of Trademark Rights and Licensing Policy on University Official Athletic Websites*, 20 J. LEGAL ASPECTS SPORT 1, 3 (2010).

5. Michael Payne, *Ambush Marketing: The Undeserved Advantage*, 15 PSYCHOL. & MARKETING 323 (1998).

6. Tony Meenaghan, *Point of View: Ambush Marketing: Immoral or Imaginative Practice?*, 34 J. ADVERTISING RES. 77 (1994); Denise Doust, *The Ethics of Ambush Marketing*, CYBER J. SPORT MARKETING, <http://fulltext.ausport.gov.au/fulltext/1997/cjasm/v1n3/doust.htm> (last visited Oct. 22, 2012).

whether a country's legal environment constitutes a handicap when bidding to host major international events.

II. DESCRIPTION OF THE PROBLEM

Global team and event sponsorship spending rose from an estimated \$2 billion in 1984⁷ to \$43.5 billion in 2009.⁸ In addition to sponsorship costs, companies heavily invest in promotional activities in order to leverage those rights. Marketers estimate that the investment in promoting sponsorships equals or exceeds the amount spent to acquire the rights, so that the total spent in acquiring and promoting sponsorship exceeds \$100 billion annually.⁹ In many cases, brands see their sponsorship diluted by the activities of ambush marketers, and event organizers fear losing their attractiveness to sponsors if unauthorized competitors are able to “free ride” on the event.

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

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

7. Tony Meenaghan, *Sponsorship—Legitimising the Medium*, 25 EUR. J. MARKETING 5, 5 (1991).

8. Simon Chadwick & Nicholas Burton, *Ambushed!*, WALL ST. J., Jan. 25, 2010, at R4.

9. Simon Chadwick & Nicholas Burton, *The Evolving Sophistication of Ambush Marketing: A Typology of Strategies*, 53 THUNDERBIRD INT'L BUS. REV. 709, 710 (2011).

10. Klayman, *supra* note 1.

11. Chadwick & Burton, *supra* note 8.

12. *Id.*

13. Dennis M. Sandler & David Shani, *Olympic Sponsorship vs. “Ambush” Marketing: Who Gets the Gold?*, 29 J. ADVERTISING RES. 9, 11 (1989).

14. Tony Meenaghan, *Ambush Marketing: Corporate Strategy and Consumer Reaction*, 15 PSYCHOL. & MARKETING 305, 306 (1998).

Kodak imply its association with the event by sponsoring the U.S. Olympic track team and television broadcasts of the Summer Games.¹⁵

Sponsorship is frequently defined as “a cash and/or in-kind fee paid to a property . . . in return for access to the exploitable commercial potential associated with that property.”¹⁶ However, “a generally accepted definition of sponsorship” does not exist,¹⁷ making it difficult to specify where sponsorship ends and where ambush marketing begins. For some observers, sponsorship should involve a “direct investment” in an event.¹⁸ Such a view would distinguish a practice termed “broadcast sponsorship” (the payment of a fee to a media source, often a television network, in order to be identified as the sponsor of the broadcast)¹⁹ from event sponsorship.

A sponsored event is distinguished from other types of communication forms because “it simultaneously attracts, and provides access to, an audience. It differs from conventional advertising in that both message and medium are inextricably linked in sponsorship.”²⁰ Sponsors may achieve major benefits because “appreciation and goodwill are part of the halo” effect of sponsorship.²¹ Sponsorship effects are typically measured in terms of sponsor memorization, image transfer to sponsor brands, buying intention for sponsor brands, sponsor sales, corporate wealth, and impact on brand equity.²²

Ambush marketing is typically considered to be detrimental to both sponsors and event owners/property rights holders. Without paying any fee, ambushers may reap many of the benefits of the official sponsors at the expense of the latter and thereby indirectly decrease the value of event property rights. Sponsors have little interest in paying for sponsorship rights if ambushers receive similar benefits at little or no cost. Studies show, for example, that ambushers are in many cases better remembered by the event audience than are sponsors.²³ At the same time, ambushing can sometimes prove beneficial to official sponsors in as much as it

15. *Who Will Win the World Cup?*, CAMPAIGN (UK), Apr. 21, 2006, at 31.

16. LESA UKMAN, IEG'S GUIDE TO SPONSORSHIP: EVERYTHING YOU NEED TO KNOW ABOUT SPORTS, ARTS, EVENT, ENTERTAINMENT AND CAUSE MARKETING 1 (2007).

17. See Björn Walliser, *An International Review of Sponsorship Research: Extension and Update*, 22 INT'L J. ADVERTISING 5, 7 (2003).

18. Christian Derbaix, Phillipe Gérard & Thierry Lardinois, *Essai de Conceptualisation d'une Activité Eminemment Pratique: Le Parrainage*, 9 RECHERCHE ET APPLICATIONS EN MARKETING 43, 53 (1994).

19. Walliser, *supra* note 17, at 7.

20. Meenaghan, *supra* note 14, at 307.

21. *Id.* at 317.

22. See generally Walliser, *supra* note 17 (outlining a review of these effects).

23. Sandler & Shani, *supra* note 13, at 13.

promotes the event and the product category of the sponsors. If, for example, both Coca-Cola and Pepsi Cola associate themselves with an event—no matter which is the ambusher and which is the official sponsor—there is the possibility that more cola will be sold (compared to other soft drinks) and that the event will receive more public attention. However, the latter hypothesized effects are little-researched and will be excluded from the subsequent considerations. Currently, companies view ambush marketing as a drain against the value of sponsoring an event.

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

Predatory Ambushing. Attacking a sponsor at an event, leaving consumers confused about who officially sponsors the activity.²⁴ One example noted in Part I is the American Express television ad of the Barcelona Summer Olympics in 1992. With Visa as the official credit card sponsor of the games, American Express created ads noting, “you don’t need a Visa” to visit Spain.²⁵ Also included would be Pepsi’s 1996 Cricket World Cup campaign of advertisements titled “[n]othing official about it” in contrast to rival official sponsor Coca-Cola.²⁶ Other traditional forms include ticket giveaways by nonsponsors.²⁷

Coattail Ambushing. Associating with an event by sponsoring a participant (e.g., a person or team) of the event.²⁸ During the 1984 Olympic Games, as noted earlier, Kodak ambushed rival Fuji (the event sponsor) by becoming the sponsor of the U.S. track team (event participants).²⁹ Tattoo advertising—the act of paying athletes to wear temporary tattoos during the event—would also qualify,³⁰ as would “jockey advertising” where jockeys display advertising on their silks.³¹

24. Chadwick & Burton, *supra* note 8.

25. *Id.*

26. Rajiv Singh, *Samsung Ambushes Nokia in Smartphone War*, ECON. TIMES (Jan. 2, 2012), http://articles.economicstimes.indiatimes.com/2012-01-02/news/30587607_1_ambush-marketing-samsung-smartphone-nokia.

27. McKelvey, Fairley & Groza, *supra* note 4, at 24.

28. Chadwick & Burton, *supra* note 8.

29. *Who Will Win the World Cup?*, *supra* note 15.

30. See John Vukelj, *Post No Bills: Can the NBA Prohibit Its Players from Wearing Tattoo Advertisements?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 507 (2005); Stephen M. McKelvey, *Commercial “Branding”: The Final Frontier or False Start for Athletes’ Use of Temporary Tattoos as Body Billboards*, 13 J. LEGAL ASPECTS SPORT 1, 14 (2002).

31. See William P. Barnette, *The Run for the Roses Meets the First Amendment: An Examination of Desormeaux v. Kentucky Racing Commission and the Constitutionality of Prohibitions on Jockey Advertising*, 52 CLEV. ST. L. REV. 371, 374-75 & n.25 (2004-2005).

Another American Express attack on Visa's official credit card sponsorship of the Olympics occurred when American Express used an athlete wearing his Olympic gold medals in its promotional materials.³²

Self-Ambushing. Using status as an official sponsor, but going beyond the scope of the agreed sponsorship.³³ An example would include an official sponsor for broadcasting rights who then hands out promotional T-shirts at a sporting event.³⁴ This practice may infringe on the host organization's agreement with another company to sponsor shirts.³⁵

Controversy Ambushing. Counting on negative publicity surrounding an event. A Canadian gay dating site, ManCrunch, produced an advertisement reportedly knowing that it would never be accepted for broadcast during the 2010 Super Bowl.³⁶ Reportedly speculating that the controversy would generate more attention, they avoided having to pay the \$2.5 million cost of direct advertising.³⁷

Associative Ambushing. Using "imagery or terminology to create an [i]llusion that an organization has links to a sporting event or property."³⁸ At the Beijing Olympics in 2008, Nike (not an official sponsor) made much use of the number 8—a symbol of good luck in China as well as a symbol used for the games.³⁹ Similarly, during the 2000 Sydney Olympics, Qantas Airlines promoted the "Spirit of Australia" in a phrase similar to that year's slogan, "Share the Spirit," to the consternation of rival airline and event sponsor Ansett Air.⁴⁰ During the 1984 Summer Olympic Games in Los Angeles where Converse was an official sponsor, rival sporting wear manufacturer Nike ran advertisements with an "I Love L.A." theme.⁴¹

32. Stephen McKelvey & John Grady, *An Analysis of the Ongoing Global Efforts To Combat Ambush Marketing: Will Corporate Marketers "Take" the Gold in Greece?*, 14 J. LEGAL ASPECTS SPORT 191, 192 (2004).

33. Chadwick & Burton, *supra* note 8.

34. *Id.*

35. *Id.*

36. Cyd Zeigler Jr., *Mancrunch Super Bowl Ad Is Really Bad. Hoax?*, OUTSPORTS (Jan. 29, 2010), <http://outsports.com/jocktalkblog/2010/01/29/mancrunch-super-bowl-ad-is-really-bad-hoax>.

37. *Id.*

38. Chadwick & Burton, *supra* note 8.

39. *Id.*

40. Jeremy Curthoys & Christopher N. Kendall, *Ambush Marketing and the Sydney 2000 Games (Indicia and Images) Protection Act: A Retrospective*, 8 MURDOCH U. ELECTRONIC J.L., no. 2, 2001, paras. 57-58, 66, <http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82.html>.

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

Distractive and Insurgent Ambushing. Using distractions around events for media promotions.⁴² Without making specific reference to an event, promoters set up a presence to attract attention.⁴³ Examples include banners flown over outdoor sporting or entertainment venues.⁴⁴ During the 2008 French Open, K-Swiss parked a car nearby this event that appeared to have been smashed by a giant K-Swiss tennis ball.⁴⁵

Unintentional Ambushing. When media coverage identifies equipment, clothing, or products used by an athlete or company in the event although the manufacturer has not paid for sponsorship.⁴⁶ Speedo, often mentioned during the Beijing Olympic Games in association with the successful performances of swimmers wearing their LZR Racer swimsuits, was subsequently incorrectly identified by consumers as an official sponsor.⁴⁷

Saturation Ambushing. Using intensified advertising campaigns around an event, with no direct or indirect reference to the game or activity.⁴⁸

Examining these various forms of ambushing, it appears as if two basic approaches should be separated: activities that may constitute an infringement of intellectual property law (such as the unauthorized use of a logo), also called direct ambushing,⁴⁹ and the more subtle activities, sometimes referred to as indirect ambushing,⁵⁰ for which the legal remedy is less clear.⁵¹ Table 1 summarizes the direct and indirect ambushing activities.

42. Chadwick & Burton, *supra* note 8.

43. *Id.*

44. Vukelj, *supra* note 30, at 518.

45. Chadwick & Burton, *supra* note 8.

46. *Id.*

47. *Id.*

48. *Id.*

49. Thomas C. Körber & Rüdiger Mann, *Werbefreiheit und Sponsoring: Möglichkeiten und Grenzen von Ambush Marketing unter Besonderer Berücksichtigung des Neuen UWG*, 110 GRUR 737, 738 (2008).

50. *Id.*

51. Stephen Townley, Dan Harrington & Nicholas Couchman, *The Legal and Practical Prevention of Ambush Marketing in Sports*, 15 PSYCHOL. & MARKETING 333, 335-37 (1998).

Table 1: Direct and Indirect Ambushing Activities.⁵²

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

Legal remedies may concern any of the following three factors:

1. Manner in which logos, emblems, and other material eligible for intellectual property protection were used.
2. Availability of legal measures to deal with “unfair competition, misleading advertising, false trade descriptions, street vending, and appropriation of goodwill.”
3. Ability of the governing bodies to control the activities of the event’s participants (athletes, media, organizations) and the venue (surrounding areas, airspace).⁵³

III. COMPARATIVE SURVEY OF LEGAL PRACTICE IN SELECTED COUNTRIES

Successful ambush marketing depends on the law in host countries; what is permitted in some jurisdictions can be unlawful elsewhere. For common law countries, there is generally a combination of common law causes of action that may give companies greater protection from ambush marketing. These include, for example, prohibitions against unfair

52. Adapted from Meenaghan, *supra* note 6, at 80-82.

53. Townley, Harrington & Couchman, *supra* note 51, at 336-37.

competition and passing off. Civil law countries, by contrast, have such causes of action codified. Common law and civil law countries both have trademark laws in their statutory systems, although their scope differs as discussed below. What is a constant among all of the jurisdictions (whether their foundation lies in common or civil law) examined below is that they have each enacted legislation protecting Olympic marketing. That governments often have significant financial stakes in Olympic events is surely a reason for greater protectionism in that area.

A. *United States*

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

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

The first approach falls under the Lanham Act.⁵⁴ This federal statute provides protection for misleading advertising. Sections 32⁵⁵ and 43(a)⁵⁶

54. Lanham Act, 15 U.S.C. §§ 1051-1141 (2006).

55. *Id.* § 1114:

Remedies; infringement; innocent infringement by printers and publishers

- (1) Any person who shall, without the consent of the registrant—
- (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
- (b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive,

shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive.

56. *Id.* § 1125:

False designations of origin, false descriptions, and dilution forbidden

- (a) Civil action
- (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
- (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as

of the Act prohibit the use in commerce among states of any registered mark that is likely to cause confusion, mistake, or deception. This could apply, for example, to companies such as garment manufacturer Quiksilver, Inc., who created a design featuring the company's logo inside five interlocking circles similar to the five Olympic rings,⁵⁷ or to a telecommunication company that used the word "ring" five times in an ad, together with the slogan "with Telecom Mobile you can take your own phone to the Olympics."⁵⁸ Section 44 of the Lanham Act extends protections to international agreements involving trademark law if the United States has been a signatory to the treaty.⁵⁹ To be successful, a plaintiff would need to show that there was an unauthorized use of a trademark or trade name and that this unauthorized use was likely to cause customers to be confused.⁶⁰ There would be no violation of the Act, therefore, if there was no misuse of a protected name or mark. Even if there were an unauthorized use, a petitioner would have the burden of showing a likelihood of customer confusion.

One court held that using a trade name was protected speech when included in a news report about the event.⁶¹ The Lanham Act therefore has limited application to most ambush marketing because it is so easily circumvented. Any ambush marketer could avoid violating the act simply

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

57. McKelvey & Grady, *supra* note 32, at 207. The U.S. Olympic Committee successfully stopped Quiksilver, Inc., from selling the product, claiming that it would "mislead and deceive consumers." *Id.* (internal quotation marks omitted).

58. Janet Hoek, 'Ring Ring': *Visual Pun or Passing Off? An Examination of Theoretical and Research Issues Arising from Ambush Marketing*, 5 ASIA-AUSTL. MARKETING J. 33, 34-35 (1997).

59. 15 U.S.C. §§ 1126-1127 ("The intent of this chapter is . . . to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations."); *see, e.g.*, Paris Convention for the Protection of Industrial Property, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305. Article 10*bis* of the Paris Convention has been incorporated into section 44 to protect against unfair competition. *See generally* Patricia V. Norton, Note, *The Effect of Article 10bis of the Paris Convention on American Unfair Competition Law*, 68 FORDHAM L. REV. 225 (1999).

60. 15 U.S.C. § 1114.

61. *See* WCVB-TV v. Bos. Athletic Ass'n, 926 F.2d 42 (1st Cir. 1991). In this case, the United States Court of Appeals for the First Circuit refused to enjoin a television station from using the words "Boston Marathon." *Id.* at 44. The court held that it would not cause customer confusion to describe the media event since viewers would be unlikely to be confused into thinking that the station was conducting the marathon. *Id.*

by avoiding the use of a trademark. The Lanham Act does not proscribe many of the activities that have been associated with ambush marketing. The Act would not, for example, create any barrier to such classic ambush marketing tactics as purchasing advertising before or after an event, distributing promotional materials at an event, or offering tickets or other prizes associated with an event. As one observer noted:

The difficulty with ambush marketing is that the law is on the side of the ambushers. Purely defined, ambush marketing does not involve counterfeiting or the illegal use of trademarks, tradenames or symbols. Companies simply develop a creative advertising campaign around the event, never use the event logo, trademark or tradename and capitalize by association with the event without paying for official sponsor status.⁶²

Even when using trademarks without permission, the practice may be permitted under American law. In *United States Olympic Committee v. American Media, Inc.*, the United States District Court for the District of Colorado concluded that use of the Olympic marks in promotional media did not constitute commercial speech although it solicited consumers to buy the publication.⁶³

Furthermore, it is very difficult for a plaintiff to prove consumer confusion as a consequence of ambush marketing. Consumer behavior research shows that sponsorship targets lack knowledge about different levels of sponsorship and the rights associated with the various sponsors.⁶⁴ About one third of the spectators of the 1996 Olympic Games thought that any brand that advertised during the broadcast of the event was an official sponsor.⁶⁵ The same study reveals that consumers are not concerned about ambush marketing: about 40% do not feel that the practice is unfair, and more than half state that they are not “annoyed by companies trying to associate themselves with the Olympic Games without being Official Sponsors.”⁶⁶ Results are basically confirmed over time and in different sports contexts. For example, most people think that only official sponsors of a Super Bowl may advertise during the broadcast of the event, although this is not the case.⁶⁷ According to the same source,

62. Robert N. Davis, *Ambushing the Olympic Games*, 3 VILL. SPORTS & ENT. L.J. 423, 430 (1996) (citation omitted).

63. 156 F. Supp. 2d 1200, 1208-10 (D. Colo. 2001).

64. David Shani & Dennis M. Sandler, *Ambush Marketing: Is Confusion To Blame for the Flickering of the Flame?*, 15 PSYCHOL. & MARKETING 367, 367 (1998).

65. *Id.* at 376.

66. *Id.* at 378-79.

67. Mark R. Lyberger & Larry McCarthy, *An Assessment of Consumer Knowledge of Interest in, and Perceptions of Ambush Marketing Strategies*, 10 SPORT MARKETING Q. 130, 134 (2001).

40% of spectators (incorrectly) think that the Super Bowl logo may be used by all event sponsors (although only the prime sponsors have this right), and only 20% of viewers are annoyed about Super Bowl ambushers.⁶⁸

In sum, there is a general lack of consumer knowledge and concern about ambushing. Event organizers incidentally contribute to the general confusion inasmuch as they constantly modify sponsorship categories and levels. To illustrate, there is a myriad of titles such as “official sponsors,” “official suppliers,” “global, national and regional partners,” “licensees,” “platinum, gold, and silver sponsors,” and the like, which change from one property to the next.⁶⁹ Some properties—for example, baseball teams—have more than sixty brands officially associated as either advertisers or sponsors.⁷⁰ Dozens of others advertise on television before, during, and after the broadcast of the events.⁷¹

Consumers do not know which kind of rights correspond to the various brands associated in one way or another to a property.⁷² Consumers tend to perceive as an official sponsor the brand whose television commercial they viewed most recently in the context of the event.⁷³ On those grounds, it seems difficult to prove that it is the ambushing which creates confusion. The myriad sponsorship levels in themselves create confusion.

In addition to the Lanham Act, there is federal legislation that protects trade names and marks related to the Olympics. The Ted Stevens Olympic and Amateur Sports Act (OASA) designates certain Olympic related words and symbols as being the exclusive property of the U.S. Olympic Committee (USOC), prohibits their unauthorized use, and subjects the unauthorized user to civil actions and remedies.⁷⁴ The United States Supreme Court has held that granting the USOC the exclusive right to use the word “Olympic” did not violate the United States Constitution’s First Amendment protection of free speech.⁷⁵ However, the Federal

68. *Id.* at 134-35.

69. See Kirk L. Wakefield, Karen Becker-Olsen & T. Bettina Cornwell, *I Spy a Sponsor: The Effects of Sponsorship Level, Prominence, Relatedness, and Cueing on Recall Accuracy*, 36 J. ADVERTISING 61, 61 (2007) (discussing the various levels of sponsorship that can be obtained).

70. *Id.* at 65-66.

71. *Id.* at 63-64.

72. Shani & Sandler, *supra* note 64.

73. Stephen R. McDaniel & Lance Kinney, *The Implications of Recency and Gender Effects in Consumer Response to Ambush Marketing*, 15 PSYCHOL. & MARKETING 385, 396 (1998).

74. 36 U.S.C. § 2205 (2006).

75. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 522-23, 532-33, 536, 539 (1987) (regarding the use of the term “Gay Olympic Games”).

District Court of Colorado has held that the OASA does not prevent conduct that the USOC characterized as “ambush marketing.”⁷⁶ In a challenge to a publisher’s distribution of a magazine called *Olympics USA*, the court found that since the contents were (at least in part) editorial and not commercial, the OASA did not prohibit the use of the word “Olympics” in its name.⁷⁷ In that the OASA provides additional protections to common law and the Lanham Act, the court held, it must be construed narrowly.⁷⁸

2. Common Law: Unfair Competition

Using common law, a company or organization could charge an ambush marketer with unfair competition. Interpretations of the common law right would differ somewhat among the separate states but are, without exception, broader than the protections created by the Lanham Act. In some states—for example, California—the law related to unfair business practices is extensive. It has been codified to include any unfair business practice regardless of a showing of loss.⁷⁹ In other states, the common law right has been interpreted more traditionally, requiring a showing that false and deceptive practices have deprived a company or organization of its goodwill.⁸⁰ The practice is difficult to combat because it may be difficult to show harm, at least in a traditional legal sense.⁸¹ In an economic sense, goodwill and loss can be measured. In practice, however, it is difficult to isolate the specific contribution of a sponsorship or ambush activity on such variables as goodwill, sales, or profits. With little exception, economic sponsorship research concentrates on variables such as sponsor/ambusher memorization or image. Studies show that brand attitudes toward sponsors and ambushers do not systematically differ.⁸² Nor does ambushing have a systematic effect on purchase intentions, at least not when measured in laboratory experiments.⁸³

Under common law theories, a firm could allege that an ambush marketer engaged in unfair business practices even without misuse of a

76. U.S. Olympic Comm. v. Am. Media, Inc., 156 F. Supp. 2d 1200, 1203, 1210 (D. Colo. 2001).

77. *Id.* at 1208-09.

78. *Id.* at 1209.

79. CAL. BUS. & PROF. CODE § 17200 (LexisNexis 2007), construed in *Mass. Mut. Life Ins. Co. v. Superior Court*, 119 Cal. Rptr. 2d 190, 192-93 (2002).

80. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 (1995).

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

82. *Id.* at 207.

83. McDaniel & Kinney, *supra* note 73, at 398.

trademark or a showing of consumer confusion, as would be required for an action under the Lanham Act. Still, however, the activities traditionally associated with ambush marketing generally do not rise to the level of fraud, misrepresentation, or otherwise misleading practices normally required for a successful cause of action for unfair business practices. This has left one commentator to suggest that a federal law be created prohibiting ambush marketing practices.⁸⁴ Even if such a statute were enacted, however, it would face significant barriers in the American legal system. While commercial speech is less protected than other speech under the U.S. Constitution's First Amendment, there are still broad freedoms associated with nonfraudulent commercial speech.⁸⁵ In addition, most ambush marketing efforts are so short-lived as to make the legal system's remedies too sluggish to provide relief.⁸⁶

B. *Canada*

In Canada, there is no law directly prohibiting ambush marketing, with the exception of legislation protecting Olympic marks. The laws most clearly applicable to the practice include common law and statutory prohibitions of passing off and common law causes of action related to interference with contractual relations.⁸⁷ Under laws prohibiting passing off, a company could allege that an advertiser improperly implying a relationship to an event was liable for deliberately causing confusion. As cited by the Supreme Court of Canada:

To sell merchandise or carry on business under such a name, mark, description, or otherwise in such a manner as to mislead the public into believing that the merchandise or business is that of another person is a wrong actionable at the suit of that other person. . . . The law on this matter is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by rival traders. . . . The true basis of the action is that the passing off injures the right of property in the plaintiff, that right of property being his right to the goodwill of his business.⁸⁸

However, the Court notes:

84. Patrick Donohue Sheridan, *An Olympic Solution to Ambush Marketing: How the London Olympics Show the Way to More Effective Trademark Law*, 17 *SPORTS L.J.* 27, 48 (2010).

85. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. c, illus. 4(d).

86. Bean, *supra* note 41, at 1101.

87. *Id.* at 1109.

88. *Consumers Distrib. Co. v. Seiko Time Can. Ltd.*, [1984] 1 S.C.R. 583, 597-98 (Can.) (quoting SALMOND ON TORTS 400-01 (R.F.V. Heuston ed., 17th ed. 1977)).

The role played by the tort of passing off in the common law has undoubtedly expanded to take into account the changing commercial realities in the present-day community. The simple wrong of selling one's goods deceitfully as those of another is not now the core of the action. It is the protection of the community from the consequential damage of unfair competition or unfair trading.⁸⁹

The common law tort of passing off is codified in Canada under the Trade-marks Act:

No person shall . . . direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another.⁹⁰

Codification, however, has not expanded the scope of the action; if a plaintiff cannot demonstrate common law passing off, he cannot establish a claim under the statute.⁹¹

Another approach to challenge ambush marketing is the tort of interference with economic relations. This tort requires that (1) there be interference with the execution of a contract, (2) that the interference be deliberate, and (3) that the interference be direct.⁹² This tort provides limited remedies to ambush marketing because it requires that there be a contract in existence and allows only parties to the contract an opportunity for remedy.

A Canadian court had an opportunity to rule on an early attack on ambush marketing. Coca-Cola entered a \$2.6 million agreement with the National Hockey League (NHL) to become the official league sponsor.⁹³ There was no agreement, however, permitting Coca-Cola to advertise during the NHL broadcasts in Canada.⁹⁴ In 1990, rival soft drink manufacturer Pepsi then contracted to have exclusive advertising rights for soft drinks during the broadcast of all "Hockey Night in Canada" games televised by the Canadian Broadcasting Corporation.⁹⁵ In refusing to hold Pepsi liable for ambush marketing, the Supreme Court of British Columbia ruled:

[T]he [NHL]-Coke agreement obligates [the NHL], so far as it is able, to protect the rights of Coke from "ambush marketing". Such an obligation

89. *Id.* at 598.

90. Trade-marks Act, R.S.C. 1985, c. T-13, § 7(b) (Can.).

91. *MacDonald v. Vapor Can. Ltd.*, [1977] 2 S.C.R. 134, 153 (Can.).

92. *Mark Fishing Co. v. United Fishermen & Allied Workers' Union* (1972), 24 D.L.R. 3d 585, 620 (Can. B.C.C.A.) ("Indirect interference is only unlawful if unlawful means are used.')

93. *Vukelj*, *supra* note 30, at 527.

94. *Id.*

95. *Id.*

cannot, however, impose on a third party a duty to refrain from engaging in advertising its products in a manner which, although aggressive, is not, by the law of Canada, unlawful.⁹⁶

While the case may simply reflect a controversy that was, on the facts, weak, it illustrates the difficulty ambush marketing victims face in trying to prove that the practice violates traditional common law and establishes causes of action. One commenter has called upon Canada to increase statutory protections against ambush marketing.⁹⁷

In anticipation of the 2010 Olympic Games, Canada passed legislation designed to lower the standard of proof needed to obtain an injunction to stop ambush marketing. The Olympic and Paralympic Marks Act prohibits certain marks associated with the Olympics.⁹⁸ The Act also prohibits traditional ambush marketing conduct, for example, promoting or directing attention to “business, wares or services in a manner that misleads or is likely to mislead the public” to believe that there is approval, authorization, or endorsement by an Olympic organization.⁹⁹ Notably, the Act permits the issuance of an interim injunction against alleged infringers even without proof of irreparable harm,¹⁰⁰ a significant departure from the traditional rule. The law came under heavy criticism for including such common words as “gold,” “silver,” “games,” “21st,” and “2010.”¹⁰¹ When asked why the government was giving such protection against ambush marketing to the Olympics but not to other large entertainment events, a government official noted: “Rock concerts are not publicly subsidized events. Rock concerts do not cost \$2.45 billion.”¹⁰² The government’s financial interest, then, is clearly one rationale given for enacting greater protections against ambush marketing.

C. *Australia*

Australia operates under a federal system of government, where lawmaking powers are distributed between the federal (or commonwealth) parliament and the parliaments of the states.¹⁰³ Under the Australian

96. *NHL v. Pepsi-Cola Can. Ltd.* (1992), 92 D.L.R. 4th 349, 369 (Can. B.C.).

97. Laura Misener, *Safeguarding the Olympic Insignia: Protecting the Commercial Integrity of the Canadian Olympic Association*, 13 J. LEGAL ASPECTS SPORT 79, 92 (2002).

98. S.C. 2007, c. 25, § 3 (Can.).

99. *Id.* § 4(1).

100. *Id.* § 6.

101. Ian Austen, *For Vancouver’s 2010 Olympics, Proprietary Words*, N.Y. TIMES, Apr. 2, 2007, <http://www.nytimes.com/2007/04/02/business/02olympic.html#>.

102. *Id.*

103. AUSTRALIAN CONSTITUTION ss 1, 109.

Constitution, the federal parliament has the exclusive power to make laws on a range of matters, including intellectual property,¹⁰⁴ and concurrent powers over subject matter where both federal and state governments are able to enact laws. The states have independent legislative power in all matters not specifically assigned to the federal parliament under the Constitution.¹⁰⁵ Federal law applies to the whole of Australia and prevails if there is any inconsistency between federal and state law.¹⁰⁶

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

1. Trade Marks Act 1995 (Cth)

In common with most jurisdictions, Australia has a trademark registration process. A registered mark is infringed when another party, without consent, uses a substantially identical or deceptively similar mark, *as a mark* (that is, to distinguish products from those of other traders) on products for which the mark is registered.¹⁰⁷ There are wider protections for “well-known marks”—essentially preventing use by another party on any (even unrelated) products.

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

2. Competition and Consumer Act 2010 (Cth)

Formerly known as the Trade Practices Act 1974, the Australian Consumer Law provisions of this statute provide the most relevant statutory protection from (or regulation of) ambush marketing. In addition to general prohibition on conduct that is, or is likely to be, misleading or deceptive, there are specific provisions prohibiting conduct that constitutes “a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or . . . a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation.”¹⁰⁸

These provisions were relied on, unsuccessfully, in a case arising from the use by an airline of an image of a champion long jump athlete.¹⁰⁹

104. *Id.* s 51 (xviii).

105. *Id.* s 107.

106. *Id.* s 109.

107. *Trade Marks Act 1995*(Cth) s 120 (Austl.).

108. *Competition and Consumer Act 2010*(Cth) s 29 sch 2 (Austl.).

109. *See Honey v Austl. Airlines Ltd.* (1990) 18 IPR 185, 186-87 (Austl.).

The airline had used images of the athlete, along with their logo and name, on posters.¹¹⁰ The court held that conduct that “merely implies some form of association” is not likely to have the necessary level of “deceptiveness” to satisfy the requirements of the statute.¹¹¹ This decision was made despite the court’s view:

[M]any, if not most, viewers would have assumed that the first respondent had undertaken the task of producing and distributing posters of the kind exemplified by the one here in question because it perceived that such activity would enhance its public image and so generate benefits to . . . its commercial operations. But that is quite a different thing from saying that by publication of the poster the first respondent was representing that the appellant had approved the use of his photograph and endorsed, or was otherwise commercially associated with, the activities of the first respondent.¹¹²

3. Olympic Insignia Protection Act 1987 (Cth)

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

- (1) making the Australian Olympic Commission (AOC) the owner of copyright in the Olympic symbol,
- (2) making the AOC the owner of certain Olympic designs (for the purposes of the Designs Act),
- (3) providing that the Olympic motto, the Olympic symbol, and certain other Olympic images (including the Olympic torch and flame) must not be registered as trademarks, and
- (4) prohibiting the commercial use of certain Olympic expressions unless the user holds a license granted by the AOC.¹¹³

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

When Australia was awarded the 2000 Olympic Games in 1993, the Australian Senate Legal and Constitutional References Committee undertook an inquiry covering the protection of Olympic insignia and

110. *Id.*

111. Curthoys & Kendall, *supra* note 40, para. 36 (internal quotation marks omitted).

112. *Honey* 18 IPR at 194.

113. *Olympic Insignia Protection Act 1987*(Cth) ss 5-6, 8, 18-19 (Austl.).

sponsorship for the Sydney Olympics.¹¹⁴ It was a requirement under the Host City Agreement with the International Olympic Committee (IOC) that Australia provide a certain level of legislative “protection for the intellectual property and marketing activities of the IOC and the Olympic Games Organising Committee.”¹¹⁵

Section 3 of the Sydney 2000 Games (Indicia and Images) Protection Act (Cth) lists its objects as:

- (1)(a) to protect, and to further, the position of Australia as a participant in, and a supporter of, the world Olympic and Paralympic movements; and
- (1)(b) to the extent that it is within the power of the Parliament, to assist in protecting the relations, and ensuring the performance of the obligations, of the Sydney 2000 Games bodies with and to the world Olympic and Paralympic movements; in relation to the holding of the Sydney 2000 Games.
- (2) These objects are to be achieved by facilitating the raising of licensing revenue in relation to the Sydney 2000 Games through the regulation of the use for commercial purposes of the indicia and images associated with the Games.¹¹⁶

The definitions section of the Act provides that certain terms are protected, including “Games City,” “Sydney Games,” “Olympic,” and “Olympiad.”¹¹⁷ Also protected are “Sydney 2000 Games images,” defined as “any visual or aural representations that, to a reasonable person, in the circumstances of the presentation, would suggest a connection with the Sydney 2000 Olympic Games.”¹¹⁸

Remedies provided for specifically under the Act include injunctions,¹¹⁹ interim injunctions,¹²⁰ corrective advertisements,¹²¹ and damages.¹²² Section 47 provides that these remedies are in addition to other remedies already provided under state or commonwealth law, including the Trade Practices Act 1974 (Cth) (now known as the Competition and Consumer Act 2010 (Cth)).¹²³

114. See SENATE LEGAL & CONSTITUTIONAL REFERENCES COMM., CASHING IN ON THE SYDNEY OLYMPICS: PROTECTING THE SYDNEY OLYMPIC GAMES FROM AMBUSH MARKETING (1995).

115. Curthoys & Kendall, *supra* note 40, para. 8.

116. *Sydney 2000 Games (Indicia and Images) Protection Act 1996* (Cth) s 3 (Austl.).

117. *Id.* s 8.

118. *Id.* s 9.

119. *Id.* s 43.

120. *Id.* s 44.

121. *Id.* s 45.

122. *Id.* s 46.

123. *Id.* s 47.

It is difficult to see how either of the Olympic-specific statutes (or similar legislation) can effectively prevent ambush marketing much beyond blatant use of protected names or marks. Examples of successful ambushing include Land Rover's use of the slogan "Let the Games Begin" in its advertisements at the time of the Sydney Olympics and an Olympic swimmer's concealment of the official sponsor's logo to aid his personal commercial sponsor.¹²⁴ The protection afforded by these *sui generis* statutes seems, in practical terms, to rarely extend beyond existing statutes, in particular the Competition and Consumer Act and the Trade Marks Act. Other than some state legislation that governs the use of advertising near sports events,¹²⁵ little protection is provided.

D. United Kingdom

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

1. Passing Off

The common law action for passing off, as discussed in the U.S. and Canadian contexts above, also exists under U.K. and Australian law. It may apply to situations where the defendant relies on the goodwill or reputation of the plaintiff, and that amounts to a misrepresentation that there is some connection between the business, goods, or services of the defendant and the plaintiff, when in fact none exists, and results in some harm. This requirement for goodwill, misrepresentation, and damage (or

124. Curthoys & Kendall, *supra* note 40, paras. 69, 71. Nike was the official clothing sponsor for the Australian Olympic team, but swimmer Ian Thorpe had a sponsorship agreement with rival Adidas. *Id.* para. 69. At the medal presentation ceremony, the swimmer hid the Nike logo under a towel, depriving the team's sponsor of the promotional value. *Id.*

125. See, e.g., *Major Sports Facilities Act 2001* (Queensl.) s 30F (Austl.), amended by *Major Sports Facilities Amendment Act 2011* (Queensl.) ss 3, 4 pt 3B div 1 para 30A1 (Austl.) (limiting advertising near sports facilities); *Major Sporting Events Bill 2009* (Vict.) s 115 pt 7 (Austl.) (governing designation of those events eligible for protection as a major sporting event); *Major Events (Aerial Advertising) Act 2007* (Vict.) s 4 pt 2, s 10 pt 3 (Austl.) (prohibiting aerial advertising over certain sporting events in the state).

variations on this theme) is often referred to as the “classical trinity” of passing off.¹²⁶

2. The Consumer Protection from Unfair Trading Regulations 2008

These provisions, implementing obligations under European Parliament and Council of the European Union Directive 2005/29,¹²⁷ contain a number of grounds that could potentially support action against ambush marketing. Notably, Regulation 5 prohibits “misleading actions,” including practices that “concern[] any marketing of a product . . . which create[] confusion with any products, trade marks, trade names or other distinguishing marks of a competitor,”¹²⁸ or practices that convey an “overall presentation [that] in any way deceives or is likely to deceive the average consumer in relation to [a range of matters including those below], even if the information is factually correct.”¹²⁹

These matters include “any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product” or “the nature, attributes and rights of the trader” (including approval, affiliations, or connections).¹³⁰

3. Registered Trademarks

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

4. Legislation Relating to the Olympics

The United Kingdom has enacted specific legislation dealing with a range of matters relating to the 2012 London games, including the regulation of marketing (trading and advertising).¹³¹ Under section 19(1) of the London Olympic Games and Paralympic Games Act, “[t]he

126. See *Consorzio del Prosciutto di Parma v. Marks & Spencer P.L.C.*, [1991] R.P.C. 351 (A.C.) at 368-69 (Eng.) (citing *Reckitt & Colman Prods. Ltd. v. Borden, Inc.*, [1990] 1 W.L.R. 491 (H.L.) (U.K.)).

127. Council Directive 2005/29, art. 11, 2005 O.J. (L 149) 22 (concerning unfair business-to-consumer commercial practices in the internal market).

128. Consumer Protection from Unfair Trading Regulations, 2008, S.I. 2008/1277, § 5(3)(a) (U.K.).

129. *Id.* § 5(2)(a).

130. *Id.* § 5(4)(f), (j), (6)(e)-(f).

131. London Olympic Games and Paralympic Games Act, 2006, c. 12, §§ 19-31 (Eng.).

Secretary of State shall make regulations about advertising in the vicinity of London Olympic events.”¹³²

These regulations apply to designated “Event Zones” around Olympic event venues and routes,¹³³ during and immediately prior to Olympic events, and require parties wishing to trade or advertise in these areas to obtain specific prior authorization from the London Organising Committee of the Olympic and Paralympic Games (LOCOG).¹³⁴ The Regulations apply to those directly or indirectly responsible for the advertising activity, including those who arrange for advertising, any businesses whose products or services are advertised, and owners, occupiers, or managers of land on which the advertising takes place.¹³⁵ However, there is a defense for people who are unaware of the advertising taking place or who took reasonable steps to prevent it from occurring.¹³⁶

Individuals wearing clothing, tattoos, or carrying items bearing branding are exempt from restriction “unless the individual knows or has reasonable cause to believe that he or she is participating in an ambush marketing campaign.”¹³⁷ Ambush marketing is broadly defined in the Regulations as “a campaign (whether consisting of one act or a series of acts) intended specifically to advertise [goods, services, or persons] in an event zone during the relevant event period or periods.”¹³⁸ There are some other exceptions covering such matters as directional signage, street furniture, and government signage.¹³⁹

The London Olympic Games and Paralympic Games Act 2006 (2006 Act) also creates the “London Olympics Association Right” (Association Right).¹⁴⁰ This is an “exclusive right[] in relation to the use

132. *Id.* § 19(1); London Olympic Games and Paralympic Games (Advertising and Trading) (England) Regulations, 2011, S.I. 2011/2898, § 6 (U.K.). There are parallel regulations in Scotland, The London Olympic Games and Paralympic Games (Advertising and Trading) (Scotland) Regulations 2011, and in Wales, The London Olympic Games and Paralympic Games (Advertising and Trading) (Wales) Regulations 2011. See OLYMPIC DELIVER AUTH., DETAILED PROVISIONS OF THE ADVERTISING AND TRADING REGULATIONS 3 (2011), available at www.london2012.com/documents/oda-publications/detailed-provisions-of-the-advertising-and-trading-regulations.pdf.

133. *Advertising and Trading Regulations*, LONDON 2012 OLYMPICS, <http://www.london2012.com/business/advertising-and-trading-regulations/> (last visited Oct. 24, 2012).

134. London Olympic Games and Paralympic Games (Advertising and Trading) (England) Regulations, 2011, S.I. 2011/2898, §§ 6, 11 (U.K.).

135. *Id.* § 6.

136. London Olympic Games and Paralympic Games Act, 2006, c. 12, § 21(2) (U.K.).

137. London Olympic Games and Paralympic Games (Advertising and Trading) (England) Regulations, 2011, S.I. 2011/2898, § 8(1) (U.K.).

138. *Id.* § 5(1).

139. *Id.* §§ 7-10.

140. London Olympic Games and Paralympic Games Act, 2006, c. 12, § 33, sched. 4 (U.K.).

of any representation (of any kind) in a manner likely to suggest to the public that there is an association between the London Olympics” and the person or entity making the representation.¹⁴¹ Essentially, this right is infringed if any representation is made that suggests a connection with the games.¹⁴² In determining infringement cases, courts may specifically consider use of expressions such as “games,” “Two Thousand and Twelve,” “2012,” and “twenty twelve,” when such phrases are used in conjunction with the following words: “gold,” “silver,” “bronze,” “London,” “medals,” “sponsor,” or “summer.”¹⁴³

Remedies under section 22 of the 2006 Act include police powers to “enter land or premises on which they reasonably believe a contravention of regulations under section 19 is occurring” and “remove, destroy, conceal or erase any infringing article” with “reasonable force.”¹⁴⁴ Section 21 sets out financial penalties for infringing, with fines up to £20,000.¹⁴⁵

The experience of developing the Association Right is to be used by the U.K. Government/Intellectual Property Office to formulate policy for addressing ambush marketing at other major sporting and cultural events.¹⁴⁶ The Glasgow 2014 Commonwealth Games are also protected from ambush marketing under specific statute, which also adopts an association right.¹⁴⁷

The 2006 Act supplements the Olympic Symbol etc. (Protection) Act 1995, which protects exclusive rights in relation to the use of the Olympic symbol, the Olympic motto, and the protected words.¹⁴⁸ These rights are more akin to traditional trademark rights than the association rights protected by the subsequent 2006 Act. The rights under the Olympic Symbol etc. (Protection) Act 1995 are infringed when a party uses

- (a) a representation of the Olympic symbol, the Olympic motto or a protected word, or

141. *Id.* § 33, sched. 4, pt. 1(1).

142. *Id.* § 33, sched. 4, pt. 2.

143. *Id.* § 33, sched. 4, pt. 3.

144. *Id.* § 22.

145. *Id.* § 21.

146. *Ambush Marketing*, INTELL. PROP. OFF., <http://www.ipo.gov.uk/pro%20types/pro-tm/t-policy/t-policy-ambush.htm> (last visited Oct. 21, 2012).

147. Glasgow Commonwealth Games Act 2008 (Games Association Right) Order 2009, S.I. 2009/1969, arts. 4-5 (U.K.).

148. Olympic Symbol etc. (Protection) Act, 1995, c. 32 (U.K.).

- (b) a representation of something so similar to the Olympic symbol or the Olympic motto as to be likely to create in the public mind an association with it.¹⁴⁹

E. Germany

Unlike the United States, Canada, the United Kingdom, and Australia with their common law traditions, Germany is a civil law country. In civil law countries (and in contrast with common law jurisdictions), the predominant legal source is codified law.¹⁵⁰ Legal remedies against ambush marketing under German law, therefore, are limited to statutes and codes. Nevertheless, case law plays a significant role in the interpretation and development of the codified law. Although court decisions in Germany are, following the civil law tradition, not binding, lower courts tend to follow the decisions of the highest German civil court, Bundesgerichtshof (BGH), in order not to be overruled.¹⁵¹ In addition, legal scholarship is influential in the interpretation of statutes by the courts and the development of legislation.¹⁵² Because Germany is a Member State of the European Union, certain provisions of EU law are relevant to the application of German law to ambush marketing activities and also to other EU countries.

As in the jurisdictions presented above, in Germany, ambush marketing is not illegal, and as such, specific statutes aimed at such practices (with an exception for the Olympic Games¹⁵³) do not exist.¹⁵⁴ Thus, in order to stop, prevent, or claim damages for ambushing activities, event organizers and competitors need to rely on general legal provisions from areas such as intellectual property or unfair competition law.

149. *Id.* § 3.

150. See generally JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* (2d ed. 1985) (discussing traits in civil law and common law jurisdiction). For information about the status of a nation's legal system, see JURIGLOBE—WORLD LEGAL SYSTEMS RESEARCH GROUP, <http://www.juriglobe.ca/eng/index.php> (last visited Oct. 24, 2012).

151. See MERRYMAN, *supra* note 150, at 26.

152. *Id.* at 31-32.

153. German Olympiaschutzgesetz §§ 3 and 1 protect the Olympic signs such as “Olympics,” “Olympic,” or “Olympia” trademark like. See, e.g., Michael Nieder & Oliver Rauscher, *Inhalt und Reichweite des Olympiaschutzgesetzes*, 13 SPURT 237, 239 (2006). The law is considered to be unconstitutional by some scholars and some courts. See Christoph Degenhart, *Olympia und der Gesetzgeber: Ist ein Sondergesetzlicher Schutz Gerechtfertigt?*, AFP 103, 106 (2006); see, e.g., Landgericht Darmstadt [LG Darmstadt] [District Court of Darmstadt] Nov. 22, 2005, 7 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT RECHTSPRECHUNGS—REPORT [GRUR-RR] 232, 2006 (Ger.).

154. Switzerland unsuccessfully tried to establish a specific legal provision against ambush marketing as an unfair business practice. See Daniel Thaler, *Ambush Marketing mit der UEFA EURO 2008™—Eine Standortbestimmung*, 2 CAUSA SPORT 160, 163 (2008).

Jurisprudence applying those general laws to ambushing is still sparse. The reason for this lack of jurisprudence could be that ambush marketing in Europe is an even newer phenomenon than in the United States. Additionally, in Germany, there is a less-developed tradition of using the law as a strategic instrument between competing companies.

Much of the legal discussion in Germany and other European civil law countries (such as Switzerland) has therefore evolved around the question of the protection of the event organizer against, for example, the illegal use of event trademarks—emblems or logos—or legal protection of the surrounding area—for example, in connection with “public viewing,”¹⁵⁵—rather than the protection of the sponsor against the competing ambusher. Nevertheless, some commentators and court decisions have addressed different aspects of ambush marketing, especially in relation to the European Soccer Championship 2008 (UEFA EURO) in Switzerland and Austria¹⁵⁶ and the Soccer World Cup 2006 (FIFA WM 2006) in Germany.¹⁵⁷ Also attempts (to date, unsuccessful) by the Union of European Football Associations (UEFA) and other sports organizers, such as the Olympic Committee, to request countries hosting an event to change their national laws and to incorporate specific provisions against ambush marketing practices have elicited criticism from legal scholars and courts¹⁵⁸ who question the constitutionality of such laws.¹⁵⁹

With the growing economic importance of ambush marketing in Germany and Europe in general,¹⁶⁰ it is likely that the legal and political discussion and number of court decisions will increase with each major sports or cultural event.

As in the common law jurisdictions discussed *supra*, there are two basic challenges to ambush marketing under German private law: the first concerns applying trademark law, and the second is based on unfair

155. See, e.g., Martin Diesbach et al., “Public Viewing” als Problem des Urheber- und Wettbewerbsrechts—Zu den Beschränkungen Öffentlicher Vorführungen von Live-Übertragungen der Fußballweltmeisterschaft 2006, 50 ZUM 265 (2006).

156. See, e.g., Thaler, *supra* note 154, at 162-63; Körber & Mann, *supra* note 49, at 737; Nils Weber et al., *Der Schutz Großer Sportereignisse und Darauf Bezogener Kommerzieller Maßnahmen Durch Marken und Andere IP-Rechte (Q210)*, 58 GRUR INT. 839, 839 (2009).

157. See, e.g., Peter W. Heermann, *Ambush-Marketing anlässlich Sportgroßveranstaltungen. Erscheinungsformen, wettbewerbsrechtliche Bewertung, Gegenmaßnahmen*, 108 GRUR 359, 359 (2006).

158. See 7 GRUR-RR 232 (Ger.).

159. See generally Körber & Mann, *supra* note 49.

160. See generally *Commission White Paper on Sport*, COM (2007) 391 final (July 11, 2007), available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0391en01.pdf.

competition law. For purposes of this Article, we do not address the legal issues related to “public viewing,” the protection of the area surrounding the event, or governmental control of activities of those participating in the event (athletes, media, and organizations).

1. Trademark Law

One strategy to legally fight ambush marketing in Germany is through the use of trademark law. This would apply to such marketing actions as Quiksilver, Inc., creating a design featuring the company’s logo inside five interlocking circles similar to the five Olympic rings,¹⁶¹ or a bakery offering “EURO 2008” bread during the European Soccer Championship. In Germany, the predominant source of trademark law is a federal statute, the German Trade Marks Act.¹⁶² It is based on the Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to Approximate the Laws of the Member States Relating to Trademarks, the so-called Trade Marks Directive.¹⁶³ The Trade Marks Directive harmonizes the laws of the EU Member States relating to trademarks. The Trade Marks Directive does not have direct effect but, rather, needs to be enacted as national law by the legislators of each EU Member State pursuant to article 288 of the Treaty on the Functioning of the European Union.¹⁶⁴ Therefore, trademark law in the Member States is not identical, but instead based on a uniform minimum standard as set by the Trade Marks Directive.¹⁶⁵ Many of its provisions have been adopted almost literally by national statutes.

Moreover, even if the Trade Marks Directive lacks direct effect, according to the European Court of Justice decisions in *Leur-Bloem v Inspecteur der Belastingdienst*¹⁶⁶ and *Giloy v. Hauptzollamt Frankfurt am Main-Ost*,¹⁶⁷ national trademark laws must be interpreted in accordance with the Trade Marks Directive and its economic and political goals. This explains why German judges and commentators frequently refer to EU

161. McKelvey & Grady, *supra* note 32, at 207.

162. KEY ASPECTS OF GERMAN BUSINESS LAW 264 (Bernd Tremml & Bernard Buecker eds., 2d ed. 2002).

163. See Council Directive 2008/95, 2008 O.J. (L 299) 25.

164. See Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Sept. 5, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]. An EU directive only has direct effect if it (1) has not been correctly transformed into national law (or not transformed within the time limit set in the directive), (2) is sufficiently clear and precisely stated, (3) is unconditional or nondependent, and (4) it confers a specific right for the citizen on which to base his or her claim. See Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337.

165. TFEU, *supra* note 164.

166. Case C-28/95, 1997 E.C.R. I-4161, ¶¶ 1, 34.

167. Case C-130/95, 1997 E.C.R. 4291, ¶¶ 1, 21.

law or European Court of Justice decisions when interpreting German trademark law.

Trademark counterfeiting that results when the defendant uses an identical or similar mark owned by the plaintiff on the same type of goods or services and sells those goods or services in direct competition with the plaintiff is addressed in article 5(1) of the European Trade Marks Directive and the parallel provision in article 14 of the *MarkenG*.¹⁶⁸ According to article 5(1):

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

- (a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered;
- (b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public[, which] includes the likelihood of association between the sign and the trade mark.¹⁶⁹

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

- (a) affixing the sign to the goods or to the packaging thereof;
- (b) offering the goods, or putting them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder;
- (c) importing or exporting the goods under the sign;
- (d) using the sign on business papers and in advertising.¹⁷⁰

A trademark is defined in article 2 of the Trade Marks Directive (and in section 3(1) of the *MarkenG*) as “any sign[] capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.”¹⁷¹

One problematic feature with respect to ambushing activities is that they might not cause confusion as to the origin of the goods or services, and therefore would not fall within traditional trademark prohibitions. This raises the question of the function of trademarks. Traditionally, the purpose of a trademark has been interpreted by German courts (and in

168. Council Directive 2008/95, *supra* note 163, art. 5(1).

169. *Id.*

170. *Id.* art. 5(3).

171. *Id.* art. 2.

reliance on a European Court of Justice decision¹⁷²) as an indication of origin. The eleventh recital of the preamble to the Trade Marks Directive states that the function of a trademark “is in particular to guarantee the trade mark as an indication of origin.”¹⁷³ Therefore, there has to be “identity between the mark and the sign and between the goods or services concerned and those for which the mark is registered.”¹⁷⁴

For the trademark to be able to fulfill its essential role in the system of undistorted competition which the Treaty seeks to establish and maintain, it must offer a guarantee that all the goods or services bearing it have been manufactured or supplied under the control of a single undertaking which is responsible for their quality¹⁷⁵

This definition describes traditional counterfeiting, where the goal of trademark protection is to protect the trademark holder against competitors who try “to take unfair advantage of the status and reputation of the trade mark by selling products” or providing services illegally bearing the same or similar signs.¹⁷⁶ If an ambusher uses the sign of a major event, however, the situation differs: the ambusher typically will not sell the same products or provide the same services as the event organizers, whose service typically consists of organizing the event.

The ambush marketer usually does not want to create confusion on the part of the public as to the origin of the product or service, but instead aims to simply profit from the positive image or media coverage of the event. Also, merchandising products or other products commercialized by sponsors—for example, the use of an event logo—typically do not imply that the event organizer has control over the quality of the product. Therefore, during the 2006 World Soccer Championship in Germany, the German Federal Court denied trademark status to the term “Fussball WM 2006” (i.e., “World Cup 2006”) and its abbreviation “WM 2006” for which FIFA had requested registration with the German Patent Office.¹⁷⁷

Taking into account the need of event organizers, the economic value of the name and signs of important sports or cultural events, and the

172. Case C-206/01, Arsenal Football Club plc v. Reed, 2002 E.C.R. I-10299.

173. Council Directive 2008/95, *supra* note 163, *pmb*l. ¶ 11.

174. *Reed*, 2002 E.C.R. I-10299, ¶ 50.

175. *Id.* ¶ 47; *see also* Case 102/77, Hoffman-La Roche v. Centrafarm, 1978 E.C.R. 1139, ¶ 7; Case C-299/99, Koninklijke Philips Elec. NV v. Remington Consumer Prods., Ltd., 2002 E.C.R. I-5490, ¶ 30.

176. Case C-349/95, Loendersloot Int’l Expeditie v. George Ballentine & Son, Ltd., 1997 E.C.R. I-6244, ¶ 22.

177. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 27, 2006, 167 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN (BGHZ) 278 (Ger.), *translated in* 38 INT’L REV. INTELL. PROP. & COMPETITION L. 867 (2007).

changing marketing-oriented economy, some scholars have proposed the adoption of an “event-mark.”¹⁷⁸ By contrast with the traditional trademark definition, the function of an event-mark is to communicate to the public that products or services commercialized using the name or logo of the event have been authorized by the event organizer and contribute to financing the event.¹⁷⁹

Even after the German Federal Court denied trademark status to the term “Fussball WM 2006,” some commentators in Germany still defend the event-mark. During the 2008 European Soccer Championship in Switzerland and Austria, the Swiss Patent Office, despite the decision of the German Federal Court and the heavy influence of German law and jurisprudence on Swiss law, registered the event-marks “EURO 2008,” “EM 2008,” and “Österreich/Schweiz 2008” as trademarks.¹⁸⁰

The idea of an event-mark will certainly be raised in connection with future events in EU Member States. This might give an opportunity to the Court of Justice of the European Union to redefine the function of a trademark according to the EU Trade Marks Directive. In order to ensure a uniform application of the EU directive, and pursuant to article 267 of the Treaty on the Functioning of the European Union, any domestic court of an EU Member State needing an interpretation of a provision in national trademark law based on the Trade Marks Directive may,

if it considers that a decision on the question is necessary to enable it to give judgment, request the [Court of Justice of the European Union] to give a ruling thereon. Where any such question is raised in a case pending before [the highest] court or tribunal of a Member State, . . . that court or tribunal shall bring the matter before the Court.¹⁸¹

A ruling of the court could lead to a uniform legal treatment of this aspect of ambush marketing, at least for the Member States of the European Union.¹⁸²

In practice, in Europe, as in the United States, Canada, and Australia, and independent from the legal discussion about event-marks or

178. Karl-Heinz Fezer, *Die Eventmarke—Markenschutz für Sponsoring und Merchandising*, 65 Festschrift für Winfried Tilmann 321, 323 (2003).

179. Johann-Christoph Gaedertz, *Die Eventmarke in der Neueren Rechtsprechung*, 52 WRP 526, 527 (2006).

180. GLOBAL ADVER. LAWYERS ALLIANCE, A GLOBAL COMPENDIUM OF LAWS AND REGULATIONS 43 (2007), available at <http://www.gala-marketlaw.com/membersonly/pdfs/AmbushMarketingNovember2007.pdf>.

181. TFEU, *supra* note 164, art. 267.

182. Switzerland, home country of many international sports federations, is not a Member State.

governmental attempts to change the trademark law,¹⁸³ it will still be easy for creative marketing managers to undermine trademark protection by simply avoiding an identical or confusingly similar trademark. Marketing campaigns such as American Express's slogan that "if you're traveling to Norway, you'll need a passport but you don't need a Visa,"¹⁸⁴ as well as many of the other "indirect" ambush activities mentioned *supra*, would probably still be considered legally permissible even under a trademark law tailored to the needs of event organizers and their sponsors.

2. Unfair Competition Law

Unfair competition law in Germany is regulated by the recently revised Act Against Unfair Competition (*Gesetz gegen unlauteren Wettbewerb—UWG*) (UWG).¹⁸⁵ The UWG implements Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market.¹⁸⁶ In the Annex to section 3(3), the revised UWG features a "black list" of illegal activities that can be deemed unfair by courts without a case-by-case assessment or relevance of the illegal activity.¹⁸⁷ With respect to ambush marketing, only a marketing activity where the ambusher explicitly pretends to be an official sponsor clearly falls within the list.¹⁸⁸ According to the annex, "making the false statement that an entrepreneur, a commercial practice by that entrepreneur, or goods or services have been approved, endorsed or authorised by a public or private body; or making the false statement that the terms of the approval, endorsement or authorisation have been complied with" is considered to be an illegal commercial practice within the meaning of section 3(3).¹⁸⁹ But in practice, explicitly false statements

183. See, e.g., London Olympics Bill, 2005-06 H.C. Bill [45] cl. 32 (Eng.); Press Release, Schweizerische Eidgenossenschaft Confédération Suisse, Ambush Marketing: Keine Anpassung des Gesetzes Gegen den Unlauteren Wettbewerb (Nov. 22, 2006), <http://www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=de&msg-id=8453> (announcing the Federal Council's decision not to go forth with the proposed amendments to the Unfair Competition Act).

184. *Credit Card War Erupts at Olympics: Advertising: IOC Accuses American Express Co. of 'Ambush Marketing' in Campaign Aimed at Rival Visa*, L.A. TIMES (Feb. 19, 1994), available at http://articles.latimes.com/1994-02-19/business/fi-24757_1_american-express (internal quotation marks omitted).

185. Gesetz gegen den unlauteren Wettbewerb [UWG] [Act Against Unfair Competition], July 3, 2004, BUNDESGESETZBLATT, Teil I [BGBl.I] at 254 (Ger.).

186. *Id.*

187. *Id.* § 3(3) & annex; see also *Commission Guidance on the Implementation/ Application Directive 2005/29/EC on Unfair Commercial Practice*, at 53, SEC (2009) 1666 (Dec. 3, 2009).

188. See UWG § 3(3) annex (Ger.) (author's translation).

189. *Id.*

by ambushers purporting to be official sponsors occurs rarely, so the law has limited applicability.¹⁹⁰

Whether using a logo or the name of an event in connection with a commercial activity (for example, “Olympic bread”) would constitute a false statement within the UWG is less clear. The UWG differentiates between false statements and false impressions.¹⁹¹ Consequently, the UWG, by referring only to false statements, does not encompass creating a false impression through implicit marketing activities. Therefore, section 3 of the UWG does not provide any protection against indirect ambush activities.

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

Unfairness shall have occurred where a person uses a misleading commercial practice. A commercial practice shall be deemed to be misleading if it contains untruthful information or other information suited to deception regarding the following circumstances:

...
 . . . any statement or symbol in relation to direct or indirect sponsorship or approval of the entrepreneur or of the goods or services . . .¹⁹²

Compared to the rest of the UWG, section 5 is broader, as it is not limited to explicitly false statements, but also includes “information suited to deception.”¹⁹³ If an indirect marketing activity creates the impression that the ambusher is an official sponsor, the conduct would fall under section 5 of the UWG.¹⁹⁴ Nevertheless, section 5 of the UWG requires “untruthful information or other information in relation to the sponsorship.”¹⁹⁵ Ambush marketing activities that do not cause the impression by the consumer that the ambusher is an official sponsor, but simply “free ride” on the positive image of the event (as many sophisticated ambush activities do) would probably continue to be legally permissible under the revised German UWG.¹⁹⁶

190. See Körber & Mann, *supra* note 49, at 739.

191. *Id.*; see, e.g., UWG § 3(3) no. 9 annex (Ger.) (prohibiting “making the false statement, or creating the false impression, that goods or services can be sold with legal effect”) (author’s translation).

192. UWG § 5(1) (Ger.) (author’s translation).

193. *Id.* (author’s translation).

194. Körber & Mann, *supra* note 49, at 738-39.

195. Weber et al., *supra* note 156, at 844 (author’s translation).

196. *Id.*; Heermann, *supra* note 157, at 365-66.

3. OlympSchG

Germany enacted a specific Olympic trademark protection statute in 2004 in connection with its effort to attract the 2012 Summer Olympics.¹⁹⁷ The so-called Olympia Schutz Gesetz (OlympSchG) protects certain Olympic related words and symbols as the exclusive property of the German National Olympic Committee and the IOC, independent of the product or event category with which Olympic signs or words are associated.¹⁹⁸ It is therefore much more far-reaching than general trademark protection laws. Unlike German trademark law, the OlympSchG is not based on harmonized EU law.

Because, on the one hand, the OlympSchG creates an exclusive right for only one event organizer but not for others, and, on the other hand, applies to any unauthorized commercial user of an Olympic sign independent of his economic power or area of activity, the statute is considered to be unconstitutional by some German legal scholars.¹⁹⁹ In light of these constitutionality concerns, a lower German court has favored a strict interpretation of the statute.²⁰⁰ In a case involving an advertising campaign by tobacco brand Lucky Strike, the court ruled in favor of the ambusher.²⁰¹ The billboard advertisement presented five cigarette parcels arranged similar to the Olympic rings and accompanied by the text: “the rings are already in Athens.”²⁰² Nevertheless, the statute has not been declared unconstitutional by German courts.

IV. CONCLUSION

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

197. Heermann, *supra* note 157.

198. Karl Hamacher, *Exklusive Marketingrechte für Sportgroßveranstaltungen und ihre Grenzen am Beispiel von Kennzeichenschutz*, 2 SPUrt 55, 56 (2005).

199. *See, e.g.*, RASMUS FURTH, *AMBUSH MARKETING: EINE RECHTSVERGLEICHENDE UNTERSUCHUNG IM LICHT DES DEUTSCHEN UND US-AMERIKANISCHEN RECHTS* 60-67 (2009).

200. *Id.*

201. *Id.*

202. Landgericht Darmstadt [LG Darmstadt] [District Court of Darmstadt] Nov. 22, 2005, 7 GRUR-RR 232, 2006 (Ger.).

Two basic types of ambush activities must be distinguished: so-called “direct” and “indirect” ambushing activities. In the former case, for infringements on intellectual property rights (such as the unauthorized use of a logo), relatively clear cut legal remedies exist and have been used successfully. In the latter case, however, when ambushing is more subtle, legal protection is not easily available. Indirect ambushing “poses a very odd fringe gray area threat because it’s not technically trespassing on a trademark It’s not hijacking someone’s brand. It’s more like they’re hijacking the entire event.”²⁰³

As the EU Trade Marks Directive shows, there are stronger efforts in Europe to accommodate big event organizers through the creation of specific sponsorship laws. As a consequence, European countries may have a slight advantage in attracting major sports events.

Notwithstanding any legislative efforts, legal protection against ambushers will always be limited. There seem to be no boundaries to the creativity of marketing managers and agencies in coming up with new forms of indirect association, which are impossible to prevent without limiting freedom of commerce and freedom of speech. Thus, calls for the creation of international law to prevent ambush marketing may not be the solution.²⁰⁴

Instead, increasingly, organizers are relying on contracts and venue commitments rather than on traditional legal actions to protect advertising rights. The IOC, for example, requires that cities bidding to host the Olympics guarantee regulations that will “‘reduce and sanction’ ambush marketing,” including limiting street vending and monitoring public transport advertising.²⁰⁵ In anticipation of the 2012 Olympics, organizers reportedly booked most of London’s billboard space.²⁰⁶

203. Klayman, *supra* note 1 (quoting Chief Marketing Officer Council Vice President Liz Miller) (internal quotation marks omitted).

204. James A.R. Nafziger, *The Future of International Sports Law*, 42 WILLAMETTE L. REV. 861, 872-73 (2006).

205. Chadwick & Burton, *supra* note 8. The International Olympic Committee created an antiambush kit as part of its antiambush campaign in anticipation of the Beijing games in 2008. INT’L OLYMPIC COMM., *MARKETING REPORT—BEIJING 2008*, at 131 (2008); *see, e.g.*, Exec. Order No. 2009-1, Office of the Mayor, City of Chicago (Mar. 31, 2009) (agreeing to combat ambush marketing as part of its unsuccessful attempt to be named the host city for the 2016 Olympic games); *see also* Stacey H. Wang, *Comment, Great Olympics, New China: Intellectual Property Enforcement Steps Up to the Mark*, 27 LOY. L.A. INT’L & COMP. L. REV. 291, 314-15 (2005).

206. Joe Daly, *Dutch Brewery Sends in Blondes for World Cup Ambush Marketing Stunt*, HUFFINGTON POST, http://www.huffingtonpost.com/2010/06/17/world-cup-ambush-marketin_n_615872.html (last updated May 25, 2011, 5:50 PM). The London Olympic Association Right reportedly gives organizers the power to grant licenses and sponsorships, preventing any unauthorized association with the games. *Id.*

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