

PROTECTING OLYMPIC GOLD: AMBUSH MARKETING AND OTHER THREATS TO OLYMPIC SYMBOLS AND INDICIA

JANE SEBEL* AND DOMINIC GYNGELL**

I. INTRODUCTION

In recent years the tradition of Olympic amateurism has been recast into a new paradigm of commercialism and corporate competition. This shift began in earnest in 1984, when the Los Angeles games showed that a profit could be made from the financially struggling Olympic movement. Since that time the value in the Olympic brand has skyrocketed, and the corporate world has sought to benefit from any Olympic association. One of the consequences of this push has been the attempt by non-sponsors to capitalise on Olympic goodwill by way of ambush marketing.

This article examines the practice of ambush marketing and how it has developed as a threat to the financial viability of Olympic sponsorship. At the same time, this article discusses the legitimacy of ambush marketing. In Australia this threat evolved as a result of the limitations of the intellectual property regime and the failure of the legislature to introduce adequate legislative measures to protect Olympic symbols. The Australian legislature has responded to the practice of ambush marketing and other Olympic related intellectual property breaches by introducing the *Sydney 2000 Games (Indicia & Images) Protection Act 1996 (Cth)* (the Act). The purpose of the Act is to ensure that Australia meets its obligations to the Olympic Charter and to the taxpayers of New South Wales, and to give potential Olympic sponsors adequate protection from ambush marketers. It is intended that the legislation will meet these goals while respecting the implied constitutional right of freedom of political communication.

* BA (UNSW) LLB (Hons) (University of Sydney); Solicitor, Minter Ellison.

** BA LLB (Hons) (ANU); Solicitor, Minter Ellison.

In this regard the article looks at the limitations of previous legislative and common law protection, as well as the experiences of the other Olympic host countries and their approaches to the prevention of ambush marketing. Judicial consideration of the new legislation is also reviewed.

II. AMBUSH MARKETING AND THE OLYMPICS

Over the last 15 years the commercial value in associating products or services with the Olympic Games has risen exponentially.¹ The competition to be appointed an "Olympic partner" is intense and expensive. Companies spend millions of dollars to obtain the associative rights, and millions more in advertising revenue to cash in on the success of the Olympic movement.

In return, companies who pay out sponsorship dollars have expectations about the value for money they will receive. They expect that the Olympic organising committee will protect their investment. One of the major threats to corporate sponsorship is the increasingly prevalent practice of ambush marketing.

Ambush marketing describes the unauthorised association by businesses of their names, brands, products or services with a sports event or competition of which they are not official sponsors. The aim of the ambush marketer is to avoid the costly up-front investment of sponsorship while at the same time gaining the benefits and prestige of the association.²

The effect of this practice is that the sponsor's message is diminished and consequently the value of the sponsorship is decreased. The threat to sponsorship dollars jeopardises the financial viability of the sporting event.

An example in the context of the Sydney 2000 Games is the "Team National" advertising campaign of the National Australia Bank, which uses well known Olympic sport stars to promote its banking services. Some argue that the campaign compromises the position of Westpac Bank, who has the official Olympic sponsorship rights.³ On another view, the National Australia Bank is taking advantage of an important promotional opportunity.⁴

The legitimacy or illegitimacy of ambush marketing can depend on the perspective from which it is viewed. From the perspective of the International Olympic Committee (IOC), other Olympic bodies, or a sponsor, ambush marketing is unethical with the potential to destroy sponsorship arrangements.

1 T Meenaghan provides an excellent background to the development of corporate sponsorship for marketing purposes: T Meenaghan, "Ambush Marketing - A threat to corporate sponsorship" (1996) *Sloan Management Review* 103. See also D Sandler and D Shani, "Olympic Sponsorship vs 'ambush' marketing: who gets the gold" (1989) *Journal of Advertising Research* 9, and L Bean, "Ambush marketing: sports sponsorship and the Lanham Act" (1995) 75 *Boston University Law Review* 1099 at 1102.

2 D Sandler and D Shani, note 1 *supra* at 12.

3 N Honery, "Sponsorship fight for a sporting chance", *Sydney Morning Herald*, 18 September 1997, p 32. See also S Di Bella and T Pigani, "SOCOG Vigilantly Protects the Olympic Brand" (1999) 11 *Intellectual Property Law Bulletin* 71 at 72.

4 T Meenaghan, note 1 *supra* at 109.

Some have even gone so far as to equate the practice with stealing - as ambush marketeers have not paid for the right to be associated with the event.⁵

What may often be overlooked is that 'so-called' ambush marketeers may have purchased advertising rights legitimately, and are in no way infringing the intellectual property rights of another party. From the perspective of the ambush marketeer, their advertising is a legitimate corporate practice, ensuring that their company participates in an important promotional opportunity, access to which they would be denied, without engaging in ambush marketing.⁶

Ambush marketing can refer to a continuum of situations and thus result in "varying extents of legal and ethical infringement".⁷ As Meenaghan discusses, the classification of what constitutes ambush marketing is unstable and can vary greatly over time. Marketing practices that were once viewed as transgressions may be viewed today as "legitimate sponsorship opportunities".⁸

One strategy involves the sponsorship of media coverage. During the 1984 Los Angeles Olympics, the 'ambush' involved the worldwide Olympic sponsor Fuji and its competitor, Kodak. This dispute arose after Kodak became the sponsor of ABC TV's broadcast of the Games and became the "official film" supplier to the US track team. Through the subsequent television exposure, Kodak was able to access a far wider market than the on-site audience.⁹

A different approach has been to sponsor individuals within a team. This tactic can lead to controversies such as the one arising out of the 1992 Barcelona summer games between the Olympic team sponsor, Reebok, and Nike, the sponsor of high profile athletes such as Michael Jordan and Charles Barkley. Barkley and Jordan, as members of the gold medal winning United States basketball team (The Dream Team), threatened to boycott the medal ceremony rather than appear on international television wearing a tracksuit bearing the Reebok logo.¹⁰ The spectacle of athletes refusing to accept an Olympic medal because of sponsorship commitments was averted by Jordan and Barkley draping an American flag over the Reebok logo.

The dispute between the sneaker giants continued into the 1996 Atlanta Summer Games where Reebok was again the official sponsor store. Nike had employees handing out "Just Do It USA" banners to spectators on the marathon route and had a Nike interactive park set up next to the Reebok adorned Olympic stadium.¹¹

Another tactic has involved the use of advertising slogans. In the lead up to the Albertville Winter Olympics in 1992, American Express engaged in a marketing campaign that, it was alleged by Visa, ambushed Visa's status as the official credit card of the Olympics. Visa initiated a campaign of its own stating

5 *Ibid* at 108-9.

6 *Ibid*.

7 *Ibid* at 106.

8 *Ibid* at 109.

9 *Ibid*.

10 Senate Legal and Constitutional Committee, The Parliament of the Commonwealth of Australia, *Cashing in on the Olympics: protecting the Sydney Olympic Games from Ambush Marketing*, March 1995 at 24.

11 M Stutchbury, "Nike swooshes past the \$US40m club", *Australian Financial Review*, 23 July 1996, p 50.

that only Visa credit cards would be accepted at the Olympics. The battle continued as American Express countered with their own campaign to rebut the Visa campaign using slogans such as: "Remember to visit Spain - you don't need a Visa."¹²

III. THE INTERNATIONAL RESPONSE

The threat of ambush marketing to corporate sponsorship has been recognised by a number of countries which have responded by introducing specific legislation protecting sponsors of sports events. In 1978, the *Amateur Sports Act* 1978 was enacted in the United States. The Act grants the United States Olympic Committee (USOC) the right to prohibit certain commercial and promotional uses of the word "Olympic" and other Olympic symbols.¹³ The need for further protection led to introduction of the *Trademark Counterfeiting Act* 1984 which provides criminal sanctions for the use of Olympic words and other derivations. Sanctions include criminal penalties, seizure orders and a variety of other court orders.

In Canada, protection for Olympic marks is provided by the *Olympic (1976) Act*. This Act provided protection for words derived from the word "Olympic" as well as the words "Montreal" and numerals "1976". Further, this Act provided for additional relief where an action is brought in conjunction with the Canadian *Trademark Act*.¹⁴ The Act presumes that any contravention of the *Trademark Act* in this respect causes harm to the organising committee.¹⁵

Legislation relating to the protection of Olympic symbols has also been enacted in Norway,¹⁶ Japan¹⁷ and Korea.¹⁸

IV. AUSTRALIAN REGULATION

A number of contractual documents set out the governing rules and requirements for the staging of the Olympics. These are the Host City Contract, the Olympic Charter and the Endorsement Contract. For the Sydney Games, the Host City Contract was executed by the City of Sydney, the AOC, the IOC and SOCOG. The State of New South Wales has served to underwrite the staging of

12 S Lewis, "Going for Gold", *Australian Financial Review*, 24 July 1992, p 29. For further examples of ambush marketing see L Bean, note 1 *supra*.

13 Section 110 of the *Amateur Sports Act* 1978. For an overview of case law in the United States see Alexander, Brewer et al, "Fortius Fortius Fortus: protection of traditional and Olympic trademarks against 'knock off' identification goods", presented at INTA conference, Boston, 9-13 May 1998. For an analysis of the way the *Lanham Act* has been used to protect against ambush marketing: see L Bean, note 1 *supra*.

14 Section 15(8) of the Act.

15 For discussion of case law on the operation of this legislation in Canada, see note 12 *supra* at 181.

16 *The Provisional Act relating to the Protection of the Olympic Symbols and the Olympic Emblem* 1993.

17 See the revised Article 10 of the *Unfair Competition Prevention Act*.

18 *Seoul Olympic Organising Assistance Act* 1981.

the Sydney Olympics by the vehicle of the Endorsement Contract. Further, the New South Wales government has provided an indemnity to the AOC and the City of Sydney against all liabilities which they may incur as a result of their joint responsibility to the IOC under the Host City Contract.

A. Intellectual Property and Related Legislation

The protection of Olympic symbols and indicia from ambush marketing and other infringement to the Olympic brand name requires a complex legislative framework that builds upon and supplements existing intellectual property legislation. The suite of intellectual property legislation includes:

- The *Copyright Act 1968* (Cth);
- The *Designs Act 1906* (Cth);
- The *Trade Marks Act 1955* (Cth);¹⁹
- The *Corporations Law Regulations*; and
- The *Business Names Act 1962* (NSW)
- The *Trade Practices Act 1974* (Cth).

(i) Copyright

As the *Copyright Act 1968* (Cth) was introduced to protect original artistic, literary or musical works, it provides very little protection for Olympic symbols and insignia. In order for copyright to subsist in a published work,²⁰ a number of requirements must be met. The work must be original,²¹ and the author must live in or be sufficiently connected to Australia.²² In the case of Olympic symbols, unless there is a measure of creativity in the depiction of the symbols, it is unlikely that the originality requirement would be satisfied. Further, the Australian Olympic Committee (AOC), as the body responsible for protecting the interests of sponsors, is not the author of the Olympic symbols.²³ Finally, even if the above conditions could be satisfied, the nature of copyright is to protect against substantial reproductions of a work, and not against false associations which form the main ammunition of ambush marketeers.

(ii) Designs

Initially, the AOC was unable to register any Olympic design under the *Designs Act 1906* (Cth).²⁴ There are similar requirements of originality in

19 Now amended as the *Trade Marks Act 1995* (Cth).

20 The *Copyright Act 1968* (Cth), s 32(2).

21 See for example *University of London Press v University Tutorial Press Ltd* [1916] 2 Ch 601 (United Kingdom Chancery Division), *Victoria Park Racing & Recreation Ground Co Ltd v Taylor* (1937) 58 CLR 479, *Ladbroke (Football) Ltd v William Hull (Football) Ltd* [1964] 1 WLR 273, *Kalamazoo (Australia) Pty Ltd v Compact Business Systems Pty Ltd* (1985) 5 IPR 213 and *Exxon Corporation v Exxon Insurance Ltd* [1982] 1 Ch 119. For general principles about copyright law see S Ricketson, *Intellectual Property: Cases, Materials and Commentary*, Butterworths Ltd (2nd ed 1998); J McKeogh, *Intellectual Property*, Butterworths (3rd ed, 1999); and P Loughlan, *Intellectual property: creative and marketing rights*, LBC Information Services (1998).

22 Section 32(4) of the *Copyright Act 1968* (Cth).

23 Note 12 *supra* at 41.

24 This was because the AOC could not fulfil the requirements of s 17(1) of the *Designs Act 1906* (Cth).

respect to the registration of designs as exist under copyright legislation.²⁵ Other limitations to design protection for Olympic symbols and indicia relate to the tension between copyright protection for artistic works under the *Copyright Act* 1968 (Cth) and protection for designs under the *Designs Act* 1906 (Cth). If copyright did subsist in the depiction of the Olympic symbols and that design was then industrially applied to t-shirts for example, and sold, then copyright protection in the design could be lost by virtue of the operation of the *Copyright Act* 1968 (Cth).²⁶ Further, design protection is limited to the application of the design for which registration is obtained.²⁷ For example, if protection was available in respect of the design applied to t-shirts, infringement of the design could be avoided if it were reproduced on mugs. Finally, as with copyright, design protection does little to protect against false associations.

(iii) Trade Marks

The *Trade Marks Act* 1995 (Cth) also provides limited protection. A trade mark is defined as a sign, used to indicate the trade origin or source of goods or services manufactured or sold, as being the goods or services of a particular trader.²⁸ In practical terms, a trade mark functions to distinguish the commercial origin of the goods and services sold under that mark. Consumers will associate the commercial origin of the goods with a particular standard or quality.²⁹ For example, a restaurant with the trademark name "McDonald's" would represent to the consumer that the restaurant or the food was of a particular standard and quality.³⁰

Although the use of an official Olympic symbol may act to suggest a company's official association with the Olympics, it will not necessarily indicate that the goods or services derive from a particular trader or serve to distinguish the goods and services of the trader from the goods and services of other traders.³¹ This will prevent Olympic symbols being registrable as trade marks. It is a fundamental requirement of the *Trade Marks Act* 1995 that a mark be inherently capable of distinguishing the goods and services of the trader from those goods and services of other traders.³²

The majority of symbols associated with the Sydney 2000 Games such as "Sydney", "2000", "Games" or colours such as "Gold", "Silver" or "Bronze"

25 See *Malleys v JW Tomlin* (1961) 35 ALJR 352 and *Sebel & Co Ltd v National Art Metal Pty Ltd* (1965) 10 FLR 224. Although this deficiency has since been remedied by the *Olympic Insignia Protection Act* 1987 (Cth) discussed below.

26 See *Copyright Act* 1968 (Cth), ss 74-77.

27 The *Designs Act* 1906 (Cth), s 20.

28 The *Trade Marks Act* 1995 (Cth), s 17.

29 *Johnson & Johnson Australia Pty Ltd v Sterling Pharmaceuticals Pty Ltd* (1991) 30 FCR 326 at 348, per Justice Gummow.

30 The South African case of *McDonald's Corporation v Jo'Burgers Drive-Inn Restaurants Pty Ltd and Ors* [1996] (4) All SA(A) illustrates a situation where the use of the trademark in relation to a burger restaurant was not legitimate. See C Webster, "The McDonalds case: South Africa joins the global village" (1997) 86 *Trademark Reporter* 576.

31 This is illustrated in *Aristoc Ltd v Rysta* [1945] AC 68 at 97 and *Smith Kline & French Laboratories (Australia) Ltd v Registrar of Trade Marks* (1967) 116 CLR 628 at 636-7.

32 Section 41 of the 1995 Act.

would not be likely to gain trade mark protection due to their nature as geographic locations,³³ or the fact that they are words used in everyday speech and therefore inherently unable to distinguish goods and services. Further, there are a number of prior registered rights to the word "Olympic" held by other organisations. This would almost certainly prevent the registration of the term by Sydney Organising Committee for the Olympic Games (SOCOG) or the AOC in most classes of the Register.³⁴

(iv) *Corporations Law*

Regulations made under the *Corporations Law* list certain Olympic phrases which are unacceptable for registration as, or as part of, a company name. This restriction on the use of the word "Olympic" applies where the word suggests some connection with the Olympics or an official body connected with the Olympics, if in fact that connection does not exist. Similarly, other words may not be used, such as "Paralympic", "Olympiad" and "Olympian".³⁵ Further, there are certain phrases which are not available for registration as or as part of a company name under any circumstances. These include "Twenty-Fourth Olympics", "Olympic Games" and "Millennium Games".³⁶ There is also a practice of cross-referencing applications for registration of company names with the business names register in each State and Territory of Australia. If a name is unregistrable under a State or Territory business name law, it is highly unlikely that the name will be accepted for registration as a company name pursuant to the *Corporations Law*.

(v) *Business Names*

The use of business names associated with the Sydney Olympics or the Paralympics is also restricted by Federal, State and Territory governments. In New South Wales, a ministerial direction pursuant to the *Business Names Act 1962* (NSW) contains similar restrictions as those contained in the *Corporations Regulations*. Certain Olympic phrases are not registrable without ministerial consent. Under the new ministerial directions and guidelines, words and phrases such as "Olympic", "Olympiad", "Paralympic", "Olympian", "Share the Spirit", "Gold", "Summer Games" and "Millennium Games" cannot be registered without the consent of the Minister for Consumer Affairs.³⁷

However, these measures only serve to prevent traders registering company or business names using Olympic indicia and images, they do not prevent a corporation using these terms in the course of business or trade.

33 Section 24(1)(d) of the 1955 Act.

34 Note 12 *supra* at 43.

35 *Corporations Law* regulation 4.2.01 (1B) (m) and Schedule 6A.

36 *Corporations Law* regulation 4.2.01 (1B) (c).

37 C McGill, "And the Winner is ..." (1995) 14 *Communications Law Bulletin* 18 at 19.

(vi) *Common Law and Consumer Protection*

The tort of passing off is a common law remedy which has traditionally provided some protection in relation to advertising practices. Passing off occurs when goods sold by one trader are marketed to give the impression that they are the goods of another trader.³⁸

Three elements need to be established in order to successfully make out this tort:

- an established reputation by the plaintiff in some product or service;
- a misrepresentation by the defendant that their goods or services are connected to the goods or services of the plaintiff; and
- damage to the goodwill of the plaintiff as a result of the misrepresentation.³⁹

The element of damage is the most difficult to establish particularly in the case of ambush marketing, where the Olympic sponsor would be required to quantify a loss which is not directly tangible or which may not be identifiable until a much later date.

The *Trade Practices Act 1974* (Cth) (TPA) regulates the activities of corporations and partnerships. Section 52 acts to prevent a corporation from engaging in misleading or deceptive conduct or conduct which is likely to mislead or deceive. The benefit of s 52 is that it does not require intention or knowledge in order to prove a breach. There is no requirement that loss or damaged be suffered.⁴⁰ Therefore, an action under the TPA is more attractive as a potential cause of action than the tort of passing off. The Act also provides a broad range of remedies.⁴¹ The main limitation of s 52 is that it will not apply to activities of non-corporate traders. However, this limitation is in part remedied by legislation enacted at state level.⁴²

At first glance it appears that ss 53(c) and (d) of the TPA would also be a useful tool in the prevention of ambush marketing as they prohibit a corporation representing that goods and services have sponsorship approval or that the corporation itself has sponsorship approval or affiliation. Judicial interpretation of this section indicates that the association suggested must be clear and direct.⁴³ The ability of ambush marketers to convey subtle associations may mean that such behaviour is not sufficient to bring their conduct within the ambit of s 53.

38 See S Ricketson, note 21 *supra*, p 772, and the following chapter for a discussion of the case law.

39 See *ConAgra Inc v McCain Foods (Australia) Pty Ltd* (1992) 23 IPR 193 at 246-8 per Justice Gummow.

40 The damage requirement is often a factor in the failure of a passing off action.

41 These remedies include injunctions or actions for damages s 80, and other orders such as corrective advertising under s 87.

42 The *Fair Trading Act 1987* (NSW), s 42; the *Fair Trading Act 1989* (Qld), s 38; the *Fair Trading Act 1987* (SA), s 56; the *Fair Trading Act 1985* (TAS), s 14; the *Fair Trading Act 1985* (Vic), s 11; and the *Fair Trading Act 1987* (WA), s 10.

43 See for example, *McDonalds Systems Australia Pty Ltd v McWilliams Wines Pty Ltd (No 2)*(1979) 41 FLR 436 and on appeal, *McWilliams Wines Pty Ltd v McDonalds Systems Australia Pty Ltd* (1980) 33 ALR 394. Note 12 *supra* at 45.

In addition, the use of express disclaimers can reduce the likelihood of success under the TPA, as they function to remove any likelihood of deception even though the advertisements may still be confusing and ambiguous.⁴⁴

B. Specific Olympic Legislation

The most significant aspect of the specialised Olympic legislation introduced in 1987 was that it provided the vehicle by which the IOC allowed the AOC to exercise the rights in Olympic symbols and indicia in Australia, and in turn licence those symbols and indicia in order to collect the revenue for the AOC.⁴⁵

(i) *The Olympic Insignia Protection Act 1987 (Cth)*

The *Olympic Insignia Protection Act 1987 (Cth)* (the 1987 Act) was introduced in order to specifically address limitations in copyright, design and trade mark law protection of Olympic symbols and indicia. Importantly, the 1987 Act vests exclusive copyright and design rights in certain fundamental Olympic symbols in the AOC.⁴⁶ Examples of the symbols given protection under the 1987 Act include:

- Copyright protection expressly given to the Olympic interlocking six ring logo;
- The interlocking six ring logo or the Olympic torch and flame which the AOC is given the exclusive right to apply to register; and
- The prevention of the registration of a trade mark of the Olympic motto in Latin 'Citius Altius Fortius'.⁴⁷

Protection against fraudulent or obvious imitation of the symbols and designs is also provided by the 1987 Act.⁴⁸ Interestingly, while protection is limited to a four year period in relation to games specific art works, the 1987 Act has granted indefinite copyright in the Olympic ring symbol.⁴⁹ The 1987 Act gives the AOC a range of statutory remedies to enforce its intellectual property rights, including injunctive relief to prohibit the sale or dissemination of the infringing material, damages or an account of profits.⁵⁰ Protection for the Olympic symbols and indicia is provided where the designs or images are applied (fraudulently or as an imitation) to an article or are imported for sale or business use or are hired, sold or offered for sale without the licence of the AOC.⁵¹

Despite the important progress made by the 1987 Act, the experience at the 1988 Seoul Olympic Games revealed the need to extend legislative protection to certain additional Olympic words and symbols and led to the enactment of the *Olympic Insignia Protection Amendments Act 1994 (Cth)*⁵² (the 1994 Act). The

44 *INXS & Ors v South Sea Bubble Co Pty Ltd* (1986) ATPR 40-667 and *Sony Music Australia Ltd & Anor v Tansing* (1993) ATPR 41-279.

45 C McGill, note 37 *supra* at 18-19.

46 *The Olympic Insignia Protection Act 1987 (Cth)*, s 6.

47 *Ibid*, s 5.

48 *Ibid*, s 10(1).

49 *Ibid*, s 5(2).

50 *Ibid*, s 8.

51 *Ibid*.

52 Note 12 *supra* at 18-20.

operation of the 1994 Act further widened the protection afforded to Olympic images and indicia by allowing protection of the Olympic torch and flame design.⁵³ Further, the 1994 Act prevented the registration of the English translation of the Olympic motto 'Citius, Altius, Fortius' (faster, higher, stronger).⁵⁴

Curiously, the existing Olympic protection legislation did not contain any restriction on the use of the word 'Olympic'. The inadequacies of the legislation led to the commissioning of a parliamentary report, "Cashing in on the Olympics" (the Report),⁵⁵ which examined the protection afforded to the words and symbols associated with the Olympics in Australia.

The Report placed a significant emphasis on Australia's obligations, both under the Host City Contract and under the Olympic Charter, to ensure that Olympic symbols and indicia were adequately protected. In addition, the Report recognised the obligation of the New South Wales government to its taxpayers to ensure that Olympic sponsorship expectations are met.⁵⁶ A failure to do so would damage Australia's reputation in the international marketplace⁵⁷ and significantly reduce the amount of revenue raised in connection with the use of the symbols and indicia.

After a consideration of the existing limits of the intellectual property regime and other statutory and common law regimes in Australia dealing with ambush marketing, the Report recommended that additional protection was necessary. As a result, the *Sydney 2000 Games (Indicia & Images) Protection Act 1996* (Cth) was enacted.

In recognising the threat posed by ambush marketing to the commercial viability of sponsorship and the threat posed to the financial viability of the Sydney 2000 Games, the report underplayed the potential adverse impact of introducing further legislation. For example, the Queensland government submitted that while the AOC was entitled to protect its symbols and indicia in relation to business and trade associations, the limitation of use of certain words would prevent public and private sector bodies from being able to profit from the Sydney 2000 Games in an incidental manner.⁵⁸ Additionally, the Trade Practices Commission submitted that an extension of protection for Olympic words and symbols could have far reaching effects on competition that could in turn be detrimental to consumers.⁵⁹

Along with the need to ensure the commercial viability of Olympic sponsorship, the Report discussed a separate, and perhaps competing goal of protecting free speech. One of the main concerns of the report was the effect of the decision of the High Court in *Davis v The Australian Bicentennial*

53 *The Olympic Insignia Protection Amendment Act 1994* (Cth), s 14.

54 *Ibid.*

55 Note 12 *supra*.

56 *Ibid.*

57 L Ritson, "Special legislation protecting Olympic symbols, images and indicia: Sydney 2000 Games", presented at the International Trademark Association Conference, Boston, 9-13 May 1998 at 6-7.

58 Note 10 *supra* at 63.

59 *Ibid* at 62-3.

*Authority*⁶⁰ and the constitutional guarantee of freedom of political communication which was endorsed by the High Court in cases such as *Australian Capital Television Pty Limited v The Commonwealth*⁶¹ and *Theophanous v The Herald and Weekly Times and Anor.*⁶² The concerns of the Report resulted in the inclusion of a section in the Act, section 25, which provides that the use of Olympic indicia and images will not breach the Act if the use is for the provision of information or for criticism or review.

Interestingly, these cases are probably less significant in light of cases such as *Lange v Australian Broadcasting Commission*⁶³ which revealed a more conservative approach of the High Court towards the development of the doctrine of freedom of political communication.⁶⁴ The Lange decision clarified that the implied constitutional right of freedom of political communication does not protect all communication which can be classed as 'political' or shown to relate to some aspect of representative or responsible government. Rather, a nexus must be established between the communication and a particular aspect of representative or responsible government set out in the Commonwealth Constitution. If a law does effect communication of this nature it will be invalid unless the law is "reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of...the system of government prescribed by the Constitution".⁶⁵

The two goals of the Act, protecting both commercial interests and free speech, are not altogether complementary. A discussion of the interaction between the commercial goals of the Act and their effect on open communication is set out below.

(ii) *The Sydney 2000 Games (Indicia & Images) Protection Act 1996*
(Cth)

Broadly speaking, the Act protects a wide range of expressions, images and symbols associated with both the Olympics and the Paralympics.⁶⁶ Words such as "Olympic", "Olympiad" and "Paralympic" are protected against any commercial use which is unlicensed. The Act also applies to indicia in languages other than English.

The Act applies to myriad circumstances in which images and indicia are taken to be applied to goods and services.⁶⁷ The Act deems the importer of the

60 (1988) ALJR 35. In *Davis*, the Court struck down certain provisions of the *Australian Bicentennial Act* 1980, as disproportionate to the requirements of the Bicentennial Authority. The Australian Bicentennial Act had attempted to restrain the use of expressions including "1788", "1988" and "88".

61 (1992) 108 ALR 577

62 (1994) 124 ALR 1.

63 (1997) 145 ALR 96.

64 For a detailed discussion of this area, see A Stone, "Lange, Levy and the Direction of Freedom of Political Communication" (1998) 21 *UNSWLJ* 117.

65 Note 63 *supra* at 112.

66 The purposes of the *Sydney 2000 Games (Indicia & Images) Protection Act* 1996 (the Act) are set out in s 3 of the Act.

67 *Ibid*, s 10(1).

offending goods to be the person who applies the images and indicia.⁶⁸ Further, the use of symbols and indicia for commercial purposes is prohibited. Commercial purpose is defined as the application of indicia and images to goods or services for the purpose of advertising or promotion.⁶⁹ The Act also applies to situations where the application of the images or indicia would suggest sponsorship of the games or an official connection with an official Olympic or Paralympic Games body. The Act also prohibits companies using indicia which are substantially similar to Sydney 2000 indicia.

Commercial use of the relevant Games' symbols or images is permitted by SOCOG, the Sydney Paralympic Organising Committee (SPOC) and licensed users.⁷⁰

The Act applies in conjunction with existing legislation, such as the *Olympic Insignia Protection Act 1987* (Cth). It contains detailed provisions regarding the acquiring of licences⁷¹ and requires that all users become registered.⁷² The Act also facilitates the creation of a register of users which is available for public inspection.⁷³

Importantly, the Act makes provision for those individuals and corporations who have registered trade marks or designs of images or indicia which are prescribed under the Act.⁷⁴ The Act also allows an exception of the use of Olympic indicia and images in the case of free speech.⁷⁵ It allows for the use of these symbols in situations which are not sufficient to suggest sponsorship, such as the provision of information or for criticism or review.⁷⁶

The range of remedies provided by the Act is extensive. Injunctive relief is provided⁷⁷ but is only available to the relevant section of the Olympic Committee or to registered users and will only apply to images or indicia relating to the Sydney 2000 Games. The court has a wide discretion in terms of the circumstances in which they are allowed to grant injunction and such injunctions may be granted in relation to past, present or anticipated breaches of the Act. Importantly, both the Supreme and the Federal Court are empowered to vary or discharge injunctions which are granted.⁷⁸

The court also has a wide discretion to order corrective advertising.⁷⁹ This remedy can be granted on its own or in addition to an injunction. The court may also grant damages for loss and damage incurred as a result of a contravention of

68 *Ibid*, s 10(2).

69 *Ibid*, s 11.

70 *Ibid*, s 12.

71 *Ibid*, s 14.

72 *Ibid*, s 15.

73 *Ibid*, ss 16-23.

74 *Ibid*, s 24 of the Act. The effect of this provision is considered in the decision of *Australian Olympic Committee Incorporated v Baxter & Co Pty Ltd* (1997) 36 IPR 621.

75 For further analysis of the freedom of speech implications see G Orr, "Marketing Games: the regulation of Olympic indicia and images in Australia" (1997) 9 *EIPR* 504 at 507-8.

76 Note 53 *supra*, s 25.

77 *Ibid*, ss 43 and 44.

78 *Ibid*, s 43(7).

79 *Ibid*.

the Act.⁸⁰ The Act also establishes that the remedies it provides are in addition to other rights provided to registered users.⁸¹

The Act was amended in 1997⁸² to enable SOCOG, SPOC and licensed users to take action against those who aid, abet, counsel and procure breaches of the Act.⁸³

V. JUDICIAL INTERPRETATION

The Sydney 2000 Act has been subject to judicial interpretation by the Federal Court in the case of *Sydney Organising Committee for the Olympic Games v Pam Clark*.⁸⁴ This decision arose out of an injunction sought against the defendant, Ms Clark, who had produced t-shirts which featured a design depicting a hen in a cage with five eggs below in the shape of the Olympic rings. The t-shirts were in support of Animal Liberation Tasmania Inc.

SOCOG argued that the design was a copy of their Olympic mascot. The design was found to be an original work and copyright was held to subsist with SOCOG. Branson J awarded an injunction and a declaration that the conduct of Ms Clark constituted an infringement of SOCOG's copyright in the work. Further, her Honour ordered delivery up by Ms Clark of all the infringing copies of the work in her possession or power.⁸⁵

No argument was raised in Ms Clarke's defence that her use of the Olympic images fell within the exemption provided by section 25 of the Act. The freedom of speech implications of this decision are considered in more detail in the next section.

The Act has also been considered by Hearing Officer Homann in the trade mark registration opposition proceedings *Australian Olympic Committee Inc v Baxter & Co Pty Ltd*.⁸⁶ Baxter applied for the word mark "The Olympic" in respect of footwear. The AOC opposed the registration because, inter alia, the registration of the mark was not entitled to protection by the courts and that the use of the mark would be contrary to law and would lead to deception and confusion of the public.⁸⁷

The Registrar considered the protection afforded to the word "Olympic". Trade mark use of the word "Olympic" would appear to be caught by the Act as a use for "commercial purposes". However, in order for the rights and remedies under the Act to apply, the use must suggest to a reasonable person that the user

80 *Ibid*, s 46.

81 *Ibid*, s 47(1).

82 *Sydney 2000 Games (Indicia and Images) Protection Amendment Act 1997* (Cth). Second Reading Speech, Australia, House of Representatives 1997, Debates, vol HR 9, 16-19 September 1997, at 4582.

83 *Ibid*, Sch 1 - Amendments, s 5; *Sydney 2000 Games (Indicia and Images) Protection Amendment Act 1996* (Cth), s 13A.

84 *Sydney Organising Committee for the Olympic Games v Pam Clark* (unreported, FCA, Branson J, 25 June 1998).

85 *Ibid* at 3.

86 (1997) 36 IPR 621.

87 *Ibid*.

provided sponsorship or other support to the Sydney Olympic Games. The association with the Sydney 2000 Games had to be precise; it was not sufficient to suggest some vague connection with the Olympic Games or the Olympic movement in general.⁸⁸ No deception of the public occurred by the representation or suggestion that Baxter had been accorded the status of an official sponsor. The court was not convinced that the use of the mark would lead to deception or confusion of the public.

This case illustrates that the Act will only apply to commercial uses which have the effect of conveying the impression that there is a defined connection between the product and the Sydney 2000 Games.⁸⁹

It appeared that the Act might have its first road test in the sphere of the Internet following the registration of the domain name <sydney2000.net> by an Australian Internet service provider, the Asia Pacific Internet Company (APIC).⁹⁰ Potential litigation appears to have been avoided following the issuing of a cease and desist letter by SOCOG.

A. Freedom of speech

As discussed above, one of the objectives of the Act is to protect the commercial value of Olympic symbols while respecting the freedom of provision of information about the Olympics. Writers such as Rosemary Coombe⁹¹ and Graeme Orr⁹² suggest that exclusive use of Olympic insignia by governments has the opposite effect. The argument of these writers is that intellectual property laws and official 'signifiers' (such as Olympic insignia) are used politically; either to suppress general political speech (as in the case of Pam Clark) or to perpetuate political paradigms by utilising signifiers selectively.

Coombe illustrates her point by the example of the use of the 'Olympic' trademark in the United States.⁹³ The exclusive right to the trademark is held by the United States Olympic Committee (USOC). The USOC have licensed the use of the trademark to a number of groups including the disabled (Paralympics), the Police and others. Yet the USOC refused the use of the trademark to the Gay community when the first Gay Olympic Games (now the Gay Games) was organised.

In Coombes' view the use of the law in this way enables a public authority to exercise its power in a discriminatory manner; by denying 'ownership' of common symbols to subordinated groups.⁹⁴

88 *Ibid* at 622.

89 *Ibid* at 633.

90 Staff Reporter, "Games Body sue over Name", *The Australian*, 23 May 1997, p 13. This would have presented an interesting case for two reasons. The first, is that Sydney 2000 is actually the zipcode of the central business district in Sydney. The second, it would have provided an opportunity for Australian courts to examine the domain name issue.

91 RJ Coombe "Tactics of Appropriation and the Politics of Recognition in Late Modern Democracies" (1993) 21 *Political Theory* at 411-33.

92 Note 75 *supra* at 507-8.

93 Note 91 *supra* at 417-18

94 *Ibid*.

The case of Pam Clark, Graeme Orr argues, is an example of SOCOG using its intellectual property rights to restrict free political speech.⁹⁵ There is no suggestion that Ms Clark was attempting to pass off goods as authentic Olympic merchandise for commercial gain, rather she was using recognisable symbols to draw attention to a political issue.

The flip side of this argument is that to achieve the goal of protecting the Olympic's commercial interests, the Olympic movement need to prevent uses of their symbols which might adversely affect the value of those symbols. SOCOG would not impede Ms Clark's rights to campaign for the protection of animals, they would only prevent her from using their property, and diminishing their brand, to do it.

Australia might well be presented with a more striking example of the conflict between open political speech and Olympic commercialism in the lead up to the Games. It is not difficult to imagine minority groups in Australia (the Aboriginal community for instance) using the Olympics to draw attention to their grievances. The prospect of Olympic symbols being used satirically to illustrate the plight of Aboriginal Australians must send shivers down SOCOG's broad back. Whether SOCOG would use their expansive intellectual property rights to prevent such demonstrations is an open question.

VI. LIMITATIONS OF THE ACT

Regardless of how many shortcomings the new Act addresses, and despite the efforts of SOCOG and the Government, the Act has a number of limitations which will ensure that marketing by unauthorised bodies both in Australia and overseas is prevalent in the period leading up to the Olympics.

One area of concern for SOCOG and the Olympic Partners is the relatively high threshold which must be reached before an advertiser is deemed to be in breach of anti-ambush marketing provisions. This question was considered by a New Zealand court in one of the few cases on ambush marketing relating to Olympic sponsors, *New Zealand Olympic and Commonwealth Games Association Inc v Telecom New Zealand Limited*.⁹⁶

In that case an action was brought by the New Zealand Olympic and Commonwealth Games Association (NZOCGA) against Telecom Mobile. The NZOCGA was acting to protect the interests of one of its sponsors, BellSouth. Telecom Mobile had taken out advertisements which contained the word 'RING' in capital letters arranged three times in one horizontal line and twice in a line below.

RING RING RING
RING RING

95 Note 75 *supra* at 507.

96 (1996) 35 IPR 55.

The natural association for viewers of this arrangement are the Olympic Games rings. The word 'RING' was presented in the same variety of colours as the Olympic rings. The purpose of the advertisement was to inform Telecom Mobile customers that they could use their mobile phones at the Atlanta Olympics, but it was alleged by BellSouth and the NZOCGA that Telecom had misrepresented an association between itself and the New Zealand Olympic Team.

Justice McGechan conceded that the NZOCGA was, along with its sponsors, entitled to the sole use of the Olympic symbols and Olympic rings, and that the advertisement could be taken as a play on the Olympic symbol. Despite this, and despite the fact that readers who saw the advertisement would no doubt pick up a reference to the Olympics, McGechan J held that there was no association implied between the NZOCGA and Telecom.⁹⁷

This case presents a good example of the extent ambushing companies can go without infringing on the license rights of Olympic sponsors. There is little doubt that a casual reader of the advertisement would associate Telecom Mobile with the Olympic rings and the Olympics in general, however, there is nothing in the advertisement which suggests that Telecom Mobile has a direct or authorised association with the NZOCGA or the Olympic movement. This is achieved by invoking Olympic images without using registered trademarks or breaching the provisions of existing Olympic indicia protection legislation.

The limitations of anti-ambushing legislation are well recognised by Olympic sponsors. David D'Alessandro, the president of world wide Olympic Partner John Hancock, has stated that sponsors realise that ambush advertising cannot be legislated against. In a speech in 1998, Mr D'Alessandro stated that "through no fault of SOCOG, this anti-ambush effort will not succeed. Because ambush possibilities are endless, and ambush marketeers with money to burn are equally determined to beat the system...You cannot prevent ambush".⁹⁸

Realistically, the Act cannot protect sponsors or SOCOG from advertisers who want to capitalise on the 'shared experience' of the Olympics. A number of other Australian companies have used Olympic athletes to sell their product without any reference to the Olympics or any other word protected by the Act. Olympic sponsors recognise that athletes will go where the money is, regardless of the association of their personal sponsors to the Olympics.

VII. CONCLUSION

Ambush marketing presents a very real threat to corporate sponsorship and effective capitalisation of Olympic commercial potential. The spectre of ambush marketing has haunted sports administrators and sponsors since the market began to realise the inherent value is sports stars, teams and brands. The lure of the goodwill generated by sports events is immense, and those who have not

⁹⁷ *Ibid* at 57.

⁹⁸ See M Moore and G Korporaal, "Sponsor's Angry Message" *The Sydney Morning Herald*, 5 December 1997, p 14.

obtained official sponsorship rights will in many cases attempt to capitalise on that goodwill.

Ambush marketing involves a spectrum of behaviour, from the glaringly obvious to the ambiguous and subtle. There is little doubt that despite the best endeavours of the legislature, the Olympic Partners and other sponsors will have little recourse against the majority of ambush marketing which will appear in the coming year. There are also concerns that although the Act may fail to stop most ambush marketing by the corporate world, it might be used to stifle political comment about the Olympics. Ultimately, Olympic sponsors might well be better off fighting the battle against ambush marketing in the marketplace rather than the courts.