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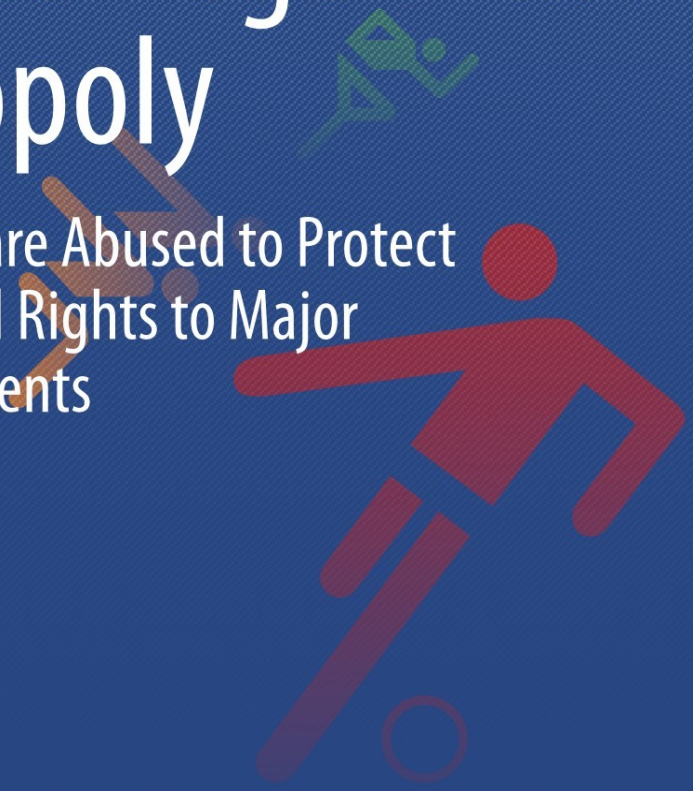
Ambush Marketing and the Mega-Event Monopoly

How Laws are Abused to Protect Commercial Rights to Major Sporting Events



Andre M. Louw

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Andre M. Louw
School of Law, Howard College Campus
University of KwaZulu-Natal
King George V Avenue
Durban 4041
South Africa

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Series Editors
Dr. Robert C. R. Siekmann, Director Asser International Sports Centre
e-mail: r.siekmann@asser.nl

Dr. Janwillem Soek
e-mail: J.soek@asser.nl

M. A. van der Harst LL.M.
e-mail: m.van.der.harst@asser.nl

Editorial Office
ASSER International Sports Law Centre
T.M.C. Asser Institute
P.O. Box 30461
2500 GL, The Hague
The Netherlands
www.sportslaw.nl

For my father, the biggest sports fan ever, with all my love
Thanks for everything

Preface

My homeland was invaded by a foreign power 2 years ago, amidst much fanfare, publicity and excitement. The world sat watching with avid interest to see events unfold, although few spectators were even mildly concerned about these developments and, ultimately, boredom over the resultant spectacle appeared to be the order of the day. The invader was expected (had been invited, in fact), it brought no tanks or guns (although quite a few private jets were to be seen), and its uniform was more bespoke three-piece suits than combat camouflage. While the operation had taken longer to plan than the D-Day landings (more than 6 years in the making), the invasion and subsequent regime change lasted only a month. FIFA had come to South Africa, and my country would never be the same again.

This book started as the germ of an idea that festered amid some interesting debates with postgraduate students in seminars on intellectual property law, where we explored the fascinating world of 'ambush marketing' (well, I found it fascinating, it's mostly impossible to divine the thoughts of a student). From subsequent reading on ambush marketing and IP rights in sport I developed an interest in the commercialisation of sport in its various guises; in the sometimes extremely interesting ways in which businesses have managed to 'unofficially' market their products and services in relation to major sports events and the likewise intriguing ways in which rights holders have proceeded to protect their often considerable investment in these events by means of recourse to the law. Fascination, however, gradually blossomed into disbelief, caused mainly by one specific aspect of ambush marketing: The ways in which the law—specifically in the form of domestic legislation in the countries that have hosted recent major events—has been used, or abused, in order to protect the privately 'owned' commercial rights of event organisers and sponsors at the expense of the rights of just about everyone else.

Upon further reading I found more, and ever more blatant, examples of this, and started to see a pattern of significant economic and political power at work in the world of sport. I have come to the conclusion (and I am not alone in this respect) that those governing world sport and those who plough millions of dollars into major events as sponsors and 'commercial partners' in order to put on the biggest

shows on earth have for some time now been hard at work behind the scenes creating very powerful and influential cliques, and have often rabidly protected their power and financial interests by various means involving the law. I am no conspiracy theorist, and I am not suggesting that some dark forces or *illuminati* are at work here. I just believe that the modern political economy of international sport has assumed dimensions which may require urgent intervention in the public interest, and in the interests of sport. As a lawyer and a teacher of law I have found them extremely worrying.

Following FIFA's brief but tempestuous invasion of my country I felt the need to take up arms. The pen is mightier than the sword, and the laptop is mightier still. So I did what academics are wont to do. I wrote a paper, which was published as a series of articles in a local South African law journal, on the legal implications of commercial monopolies in events such as the FIFA World Cup, and on the (what I view to be) deplorable legislation that my country's democratically elected law-makers have passed and which has been employed in order to protect and maintain one such monopoly. These articles have formed the basis for this book, and I wish to thank the publishers of the *Obiter* journal, at the Law Faculty of the Nelson Mandela Metropolitan University in Port Elizabeth, for their kind permission to use some of that material in this attempt to expand the discussion and to include other jurisdictions and other events in the purview.

Further reading on the subject in researching this book has surprised me into finding that very little work has been done to date by the legal fraternity, *from a critical perspective*, in respect of assessing the legitimacy of the current state of affairs regarding commercial rights to sports mega-events and how the law is employed to protect such rights. In trawling the Internet I have found literally hundreds of articles, opinion pieces and blog postings on ambush marketing, from across the world. The reader is encouraged to search for these, there's some very interesting stuff out there. From this bounty of source material I have tried to piece together what I hope is an interesting if possibly rather long-winded exploration of the nature and implications of the commercial juggernaut that is the modern sports mega-event, and of the activities of those involved in staging and financing these spectacles. While I also found a number of examples of scholarly writing on the subject emanating from both the legal and marketing fraternities, a definitive and all-encompassing critical treatise on the legal and other issues involved has eluded me. This book is not such a work, although I fervently hope that, while not providing a comprehensive and all-encompassing source on the subject, it might serve at the very least to provoke further thinking, reading, writing and debate in the interests of development of the law for purposes of its application to such events in future.

I wish to sincerely thank my colleague, mentor and friend, Tanya Woker, who first suggested that I should write this book (although I am constantly looking for ways to get back at her for the months of hard work that her suggestion inspired).

A number of persons either expressed very flattering interest in the work, assisted me in writing it, or provided helpful information which I managed to use in the process. I wish to express, in no particular order, my sincere gratitude to

Nandan Kamath, Phillip Johnson, Dalton Odendaal, Tim Burrell, Ari Sliffmann, Brian Pelanda, Susan Corbett, Joe Cobbs, Simon Boyes and Kim Skildum-Reid, most of whom offered to assist me although my own busy academic schedule unfortunately prevented me from doing their offers justice. My thanks go also to Kadephi Majola and to Christopher Rodel (for helping me find some of the research material, which turned out to be very helpful); to the good folks at Google; and to Jo-Anne Du Plessis for her extremely thoughtful comments early in the process. Thanks also to Dawn Southgate and the UK's Chartered Institute of Marketing for providing me with material. A special and heartfelt word of thanks goes to Willene Holness, for her tireless and invaluable assistance in compiling the index for the book.

I wish to specifically single out a few individuals who assisted me greatly in preparing the manuscript, mostly by reading draft sections or chapters before its submission to the publisher. First, my heartfelt thanks to Jon Heshka, professor of law at Thompson Rivers University in Kamloops, British Columbia. Jon not only provided me with copies of some of his own writings on ambush marketing and expressed an avid interest in this project from the time of our first correspondence in late 2010, he also went way beyond the call of duty and agreed to read through advanced drafts of some of the chapters of this book to help save me embarrassment upon releasing it on unsuspecting readers. Jon will always be welcome for a beer or two at my place if he's ever in the neighbourhood, if only so I can apologise for mentioning his name here. My thanks go also to Wim Alberts, and to Roshana Kelbrick (for sacrificing her well-deserved beach holiday) for their thoughtful comments on the contents of Chap. 5.

I wish to also sincerely thank David Becker, at the time of writing the head of legal services for the International Cricket Council and someone with an intimate knowledge of both the law and practice of ambush marketing, from both 'sides of the fence'. David took time out of a busy schedule to provide me with extremely valuable information (unfortunately at the eleventh hour in my preparation of the manuscript; we had planned to meet earlier but my own commitments unfortunately did not allow for this). David was instrumental in assisting me to inject some much-needed objectivity into the analysis and also, specifically, in informing me of some of the most prominent characteristics of the 'modern ambush' from his experience particularly in respect of the 2011 ICC Cricket World Cup event (which I've tried to discuss briefly in the concluding chapter).

In particular I also wish to thank Felipe Dannemann Lundgren, whose avid interest in the project and extremely generous and selfless assistance in updating me on recent developments in Brazil will always be greatly appreciated. He did so much more than just guide me through impenetrable Portuguese-language texts. In light of the scope of the project and the way in which some chapters simply snowballed into near unmanageable Tolstoy-like ramblings, my inability to do real justice to the relevant Brazilian law in the short section as contained in Chap. 4 is in no way attributable to Felipe. I hope that he will not be too disappointed in the result.

Finally, I also wish to thank Philip van Tongeren and Marjolijn Bastiaans at Asser Press, and, of course, Rob Siekmann, for their interest in and support for the project (and, especially, for the much-appreciated hands-off approach and the significant trust placed in me to finish the manuscript, substantially on time if a little 'warts and all').

As always, a heartfelt word of thanks and of immense love to my family, especially my long-suffering parents (I love you dearly), brothers, sisters-in-law, nephew, and the little ones. Thanks also to my friends (especially Dave and Willene, Hugo and Eloise and Martin and Claudia).

I hope, for once, that more people will read this book than have assisted me in writing it or have supported me along the way. Despite all their assistance, the mistakes, omissions and no doubt glaring errors are, of course, my own.

Durban, South Africa, Summer 2012 Andre M. Louw

About the Author

Andre M. Louw is an academic at the School of Law of the University of KwaZulu-Natal in Durban, South Africa. He holds the degrees BA, LL.B, LL.M and LL.D (in sports law, from the University of Stellenbosch).

Andre teaches contract law and sports law, and has taught some intellectual property law. His research interests are, exclusively, in the area of sports law, and he has contributed articles to various law journals on a diverse range of issues within the field. He is an attorney of the High Court, South Africa; a member of the British Association for Sport and Law; and a member of the editorial board of the *International Sports Law Journal.*

Andre is also the author of *Sports Law in South Africa* (Kluwer Law International, 2010).

Contents

Abbreviations

AIPPI	International Association for the Protection of Intellectual Property
BCCI	Board of Control for Cricket in India
BCCLA	British Columbia Civil Liberties Association
BOA	British Olympic Authority
BOCOG	Beijing Organising Committee for the 2008 Beijing Olympic Games
CBF	Brazilian Football Federation (Confederaçao Brasileira de Futebol)
CIM	Chartered Institute of Marketing (United Kingdom)
COC	Canadian Olympic Committee
CONAR	Brazilian Advertising Standards Authority
FIFA	Federation Internationale de Football Associations
ICC	International Cricket Council
ICCDIL	ICC Development International Ltd
INTA	International Trademark Association
IOC	International Olympic Committee
IP	Intellectual Property
IPC	International Paralympic Committee
IPL	Indian Premier League (cricket competition)
IRB	International Rugby Board
ISL	International Sports and Leisure (sports marketing rights agency)
LOAR	London Olympics Association Right
LOC	Local Organising Committee (2010 FIFA World Cup South Africa)
LOCOG	Organising Committee for the 2012 London Olympic Games
MEMA	Major Events Management Act, 2007 (New Zealand)
MMA	Merchandise Marks Act, 1941 (as amended) (South Africa)
NFL	National Football League (United States)
NOC	National Olympic Committee
NZRFU	New Zealand Rugby Football Union
OCOG	Organising Committee for the Olympic Games
ODA	Olympic Delivery Authority (for the 2012 London Olympic Games)
OHIM	Office for Harmonisation in the internal market
OSPA	Olympic Symbol etc (Protection) Act, 1995 (United Kingdom)

SROC	Sports Rights Owners Coalition
TOP	The Olympic (Partner) Programme
UEFA	Union of European Football Associations
USOC	United States Olympic Committee
VANOC	Organising Committee for the 2010 Vancouver Winter Olympic Games

Chapter 1
Introduction

Two Million Reasons Not to Wear Reebok

August 1992—Barcelona:

> Officials of the United States Olympic Committee announced that if … Nike endorsers composing half of the American [basketball] "Dream Team" did not relent and wear the official, American flag-bedecked awards ceremony jackets also bearing the emblem of Reebok, the athletic-shoe company against which Nike had conducted a holy war for much of a decade, the players would not be allowed atop the medals stand when some 600 million television viewers in 193 countries heard the "Star-Spangled Banner" begin. But Michael Jordan and the other Nike guys on the Dream Team refused to budge. "We won't wear Reebok," Jordan said …
>
> Here was a sports moment meant to reside above the marketplace, an event indicative of sport's traditional purity of purpose: the flag unfurled and the national anthem on the public-address system, the tears of young athletes glistening in the arc lights. And yet certain ostentatiously remunerated basketball players seemed willing to deny the nation this experience because of loyalty not to the flag, to the "glory of sport" or "honour of our teams," as the Olympic oath has it, but to a company in Oregon that markets their shoes. Charles Barkley … managed to underscore the perception that mammon was about to triumph over patria in Barcelona by proclaiming that he had no less than "two million reasons not to wear Reebok."[1]

The Olympic Truce (or *Ekecheiria*—the 'laying down of arms') was first established in ancient times by the signing of a treaty between kings to ensure the safety of athletes, pilgrims and the masses when travelling to and from the Olympic Games, and for the duration of their participation in and attendance of the event. This ancient custom, with all its considerable feel-good PR value, was revived in modern times, and since 1993 the Truce is declared for each instalment of the Games by a special resolution (proposed by the government of the host

[1] Katz 1994, p. 16.

A. M. Louw, *Ambush Marketing and the Mega-Event Monopoly*,
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nation) of the United Nations General Assembly, and signed by all UN member states.[2]

We all know what weight UN resolutions carry when it comes to international armed conflict. It should therefore come as no surprise that the revival of the Truce has been rather less than a spectacular success. It appears to have much the same deterrent effect as those pesky speed cameras on many of our modern roads, and to be generally subjected to about as much respect as most grown-ups reserve for Santa Claus. In the 115 years to date of the modern era of the Olympics, the Games have been cancelled on three occasions due to war, have been blighted on five occasions by mass boycotts and twice by terrorist attacks, and virtually every instalment of the Summer, Winter and Paralympic Games has occurred in the midst of violations of the Truce.[3] Apart from this rather shabby treatment of such an intrinsically laudable symbolic institution by the governments and militia of the world, the Olympic Games and other comparable international sports mega-events have also come to be characterised by a rather ironic breach of the peace by the very custodians of such events. Every 4 years or so, and mostly behind the scenes (although increasingly publicly) the organisers of these events declare a no-holds-barred, albeit bloodless, war.

The war is a commercial one. Hit squads of those modern and most scary of warriors—lawyers—and sundry other 'suits' are deployed to all corners of the globe to take the fight to 'ambush marketers' or those who engage in 'guerrilla marketing' tactics. Cease-and-desist letters are dispatched by the thousands (old news reel footage of the Stalin organ in action comes to mind), threatening the unfortunate recipients with all species of dire consequences for having had the audacity to attempt to associate a product or service with such grand publicity-generating events or to have used a depiction of the sacred Five Rings or words such as 'world' or 'cup' or even 'summer' or 'gold' in an advertising campaign. Sometimes threats turn to legal action and courts the world over have sporadically been faced with pitched battles in the war between the sporting and corporate world's big boys, and the various unfortunate souls who may have inadvertently stumbled into the crosshairs. While some of the 'ambushers' are seasoned and very shrewd campaigners unworthy of our sympathy (anything but some shrinking little Bambi caught in the headlights), some allegations of 'transgressions' or

[2] 'In 1993, the United Nations officially revived the ancient tradition of Ekecheiria by adopting an unbinding resolution to restore the Olympic Truce, whereby countries agree to cease all hostilities during the course of the Games. Since then, the United Nations adopts a similar resolution specific to the Olympiad at hand in which the Olympic Truce is used as an international appeal for peace … The Olympic Truce resolution was established on November 7, 1995, when the United Nations amended a previous resolution to include in the agenda of its 52nd session an item entitled "Building a peaceful and better world through sport and the Olympic ideal." This resolution specified that a new resolution calling on a renewed commitment to Olympic Truce be passed every two years in advance of each Summer and Winter Olympic Games.'—Burleson 2009, p. 33.

[3] From an article entitled 'A legacy far greater than medals and prizes,' 15 December 2010, available on the web site http://www.epolitix.com.

'infringements' are often reminiscent of the much-publicised search for the mythical WMD from our recent past. Sometimes ordinary people or the odd entrepreneur may wonder why this particular rather large pitfall of modern marketing was never on the syllabus at elementary school while they were being taught never to talk to strangers, and that fingers and wall plugs go together like dinosaurs and meteor showers. Bright (sometimes award-winning) marketers and advertising executives may feel the pinch and may even get the impression that fascism is alive and well and has found a new home in the corridors of power of world sport.

This war is a very real (and sometimes very dirty) one, although for the most part it goes unnoticed by members of the public. As the incident regarding the Nike-sponsored 'Dream Team' recounted in the by-line to this chapter illustrates, big money and the commercial interests of athletes have assumed such a prominent role in sports, and in the mega-event context, that traditional notions of the primacy of national pride and of sporting achievement are becoming peripheral and sometimes subordinate to brand allegiance and the event as marketing platform. When Joe Soap tunes in to watch the Games he often has no clue of the skirmishes behind the scenes. These intrigues have, however, become part and parcel of the modern sports mega-event, and it might not be long before the fascinating slash and parry of the battle to protect the vastly lucrative commercial rights to these spectacles itself attains the status of an official Olympic event.

It is now cliché to say that 'it is cliché to say that sport is big business.' It would not be an exaggeration to characterise the biggest sport of all, football, as the world's single most popular and ubiquitous form of recreational entertainment across all strata of nationality, class, race, creed, religious persuasion and—even that most divisive of distinctions—club affiliation. The other major entertainment sectors also regularly capitalise on the popularity of sport: Hollywood has in recent years gone gaga for American football (with films like *Any Given Sunday*, *Varsity Blues* and *Friday Night Lights*), motor racing (*Days of Thunder*), rugby union (*Invictus*), football (want to learn to *Bend it like Beckham*, anyone?), golf (*The Legend of Bagger Vance*, *Tin Cup* and *The Greatest Game ever Played*) and a host of other sports (including those intrepid Jamaican bobsled boys). Even popular music and video games (compare the hugely successful *FIFA* and *Pro Evolution Soccer* franchises, or the *Madden NFL* monopoly currently enjoyed by Electronic Arts in the USA) have managed to join the gravy train in exploiting the phenomenal popularity of sport. In fact, sport has in recent decades managed to very successfully cross into the realm of popular culture, and celebrity athletes are, well, celebrities, some of the world's best-paid entertainers.

Apart from the blockbuster commercial success of leagues and competitions that are hosted on an ongoing annual or seasonal basis (prime examples being the English Premier League football competition, American football's Super Bowl and baseball's (always ambitiously named) 'World Series,' the FIA Formula 1 world championship and, more recently, the Indian Premier League cricket tournament), the pinnacle of elite sport, globally, is found in the quadrennial world championship events such as the Olympic Games and the FIFA football World Cup.

These and a selected few other events have reached such an iconic status and scope that they have garnered the handle 'mega-event.' While their success may be attributable to the national pride factor (they serve, after all, to crown world champions), it is probably more realistic a view to observe that the events have simply attained the status and expectation of *über*-spectacles, a 'grand show' on a global stage. They serve to focus the attention of the world media, sports fans and, importantly, consumers (which we all ultimately are), like no other modern-day public spectacles. One writer observed in the mid-1990s that the Olympic Games and FIFA's World Cup 'have become the most known, watched, romanticised, revered, commercialised, mediatised, nationalistic, passionately followed, and critiqued mega sporting events'[4]—that is quite a mouthful. Nations and cities feverishly bid for the privilege (if sometimes only perceived) to host these events. They generate billions of dollars in revenues for their organisers and for the corporations that 'jump on the brand wagon' by paying astronomical amounts to associate themselves and their products and services with these 'feel-good' occasions that provide such unprecedented marketing opportunities to captive television and other media audiences on a global scale. Sometimes, these events even make money for their hosts. But it seems that there is a dark side to these extravaganzas, and it is not fanciful to say that public and scientific opinion on the benefits is rather ambivalent:

> Sports mega-events have been largely developed by undemocratic organisations, often with anarchic decision-making and a lack of transparency, and more often in the interests of global flows rather than local communities. In this respect they represent a shift from public funds to private interests. Such organisations represent part of the ideological assault on citizenship that has occurred since the 1980s, which prefers global consumers to local publics.[5]

For some, the mega-events provide what is possibly an unrivalled opportunity to generate profits and to wield substantial economic and even political power. These events are the biggest of the big in sports business. They represent the pinnacle of the sport-media-business alliance that was formed in the late twentieth-century. Through the idea of packaging, via the tripartite model of sponsorship rights, exclusive broadcasting rights and merchandising, sponsors of the Olympic Games and football World Cup have been attracted by the association with the sports and the vast global exposure that these mega-events achieve.[6] Those who control the staging and those who provide much of the financing for these events are the all-powerful international governing bodies and their commercial partners. This book will examine the relationship between these role-players and the legitimacy (in terms of laws in various jurisdictions) of such commercial relationships and their protection by the law.

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[4] Real 1996.

[5] Horne and Manzenreiter 2006, p. 18.

[6] Horne and Manzenreiter *supra* 5.

One of the most powerful organisations in world sport, FIFA, has in recent years generated much interest from various quarters in its activities in presenting its World Cup, which is the world's biggest single-sport event. FIFA itself, like its counterparts in other popular sporting codes, is a rather anomalous entity, which represents a non-governmental organisation that, in essence, has no status in the global polity as either a nation state or one of the recognised non-governmental organisations (or NGOs) that perform official functions and enjoy recognition in terms of international law. FIFA, as a sports governing body, is a transnational entity based on principles of voluntary association of private individuals and groups of individuals, which is registered in a canton in Switzerland as a non-profit organisation, although it generates revenues (and profits, although they don't like to call it that) which exceed those reported by some multinational corporations, and often exerts economic and political power that dwarfs the influence of smaller nations in the developing world.

This book is not about FIFA, just as it is not about the International Olympic Committee or any of the other sports mega-event organisers (or, as they've charmingly been called, the 'quadrennial anagrams'[7]) whose activities will be discussed in the chapters that follow. It is also not about Coca-Cola, Kia, McDonalds, VISA or any of the other large multinational corporations who so love to associate their brands with sports mega-events. I am not a marketing expert, and this book will not provide guidance on how best to engage in sports sponsorship or (ambush) marketing.

What this book is about is the way in which sports mega-events have in the past few decades become major global brands, which, like other such brands, are dependent on the protection of the law in respect of the creation of a monopoly of control over elements of popular culture. Others have in recent years written, critically, about the ways in which corporate entities have eroded the public commons of literature, music and various other areas of human endeavour, through the sometimes rabid enforcement of intellectual property rights and other means. This book will examine similar developments in what I view to be an especially germane context. Sport—especially top level international competition—represents one of the best examples of an activity fundamentally situated within the public domain. It also provides a prime example of an area where corporate commercial interests have 'hijacked' the public interest to a significant degree—sports clothing manufacturer Nike, for example, which has been so dominant in sports branding and (ambush) marketing since the 1990s, has been described as a 'company that swallows cultural space in giant gulps.'[8]

Sport is one of the most popular and prominent means by which we pursue recreation and entertainment, as participants, or (for those of us who are less active-minded) as couch potato fans, those who wager a few dollars on matches or as water cooler pundits around the office. Aside from the weather (and politics),

[7] Skildum-Reid 2009.

[8] Klein 2001, p. 51.

few topics hold more general interest and potential to spice up small talk. Is it any surprise that any news bulletin worth its salt will include the general news of the day, a segment on financial news, and a segment on sport? It is hard to imagine a field of human activity that can be more aptly characterised as being, fundamentally, grounded and positioned so squarely within the public domain. In fact, law-makers and courts in various jurisdictions have described the basis for the power that those governing sport (the organisations like FIFA) wield as being a 'sacred trust' to administer the relevant sporting code in the public interest. Even the very definition of a 'mega-event' acknowledges this public dimension to such grand shows:

> "Mega-events" are large-scale cultural (including commercial and sporting) events which have a dramatic character, mass popular appeal and international significance. They are typically organised by variable combinations of national governmental and international non-governmental organisations and thus can be said to be important elements in "official" versions of public culture.[9]

In this light, it is interesting to consider the fact that mega-events and the vast amount of publicity that they generate are now often claimed to be commercial (read: private, and lucrative) property, and I will argue that controversial laws have started to actually protect them as such in various jurisdictions (even though, traditionally, there exists no such thing as a 'property right to a spectacle').

One observer has expressed the opinion that the allocation of hosting rights to the football World Cup resembles a franchise system, with FIFA constituting the monopolistic supplier and exclusive holder of property rights to the event.[10] This type of system has apparently also been accepted by the Olympic insiders, and is justified as necessary in order to guarantee the success of the Games.[11] Such a claim to a 'property right' to the World Cup event is echoed in FIFA's own founding documents (which variously claim ownership of *inter alia* 'every kind of

[9] Roche 2000, p. 1.

[10] Kurscheidt 2006, p. 7.

[11] Former IOC Executive Board member (and vice-president) Dick Pound, expressed it as follows:

> In recent years, we have begun to think of the Olympics as a special form of franchise, in which the IOC is the franchisor and the host cities are the franchisees. It is up to us [the IOC] to define the basic parameters and standards we expect, and to see that these standards are met and even exceeded by our franchisees. Above all, we must be sure that no franchisee devaluates the Olympic franchise.
>
> Pound 2006, p. 163.

financial right,'' marketing rights' and 'promotional rights' related to the event[12]) and in court papers in litigation where FIFA has attempted to protect such property through claims of the 'considerable goodwill in terms of common law' of their event. The IOC also views the Games as its property,[13] and rights to associate brands with the Olympics are sold to commercial partners at the rate of hundreds of millions of dollars (e.g. an approximate total of US$866 million in sponsorship investment in the Beijing Games of 2008, an event that lasted, in 'real time,' a little more than 2 weeks[14]). Most of these sponsorship deals, nowadays, are framed in the form of category exclusivity arrangements based on a groundbreaking Olympic sponsorship model created in the 1980s, which provides sponsors (in return for the hefty price tag) with the means of very effectively excluding their competitors from such events.[15] The attraction for sponsors is clear, and in no small measure connected with the nature of the rights grantors (the governing bodies) and their stance on claiming the existence of and protection for their 'property rights' to the events:

> Because sport with its self-governance has an exceptional and internationally acknowledged status, enjoying monopolistic elements in its governance and management, advertisers can indirectly enjoy similar benefits. For instance, being the sole provider of certain category of products that is allowed to enjoy the benefits of associating with a certain sport or event. Also, when the rights are acquired from a sole existing seller and in packages, it is arguably easier to conduct advertising campaigns, the strategy usually by default unanimously covering all the channels for the message to reach the audience. In most cases it is probably also easier to negotiate, enter into agreements and implement them, when a sole rights holder needs to be contracted, provided that the acquirer is able to provide substantial financial injections.[16]

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[12] Article 74 (entitled 'Rights') of FIFA's Statutes (August 2009 version in force at the time of writing) provides as follows:

> Article 74(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.
>
> (2) The Executive Committee shall decide how and to what extent these rights are utilised 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.

[13] Compare Article 40(a) of the Host City Contract for the 2012 London Olympic Games, which provides that '[t]he City, the NOC and the OCOG acknowledge, without limiting any provision of the Olympic Charter, that the Games are the exclusive property of the IOC.'

[14] Harris et al 2009, p. 74.

[15] Sponsorship exclusivity will be more closely examined in Chaps. 2 and 6.

[16] Gradauskaite 2010, para 34.

It is difficult to imagine a more perfect textbook example for students of marketing and advertising of a surefire campaign which enjoys universal media coverage and is pitched at (and, generally, positively received by) a captive target audience seemingly perpetually insatiable for images and sound-bites associated with sports entertainment and popular culture. As I said, I know very little about marketing, maybe they do teach this in the classrooms; if they do not then maybe they should.

At the heart of these commercial arrangements is to be found a monopoly, and an extremely lucrative one at that. The Hollywood film industry and other entertainment sectors tend to concentrate the power to make and distribute films and other entertainment products in the hands of a few powerful studios, record companies or design houses, and protect the property that they create by means of the enforcement of the (limited) monopoly rights that the law provides for what has come to be known as intellectual property. However, an inherently monopolistic international sports governing body, which is by definition the self-proclaimed sole entity entitled to officially control the relevant sporting code (and especially its world championship competition—the mega-event), enjoys unprecedented power to exploit the commercial spin-offs of such competitions to the exclusion of all others. And this sometimes happens by way of a self-fulfilling prophecy, whereby an organisation that claims in its statutes that it is 'the original owner of all of the rights emanating from competitions and other events … without any restrictions as to content, time, place *and law*'[17] often appears to manage to usurp or coerce the law-making powers of event host nations in order to protect its fiefdom and the interests of its 'elite club' of commercial partners. I love telling my students about how these organisations frequently go so far as claiming (with varying success) immunity from laws in certain jurisdictions, in respect of their general day-to-day activities ranging from doping control to selling broadcasting rights or regulating the employment of professional athletes. But nowhere has this 'immunity' been achieved more completely than in the context of the staging of mega-events, where we have increasingly seen event organisers demand the passing of their very own, tailor-made laws by sovereign legislatures. *That* is the real subject of this book.

It is debatable whether there exists, anywhere, a more perfect example of an iron-clad commercial monopoly (which is protected by means of special laws) than the sports mega-event. Ironically, however, in light of the fact that legislatures have frequently engaged with these events in the process of passing such protecting laws, these monopolies appear to have managed to avoid significant legal scrutiny in most jurisdictions. This book will ask the pertinent question 'Why?,' and I will argue that the time has come for the legal fraternity and host governments to seriously question the continued legitimacy of the status quo when it comes to mega-event commercial rights protection and the role of the law.

[17] Article 74(1) of the FIFA Statutes (2009).

One reason for the lack of critical engagement with these issues that arise in the context of the sponsorship of sport may be due to the fact that the very study of sports sponsorship has possibly been 'staunchly positivistic' and 'lacking in self-reflectivity':

> For most researchers sport sponsorship is seen as a neutral harmless task in which sponsors provide money to sport and in turn get to link their product to an athlete, team or event. Sport is seen to benefit because it receives a needed infusion of money. Commercial sponsors benefit because of their association with the popularity of sport, the visibility of the event or the high profile nature of the athlete(s) involved … The conceptual underpinning of such an understanding of the process of sport sponsorship is based in the notion that these types of transactions … involve an exchange relationship … By basing ideas about sponsorship on the concept of exchange, scholars who have studied this practice have provided an image of neutrality and of choices that are limited only by the skill of the people involved in the sponsorship transactions. Such a view ignores the underlying inequalities of power that are part of the sponsorship process, presents an overly simplistic account of the complexities of such interactions and neglects to address how structures of domination and exploitation shape and mediate these relationships.[18]
>
> Sponsorship is different from philanthropy: It is a strategic action from which the sponsor expects commercial benefits to accrue. Looking critically at this process will … show that the cheques are not free but can come at a cost to the sport and often involve broader social costs. A [critical rather than positivistic approach to sponsorship research] will need to move away from the bland surveys that characterise much of what passes for sponsorship research, to engage with more interpretative approaches.[19]

As mentioned, I am not a marketing or sponsorship researcher, and as such this book does not constitute sponsorship research in the strict sense of the word. My interest lies with the critical evaluation of what is, apparently, often viewed in mainstream discourse as sacred truths or *fait accompli*. Much of this book is about 'ambush marketing.' While I do not want to come across as a big fan of such much-maligned practices, I do often feel a measure of disappointment and sometimes even pure disgust at some allegedly expert writers' treatment of the subject—one more often than not encounters bald and unsubstantiated views condemning such marketing and vilifying the 'ambushers.' As observed above regarding the experience of sponsorship research to date, the same can possibly be said for research on ambush marketing:

> As the amount of money invested in sponsorship, and therefore the importance of brand protection has increased, so too has research in this area. However, despite the increasing interest, literature on ambush marketing has remained highly descriptive with little to no integration of theory. To date, the ambush literature has mainly focused on five themes: (1) definitions and explanations of the phenomenon …; (2) consumer reaction and sponsors recall …; (3) ethical issues …; (4) strategies and remedies for ambush marketing …; and (5) legal issues.[20]

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[18] Slack and Amis 2004, p. 270.

[19] Ibid. 284.

[20] From Seguin et al 2009, p. 241.

While this book will largely focus on this last-mentioned area, namely legal issues regarding ambushing, I hope that it will do so by adding to the 'integration of theory' rather than merely being another 'highly descriptive' text on the subject. Most troubling about the vilifying and pejorative approach to ambush marketing in the literature is the frequently repeated but seldom interrogated truism that 'ambush marketing' is bad for sports and bad for mega-events, and that absent 'proper' (read: all-comprehensive, often draconian) legal protection against such marketing the sponsors will fly south for a long and dark winter in which sports mega-events will consequently and inevitably go the way of the dodo (sorry, I strangled some metaphors there I'm sure). I hope that my approach to the issues will go some way towards providing a measure of the type of critique called for in the above quoted passage in the context of sports sponsorship research, and that it might provide some much-needed balance in the debate about the ethics and legality of ambush marketing.

Central to the commercial value of mega-events for sponsors is the right to associate their brands, products and services with the relevant event. 'Association rights' have in recent years developed from a practical consequence of the working of the law (in the form of the threat of litigation for contravention of statutory trade mark rights and common law protections found in actions such as 'passing off' and other prohibited forms of unlawful competition) to what appears to be a new form of pseudo-property, in some cases created specially in mega-event specific legislation. What was previously not recognised as a substantive legal right—i.e., an event organiser's liberty to decide to contract with a commercial entity for purposes of sponsorship or endorsement, or not—has apparently been transformed into a legally protected right to associate with an event; a right that can be infringed by anyone—and I do mean anyone—who has not in fact entered into such a contract. The sometimes rabid protectionism as displayed by the event organisers (and there are many examples referred to in this book) reminds me of James Boyle's reference (made in the context of copyright as intellectual property) to the fact that 'the legal system's default setting is that "all rights are reserved" to the author' (or creator of the event, in this case).[21]

It appears to be accepted that the mega-event provides a sought-after platform (in the meaning of a 'mechanism that allows for the presentation of information and its transmission from a sender to a receiver'), and Price has explained that these platforms have enormous value if they are successful in attracting large, indeed massive, audiences and serving the need of their sponsors, whether they are selling goods or ideas or have the potential to do so.[22] He further explains, with reference to the Olympic Games, how this platform may be appropriated by persons who have not contributed to its creation:

> [T]he emphasis is on the effort (and this is a rough distinction) not to create a platform, but rather to appropriate one that was already established or constructed for another purpose,

[21] Boyle 2008, p. 181.

[22] Price 2008, p. 87.

> turning the message from that of its sponsors to those of others, commercial entities or global civil society groups. It is that specific irony—the notion of hijacking or piggy-backing—that becomes of interest with respect to the Olympics. The central idea is to find a platform that has proven highly successful in establishing a major constituency for one purpose and then convert that constituency to a different, unintended objective. The cost of creating the platform (very likely considerable) is borne by one player, but the benefits are then obtained by another. The Olympic Games, which offer advocacy groups opportunities for alliances among disparate groups that make up global civil society, provides an important example of this phenomenon. Embedded in this idea are a variety of sub-notions: (a) that the Olympic Games are such a platform; (b) that one can identify a dominant narrative that is the intended and approved narrative for which the platform was designed; and (c) in contrast, one can categorize other uses of the platform as counter-narrative in ways that are worthy of distinction. In other words, there is some (possibly illusionary) accepted use for the Olympics that is crowded out or violated and that it is possible to tell, sometimes in advance of the event, who the contenders are for the secondary use.[23]

This book will evaluate (and question) the notion of 'ambush marketing' as such a 'counter-narrative' in respect of the sport mega-event as platform for commercial exploitation, and the event organisers' frequent condemnation of ambushing as 'piggy-backing,' 'filching' and 'misappropriation of goodwill' of events. In essence, I will consider, on the one hand, the justification for the stigmatised view of ambushing as expressed by event organisers and the ethical and legal aspects; on the other I will examine the legitimacy of the apparently claimed 'property right' to a sports event, of the commercial monopoly in such events and, more pointedly, of the ways in which laws have been and continue to be used in order to protect such monopolies in a number of jurisdictions against ambushing. I will do so by examining the public interest in such events (and the public interest grounding of such events) as well as the frequent conflicts between private commercial interests and universally accepted human rights.

My Aims with the Book

A major focus of the book (to which I will specifically devote a chapter, Chap. 8) is the proper demarcation of the legally protectable thematic space around sports mega-events. I will examine both what sponsors pay for (and should rightly receive in return for their sponsorship fee), as well as the legitimacy of the special protection granted to organisers and sponsors in order to optimise exploitation of the potential commercial value of such thematic space. A key thread in this evaluation will be to determine what it is about these events that is actually deserving of legal protection. The public domain element of this thematic space is an ever-shrinking one in light of the legislative intervention by host governments and law-makers, and the 'special interest legislation' against ambushing

[23] Ibid. 89.

significantly skews the commercial playing field as well as the wider social and cultural dimension of the sports mega-event in favour of a generally small group of primarily large multinational corporations and monopolistic sports governing bodies (with narrow commercial interests which may easily ignore and impinge on wider societal goals and imperatives). I generally object to the 'propertization' of all kinds of elements of events (such as organisers' persistent claims of 'rights,' some of which, frankly, do not exist in terms of general legal principles in most jurisdictions), which includes, *inter alia*, the worrying trend towards monopolisation of language re events and claims to control the 'conversation' around the event (which claims face stiff challenges from the modern social media). Somewhere during the past few decades the eminently public-centred sports mega-event became a private money-spinner *par excellence*. While developing nations continue to bid for the right (or is it a privilege?) to host these events, the mega-event has become a creature that does not necessarily bring with it the benefits that voters and tax-payers in these nations should be entitled to expect, while auguring significant implications for the civil liberties and fundamental rights of such host nation citizens.

At the risk of displaying a lack of objectivity, I strongly believe that the current model of commercial exploitation of events and the continuing trend of legal legitimisation and protection thereof has been insufficiently justified to date and, in fact, has not been subjected to proper and in-depth scrutiny by the legal fraternity. I believe that the time is ripe for radical law reform in this regard, and I hope that this book will go some way towards providing the necessary impetus for such a process.

I tend to subscribe to the apparently growing consensus view of some marketing experts, such as (specifically) the outspoken Kim Skildum-Reid, namely that the most successful way to avoid or combat ambushing is by proper leveraging of sponsorship rights, rather than the prohibitive and potentially restrictive efforts at erecting legally reinforced walls around events. The answer may not lie (or not primarily, at least) in use of the sometimes blunt instrument of the law. I have strong objections against the conduct and track record of some of the major event organisers (such as FIFA) in respect of aggressive rights protection programmes which often display a marked lack of forethought or even common sense. Recent research suggests that some of the problems relating to the pejoratively characterised 'ambushing' of events are probably more properly ascribable to marketing clutter caused by these very organisations, as a result of their efforts to ostensibly milk every last possible dollar from rights exploitation rather than providing fewer official sponsors with more 'bang for their buck.' The law-makers have, for the most part, not displayed a sufficient sense of sovereignty, of accountability to their domestic constituencies and of respect for the rule of law, and have compounded the problem through largely indiscriminate acceptance of the now standard, non-negotiable demands for special legal protection of events in the form of bid guarantees. The result is an environment where conduct by members of the public (tax-paying contributors to the hefty bills to host mega-events), which would otherwise not fall foul of normal and universally-accepted legal principles, has

been outlawed in order to protect narrow commercial interests of sometimes dubious legitimacy in terms of legal principles. Ironically, while support for better leveraging of sponsorship rights as a primary means to deter and combat ambushing is gaining ground (although not yet sufficiently within the legal fraternity), the special laws passed for events may in fact deter sponsors from pursuing this route. The *sui generis* event legislation tends to provide a safety net whereby event organisers and sponsors may be growing lazy in respect of their rights exploitation and enforcement/protection efforts. Not only does this foster a tendency to automatically resort to the ubiquitous cease-and-desist letters, it also promotes a rigid attitude of 'all rights reserved' (and the claiming of legal remedies for things that are/should not be protected by law). Such legislation may be fostering a culture of entitlement with very little basis in law.

The continuing trend for mega-events (of which the FIFA World Cup and Olympic Games are prime examples) to spawn sometimes ludicrous and widely-condemned incidents of very public *faux pas* in the form of overly-aggressive rights enforcement by event organisers is troubling, and cannot be good for the reputation of these events (or of the legal system) in the long run. As a South African I am embarrassed to have to point to the 'Bavaria babes' debacle experienced in this country in June 2010, during the opening round of FIFA's 2010 showcase. While this was a clear case of an orchestrated campaign to gain publicity for a brand (although I am loath to call it an 'ambush' in the traditional sense of the word, if one considers that strong anti-ambushing legislation such as that found in South Africa departs radically from the traditional notion of an 'ambush' as involving deception of the public as to official sponsorship or affiliation to the event) the response by both FIFA and the South African authorities was heavy-handed and lacked any sense of appreciation of the 'bigger picture.' While the widely reported public perception that such response back-fired will hopefully serve as food for thought for event organisers in future, I would like to see legislatures actively resisting calls for the type and level of protection that would facilitate such responses by event organisers.

My message to event organisers and sponsors who are concerned about ambushes is simple: *Less can be more*.

Limit, to the extent necessary, the number of sponsors in order to reduce clutter, but ensure that those sponsors get exactly what they pay for and that you will 'have their backs' when their rights are threatened. While no event organiser has to date managed to prove or even make a really convincing argument that ambush marketing actually threatens the continued existence of their events (because, as they tend to claim, it threatens to alienate sponsors), I would suggest that such proper support for sponsors' contractual rights would negate this risk in most cases. After all, not even the risk of competitors having a way in to grab a small slice of the pie (which, after all, is business as usual outside the context of the mega-event in free market economies) takes away from the fact that these events provide a probably unmatched and ideal marketing platform for the official sponsors.

Allow, in the domestic context of the host nation, for more freedom for smaller firms to participate in the commercial opportunities that arise from the event, with