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MAJOR SPORTS EVENTS: HOW TO PREVENT AMBUSH MARKETING?

by *Jean-Michel Marmayou**

SUMMARY: 1. Introduction – 2. Calling in the Lawmaker – 3. Applying common law mechanisms – 3.1 Intellectual and industrial property law – 3.2 Property rights – 3.3 Consumer law – 3.4 Prevention of unfair competition – 4. Ad hoc Legislation – 4.1 Examples – 4.2 Classifications – 4.3 Negative Aspects – 5. Search for a Solution – 5.1 Contractual Approaches – 5.2 Individual Contracts – 5.3 Codes of Conduct – 5.4 Limits of the Contractual Techniques – 6. On-site interventions – 6.1 Enhance exclusiveness – 6.2 Enhance Sponsorship Programme Activation – 6.3 Human Means

1. Introduction

It is said that the most repressive systems of thought are fertile ground for innovative and forward-thinking ideas. Equally, “ambush marketing” is only present in the most constraining legal systems that challenge the creativity of advertising executives.

Even so, ambush marketing is not a legal concept. There is no trace of this English term in legal dictionaries or other lexicons. In fact, it is an expression used by specialists in advertising strategies. A certain Jerry Welsh who, in the 80s, was world marketing director for American Express and as such sponsored the national athletics teams for the 1984 Olympic Games,¹ claims to be the inventor of the

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¹ J. WELSH, «*Ambush marketing: what it is, what it isn't*», http://welshmktg.com/WMA_ambushmktg.pdf.

concept. Nowadays, the expression “ambush marketing” has come to mean a marketing strategy that consists in a company hitching a ride on the back of the sponsor of a sports event whose programme of sponsorship is particularly ill-conceived and/or poorly executed. This failing opens the door to ambush marketing. However, this does not constitute improper conduct in its own right but rather a skilful publicity ploy. Even though not a legal concept, ambush marketing could not exist without a legal background.

There has been a substantial increase in ambush marketing since the 1984 games and the IOC, having suffered particularly, has been joined in its misfortune by a growing number of international organizers of major sports events. FIFA is foremost among them since the football world cup is without doubt one of the largest sports events on the planet.

There are too many examples of ambush marketing² for them to be recounted here.³ Therefore this paper will be limited to an overview of its general context.

The term “ambush marketing” has existed since the 1984 games with the concept defined and developed in papers by American analysts.⁴ It soon became

² On the major categories of ambush marketing, cf. : T. MEENAGHAN, «*Ambush Marketing: a threat to corporate sponsorship*», *Sloan Management Review*, fall 1996, 38, 1, 103-13. D. CROW & J. HOEK, «*Ambush marketing: A critical review and some practical advice*», *Marketing Bulletin* 2003, 14, 1 (<http://marketing-bulletin.massey.ac.nz>).

³ Cf. : S. BEARBY & B. SIEGAL, «*From the stadium parking lot to the information superhighway : how to protect your trademarks from infringement?*», *Journal of college and university law*, 2002, 633. C. PINA ET A. GIL-ROBLES, «*Sponsorship of sports events and ambush marketing*», *European Intellectual Property Review*, 2005, 27(3), 93-96.

⁴ D.-M. SANDLER & D. SHANI, «*Olympic sponsorship vs. ambush marketing: who gets the gold?*», *Journal of Advertising Research* 1989, 29, 9-14. J. MANDESE, & A. FAHEY, «*Sponsors lash Olympic ambushers*», *Advertising Age* 1992, 63(7), 3, 55. S. MCKELVEY, «*NHL v. Pepsi-Cola Canada, Uh-Huh ! Legal parameters of sports ambush marketing*», *Entertainment and sport law*, Fall 1993, at. 5. S. MCKELVEY, «*Atlanta 96 : Olympic countdown to ambush armageddon?*», *Seton Hall journal of sport law* 1994 n° 397, 414. T. MEENAGHAN, «*Ambush Marketing: immoral or imaginative practice?*», *Journal of Advertising Research* 1994, 34, 5, 77-88. J. JENSEN, «*Flaunting the rings cheaply : non-sponsors of Olympic games instead back teams*», *Advertising Age* 1996, 67(28), 4. T. MEENAGHAN, «*Ambush Marketing: a threat to corporate sponsorship*», *Sloan Management Review*, fall 1996, 38, 1, 103-13. R. N. DAVIS, «*Ambushing the Olympic games*», *Villanova sports and entertainment law journal* 1996, 423. T. MEENAGHAN, «*Ambush marketing : corporate strategy and consumer reaction*», *Psychology & Marketing*, vol. 15, n° 4, 1998, 305. M. PAYNE, «*Ambush marketing : the undeserved advantage*», *Psychology & Marketing*, vol. 15, n° 4, 1998, 323. S. TOWNLEY, D. HARRINGTON & N. COUCHMAN, «*The legal and practical prevention of ambush marketing in sports*», *Psychology and Marketing*, vol. 15, n° 4, 1998, 333. P. O’SULLIVAN & P. MURPHY, «*Ambush marketing: the ethical issues*», *Psychology & Marketing*, vol. 15, n° 4, 1998, 349. SHANI D. & D.M. SANDLER, «*Ambush marketing : is confusion to blame for the flickering of the flame?*», *Psychology & Marketing*, vol. 15, n° 4, 1998, 367. S. R. MCDANIEL & L. KINNEY, «*The implications of recency and gender effects in consumer response to ambush marketing*», *Psychology & Marketing*, vol. 15, n° 4, 1998, 385. A. C. MCAULEY, & W. A. SUTTON, «*In search of a new defender : the threat of ambush marketing in the global sport arena*», *International journal of sports marketing & sponsorship* 1999, 1, 64-86. D. SHANI & D. M. SANDLER, «*Counter attack: heading off ambush marketers*», *Marketing News* 1999, 33(2), 10. J. A. TRIZODI & M. SUTHERLAND, «*Ambush marketing - An Olympic event*», *Journal Brand Management* 2000, 412. M. LYBERGER & L. MCCARTHY, «*An assessment of consumer*

global.⁵ Although many have sought to define it accurately they have all encountered the problem of its legality.

Some consider that it is an illicit business practice by a company trying to create an association between its products and services and a media event, in general a sport, in order to draw a commercial benefit from the reputation of this event, but without being the organizer and without having to obtain the slightest authorization from the organizer. The result is that, in the long term, ambush marketing will diminish the value of the exclusive rights acquired at some cost by the official sponsors of the event. This definition has pleased the legislators in certain countries who, on the request of the organizers of sports events, have incorporated it into their body of standards. For instance, Italy explicitly prohibited ambush marketing for the duration of the 2006 Winter Games by defining it as “*all activities parallel to those of the entities officially authorized by the organizers in order to obtain financial gain*”.⁶

knowledge of, interest in, and perceptions of ambush marketing strategies», *Sport Marketing Quarterly* 2001, 10, 130. A. MOORMAN, «*Olympic trademarks: Citius Altius Fortius - Faster, higher and stronger trademark protection for the USOC and its protected marks*», *Sport Marketing Quarterly* 2001, 11(1), 202. A. M. WALL, «*The game behind the games*», *Marquette sports law review*, spring 2002, 557. S. A. BEARBY, «*Marketing, protection and enforcement of NCAA marks*», *Marquette sports law review*, spring 2002, 543. N. K. NISH, «*How far have we come? A look at the Olympic and Amateur sports Act of 1998, the United States olympic committee, and the Winter olympic games of 2002*», *Seton Hall journal of sport law* 2003, 53. S. MCKELVEY, «*Unauthorized use of event tickets in promotional campaign may create new legal strategies to combat ambush marketing: NCAA v. Coors*», *Sport Marketing Quarterly* 2003, 12(2), 117. J. K. SCHMITZ, «*Ambush marketing: the off-field competition at the Olympic games*», *Northwestern Journal of Technology and Intellectual Property*, vol. 3, n° 2, 2005, 203. J. GRADY & S. MCKELVEY, «*Ambush marketing the legal battleground for sport marketers*», *Entertainment and Sports Lawyer* 2004, 8, 13. A. M. MOORMAN & T. C. GREENWELL, «*Consumer attitudes of deception and the legality of ambush marketing practices*», *Journal of legal aspects of sport*, summer 2005, 183. E. VASSALLO, K. BLEMASTER & P. WERNER, «*An international look at ambush marketing*», *Trademark reporter*, nov-dec. 2005, 1338 (pub. aussi in *Intellectual property journal*, déc. 2009, 87).

⁵ J. LUCK, «*Combating ambush marketing in Australia*», *Managing intellectual property*, may 1998, 17. J. SEBEL & D. GYNGELL, «*Protecting Olympic gold : ambush marketing and other threats to Olympic symbols and indicia*», *University of New South Wales law journal*, vol. 22, 1999, 691. C. KENDALL & J. CURTHOYS, «*Ambush marketing and the Sydney 2000 Games (Indicia and Images) Protection Act: A Retrospective*», *Murdoch University Electronic Journal of Law*, vol. 8, n° 2, 2001, [14]. J. HOEK & P. GENDALL, «*Ambush marketing: more than just a commercial irritant?*», *Entertainment law*, vol. 1, n° 2, summer 2002, 72. C. GARRIGUES, «*Ambush marketing: robbery or smart advertising?*», *European Intellectual Property Review* 2002, 24(11), 505-507. L. MISENER, «*Safeguarding the olympic insignia: protecting the commercial integrity of the Canadian olympic association*», *Journal of legal aspects of sport*, winter 2003, 79. A. PÂQUET, *Le régime juridique de l'ambush marketing*, Mémoire CEIPI, 2006, (www.ceipi.edu/uploads/media/Memoire_Paquet.pdf). L. ARCELIN-LÉCUYER, «*De la difficulté d'appréhender l'opportunisme commercial: l'exemple de l'ambush marketing*», D. 2008, 1501. P. VAN DEN BULCK, «*Quel régime juridique pour l'ambush marketing?*», *Comm. com. électr.* 2007/10, étude 26. F. BUY, J.-M. MARMAYOU, D. PORACCHIA, F. RIZZO, *Droit du sport*, LGDJ 2009, n° 1181 et s. P. JOHNSON, «*Look out ! It's an ambush!*», *International sports law review* 2008, 2/3, 24. V. FORTI, A. GENTILONI SILVERI, J. FIGUS DIAZ ET F. MEZZANOTTE, «*Ambush marketing: una ricerca interdisciplinare sulle tutele*», *Riv. Dir. Ec. Sport*, 2009, n° 2, 13. I. CHERPILLOD, «*La protection contre le marketing sauvage (ambush marketing)*»,

Some courts have also adopted such a definition.⁷

Others consider that ambush marketing consists in making use of an opportunity to develop business in a way that is not prohibited on legal grounds. According to this approach there is nothing illegal about ambush marketing. This has been confirmed by certain court judgements. For instance, the Delhi high court in India has stated that the term “ambush marketing” is not part of the legal terminology and the practice does not in its own right constitutes unfair competition, does not seek to mislead the public, but on the contrary is an instrument that uses the opportunity presented by an event to further its own commercial goals.⁸ In France, a recent judgement asserted that “*sponsorship cannot deprive another economic player from basing its publicity on a sport provided it does not use the symbols or logos of the federation that organizes the event, nor the image. A sports event belongs to everyone because it constitutes part of current affairs and only its direct or televised showing can be the subject of specific rights acknowledged by article L.333-1 of the Code des Sports [Law on Sports]*”.⁹

Without overlooking the difficulty of finding a legal definition for ambush marketing,¹⁰ we are nevertheless inclined towards a liberal concept, if only because of the protective mechanisms that already exist in the common principles of ordinary law, and especially in the field of intellectual property rights. Indeed, these contain all the restrictions that the art of the “ambusher” is seeking to circumvent.

From a marketing standpoint, the “ambush” therefore consists in exploiting all unprotected business opportunities. On the contrary, those who, like FIFA, suffer from ambush marketing will do their best to make the commercial opportunities around their event as watertight as possible. Although there is no reason why they should not seek the assistance of a country’s legislative body (I), neither is there any excuse for them not putting their own house in order (II).

in Sport et propriété intellectuelle, Bruylant, LGDJ, Shulthess, Université de Genève, 2010, 21. S. JIEW, «*Qatar ! 2022 ! Ambush marketing – stealing the limelight*», AT Law update 2011, 238, 48.

⁶ L. n° 167/05, 17 août 2005 (law that expired on 31 Dec. 2006), Misure per la tutela del simbolo olimpico in relazione allo svolgimento dei Giochi invernali « Torino 2006 », Gazz. Ufficiale n 194 del 22 agosto 2005.

⁷ In France, see: CA Paris, 10 févr. 2012, Cah. dr. sport n° 27, 2012, 247, note F. MARTIN-BARITEAU : « *Le fait pour une entreprise de se rendre visible du public lors d’un événement sportif ou culturel afin d’y associer son image tout en évitant de rétribuer les organisateurs et de devenir un supporter officiel constitue une situation d’ambush marketing qui constitue une faute au regard des dispositions de l’article 1382 du code civil* ».

⁸ Delhi High court of India, case : ICC development (Int’l Ltd.) v. Arvee Enterprises & Philips, 2003 (26) PTC 245 (Del)

⁹ TGI Paris, 3^e ch., 1^{ère} sect., 30 mars 2010, RG n° 08/07671, Fédération française de rugby c/ Fiat France, Léo Burnett et autres, Cah. dr. sport n° 20, 2010, 141, note J.-M. Marmayou.

¹⁰ A. PÂQUET, Le régime juridique de l’ambush marketing, Mémoire CEIPI, 2006, (www.ceipi.edu/uploads/media/Memoire_Paquet.pdf). L. ARCELIN-LÉCUYER, «*De la difficulté d’appréhender l’opportunisme commercial: l’exemple de l’ambush marketing*», D. 2008, 1501. P. VAN DEN BULCK, «*Quel régime juridique pour l’ambush marketing?*», Comm. com. électr. 2007/10, étude 26.

2. *Calling in the Lawmaker*

Ambush marketing is a transnational phenomenon.¹¹ Both its use and prevention require the development of analogous legal strategies since this phenomenon is found more especially at major international sports events which, although they take place on the territory of only one country, are broadcast and followed in many others. Therefore, we will examine the various legal techniques used in different countries to try and prevent ambush marketing. The first of these techniques consists in bringing to bear all the resources of ordinary law in order to protect the various aspects of the official sponsoring programme (see A below). Secondly, certainly more effective but also more debatable, is the enactment of an *ad hoc* law (see B below).

3. *Applying Common Law Mechanisms*

3.1 *Intellectual and Industrial Property Law*

Intellectual and Industrial Property Law (trademark, copyright, industrial design) is the defence instrument that the victims of ambush marketing first turn to. It is the first recourse that comes to mind due to the worldwide harmonization that characterizes this body of text. It corresponds to both the international dimension of sports events and to the ambush marketing campaigns that develop in their wake.

The harmonization of the various legal instruments, treaties and international agreements between countries means that legal recourse is available against companies that use or imitate works, designs, logos, music, choreographies, trademarks, etc. of another.¹² These well-oiled mechanisms exist in almost all countries of the world and there is no longer any need to demonstrate their effectiveness. However, they are only really effective when used against rather primitive ambushers. To use or imitate the trademark or the logo of another is a stupid and malicious infringement of intellectual property rights. It is not ambush marketing. Those who refer to a sports event without using “*either the trademarks, logos or insignia of the organizers or the images and sounds that represent the event*” only “*use the freedom to create publicity based on a current affairs event, even though this is a sport*”.¹³

¹¹ See: Association internationale pour la protection de la propriété intellectuelle: «*The protection of major sports events and associated commercial activities through trademark*», Q 210 (www.aippi.fr).

¹² Ex multis : Belgique : G. SORREAU, «*Ambush marketing: trop beau pour être honnête?*», ICIP-Ing.-Cons., 2008, n° 2, 149. G. SORREAU, «*Ambush marketing : too smart to be good ? Should certain ambush marketing practices be declared illegal and if yes, which ones and under what conditions?*», Rapport belge de la Ligue Internationale du Droit de la Concurrence, 2007.

¹³ TGI Paris, 3^e ch., 1^{ère} sect., 30 mars 2010, RG n° 08/07671, *Fédération française de rugby c/ Fiat France, Léo Burnett et autres*, Cah. dr. sport n° 20, 2010, 141, note J.-M. Marmayou.

The law on trademarks is currently ill-adapted to prevent ambush marketing. It requires that the victim demonstrates the use of signs identical or similar to those that it has registered for identical or similar products and services. Moreover, in the event of a relatively basic similarity, an ambush marketing campaign of publicity can only be brought to an end by demonstrating that there is a risk of confusion in the public's mind, and damages obtained only by a convincing demonstration of an effective confusion between the products. The intelligent ambusher will avoid any risks of confusion in the public's mind by accompanying his campaign with messages stating that he is not an official sponsor of the event.¹⁴

Even so, it has to be stressed that in the field of trademark law, the simple association of two trademarks in the public's mind through their semantic content is not sufficient in its own right to conclude that there is possible confusion. On this point, as on the others, there is no difference between for instance European law¹⁵ and American law.¹⁶

Moreover, it has to be underlined that trademarks relating to major sports events cannot be protected by trademark law alone. In fact, the insignia and symbols concerning major sports events are often insufficiently distinctive and this may compromise their registration in some countries.

For instance, although FIFA registered the community trademark "WM 2006"¹⁷ with the Office for Harmonization on the Internal Market, it was not able to register "Fussball WM 2006" nor "WM 2006" in Germany insofar as the German Trademarks Office regarded these signs as descriptions of the event and hence not capable of protection. This was confirmed by the Supreme court of Germany.¹⁸

The same general principle was applied by the Delhi High Court which considered the "World Cup" and "Cricket World Cup" to be generic and as such not capable of protection as trademarks.¹⁹

In this context, it is easier to understand why the International Olympics Committee requires that the National Olympics Committees and Games steering committees ensure that their emblems contain a distinctive component and do not simply limit themselves to just the name of the ONC country in question.²⁰

¹⁴ In many countries, this type of precaution will easily release the ambusher from liability under the trademark laws, cf. L.-L. BEAN, «*Ambush marketing : sports sponsorship confusion and the Lanham act*», Boston University law review, sept. 1995, 1099. J.-M. MARMAYOU, chron. «*Un an de sport dans le droit de la communication*», Comm. com. élect. 2008/11, chron. 10, n° 4.

¹⁵ CJCE, 11 nov. 1997, aff. C-251/95, *Sabel BV c/ Puma AG, Rudolf Dassler sport, Rec. CJCE, I, 6191*. – CJCE, 22 juin 2000, aff. C-425/98, *Marca Mode CV c/ Adidas AG et Adidas Benelux BV, Rec. CJCE, I, 4861*.

¹⁶ L.-L. BEAN, «*Ambush marketing: sports sponsorship confusion and the Lanham act*», préc.

¹⁷ OHMI, division d'annulation, 28 oct. 2005, *Ferrero oHGmbH / FIFA* (réf. 969C 002155521).

¹⁸ Bundesgerichtshof, 27 avr. 2006 (2 arrêts), I, ZB 96/05 (*Fussball WM 2006*) et I, ZB 97/05 (*WM 2006*) (www.bundesgerichtshof.de/). Adde : C. Rutz, «*Germany: trade marks – football World cup 2006 Merchandising*», *European intellectual property review* 2007, 29(4), n° 63-64.

¹⁹ Delhi High court of India, case: *ICC development (Int'l Ltd.) v. Arvee Enterprises & Philips*, 2003 (26) PTC 245 (Del).

²⁰ Art. 4.4 and thereafter of the text of application of articles 7 to 14 of the Olympic Charter.

Moreover, the Olympic movement has sufficient power to ensure that states implement enhanced protection of its brands and insignia. In many countries, the protection offered by the local law on trademarks is exceptional and derogates substantially from ordinary law.

The first aspect of this process involves the States, many of whom have certified the Nairobi Agreement²¹ granting a legal assignment to the National Olympics Committees. As a result, they do not need to register trademarks, mottos, anthems or names associated with the Olympic Games. In France for instance, the protection of Olympics insignia in favour of the CNOSF has been carved in stone since the law 2000-627 dated 16 July 2000. This has now been incorporated in article L.141-5 of the Code du Sport. In China, a 2002 decree assigns the Olympic insignia to the Beijing Games Steering Committee (BOCOG).²² In Canada, the Trade-Marks Act²³ grants the National Olympics Committee the exclusive rights to use Olympics insignia and emblems. In the United Kingdom, this protection takes the form of the Olympics Symbol etc. Protection Act of 1995.²⁴ In the United States, it is the 1978 Amateur Sports Act,²⁵ in New-Zealand, a 1994 law,²⁶ in Argentina, a 1996 law,²⁷ in Brazil, the so-called *Pelé* law of 1998;²⁸ and in Greece the 1994 law on trademarks.²⁹

The second aspect is that the assigned rights are not subject to normal rules of trademark law. In France, the Court of Cassation considers that it follows from article L.141-5 of the Code du Sport that “*no person is authorized to register a trademark, copy, imitate, affix, remove or modify emblems, mottos, anthems, symbols and terms for purposes other than information and criticism without the authorization of the French National Olympic and Sporting Committee*”, from which it follows that “*article L.141-5 of the Code du Sport has instituted a separate and independent system of protection*”.³⁰ In China, automatic

²¹ The Nairobi Treaty of 26 Sept. 1981 covers the protection of Olympic insignia, (www.wipo.int/treaties/en/ip/nairobi/) was signed by 46 countries (France did not sign).

²² Decree 345 passed by the Council of State of the PRC, 4 Feb. 2002, (<http://fr.beijing2008.cn/bocog/ipr/n214072517.shtml>). Cf.: A. M. WALL, «*Intellectual property protection in China: enforcing trademark rights*», *Marquette sports law review*, fall 2006, 341. J. L. DONATUTI, «*Can China protect the Olympics, or should the Olympics be protected from China*», *Journal of intellectual property law*, fall 2007, 203. F. MENDEL & C. YIIN, «*Protecting Olympic intellectual property* », 17 *China Law & Practice* 33-34, May 1, 2003. D. E. LONG, «*Trademarks and the Beijing Olympics: gold medal challenges*», *John Marshall review of intellectual property law*, spring 2008, 433.

²³ Trade-marks Act, Unfair Competition and Prohibited Marks, R.S.C., ch. T-13, § 9 (2001).

²⁴ Olympic symbol etc. protection Act (c. 32), 19 sept. 1995, S.I. 1995/2472, art. 2.

²⁵ Amateur Sports Act, Pub. L. 95-606, § 1(b), 92 Stat. 3048 (1978), codified at 36 U.S.C. § 380(a) (1994).

²⁶ Fair Trading Amendment Act 1994, n°124 modifiant the Fair Trading Act 1986.

²⁷ Ley proteccion de simbolos y designaciones olimpicas, n°24.664, 16 julio 1996,

²⁸ Art. 87, L. n° 9.615, 24 mars 1998 – DOU 25/3/98 – (Lei Pelé).

²⁹ L. n° 2239, 16 sept. 1994.

³⁰ Cass. com. 15 septembre 2009, n° 08-15418, Bull. civ. IV, n° 113; Cah. dr. sport n°18, 2009, 131, note J.-M. Marmayou; *Ibid*, 135, note V. Forti; Contrats, concu., consom. 2009/11, comm. 271, obs. M. Malaurie-Vignal; Comm. com. électr. 2009/11, comm. 99, note C. Caron; LPA 30 mars

protection is assigned to six categories of signs and enables the BOCOG to prohibit even non-commercial uses. In the United Kingdom, the simple association of ideas with Olympics insignia is regarded as an infringement. In the USA, the USOC, that is to say the National Olympics Committee, does not need to demonstrate a risk of confusion. It has the powers to prohibit certain uses, even non-commercial. Furthermore, any third party guilty of breaching this rule is not allowed to claim exemption on grounds of good faith. All these points are widely discussed in jurisprudence.³¹

In New-Zealand, a third party that uses Olympics signs is presumed to have checked the confusion aspect and the burden is therefore on the user to prove that there is no possible confusion. Conversely, in Canada and in Argentina, protection of Olympics insignia comes under the ordinary law system of trademark protection.

Brazil stands apart from all these countries. Its so-called *Pelé* law differs from the others in that it is applied not only to the Olympics Committee but to all the sports instances and organizers whose names and symbols are fully protected on their own territory for an unspecified period of time, without there being any need to register them.³²

This enhanced protection of sports insignia helps to ensure that they fall outside the realm of intellectual property rights and are brought closer to a system of real ownership.

3.2 Property Rights

In France, specific provisions have been enacted conferring monopoly intellectual property rights on certain organizers of both non-sports and sports events (those designated by the Code du Sport). Infringing this right, that law 2010-476 of 12 May 2010 on games of chance extended to betting, is automatically sanctioned without it being necessary to call on article 1382 of the Civil Code.³³ There is no doubting the effectiveness of this legal provision in the fight to prevent ambush marketing since it allows any breach of monopoly rights over sports events to be penalized without any need to show bad faith or a prejudice suffered by the holder

2010, 13, obs. J.-M. Marmayou. Contra: CA Paris, 2, 21 janv. 2011, RG n° 09/20261, *PI* avril 2011, n° 39, 227, obs. M. Sabatier; *Comm. com. électr.* 2011/11, 26, n° 10, obs. G. Rabu.

³¹ E. M. BATCHA, «*Who are the real competitors in the Olympic games? Dual olympic battles: trademark infringement and ambush marketing harm corporate sponsors*», *Seton Hall Journal of Sport Law* 1998, 229. S. McKELVEY & J. GRADY, «*An analysis of the ongoing global efforts to combat ambush marketing: will corporate marketers take the gold in Greece?*», *Journal of Legal Aspects of Sport*, Summer 2004, 191.

³² Art. 87, L. n° 9.615, 24 mars 1998 – DOU 25/3/98 – (Lei Pelé).

³³ Although there may still remain doubts, cf. : TGI Paris, 3^e ch., 1^{ère} sect., 30 mars 2010, RG n° 08/07671, *Fédération française de rugby c/ Fiat France, Léo Burnett et autres*, according to which the infringement to the rights to make use of «*are to be analysed according to the principles of tortious liability governed by article 1382 of the Civil Code and cannot therefore give rise to a second prejudice founded on the same acts that were rejected on the same legal grounds*» (Cah. dr. sport n° 20, 2010, 141, note J.-M. Marmayou).

of the rights. However, although badly defined by the law,³⁴ its fundamental purpose of covering competition or sports event remains no less real.

These are general rules concerning intellectual property that are used so that they are remarkably effective against certain ambush marketing practices. Article 905 of the BGB (German civil code) lays down that the rights of the owner of a sports ground cover (as in France) not only its surface but extend vertically upwards and downwards within the boundaries of its use. This article enables the owners of stadia to prevent, for instance, the distribution of competitors' marketing objects within these boundaries.³⁵

3.3 Consumer Law

Ambush marketing is a publicity technique that targets consumers. It is not surprising therefore that its victims seek to use publicity and consumer legislation to sanction its perpetrators.

Many countries share the desire to protect their consumers from the harmful effects of misleading publicity. In France for instance, article L.121-1 of the Code de la Consommation, Spain with its 1988 law,³⁶ the United Kingdom with its 1988 law,³⁷ Canada with its law on competition dated 1985,³⁸ the United States through the "Lanham Act".³⁹ In any event, it is covered in European Union countries by European directive 2005/29/EC, dated 11 May 2005 concerning the unfair business practices of manufacturers with respect to consumers.⁴⁰

These types of legal instrument are undoubtedly effective. Even though there are intended more to protect consumers, they nevertheless contribute to creating a civil liability over publicity that not only misleads consumers but also destabilises a competitive market.

However, the legislation on misleading publicity only targets those cases where the company makes an assertion or uses a symbol to pretend that the professional or product benefits from direct or indirect sponsorship. In fact, if practised intelligently, ambush marketing will take care not to make an assertion that could mislead the consumer.

³⁴ Above all concerning international competitions. On this point, cf.: G. LEBON ET T. VERBIEST, «*Le droit au pari vs l'internationalité du sport: faites vos jeux!*», Cah. dr. sport n° 20, 2010, 11.

³⁵ LIDC, Rapport international sur la question B, préc., 40.

³⁶ L. n° 34/1988, 11 nov. 1988, (BOE n° 274 de 15/11/1988), réf. 1988/26156. (www.boe.es/g/es/).

³⁷ The Control of Misleading Advertisements Regulations 1988 (Statutory Instrument 1988 n°915) 23 mai 1988.

³⁸ Competition Act (R.S., 1985, c. C-34).

³⁹ This is its popular name. In fact it is the Trademark Act, L. n° 489, 60, stat. 427 (1946), enacted in US Code, Title 15, chapt. 22. et spéc. sub-chapt. 3, §1125

⁴⁰ Only transposed into French law on 3 Jan. 2008 (law 2008-3) although it should have been at the latest by 12 June 2007.

3.4 Prevention of Unfair Competition

Almost all countries have a body of legal texts that condemn unfair competitive practices. In France, unfair competition is covered by the very general laws on civil liability (art. 1382 and 1383 of the Civil Code). This is also the case in the Netherlands or in Italy.⁴¹ In other countries too, an appropriate text prohibits unfair competition by drawing up lists of acts that are to be considered illegal. However, these texts are generally preceded by a prohibition that is expressed in general terms. This is the case for instance in Brazil,⁴² Switzerland,⁴³ Germany,⁴⁴ Austria, Belgium, and Poland.

In common law countries, there is no principle that places a general prohibition on unfair competition. On the other hand, legal doctrine gathers together, under the generic expression of “*unfair competition*”, a certain number of offences such as “*passing off*”, “*injurious falsehood*”, “*inducement to breach a contract*” and “*breach of confidence*”.

In international treaties, the Paris Convention for the Protection of Industrial Property contains provisions concerning unfair competition.⁴⁵

Although these devices can be effective to some extent against clumsy ambush marketing operations, evidence has shown that they do not constitute an insurmountable obstacle.

Indeed, in France, the sanctioning of unfair competition places the burden of proving this unfairness on the victim. This requirement will be formulated differently from one country to another but always exists. In France, the term “*fault*” is used because the victim will seek an injunction under article 1382 of the Civil Code. In Belgium, the term “*act contrary to honest business practices*”⁴⁶ is used. In Germany, as in Poland, it is an act “*contrary to moral practices*”. In Spain, business practices that are objectively “*contrary to the principle of good faith*”.⁴⁷ In Italy, it is “*an act that does not conform to the principles of correct professional behaviour*”. In Switzerland, it is misleading behaviour or acting in bad faith to influence the relationship between competitors and between suppliers and customers. The Paris Convention itself speaks of an act contrary to honest practice in industrial and commercial matters. In each case it is always a question of illicit behaviour. The problem is to know precisely whether ambush marketing itself is or is not illicit and thereby constitutes a fault.

In addition to this general clause against unfair competition, certain countries

⁴¹ Art. 2598 du Code civil italien.

⁴² Art. 195, Lei n° 9279, 14 mai 1996 (www.glin.gov/search.action, ID du GLIN : 139720).

⁴³ Loi fédérale du 19 déc. 1986 contre la concurrence déloyale (LCD).

⁴⁴ Art. § 3, Gesetz gegen den unlauteren Wettbewerb UWG (Loi contre la concurrence malhonnête), 3 juill. 2004, BGBl. I S. 1414 (<http://dejure.org/gesetze/UWG>).

⁴⁵ Art. 1 et 10, CUP, 20 mars 1883.

⁴⁶ Art. 94-3, L. 14 juill. 1991 sur les pratiques du commerce et sur l’information et la protection du consommateur (www.ejustice.just.fgov.be/loi/loi.htm).

⁴⁷ L. n°3/1991, 10 janv. 1991 (BOE n°10 de 11/1/1991), réf. 1991/00628 (www.boe.es/g/es).

have developed more detailed provisions which list practices that are judged to be unfair in principle. However, in most cases, it consists in misleading consumers (Germany⁴⁸), imitation (Belgium⁴⁹), appropriating the qualities of a competitor (Italy⁵⁰), or confusion (Spain⁵¹). Although effective, these provisions only apply within the defined limits and conditions.

In certain countries (for instance Brazil, Germany, Italy and Austria⁵²), the systems developed to prevent unfair competition can only be applied between competitors. In fact, ambush marketing reflects a situation in which there is not necessarily any competition between the victim and the ambusher.

In this respect, it would appear that finally France seems to be the best equipped with its “free-riding” theory (*parasitisme*). According to this theory, “free-riding” is defined as “*any behaviour according to which an economic player uses the reputation of another in order to benefit, without cost, from the other’s efforts and expertise*”.⁵³ This corresponds fairly closely to what is understood by ambush marketing. Even so, this theory, also based on article 1382 of the Civil Code, requires that a fault has been proven to be at the origin of a prejudice.

However, it has already been seen that ambush marketing cannot be considered a fault as a matter of principle since it is also stipulated that it is extremely difficult to prove that a direct, actual and unquestionable prejudice has been suffered by the organizer. Of course, the “ambusher” seeks neither to harm the image nor the reputation of the event. Moreover, in general he does not divert customers since the “ambusher” and the victim are working on different markets.

Above all, an action for “free-riding” will be admissible only if there is no recourse available to the victim via another specific legal option. It results from this that although it is possible in theory to cumulate an action founded on privative right (such as trademark law), with an action based on unfair competition or the

⁴⁸ Art. § 5, Gesetz gegen den unlauteren Wettbewerb UWG (Loi contre la concurrence malhonnête), 3 juill. 2004, *BGBI*. I S. 1414 (<http://dejure.org/gesetze/UWG>).

⁴⁹ Art. 94-1, L. 14 juill. 1991 sur les pratiques du commerce et sur l’information et la protection du consommateur (www.ejustice.just.fgov.be/loi/loi.htm).

⁵⁰ Decreto Legislativo 25 fevr. 2000, n°67, «Attuazione della direttiva 97/55/CE, che modifica la direttiva 84/450/CEE, in materia di pubblicit  ingannevole e comparativa», *Gaz. Ufficiale* n°72, 27 mars 2000 (<http://banchedati.camera.it>). – V. aussi art. 2598 du Code civil italien.

⁵¹ Art. 6, L. n°3/1991, 10 janv. 1991 (BOE n°10 de 11/1/1991), r f. 1991/00628. (www.boe.es/g/es).

⁵² LIDC, Rapport international sur la question B : le marketing sauvage est-il trop beau pour  tre honn te ? Faudrait-il d clarer certaines pratiques de marketing sauvage ill gales, et si oui, lesquelles et sous quelles conditions ? (<http://www.ligue.org/fr/homepage/>).

⁵³ P. LE TOURNEAU, « *Le parasitisme dans tous ses  tats* », D. 1993, chr., 310, sp c. 312, n°13. – P. LE TOURNEAU, *Parasitisme – notion de parasitisme*, J.-Cl. Conc. Consom., Fasc. 227. – P. LE TOURNEAU, *Le parasitisme*, Litec, 1998. G. COURTIEU, *Droit   r paration – Concurrence d loyale – Applications pratiques : confusion et parasitisme*, J. Cl. Civil Code, Fasc. 132-30. Lamy Droit  conomique 2009, sp c. n° 2799. P. LE TOURNEAU, « *Le bon vent du parasitisme* », Contrats, conc., consom., chron. 2001, n° 1. P. LE TOURNEAU, « *Retour sur le parasitisme* », Cah. D. aff. 2000, chr., 403. – P. LE TOURNEAU, « *De la modernit  du parasitisme* », *Gaz. Pal.* 2001, doct., 4.

theory of free-riding, this is on the prerequisite and an essential condition that the two actions rely on separate acts.⁵⁴ As regards ambush marketing, unsuccessful claims by victims under the trademark laws are in fact always associated with claims on the grounds of “free-riding”.

Even so, common law countries have all developed their own special actions to sanction an “*inducement to breach a contract*”, “*interference with contractual relations*” or, a kind of variation of the two, the “*interference with prospective economic advantages*”. These actions, although little used, may have some effect in the fight against ambush marketing. They require that knowledge of a contract is proven, that benefits are expected from these contractual relationships and there is an intention to force a party to break off and therefore abandon the expected benefits.⁵⁵

4. *Ad hoc Legislation*

4.1 *Examples*

Finding that the traditional legal instruments are of limited effect, the organizers of leading sports events persuade their legislatures have *ad hoc* legal texts enacted specially designed to fight marketing practices that are not sanctioned by any ordinary law instruments. The Olympics movement is obviously to the fore in this approach and the adoption of *ad hoc* legal instruments has become an essential condition when choosing a host city. Most of the countries that have recently hosted or been selected to host a major international event have been persuaded of the need to adopt a special law to prevent ambush marketing. This is the case for Australia (2000 summer games),⁵⁶ Portugal (Euro 2004),⁵⁷ Greece (2004 summer

⁵⁴ C. ANADON, « *Conditions d'exercice de l'action en concurrence déloyale parallèlement à une action en contrefaçon accueillie* », Rev. Lamy Droit des affaires, avril 2009, n°37, 39-41. – M. MALAURIE-VIGNAL, « *Rapports entre contrefaçon et concurrence déloyale* », Contrats, conc., consom. n°5, mai 2009, 30-31. – ADDE M. CHAGNY, « *Quelle concurrence pour l'action en concurrence déloyale et l'action en contrefaçon ?* », Rev. Lamy de la concurrence n°21, 2009, 87-89. – C. CARON, « *L'articulation de l'action en contrefaçon et de l'action en concurrence déloyale ou parasitisme* », JCP G, n°8, février 2010, 442, n° 235.

⁵⁵ About this action, cf. : E. VASSALLO, K. BLEMASTER & P. WERNER, « *An international look at ambush marketing* », Trademark reporter, nov.-dec. 2005, 1338 (pub. aussi in *Intellectual property journal*, déc. 2009, 87).

⁵⁶ Olympic Insignia Protection Act 1987 – Olympic arrangement Act 2000, n°1/2000. Sydney 2000 Games (indicia and images) protection Act 1996, n°22/1996. – Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Act 2005. – Cf. : G. ORR, « *Marketing games : the regulation of Olympic indicia and images in Australia* », European intellectual property review 1997, 19(9), 504-508. – Le Gouvernement australien a pris la peine de mesurer les effets de sa loi *ad hoc*, cf. : « *Ambush marketing legislation review* », 2007, prepared for IP Australia and the Department of communications, information technology and the arts (www.ipaustralia.gov.au/pdfs/news/Ambush%20Marketing%20Legislation%20Review.pdf).

⁵⁷ Decreto-Lei 86/2004, de 17 de abril, que estabelece o regime de protecção jurídica a que ficam sujeitas as designações do Campeonato Europeu de Futebol de 2004 e reforça os mecanismos de

games),⁵⁸ Italy (2006 winter games),⁵⁹ China (2008 summer games),⁶⁰ Canada (2010 winter games),⁶¹ New-Zealand (Rugby World Cup 2011 and Cricket World Cup 2015),⁶² the United Kingdom (2012 summer games),⁶³ Brazil (2014 Football world cup and 2016 summer games).⁶⁴

Nor is FIFA backward in this respect, witness the example of the World Cup held in South Africa.

Indeed, South Africa has shown remarkable understanding towards the interests of sports organizers and hence FIFA by reinforcing its laws in order to penalize ambush marketing practices against the interests of sports events.⁶⁵

This led to the Trade Practices Act⁶⁶ that prohibits third parties from publishing or posting declarations or communications which represent, imply or suggest a contractual or other relationship or association between this entity and the event, or the entity officially appointed to sponsor the event.

Based on this same general principle, the Merchandise Marks Act,⁶⁷ amended

combate a qualquer forma de aproveitamento ilícito dos benefícios decorrentes daquele acontecimento desportivo.

⁵⁸ L. n°3254, 22 juill. 2004.

⁵⁹ L. n°167/05, 17 août 2005 (la loi expirait le 31 déc. 2006), *Misure per la tutela del simbolo olimpico in relazione allo svolgimento dei Giochi invernali "Torino 2006"*, Gazz. Ufficiale n°194 del 22 agosto 2005.

⁶⁰ Décret n°345 du Conseil d'État de la République Populaire de Chine, 4 févr. 2002, (http://en.beijing2008.cn/98/69/article_211986998.shtml) et Décret n°65 du Gouvernement du peuple de Pékin, 11 oct. 2001. – cf : I. BLACKSHAW, « *Beijing. – Introduces Ambush Marketing law for 2008 Olympics* », *International Sports Law Journal* 2003/1, 29.

⁶¹ Olympic and paralympic Marks Act, Bill C-47, 2007. Cf. : J. STRAWCZYNSKI, « *Is Canada ready for the Vancouver winter games ?* », *University of Toronto of law review*, spring 2004, 213. – N. A. MILLER, « *Ambush marketing and the 2010 Vancouver- whistler Olympic games : a prospective view* », *Intellectual property journal*, déc. 2009, 75.

⁶² Major Events Management Act 2007 (07/35), Bill n°99-2 et Bill n°99-1 (www.parliament.nz/en-NZ). See : S. CORBETT & Y. VAN ROY, « *The Major Events Management Act 2007* », *New Zealand Law Journal*, June 2008, 211. – L. LONGDIN, « *Major event regulation : lessons for and from New Zealand* », *Australia and New Zealand Sports law Journal*, 2008, 3(1), 5. – S. CORBETT & Y. VAN ROY, « *Events management in New Zealand : one law to rule them all ?* », *Journal of business law* 2010, 4, 338.

⁶³ London Olympic Bill, Bill n°45, 14 juill. 2005 et London Olympic games and paralympic games Act (LOGA), 30 mars 2006, (c.12). – Cf. : R. MONTAGNON & J. SMITH, « *Intellectual property : the London Olympic bill* », *European intellectual property review* 2006, 28(1), N11. – H. PADLEY, « *London 2012 : five years, nine month and counting* », *European intellectual property review* 2006, 28(11), 586-590. – P. D. SHERIDAN, « *An olympic solution to ambush marketing : how the London olympics show the way to more effective trademark law* », *Sports Lawyers Journal*, spring 2010, 27.

⁶⁴ The law is in project for the football world cup (Projeto de lei do Senado, n°00394, 03/09/2009). The law is effective for the 2016 summer games (Lei n°12.035 (01/10/2009)).

⁶⁵ This is the 2003 Cricket World Cup organisation the formed the background to this enhancement.

⁶⁶ Trade Practices Act n°76, 1976 (art. d. § 9), modifié par Trade Practices Amendment Bill n°26, 2001 (www.gov.za/).

⁶⁷ Merchandise Marks Amendment Act n°61, 2002 modifiant le Merchandise Marks Act n°17, 1941 (art. 15A) (<http://www.gov.za/>). See : I. Blackshaw, « *Court Kick off* », *European lawyer* 2010, 94, 13.

in 2002, enabled the Minister for Business and Industry to designate a sports event as specially protected under the Act for a limited period when this event is of interest to the public, and when, although financed by commercial sponsors, it guarantees that small companies are allowed sufficient advertising space, especially the “*formerly handicapped communities*”. The South African government designated the 2010 football World Cup as such an event.⁶⁸ The Merchandise Marks Act enhanced the protection given to official sponsors by prohibiting third parties from using their trademarks directly or indirectly by visual or sound means in order to create a relationship between themselves and the protected event without the authorization of the organizer, and thereby gain a commercial advantage from the event. These restrictions on the use of trademarks and insignias are accompanied by heavy penalties of 5 years imprisonment, to which may be added additional penalties such as the confiscation of the products in question.⁶⁹

Moreover, for the purposes of the 2010 World Cup, South Africa passed two special laws, certain aspects of which concern the fight against ambush marketing.⁷⁰ These laws formed the basis of a group of young women being accused of wearing clothing with the same colours as a brand of beer, itself not an official partner of the World Cup. This was in contravention of the trade and business restrictions in the “excluded zones” that introduced unauthorized commercial products into these zones. These special texts also formed the basis of the South African government’s decision to prohibit the resale of tickets as promotional special offers, promotional sales, hospitality packs, etc., without the written authorization of FIFA and on risk of a penal sentence of up to five years imprisonment⁷¹ for non-compliance.

Candidate countries for future major events are for the same reasons seeking to extend their body of legislation in this area.⁷² For instance, for the purposes of the 2014 World Cup, Brazil is preparing an *ad hoc* text⁷³ that is roughly

⁶⁸ Notice 683 of 2006, Staatskoerant, 25 mei 2006, n°28877, p.3. - D’autres événements ont été désignés : Coupe du Monde de cricket 2007 (Notice 1141 of 2007 - Staatskoerant, 11 sept. 2007, n°30289, p.3) ; Cape Argus Pick’n Pay Cycle Tour (Notice 374 of 2006 - Staatskoerant, 2 maart 2006, n°28589, p.3) ; British and Irish Lions Tour (Notice 906 of 2009 - Staatskoerant, 22 junie 2009, n°32340, p.3).

⁶⁹ To see an example of the application: North Gauteng High Court (Pretoria), 1 oct. 2009, *FIFA v. Metcash Trading Africa (Pty) Ltd*, case n°53304/07 (ZAGPPHC 123) (cf. : in ISLJ 2010/1-2, p.140 – South Africa 2010 World cup : FIFA wins landmark’ ambush marketing case). – Adde : L. Arcelin-Lécuyer, « *Coupe du monde de football 2010 : L’embuscade des Bavaria Grils...* », JCP E 2010, 1741.

⁷⁰ 2010 FIFA World cup South-Africa special measures Act (Act n°11 of 2006, Gov. gaz. Vol 495, 7 sept. 2006, n°29198). - Second 2010 FIFA World cup South-Africa special measures Act (Act n°12 of 2006, Gov. gaz. Vol 495, 7 sept. 2006, n°29199).

⁷¹ Notice 383 of 2009, Staatskoerant, 14 april 2009, n°32123, p.3

⁷² Hungary, candidate for Euro 2012, abandoned its project when the event was awarded to Poland and Ukraine.

⁷³ Projeto de lei do Senado, n°00394, de 03/09/2009, Dispõe sobre a utilização de espaços publicitários, denominações, bandeiras, lemas, hinos, marcas, logotipos e símbolos relativos à Copa do Mundo da Federação Internacional de Futebol (FIFA) 2014 e à Copa das Confederações da FIFA Brasil 2013,

identical⁷⁴ to the one adopted by South Africa.⁷⁵ It will contain a special provision according to which the association of products or intellectual services with names, flags, slogans, anthems, insignias, logos or symbols relating to the World Cup will be prohibited. It is stipulated that such an association will be characterized by the use of the aforesaid signs, even unforeseen, whereas this use will be accompanied by a mention such as “*non official*” or “*unauthorized*”.

4.2 Classifications

The *ad hoc* texts that international sports authorities manage to have enacted through lobbying their legislators differ. Even though their purpose is the same, ie to ostracize ambush operations that consist in suggesting the existence of an association or link between the protected event and a non associated company, there may be notable differences from one system to another.

Many of these laws reserve the use of insignias to the organizing committee. The list of protected insignias, mottos, logos and so on may be more or less extensive. However, it is never restrictive and releases the organizer from any need to register the insignias, mottos, etc. Some laws allow local government authorities to add other words to the list, and even expressions or sentences mentioning the field in which the event takes place. This ensures that the organizers have enhanced protection but lose in the area of legal certitude. Moreover, they offer the authorities charged with having them applied (often by the sports association) discretionary powers of prosecution that might be considered unreasonable.

Although some of these laws concerned a single event and are limited to its duration,⁷⁶ others have been developed to apply to all major competitions held on the territory in question.⁷⁷ These are considered “umbrella” laws because they offer the local government authority the right to designate a particular event as governed by the special text.

Lastly, countries such as Greece, South Africa or New-Zealand have chosen to move ambush marketing from the civil courts to the criminal courts by envisaging not only fines for infringements but also prison sentences, in addition to any damages that may be awarded against the ambushers.

assim como a organizadores, mantenedores dos direitos da FIFA, seleções e atletas participantes (www.lexml.gov.br/).

⁷⁴ The draft law gave the right to fix the nature of the sanctions in the event of ambush marketing.

⁷⁵ The law for the 2016 Olympics in Rio has already been passed: Lei n°12.035 (01/10/2009) Institui o Ato Olímpico, no âmbito da administração pública federal, com a finalidade de assegurar garantias à candidatura da cidade do Rio de Janeiro a sede dos Jogos Olímpicos e Paraolímpicos de 2016 e de estabelecer regras especiais para a sua realização, condicionada a aplicação desta Lei à confirmação da escolha da referida cidade pelo Comitê Olímpico Internacional (Diário Oficial, Seção extra, 01/10/2009, 1).

⁷⁶ For instance in Italy.

⁷⁷ Example of South Africa or New Zealand.

4.3 Negative Aspects

Switzerland, the organizer of Euro 2008, refused to bend before the lobbying of the sports authorities.⁷⁸ Perhaps it was considered that these special texts, obviously effective since set up for that purpose, are only effective at the cost of significant attacks on the freedom to do business, the principle of free competition and freedom of expression.⁷⁹

It has to be said that in order to target ambush marketing, on the one hand these laws enhance the rights of the holders of registered trademarks who can thus oppose the use of insignias that express only a simple association of ideas, and on the other hand stigmatize those practices that seek to benefit from the reputation of the event. However, this line of action tends to consolidate monopolies that did not necessarily need it in order to cover as many free-riding acts as possible by using relatively vague concepts that do not guarantee the legal certainty of the operators. There remains a doubt as to whether these texts are altogether compliant with the rules of free competition, whether European⁸⁰ or otherwise.⁸¹

Moreover, by prohibiting any form of publicity that does not match the rights conferred on the organizers, these special laws are prejudicial (in a manner that is not altogether adequate) to the freedom of expression of citizens and enterprises.⁸² This criticism may not be without consequences. For instance, the constitutional court in South Africa has considered that insofar as the right to freedom of expression could not be “*disproportionately limited*”, the Trademark Act had to be “*restrictively interpreted*”.⁸³

In particular, many of them have stigmatized ambush marketing as a criminal offence whereas the interests protected by this kind of law imply that at worst this is a tort,⁸⁴ even in the most serious cases.

⁷⁸ Cf. : Résultats de la procédure de consultation concernant l’adaptation de la Loi fédérale contre la concurrence déloyale (LCD) en vue du championnat d’Europe de football 2008 (www.seco.admin.ch). – see also: D. HUFSCHMID, « *Switzerland : new legislative steps against ambush marketing* », *International sports law review* 2006, 3, 77.

⁷⁹ See : TGI Paris, 30 mars 2010, *Cah. dr. sport* n°20, 2010, 141, note J.-M. MARMAYOU : « *le parrainage ne peut avoir pour effet de priver tout autre acteur économique de fonder sa publicité autour d’un sport pour autant qu’il ne s’approprie pas les symboles et logos de la fédération qui organise les matches ni les images. L’événement sportif appartient à tout un chacun car il fait également partie de l’actualité, seule sa représentation en direct ou télévisée fait l’objet de droits particuliers reconnus par l’article L.333-1 du Code des sports* ».

⁸⁰ Cf. : V. FORTI, A. GENTILONI SILVERI, J. FIGUS DIAZ ET F. MEZZANOTTE, « *Ambush marketing : una ricerca interdisciplinare sulle tutele* », *Riv. Dir. Ec. Sport*, 2009, n°2, 13.

⁸¹ J. A. FORTUNATO & J. RICHARDS, « *Reconciling sports sponsorship exclusivity with antitrust law* », *Texas review of entertainment & sports law*, Spring 2007, 33.

⁸² A. SOLDNER, « *Ambush marketing and the 2010 World Cup* », in *German South African lawyers association newsletter*, August 2006.

⁸³ Const. court of S.-A., 27 may 2005, Case CCT 42/04, *Laugh it out Promotions CC vs. South Africa Breweries International and Another* (www.constitutionalcourt.org.za).

⁸⁴ L. LEONE, « *Ambush marketing : criminal offence or free enterprise ?* », *International sports law journal* 2008/3-4, 75.

5. Search for a Solution

The prevention of ambush marketing is a lost cause when entrusted exclusively to lawyers. It is also a cause lost in advance when carried out only by marketing specialists. On the contrary, the effective prevention of ambush marketing requires close collaboration between lawyers and advertising executives, between the event organizer and its sponsors. Only then will the most appropriate contractual technique (see A below) be combined with the most effective actions in the field (see B below).

5.1 Contractual Approaches

Contractual freedom provides two ways of seeking protection against ambush marketing. They both make use of a prevention strategy. The first consists in the organizer of an event binding its partners to a tight web of precise obligations so as to protect all aspects of its marketing programme. The second consists in developing a corpus of legal texts that sets out the rights and precise marketing obligations, texts which are then submitted to the members of a given professional body for adoption.

5.2 Individual Contracts

The organization of a sports or similar event implies that many contracts will be signed with service providers, subcontractors, spectators, participants, volunteers, media, sponsors, etc. In addition to the usual obligations that are determined by the nature of the event in question, the organizers place the burden of compliance with positive or negative contractual obligations on its partners in order to close any loopholes that might have been left that an ambusher could exploit.

A holder of rights over an event will frequently restrict contractually the freedom of the organization in charge of the audio-visual broadcasting of the event to choose its own partners. This action is taken in order to minimize the risk of ambush marketing. Three types of clauses are used: those under which the organizer forces the broadcaster to grant official sponsors a right of first refusal to sponsor audio-visual broadcasting of the event, those under which the broadcaster undertakes not to authorize a competitor of an official sponsor to itself sponsor the broadcasting of the event,⁸⁵ and those under which the broadcaster is committed not to affix any virtual publicity generated by computer means on the images broadcast.

The organizer is also able to impose a certain number of rules on a host city requiring it to take measures to control the publicity around the competition venues.⁸⁶ This would lead it to impose in the contract a “*clean site*” or “*clean venue*” clause

⁸⁵ Mémorandum de l'European Broadcasting Union (EBU) sur la publicité virtuelle, 25 Mai 2000 (www.ebu.ch/CMSimages/fr/leg_virtual_advertising_fr_tcm7-4386.pdf).

⁸⁶ Ex multis : www.olympic.org/host-city-elections/documents-reports-studies-publications.

by which it ensures that the stadia and the surroundings of official venues are free from any advertising that is not under its control.

The organizer may further require that participating competitors comply with certain obligations concerning the visibility of their own sponsors.

The organizer may also use the tickets to prohibit spectators from any form of advertising by non official sponsors by imposing a particular “*dress code*” on them. More broadly, it may prohibit any holder of a ticket from reselling it, offering it in the context of a sales campaign, programme of hospitality or lottery.

Most sports events include event-specific regulations which exclude some or all forms of advertising within the venue. Rule 50 of the Olympics Charter states that no form of publicity will be permitted in and above stadia or other places of competition that are considered part of the Olympics venues. This results in very precise control of athlete’s equipment which states: “*No form of publicity or propaganda, commercial or otherwise, may appear on persons, on sportswear, accessories or, more generally, on any article of clothing or equipment whatsoever worn or used by the athletes or other participants in the Olympic Games, except for the identification – as defined in paragraph 8 below – of the manufacturer of the article or equipment concerned, provided that such identification shall not be marked conspicuously for advertising purposes. The identification of the manufacturer shall not appear more than once per item of clothing and equipment. (...),”* etc.

Moreover, the effects of partnership or sponsoring contracts signed by sports organizations and other groups which prohibit the use by employees, subcontractors, representatives of these groups of products or the services of competing brands must be mentioned. For example, the internal rules governing the French football team adopt the terms of a partnership contract signed by the French football federation with an equipment supplier. These rules prohibit all selected players from wearing the equipment of another brand during the official periods of selection, even those brands they are already under contract with. Trademark law cannot be used to prevent the use of these restrictions. Indeed, although they affect the value of the brands indirectly and its function as an advertising medium, they do perform the essential function of the brand name which is to guarantee the origin of the product and thus identify the manufacturer. On the other hand, these restrictions may be criticised on the grounds that they hamper free competition and are equivalent to an illegal business arrangement.⁸⁷

Moreover, as the parties who practise ambush marketing on certain events may be the official partners on other events,⁸⁸ the event organizers may find it beneficial to incorporate in their contracts, clauses that specifically prohibit occasional

⁸⁷ Cass. com., 2 déc. 1997, n°95-19753, 95-19820 et 95-19814, *Bull. civ.* IV, n°316, p.272, *Rev. Lamy dr. aff.* 1998, n°2, n°67, note G. Montégudet.

⁸⁸ Or worst, of the same event, cf. : District Court for the Southern District of New York, 23 mars 1994, *Mastercard international Inc. v. Sprint communications Co.*, n°94 Civ. 1051 (Westlaw : 30 U.S.P.Q.2d 1963).

partners from pursuing ambush marketing actions against any sports event organizer in the future.

5.3 Codes of Conduct

All confirmed or potential contractors or sponsors belong to representative groups, chambers of commerce, clubs, and more or less institutionalised networks. A collective discipline based on a code of conduct has been developed within these groups in order to limit the freedom of advertising and marketing by its members.

The example of the consolidated code of the International Chamber of Commerce on publicity practices and marketing communication⁸⁹ is an example of this self regulation.⁹⁰ It is not the only one. The British Institute of Sports Sponsorship has established a code of conduct for sponsors that contain in particular measures to prevent ambush marketing practices.⁹¹ But of even greater interest is the decision taken by South Africa for the 2010 World Cup to create a special authority, the Advertising Standard Authority of South Africa (ASA)⁹² which published a code of advertising practices and a sponsorship code containing a series of rules intended to prevent ambush marketing.⁹³

The role of such professional codes of conduct is sometimes recognized in a country's legal system, thereby lending them an additional force. Article 6 of directive 2005/29/EC, defines unfair practices as business practices by companies that “do not comply with the undertakings contained in the codes of conduct by which it has agreed to abide, when such undertakings are firm, and that their author has declared that it is bound by such codes”.

5.4 Limits of the Contractual Techniques

The question then arises as to whether the contractual techniques will close all the loopholes left by the countries' applicable laws. The answer to this is negative. It is impossible for these techniques to cover every inch of space.

A contract's effectiveness will depend on the rights that the organizer is able to assert. However, although article L.333-1 of the French Code du Sport confers monopoly powers on French events (which are not unlimited), not all countries have formally acknowledged this right.

Moreover, the relative effect of contracts prevents third parties from imposing obligations by agreements when they are not a party to such agreements. In this respect, it has been observed that the ambushers make sure that they avoid

⁸⁹ Consolidated Code ICC of Advertising and Marketing Communication Practice (1^{er} juin 2006), doc. n°240-46/330 (www.iccwbo.org).

⁹⁰ The members of the European Sponsorship Association (ESA) have to abide by this code (www.sponsorship.org).

⁹¹ UK Sponsorship Code, 8 Euromarketing, Oct. 4, 1994, n°4.

⁹² www.asasa.org.za.

⁹³ Cf. art. 3.7 et 11.

establishing a relationship with the organizers of events.

Lastly, the freedom to sign contracts cannot satisfy all the circumstances that could arise. It has to take account of the basic freedoms and rights of the legal profession and especially the different actors in the economy: freedom of expression, right of information, freedom of trade and industry, free movement of workers, services and capital, etc. In this respect, article L.333-4 of the French Code du Sport which sets out that “*the sport federations, the sports companies and the organizers of sports events cannot, in their capacity as holders of a concession, impose on sports persons taking part in an event or a competition an obligation that breaches their freedom of expression*”.⁹⁴

The space around the sports event that an organizer may reserve for its own use or use by its partners is limited and this has had the effect of increasing the space left for other economic actors who, rather than devote considerable sums to obtaining the title of official sponsor of a sports event, prefer to concentrate their intelligence, and a smaller budget, on developing ingenious business operations.

6 On-site Interventions

6.1 Enhance exclusiveness

A lawyer’s contribution to the prevention of ambush marketing does not necessarily reside in his/her field of legal expertise (trademark law, contract law, etc.) when applied to combating ambush operations. It is more a method of reasoning which initially consists in taking on the mantle of his adversary in order to better counter his arguments.

The organizers of events and their official sponsors must examine the position adopted by an ambusher in order to identify the weaknesses in their own strategies and ensure that they are remedied. To do this, it will have to understand the publicity potential that has to be protected.

Ensuring the exclusiveness of its official sponsors means that the organizer must from the outset occupy all the display and communication space. To do this, his first step is to draw up as comprehensive as possible a list of all the marketing space. This requires knowledge of the most recent examples of ambushing. The organizer will even go so far as to identify the space available on hotel key rings allocated to the official delegations. Once this list has been prepared, a sufficiently watertight contractual strategy will be set up to ensure that it benefits itself either directly, or its official sponsors benefit from the use of these spaces. All the publicity openings offered by large audio-visual broadcasters will have to have been bought up as soon as the decision is taken to organize an event on a particular date. Failing this, organizers should obtain a commitment from broadcasters to offer priority to

⁹⁴ It remains to be decided whether the freedom of expression that arises here concerns commercial advertising or not (CEDH, 20 nov. 1989, *Markt Intern Verlag GmbH c/ Allemagne*, n°10572/83, Rec. Série A, 165. – Cass. crim. 19 nov. 1997, D. 1998, p.613, note J.-C. Galloux).

the official sponsors. All billboards inside and outside the stadia, all available spaces, whether public or private, that could be used in the areas surrounding the venues (roadside billboards, building frontages, etc.), will have to be reserved.

Obviously, the organizers will have to set up a policy of sufficiently dense and international registration of trademarks and brands to complete any reservations granted by an ad hoc local law, but this concerns the least sophisticated ambushers.

6.2 *Enhance Sponsorship Programme Activation*

The organizer also has to convince his sponsors of the need to implement important advertising campaigns to accompany the one directly related to the exclusiveness granted. The aim is to convince the public that the sponsor is indeed an official sponsor.

Obviously, the programme of sponsorship established by the organizer has to minimize the potential for ambush-operations. Exclusivenesses that are too expensive may persuade a potential sponsor to stick to ambush actions rather than pay the required price. Too many categories of sponsors or too many official sponsors may lead to certain confusion in the public's mind, confusion the ambushers will soon exploit.

Whenever possible, the organizer will resort to *naming* the competition. If set up and implemented correctly, this kind of sponsorship programme prevents officially sponsored competitors from associating their trademark with the event.

As marketing specialists have shown,⁹⁵ the organizer has every interest in undertaking actions known as "public information" (websites, media campaigns, distribution of leaflets, etc.) through which it informs the spectators and the consumers that ambush marketing practices jeopardize the lasting funding of events and thus the events themselves. The aim is to encourage spectators to react negatively against those brands that are guilty of ambush marketing. The official sponsors are also guaranteed that their official status will be recognized by the public. These actions must also be combined with public awareness programmes that target local companies in order to inform them of what they can and cannot do. There is a cost involved in these actions but they enhance the exclusiveness granted and thus their value.

6.3 *Human Means*

The organizer must also set up sufficiently trained human means⁹⁶ whose role is to ensure that the contractual obligations contained in the tickets sold to spectators are complied with both inside and around the competition venues. It is pointless

⁹⁵ Cf. : D. Crow & J. Hoek, « *Ambush marketing : A critical review and some practical advice* », Marketing Bulletin 2003, 14, p.1 (<http://marketing-bulletin.massey.ac.nz>) and the quoted references.

⁹⁶ The officials have to be capable, in compliance with the fundamental rights of citizens, to distinguish between an ambush marketing operation and the individual behavior of an ordinary spectator.

imposing a “*dress code*” on persons when no one at the entrance to the venue ensures that this “*dress code*” is correctly observed.

Furthermore, the creation of a “*clean venue strategy*” requires that employees are dedicated to identifying any counterfeit products sold around the stadia as well as eliminating any flyposting by ambushers. These practices by a “*dedicated task force*”, or “*mystery shopping surveillance operation*” or “*ambush policing*” have proved to be effective in the past.⁹⁷ Similarly, the staff has to inform the ambushers that their acts may contravene a certain number of legal provisions. Experience has shown that a simple telephone call or just a letter may dissuade small ambushers from pursuing their operations.

Lastly, the organizers have to coordinate their actions with the local authorities since interventions in the public area cannot take place without the policing powers provided by appointed persons.

⁹⁷ See the FIFA programme: « *Marketing fair-play : la FIFA en guerre contre le marketing sauvage* » : <http://fr.fifa.com/aboutfifa/marketing/marketing/rightsprotection/index.html>.