

Contents

Abstract
The Commercialisation of Sport
Sports Event Marks
Adidas 'Three Stripes' Trademark Case
'Ambush Marketing'
So, what is 'Ambush Marketing'
'Naming and Shaming' and 'Brand
Protection Programmes'
What are the Games' Marks?
In what ways are the Games' Marks
legally protected?
Who is entitled to use the Games'
Marks?
Conclusions
Bibliography

Protecting Major Sporting Events with Particular Reference to the 2012 London Olympic Games

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ABSTRACT

Sport is big business and mega bucks are spent on organising and commercialising major sporting events, such as the FIFA World Cup and the Summer and Winter Olympics. In this article, we will consider in what ways the law is able to protect the substantial investments made in these sporting events by organisers and sports sponsors and merchandisers alike, particularly in relation

to the 2012 London Olympic Games and the rise of the phenomenon of so-called 'Ambush Marketing'. Finally, some general conclusions will be drawn.

KEYWORDS

2012 Olympics - Commercialisation - Trademark - Ambush Marketing - Games Marks

THE COMMERCIALISATION OF SPORT

Sport is now big business accounting for more than 3% of world trade. In the European 1
Union, sport has developed into a discrete business worth more than 2% of the combined
GNP of the twenty-seven Member States. Indeed, according to Sepp Blatter, the President of
FIFA, the World Governing Body of Football, and I would entirely agree with him, sport is now
a 'product' in its own right, and there is much to play for - not only on but also off the field of
play. Whether this is a good thing as far as the integrity of sport is concerned is, of course,
another matter and for debate on another occasion!

For example, licensing and merchandising rights in relation to major sporting events, such as 2
the FIFA World Cup and the Olympic Games, are 'hot properties', commanding high returns
for the rights owners ('licensors') and concessionaires ('licensees') alike (Blackshaw, 2006,
ch 10, 11). Again, the commercial exploitation of the image rights of famous sports persons,
such as David Beckham and Tiger Woods, is also big business (Blackshaw and Siekmann,
2005). Likewise, sports broadcasting and new media rights are also money-spinners. For
example, the English FA Premier League has sold its broadcasting rights for the 2007-2010
seasons for a record sum of £1.7 billion!

Under English Law, there is no legally recognized right in a sporting event *per se*. In *Victoria* 3
Park Racing and Recreation Grounds Co Ltd v Taylor and Others [1937] 58 CLR 479 Latham
CJ opined that 'a spectacle cannot be 'owned' in any ordinary sense of that word,' so
organizers, sponsors, merchandisers and others wishing to be associated with and market
and commercialise major sporting events have to rely upon Intellectual Property Rights
(IPRs), especially trademarks and copyright, to protect them. Likewise, under English Law,
there is no right of personality *per se*. So, sports 'stars' have to rely on a 'rag bag' of rights,
including trademarks, copyright and 'passing off' to protect their images and capitalise on
them.

Other IPRs, such as Patents, for example, are of limited application and importance in a 4
sporting context, although they do figure - to a certain extent - for example, in connection
with the commercialisation of sports equipment, including high-tech running shoes, for
example, like those developed by NIKE, and so-called 'sports movements' such as the

'Fosbury flop'.

So, this situation has led to the creation of event marks, including logos, which identify the particular sporting event and which can be commercially exploited as a major source of revenue which makes the event financially viable.

SPORTS EVENT MARKS

Perhaps the most distinctive and recognized sports event mark in the world are the five interconnected rings in blue, yellow, black, green and red symbolizing the world-wide reach of the Olympic Movement and the Olympic Games – often referred to as the 'greatest sporting show on Earth!'. The Olympic Rings enjoy special legal protection at the international and national levels around the world. At the international level, they are protected by the so-called 'Nairobi Agreement' – the Agreement on the Protection of the Olympic Symbol of 1981.

At the national level in the UK, the Rings are protected under the provisions of the London Olympic Games and Paralympic Games Act of 2006. This Act also protects the use of the Olympic Motto and the use of such expressions as 'the Games', 'Olympians', and 'Olympiad', as well as 'strap lines' in advertisements, such as 'Come to London in 2012' and 'Watch the games here this Summer'. All these measures, which we will consider in more detail later, are designed to provide Olympic brand protection and combat various forms of so-called 'Ambush Marketing' for the benefit of the Official Sponsors of the Games, who pay mega bucks for a package of 'top line' sponsorship rights, against those who, in the advertising and promotion of their products and services, falsely and unfairly claim an association or affiliation with the Games. However, these measures – however laudable – have been described by the UK Advertising Industry as 'draconian' and threatening the right of free speech, which includes commercial or advertising speech!

As regards the use of trademarks, which is probably, in practice, the most important form of legal protection available for sports events, sports bodies and organisations, the UK Trade Marks Act of 1994 defines a trademark in section 1(1) as:

'... any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.'

As will be seen, this is a wide definition and so a trade mark may be granted in respect of, for example, distinctive sounds, as in the case of the Australian Football League, which has registered the sound of a football siren for football and associated services.

Thus, provided the basic legal requirement of distinctiveness is satisfied, it is possible to register the names and associated *logos* of sports events as trademarks. However, the crucial test is distinctiveness, and the name 'Euro 2000' failed the distinctiveness requirement and could not be registered as a trademark *per se*. But, *prima facie*, combined with a distinctive *logo*, this event name could be registrable as a trademark. Likewise, an attempt in 1998 to register the name 'World Cup' also failed through lack of distinctiveness. Again, combined with a distinctive and original logo, such a mark can be protected as a so-called device mark or composite trademark; and it also enjoys copyright protection as an 'artistic work'. Under section 4 (1)(a) of the UK Copyright Designs and Patents Act of 1988, 'a graphic work, irrespective of artistic quality' qualifies for legal protection as an 'artistic work' under the Act. As will be seen, we are not dealing in this context with great works of art!

Sports event 'mascots' may also qualify, in principle, for registration as trademarks, again subject to their being distinctive. And may also be protected as registered designs – both at the National and European Union levels. Such 'mascots', incidentally, offer sports event organisers a wide range of merchandising opportunities with significant financial returns. It should be noted here that the European Union offers the possibility of registering a so-called 'Community Mark' which provides legal protection against infringers throughout the present twenty-seven Members States.

ADIDAS 'THREE STRIPES' TRADEMARK CASE

Although not - *in stricto sensu* - an event mark, it would perhaps be remiss not to mention 13
the ADIDAS 'three stripes' trademark case, in which the long-awaited Preliminary Ruling by
the Court of First Instance of the European Court of Justice (ECJ) (C-102/07) was rendered
on 10 April, 2008. This case well illustrates the need for trademark protection in the sporting
arena generally to protect so-called 'sports properties'; it concerned the extent of the legal
protection under Trademark Law within the European Union that may be afforded to the three
vertical stripes on sports and leisure goods produced and sold by Adidas. The facts of this
case are as follows:

The Parent Company of the Adidas Group, Adidas AG, is the proprietor of a figurative
trademark composed of three vertical, parallel stripes of equal width that feature on the sides
of sports and leisure garments in a colour which contrasts with the basic colour of those
garments. Its Subsidiary Company, Adidas Benelux BV, holds an exclusive licence, granted by
Adidas AG, to use this mark on garments marketed in the Benelux countries.

Marca Mode, C&A, H&M and Vendex are competitors of Adidas, who also market sports
garments featuring two parallel stripes, the colour of which contrasts with the basic colour of
those garments.

Adidas took the competitors to Court in The Netherlands claiming the right to prohibit the use
by any third party of an identical or similar sign which would cause confusion in the market
place. Marca Mode and the other defendants to these proceedings, however, claimed that
they are free to place two stripes on their sports and leisure garments for decorative
purposes. Their defence was based on the so-called requirement of availability, namely that
stripes and simple stripe motifs are signs which must remain available to all and, therefore,
they did not need the consent of Adidas to use the two-stripe motif on their garments.

Adidas won at first instance; were overruled on appeal; and the case finally came, on a point
of law, before The Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*), which
sought clarification from the ECJ on the main point at issue, namely, whether the requirement
of availability is an assessment criterion for the purposes of defining the scope of the
exclusive rights enjoyed by the owner of a particular trademark.

The ECJ ruled, first, that the requirement of availability of certain signs is not one of the 14
relevant factors to be taken into account in the assessment of the likelihood of confusion. The
answer to the question as to whether there is that likelihood must be based on the public's
perception of the goods covered by the mark of the proprietor on the one hand and the goods
covered by the sign used by the third party on the other. The national court must determine
whether the average consumer may be mistaken as to the origin of sports and leisure
garments featuring stripe motifs in the same places and with the same characteristics as the
stripes motif of Adidas, except for the fact that the competitors' motif consists of two rather
than three stripes.

Secondly, the ECJ turned its attention to the specific protection granted to trademarks with a 15
reputation. It noted that the implementation of that protection does not require the existence
of a likelihood of confusion between the sign and the mark. The mere fact that the relevant
section of the public establishes a link between the two is sufficient. Since the requirement of
availability is extraneous both to the assessment of the degree of similarity between the mark
with a reputation and the sign used by the third party and to the link which may be made by
the relevant public between that mark and the sign, it cannot constitute a relevant factor for
determining whether the use of the sign takes unfair advantage.

And this point of unfairness - in a commercial and marketing sense - leads us conveniently to 16
the phenomenon of so-called 'Ambush Marketing' which is an increasing curse and constant
battle as far as major sporting events organizers are concerned.

'AMBUSH MARKETING'

Another form of unfair marketing practice is so-called 'Ambush Marketing', which has been 17 described by Michael Payne, a former Director of Marketing at the International Olympic Committee (IOC), as 'parasite marketing' and has also made the following disparaging remarks on the practice:

"Ambush Marketing' is not clever marketing – it is cheating. And who wants to be a cheat?"

SO, WHAT IS 'AMBUSH MARKETING'?

Basically, a company or firm claims an association with a sports event, which it does not 18 have, and, perhaps more importantly, for which it has not paid a penny. In such a case, sponsors do not get value for the considerable sums that they have expended on the particular sponsorship. 'Ambush Marketing' not only adversely affects sponsors, it also dilutes the value of events and causes confusion to consumers.

Depending on the facts and circumstances of the particular case and depending on whether 19 the sports event is protected by a special law or statute - in order for a country to host the Olympics, such a law protecting the Olympic marks and designations must be passed – it may be possible to obtain a Court Injunction or an award of damages (Blackshaw, 2006, ch 10, 11).

In what ways, can 'Ambush Marketing' be attacked and eliminated - or, at least, its pernicious 20 effects be reduced? Certain legal and practical measures can be taken, two of which – perhaps the most effective ones - will now be described.

'NAMING AND SHAMING' AND 'BRAND PROTECTION PROGRAMMES'

The IOC has introduced a 'Naming and Shaming' procedure in which offenders are exposed in 21 a Press Conference! This seems to have been quite effective on occasions, but must be handled discreetly to avoid any claims of Defamation or Injurious Falsehood.

Another method of combating 'Ambush Marketing', which takes many creative forms, are 22 detailed and sophisticated so-called 'Brand Protection Programmes' created and strictly enforced by major sports event organisers. For example, an elaborate scheme was put into action and successfully implemented during the 2002 Salt Lake City Winter Olympics. Again, there are strict rules in force under specific South African Laws to protect the FIFA World Cup in 2010.

Likewise, strict rules, having the backing of statutory law, have been put into force by the 23 Organising Committee (LOCOG) of the London 2012 Summer Olympic Games. LOCOG justifies these measures, which, as will be seen, are quite strict and comprehensive, on the following grounds:

The value of the London 2012 brand is vital to the funding of the Games. You can help support London 2012 by understanding and respecting the need to protect the brand, and by not using our emblems or otherwise creating an association with the Games unless you are sure you are entitled to do so...The hundreds of millions of pounds necessary to organise the Games must be raised by the London 2012 Organising Committee from the private sector – by selling sponsorship, official merchandise and tickets.

To raise the necessary revenue, the London 2012 Organising Committee must be able to give its sponsors an exclusive association to London 2012 and the Olympic and Paralympic movements in the UK. As such we must prevent other companies undertaking unauthorised activities which damage our sponsors' exclusive rights.'

Of course, if anyone could use the 'Games' Marks' (see below) for free, or otherwise create an 24 association with the 2012 Games, sponsors and merchandise licensees would not want to

invest in them.

Similarly, from a trademark point of view, uncontrolled or free use of the Marks could damage 25 their reputation and prestige and also of the event itself.

WHAT ARE THE GAMES' MARKS?

They are all of the official names, phrases, trade marks, logos and designs related to the 26 2012 Games and the Olympic and Paralympic Movements and they are protected by the law in a variety of ways.

The following are some of the current items that make up the Games' Marks: 27

- The Olympic symbol
- The Paralympic symbol
- The London 2012 Olympic and Paralympic emblems
- The words 'London 2012' and '2012'
- The words 'Olympic', 'Olympiad', 'Olympian' (and their plurals and things very similar to them – eg 'Olympix')
- The words 'Paralympic', 'Paralympiad', 'Paralympian' and their plurals and things very similar to them – eg 'Paralympix'
- The Olympic motto: 'Citius Altius Fortius' / 'Faster Higher Stronger'
- The Paralympic motto: 'Spirit in Motion'
- The Team GB logo
- The Paralympics GB logo
- The British Olympic Association logo
- The British Paralympic Association logo
- London2012.com (and various derivatives)

IN WHAT WAYS ARE THE GAMES' MARKS LEGALLY PROTECTED?

They are legally protected by a variety of means: some are registered trademarks; and 28 others enjoy copyright protection.

In addition, in the UK, special laws have been passed to give extra protection to some of the 29 Games' Marks: the Olympic Symbol etc. (Protection) Act 1995 (OSPA) protects the Olympic and Paralympic symbols, mottos and various words.

Added protection is provided by the London Olympic Games and Paralympic Games Act 2006 30 (the '2006 Act'). This prevents the creation of any unauthorised association between people, goods or services and London 2012.

These statutory measures are, in fact, a legal requirement of the IOC for the granting of the 31 holding of the Games in the first place.

Thus, the unauthorised use of any of the Games' Marks - or, indeed, any other marks or logos 32 that are confusingly similar to, or likely to be mistaken for, them - is strictly prohibited and illegal.

For example, without LOCOG's prior written consent, it is unlawful to use the Olympic symbol, 33 the London 2012 logo or the mark 'London 2012' in the course of trade. In other words, for commercial purposes.

So they cannot, for example, be used on goods; in business names; on business papers; or in 34 advertising.

It is also unlawful, whether through the use of the Games' Marks or otherwise, to falsely 35 represent any association, affiliation, endorsement, sponsorship or similar relationship with London 2012, the British Olympic and/or Paralympic teams, or any other part of the Olympic

and/or Paralympic Movements.

The 'weasel' words protected by OSPA can, however, be used in editorial news pieces without 36
LOCOG authorisation and journalists are, in certain circumstances, able to use their emblem
in order to illustrate an editorial piece about the Games. But, this exception does not apply to
businesses which produce newsletters, client bulletins.

Another exception applies to businesses that have traded under an 'Olympic' name for many 37
years (pre-1995). The exception allows them to continue to do this.

There are a few other defences available under OSPA and the 2006 Act. And these are set out 38
in the LOCOG Statutory Marketing Rights Booklet.

And what sanctions will be incurred in the event of an infringement of the Games' Marks? 39
LOCOG will take legal action to stop the misuse of their Marks, which could include obtaining
Court Orders for the seizure of unauthorised merchandise and also the payment of
compensation (damages).

WHO IS ENTITLED TO USE THE GAMES' MARKS?

The companies and organisations that have been authorised by LOCOG to do so and paid - in 40
fact, handsomely - for the privilege. These include the 2012 official partners, sponsors,
suppliers and licensees, who are allowed to use the Games' Marks in accordance with the
terms and conditions of their respective agreements with LOCOG. Details of the current
LOCOG partners are given on the 2012 official website, which can be found at
'www.london2012.com'.

Furthermore, the LOCOG partners and the other organisations granted rights to associate 41
themselves with London 2012 are listed in the Statutory Register which LOCOG is obliged to
maintain in accordance with the 2006 Act.

As will be seen, these rules are very strict and all-embracing and, indeed, have been widely 42
criticised by the UK Advertising Industry as being too restrictive and against free commercial
speech! In fact, they have been labelled 'draconian'!

LOCOG has also sought to gain even further protection through trademark law by seeking to 43
register at the UK Trademarks Office a wide range of marks, including the number '2012'
itself. Such a mark would, in theory, have given wide powers to LOCOG to prevent any other
business using the number 2012 in relation to its goods or services. Apparently, this attempt
has finally been abandoned recently following an indication from the UK Trademarks Office
that they were likely to refuse the application on the ground that the mark lacked
distinctiveness - in other words, was 'generic'.

It has also been reported that LOCOG is currently seeking to register as a trademark the 44
words 'Get Set'. It will be interesting to see how the UK Trademarks Office responds to this
application, which, *prima facie*, would not appear to be very distinctive either and, therefore,
would not satisfy the legal requirements for registrability of a trademark.

CONCLUSIONS

The importance of using creatively IPRs to protect 'sporting properties' generally and 45
especially those of major sporting events cannot be overemphasised. Indeed, without them,
many major sporting events, such as the Summer and Winter Olympic Games, could not
afford to be staged, much to the disappointment of billions of sports fans worldwide!

Whenever and wherever possible, event names should be registered as trademarks and 46
copyright claimed in respect of event logos, using the international copyright symbol © plus
the name of the event rights holder and the year of publication of the copyright material. The
words 'All Rights Reserved' should also be added to cover those cases where the copyright

material is used in countries that have not subscribed to the Universal Copyright Convention.

Although as has been seen, the LOCOG measures for protecting the 2012 London Olympic 47 Games are quite strict and comprehensive, in certain respects, however, one cannot but admire the zeal, ingenuity and determination of LOCOG to do all they legally can to protect the Olympic Marks and the commercial value of the event itself! Not only, may it be said, for the 2012 Olympics, but also for future editions of them.

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