

Chapter 2

The Commercial Monopoly in Sports Mega-Events

[The world football governing body was] not driven by any selfless goal of global equity within FIFA, more by the entrepreneurial motivation and machiavellian global networking of FIFA's bosses and their business allies ... In such contexts and circumstances, global markets for sports business and for major sponsors have expanded with little or no reference to the wider constituencies of sport, or to the ruling forum of individual sports organisations. Benefits may have accrued to under-resourced areas of the football world, but such expansion has been driven by the commercial interests of an incestuous network of sports leaders, administrators and commercial entrepreneurs.¹

2.1 Introduction

These are challenging times for those who roam the corridors of power in the highest echelons of international sport, with some international sports federations (notably the two biggest players, the International Olympic Committee and FIFA) having experienced crises of governance and well-publicised allegations of corruption and mismanagement in the past decade or so. The Salt Lake City Olympic Games, of course, comes to mind. More recently we saw a widespread furore over bribes in the bidding for 'Fair Play'-loving FIFA's 2022 World Cup, which, after some FIFA officials were suspended clearly did not bother President Sepp Blatter too much. He subsequently responded to criticism of the organisation by saying that all FIFA's 'successes' have created 'a lot of envy and jealousy in our world because you cannot satisfy everybody'; 'the success story of FIFA can continue because we are in a comfortable situation' and 'we have the power and the

¹ Tomlinson 2005, p. 59, 60.

instruments to go against any attacks that are made’.² ‘Herr Sepp’, who was named in March 2011 by *The Times* in the top spot of its ‘Sport Power 100’ list of the one hundred most influential people in sport, is presently still firmly ensconced in FIFA House, described as ‘a \$100 m bunker remote from the eyes of the world’.³ Undoubtedly, he is correct in his convictions of the untouchable nature of his fiefdom. The major international sports governing bodies often appear to weather the storms of criticism and to be able to function, to a significant degree, outside the realm of domestic regulation, as the many calls for a ‘sporting exception’ to the application of the EU Treaty in recent years attests. Two significant reasons for this is the lack of transparency in respect of the governance of an organisation such as FIFA as well as the very nature of the beast, as was observed by Transparency International in a rather scathing August 2011 report:

FIFA is both a non-governmental, non-profit organisation and a global company with huge revenues, unprecedented reach, political clout and enormous worldwide social influence. But unlike a multinational company, answerable to shareholders, FIFA’s mandate comes from the member federations represented by officials (i.e. presidents and delegates, mostly working on a voluntary basis) from all over the world, elected bottom up. This means that FIFA is answerable to the 208 national football associations who themselves are partly dependent on the funds that FIFA allocates to them. This lack of mandatory accountability to the outside world makes it unlikely that change will come either from within the organisation or from the grassroots of the football organisations. Moreover, the scale and specific structure of FIFA makes it difficult to adapt what is considered best business practice to the governance challenges it is facing.⁴

Despite the scandals and the controversies, the silver lining to all of these woes attendant to a modern Internet-based society of social networking, blogging, WikiLeaks and widespread access to dirty little secrets, may be the prospect of an even larger paycheque for sports administrators in future. It appears that there are important recent developments regarding the commercialisation of major events, which deserve critical consideration. This phenomenon is systemic and widespread, which might lead cynical observers to question the extent to which sport as a social activity has apparently largely lost touch with the fact that it was, until relatively recently still, at least notionally, rooted in ‘Corinthian ideals’ and the much-vaunted ‘spirit of Olympism’. We are concerned here primarily with what is

² See the report dated 6 January 2011, available online at <http://uk.reuters.com/article/2011/01/06/uk-soccer-asian-congress-blatter-idUKTRE70525X20110106>.

³ From Scott, M ‘FIFA crisis: Storm clouds gather as big hitters fight to clear names’, 29 May 2011 in *The Guardian*—available online at the time of writing at <http://www.guardian.co.uk/football/2011/may/29/fifa-crisis-storm-clouds-gather?INTCMP=ILCNETTXT3487>.

⁴ Schenk, S *Safe Hands: Building Integrity and Transparency at FIFA* Report by Transparency International (August 2011) at 2—copy available at the time of writing for download on their web site at http://www.transparency.org/news_room/latest_news/press_releases/2011/2011_08_16_independent_group_fifa_reform.

often referred to as the development of the ‘Olympic brand’⁵ or its equivalent in sports such as football, with its FIFA World Cup.

Examples of the excesses that have been experienced with the influx of money in sport abound. Cynical observers may feel that commercialisation appears to be making a mockery of the ‘sacred trust’ which has traditionally formed the basis for sports governing bodies’ trusteeship over sporting codes,⁶ and big money has also contributed significantly to the increased scrutiny of the activities of such organisations by the media and others. Amidst the allegations of greed and corruption that have so frequently been levelled at those at the very top in the largest and most elite of these bodies,⁷ I hesitate to express a view on the morality or otherwise of the ever-increasing role of money in sport. I am, personally, not averse to this; if one considers the vast entertainment value of sport across the globe it would be fatuous to condemn money in sport and to ignore consumer choice and the rights

⁵ See, for example, the arguably rather arrogant view of Michael Payne, former marketing director of the International Olympic Committee, writing in Payne 2006, p. 187:

‘[B]y the time the athletes and media arrived at Salt Lake [for the 2002 winter Olympic Games], the world found what it wanted: a city and an organising committee that fully understood its responsibilities in staging the Games; that they were mere custodians of the Olympic brand, and were tasked with nurturing it, polishing it and eventually returning it back to the [International Olympic Committee]—stronger, and in better shape, than when they had received it’.

⁶ It is interesting to note what (it is submitted) may amount to a rather blatant recent example of the way in which the pursuit of profit has assumed a dominant role over the promotion of sport for the greater good: The South African organisers of the 2010 FIFA World Cup apparently experienced difficulty in negotiations with FIFA regarding ticket prices for the event. While the local organisers (and other forums across Africa) had insisted that tickets should be affordable to the masses, FIFA apparently pegged the prices, insisting on the maximisation of profits in order to finance their own activities for the four years until the next World Cup in 2014. Apparently, FIFA emphasised the fact that the event is a FIFA event and that South Africa has little bargaining power in this respect—even to the point of stating that the organisation could take away the World Cup if they chose (from a briefing to the parliamentary Portfolio Committee on Sport and Recreation, Cape Town, 14 June 2005). It appears that there is widespread dissatisfaction amongst host countries of the FIFA World Cup in respect of the organisation’s history of imposing rigid demands on hosts in the interest of maximising FIFA profits from the event. On a study tour to France by members of the Parliamentary Portfolio Committee on Sport and Recreation (visit undertaken in June 2005, to investigate issues surrounding France’s hosting of the FIFA World Cup in 1998 with a view to preparations for World Cup 2010 in South Africa), members of the delegation were specifically warned by the Director-General of the French Football Federation that FIFA was imposing increasingly rigid regulations in this regard (e.g. that the organisation would receive all the revenues from television rights for the event). The delegation was reportedly advised that South Africa should not agree to a blanket acceptance of all FIFA’s rules and conditions, in order to ensure that the country would derive sufficient economic benefit from the event. See the minutes of the discussion of the Committee, 11 August 2005 (available online at <http://www.pmg.org.za/viewminute.php?id=6094>).

⁷ Compare the latest in a number of critical exposes, British investigative journalist Andrew Jennings’s *Foul! The Secret World of FIFA: Bribes, Vote Rigging and Ticket Scandals*, Harper Sport, London, 2006; see also (in respect of the International Olympic Committee) Jennings’s *The New Lords of the Rings* Pocket Books 1996.

of those savvy enough to try and turn a profit in the face of such abundance. This does not, however, mean that all degrees of the apparently largely unchecked expansion of the commercial elements of sport should not be open to scrutiny and even treated with a healthy dose of suspicion on occasion.

A watershed moment in the commercialisation of international sport and its mega-events was the 1984 Olympic Games in Los Angeles, which, despite the then still notionally ‘amateur’ status of the competition, was the first instalment of the Games where no public money was required to host the event and where the International Olympic Committee managed to show a more than USD 200 million profit. This was due mainly to the efforts of the president of the Organising Committee, Peter Ueberroth, who managed to an unprecedented degree to leverage the commercial potential of the Games by means of expensive corporate sponsorship fees, different categories of sponsorship and the promise of exclusivity within each level.⁸ Interestingly, the 1984 Games also saw the first really mainstream media attention for what would be dubbed ‘ambush marketing’—which we will examine in Chap. 3—when Kodak upstaged official Olympic sponsor Fuji. More will be said about developments surrounding the Los Angeles Games and the commercialisation model that it spawned in the discussion below.

More generally, the professional sports industry in recent decades has simply exploded to the point of the astronomical amounts that make up today’s sports broadcasting market (internationally, the major source of income for those governing sport). In English football, the entry of BSkyB into the market of broadcasting Premier League matches (in 1992) facilitated a phenomenal increase in the TV rights fees. In the 15-year period between 1986 and 2001, the rights fee increased from GBP 6.3 million for a 2-year period to GBP 1.1 billion over 3 years (or from GBP 3.1 million to GBP 367 million per year).⁹ The Premier League rights became even dearer in recent years, with the League’s sale of broadcasting rights for the 2010–2013 period raising GBP 1.78 billion in respect of domestic television rights and a further GBP 1.4 billion representing the sale of overseas broadcasting rights.¹⁰ In the United States, television money represents the NFL’s most lucrative revenue source, and in agreements with CBS, Fox, NBC, ESPN, and Direct-TV the NFL earns more than USD 3.75 billion per season.¹¹ Even a traditionally less mainstream commercial sport such as cricket has in the past

⁸ See Crow and Hoek 2003, p. 2; Johnson 2007, p. 4; see also the discussion in Pound 2006, Chap. 6.

⁹ See Walters 2004, p. 17.

According to recent reports (see *The Observer*, 12 February 2007), at the time of writing BSkyB and Setanta Sports are reportedly paying £1.7 billion to hold the exclusive rights to screen live matches of the English Premiership in Britain for the next 3 years. Broadcasters in 208 other countries have reportedly recently doubled their payments to secure English Premiership rights, to a combined £625 million.

¹⁰ See the report available online at the time of writing at <http://www.independent.co.uk/sport/football/premier-league/premier-league-nets-16314bn-tv-rights-bonanza-1925462.html>.

¹¹ Fortunato and Martin 2011.

decade felt the effects of the boom in TV rights revenues. It was announced on 1 March 2006 that Indian sports and media agency Nimbus Communications Limited had concluded a deal with the Board of Control for Cricket in India to acquire the global media rights to all international and domestic cricket played in India until 2010. Nimbus prevailed over media giants such as ESPN Star Sports and Sony Entertainment Television, and paid USD 612 million for the media rights.¹² This agreement was the single biggest commercial deal in the history of cricket, but took only 2 years to be eclipsed by the more than USD 1 billion 10-year broadcasting deal in respect of the phenomenally successful Indian Premier League (or IPL). In 2008, amidst the beginning of a global recession, *Sport Business* reported that the IOC president had announced that television income for the 2010 and 2012 Games was USD 3.8 billion, an increase of 40% on the USD 2.6 billion the IOC had received for the 2006 and 2008 Games.¹³

And the top international professional athletes also appear to draw those with deep pockets like moths to a flame. It is not only the players in successful leagues who benefit from the lucrative broadcasting rights deals (e.g. where players in the English Premier League see significant salary hikes from the influx of TV money—one response to news of the record EPL 2010–2013 broadcasting rights deal was that the ‘sighs of relief were audible in Porsche dealerships from Wilmslow to Berkeley Square’¹⁴). The individual stars also earn huge amounts from personal endorsement contracts. David Beckham reportedly earned, over and above his playing salary, in the region of GBP 33,300 *per week* back in 2003 while under contract with Manchester United, *solely for the use of his image on club merchandise*.¹⁵ Tiger Woods has for a number of years earned by far more income from sponsorship and endorsement deals than from actual tournament winnings (in fact, when Mr. Woods won the Australian Masters tournament in November 2009, which preceded a 2-year win drought for the great player, it was reported that his appearance fee to play in the event significantly exceeded the amount of the winner’s cheque). And then there’s the story (which reflects less on Tiger than on shady corporate social responsibility and rampant commercialism in sport) of Nike workers in Thailand who wrote to Woods, expressing their ‘utmost respect for your skill and perseverance as an athlete’ but pointing out that they would need to work 72,000 years ‘to receive what you will

¹² See the report available online on the web site of the Asser Sports Law Centre at <http://www.sportslaw.nl> (last visited 8 March 2006).

¹³ See <http://www.sportbusiness.com/news/167610/olympic-tv-revenue-to-increase>.

¹⁴ Nick Harris ‘£1.78bn: Record Premier League TV deal defies economic slump’ *The Independent*, 7 February 2009—available online at the time of writing at <http://www.independent.co.uk/sport/football/premier-league/163178bn-record-premier-league-tv-deal-defies-economic-slump-1569576.html>.

¹⁵ See the short article by Andrew Braithwaite and Sonya Pennington ‘Image Rights: Do they exist and who should own them?’, available online at <http://www.sportandtechnology.com/page/0035.html> [last accessed 27 February 2007].

earn from [your Nike] contract'.¹⁶ Of course, recent events appear to have overtaken the world's most well-known golfer, as sponsors dropped him like a hot potato following his marital infidelity scandal, and it appears that 'Tigergate' may forever change the way sports sponsors approach the athlete endorsement brand. When the athlete signed an endorsement deal with Rolex in late 2011 it was reported that he had slumped to a ranking of 2,775th most effective product spokesperson according to online consumer polls.¹⁷

Apart from the sports broadcasting and athlete endorsement markets, the growth in sports sponsorship spending, generally, has been so phenomenal as to remind one of the dot.com boom. Burton and Chadwick¹⁸ provide some figures on sponsorship growth in the past 20-odd years. They state that global sponsorship spending in 1984 (an auspicious year, as we will see) amounted to approximately USD 2 billion. The 2008 international sponsorship industry was calculated to be worth USD 43.5 billion, a growth of USD 19.1 billion over the previous six years. And, as the authors observe, marketing expenditures in leveraging and promoting sponsorship are generally agreed to at least equal, if not exceed, the amount spent securing rights, making sponsorship's overall estimated market value nearly USD 100 billion per annum.¹⁹ PriceWaterhouseCoopers has reportedly declared that 'sports marketing has exploded into a multi-billion dollar business, with the global sports market expected to see revenues of \$141 billion by 2012'.²⁰ Rather ironically, recent years have seen the media branching out into the role of participants as broadcasting corporations and networks have purchased clubs and teams.²¹ Not to be outdone, sports teams have entered the broadcasting industry to corner an even bigger slice of the economic pie.²² It is now truly cliché to remark that sport

¹⁶ Taken from Pilger, J 'Why sharks should not own sport' on the *truth-out* web site at <http://www.truth-out.org/why-sharks-should-not-own-sport58820>.

¹⁷ See the report by Vranicka, S 'Tiger scores a comeback', 6 October 2011, *The Wall Street Journal*—available online at <http://online.wsj.com/article/SB10001424052970203388804576613220984785418.html>.

¹⁸ Burton and Chadwick 2009, p. 3.

¹⁹ Ibid.

²⁰ Gannon 2010, p. 67.

²¹ Rupert Murdoch (Fox, Sky and Star TV networks) has at times had holdings in British and German football clubs, major league baseball teams in the United States and rugby league clubs in Australia. Silvio Berlusconi was at one time the principal owner of AC Milan football club, and has also had a major stake in Sportal, the Internet sport company. Canal Plus, the French television station, owned the Paris St. Germain football club. See Mark Marqusee 'Sport as Apocalypse', available online at <http://www.frontlineonnet.com/f1716/17161100.htm>.

See also Downward and Dawson 2000, p. 37.

²² E.g. Manchester United football club and the New York Yankees baseball franchise, both of which have entered the Internet and broadcasting business. See, in general, Sect. 2.5 of the final report of the Sports Directorate of the Netherlands Ministry of Health, Welfare and Sport, entitled *The Balance Between the Game and the Money* (2000).

has become big business.²³ In fact, it is so cliché that, were I a journalist, one observer would have my pay docked and press pass revoked for stating the ‘mind-numbingly obvious’²⁴—which just proves the point, I guess.

Along with the influx of money has come an attitude of (sometimes rabid) protectionism in respect of the interests of the governing bodies and their commercial partners who bankroll major events. In recent years this has been encountered in the form of the responses by those governing sporting codes to initiatives by private promoters in the establishment of unofficial, ‘breakaway’ leagues and competitions (compare the Board of Control for Cricket in India’s responses to the Indian Cricket League or ICL). These responses have raised competition law and restraint of trade concerns regarding the banning of players as well as efforts to deny access to facilities for the hosting of such unofficial competitions.²⁵ A related development is the efforts by governing bodies and their commercial partners to protect the commercial exploitation of the publicity value of major events. Commentators elsewhere have criticised the apparently limitless expansion of protection (legislative and otherwise) of the commercial interests of international sports organisations and these partners—especially in the context of anti-ambush marketing measures, which will be the specific focus of [Chap. 3](#)—and it appears that current developments in one jurisdiction may point towards the potential for even increased future claims of ‘monopolies’ in major events.²⁶ I view such developments with concern, and it is submitted that what may currently be just a blip on the radar screen should be watched very closely indeed by the legal fraternity and sports-loving public.

The modern era has seen an apparent worldwide backlash against some of the more invidious aspects of capitalism and free markets, especially anti-competitive behaviour. Many countries have adopted competition laws and governmental competition authorities are playing an ever more visible and significant role in clamping down on cartels and monopolies and in addressing abuse of dominance by firms and undertakings, ranging from bread manufacturers to mobile phone

²³ Philip Knight, founder of the Nike Corporation, characterised sport in the mid-1990s as ‘the dominant entertainment in the world’. Gratton and Taylor [2000](#), p. 3 remarked the following in 2000:

‘Sport is now recognised as an important sector of economic activity, part of the increasingly important leisure industry which accounts for over a quarter of all consumer spending and over 10% of total employment in the UK, and brings in over £20 billion per annum in foreign exchange. Sport is not the largest sector of the leisure industry, but it is among the fastest growing’.

In respect of commercialisation of sporting competition, Downward and Dawson [2000](#), pp. 36, 37 identify sports leagues’ main sources of revenue (historically) as gate receipts, merchandising, sponsorship, the sale of TV rights, transfer fees and the sale of match schedules to the gaming industry.

²⁴ Andrews [2004](#), p. 3.

²⁵ For more on these developments and their legal implications, see Louw [2009](#), par. 353–364, 406–412, 485–490.

²⁶ See discussion of the apparent development of a ‘sports event organiser’s right’ in [Chap. 10](#).

service providers, in the interests of consumers. Sport has not failed to escape the scrutiny of competition authorities, and those who abhor the abuse of power by those with significant commercial clout should seriously consider the legitimacy of the conduct of organisations or commercial entities that so often claim promotion of the common good as a veiled attempt to justify the much baser generation of profits. Events like the Olympic Games and the football World Cup have become powerful global brands. We must consider to what extent these brands that are so fundamentally based (and dependent) on the public's support of the sport should be protected and advanced, apparently, with scant regard for the rights and interests of members of the public or for wider societal and developmental goals in the domestic jurisdictions where these nomadic events may encamp at any given time.

The main focus areas of this book, namely anti-ambush marketing measures and the often rabid protection of exclusive commercial interests in sporting events by means of special laws, are at the crossroads of the interaction between such developments in competition law and other fields of law. A significant aspect of the fight against ambush marketing involves the use of intellectual property (or IP) rights²⁷; and these rights are, traditionally, fundamentally about the creation of (limited) monopolies.²⁸ A further aspect that requires special consideration is the fact that such issue of monopolisation of sporting events by means of (e.g.) anti-ambush marketing measures is, in the sporting context, situated squarely within an inherently monopoly-based global industry. I (and others) have elsewhere discussed the fundamental monopolistic governance role and functions of (international) sports governing bodies in terms of the 'European Model of Sport', and I have characterised these organisations as monopoly regulators with inherent market dominance.²⁹ While 'monopolisation' of major sporting events might, therefore, appear to be a natural consequence or function of the very milieu within which these organisations operate, it must be remembered that recent years have seen the development of an increasingly strained dichotomy between the commercial function of sports organisations and their traditional role as 'custodians of the game' in the respective sports, in the (at least professed) interests of the public.

It is contended that the ever-increasing efforts at commercialisation of major events by sports governing bodies and their commercial partners is fostering a culture of greed and opportunism surrounding such events, which is inimical to the very *raison d'être* for the events and their traditional role of providing a showcase

²⁷ See the discussion in section [Chap. 5](#).

²⁸ As it has been put, succinctly, in the American context:

'Both patent and copyright law limit competition and therefore increase or at least stabilize prices for a product or service. Patents and copyrights are the only constitutionally mandated monopolies, created with the recognition that unfettered competition would drain creators of their financial incentive to create'. Vaidhyathan [2003](#), p. 87

²⁹ The International Olympic Committee of the 1970 s, for example, has been described as an organisation 'with an extremely limited product increasingly in global demand'—see Magdalinski and Nauright [2004](#), p. 193.

to the public of the best in sporting talent and athletic endeavours. For example, much has been made promotionally in recent years of football as the ‘beautiful game’, and the status of football as the game of the people has often been touted, especially with reference to African football (which has been blighted in recent times by the proverbial ‘slave trade’ of players to especially European clubs). One would be hard-pressed to find, in the era following the fall of the Berlin Wall, a more symbolically loaded development in respect of the global appeal of sport as a uniting, universal force, than the decision to host the football World Cup on the last remaining bastion, the African continent. FIFA’s much-celebrated first foray onto African soil with the 2010 FIFA World Cup South Africa had, however, already prior to the event been characterised by apparently deep-seated apathy for the interests of the masses and, frankly, apparent attempts (not only by FIFA and its commercial partners but also by other service providers) to simply milk the commercial potential of the popularity of the event for all it is worth. Examples range from controversy surrounding ticket pricing by FIFA³⁰ to an investigation by South African competition authorities into allegations of collusion by the country’s major airlines in hiking airfares with a view to the event,³¹ as well as reports of exorbitant rates set by private accommodation service providers threatening the potential uptake by foreign tourists for the event. While such apparently short-sighted scrambling for what will surely promise to be no more than short-term gains may be understandable in respect of small businesses, the more systemic and institutionalised pursuit of profit associated with the commercial arrangements of major sports governing bodies and their multi-million dollar sponsors and partners is much more worrying.

The attempts to protect the commercial rights and interests associated with mega- events, as discussed in this book, relate mainly to two legal bases: The first is intellectual property protection in respect of licensing schemes involving the intellectual properties created for and associated with such events (primarily registered trademarks and copyrighted works, and ranging from official marks, emblems and event posters to mascots and event anthems). The second relates to

³⁰ FIFA is no stranger to controversy surrounding the sale of tickets to its World Cup events. The European Competition Commission ruled against the French local organising committee (the CFO) established by FIFA and the French football federation for purposes of the hosting of the 1998 FIFA World Cup in France, in respect of its mandate in respect of ticket sales. The Commission ruled that the CFO had infringed Article 82 of the EC Treaty (see discussion in the text below) by applying discriminatory arrangements in the sale of tickets to the general public, which involved the imposition of unfair trading conditions on consumers outside France which resulted in the limitation of the market to the prejudice of such consumers—Commission Decision of 20 July 1999, Case IV/36.888—*1998 Football World Cup*); see the discussion in Gardiner et al. 2006, pp. 360–362.

³¹ It was reported on 7 April 2010 that competition authorities had raided the offices of South African Airways and its low-cost local subsidiary Mango Airlines in order to obtain evidence in respect of such collusion investigation (and it was speculated that these two companies were at risk of losing indemnity for their participation in such investigation on the basis of alleged withholding of evidence).

purely contractual rights created between sports governing bodies and their commercial partners, rights that are enforceable only between such contracting parties in light of the privity of contract. These rights are the genesis of sponsorship exclusivity in relation to events,³² which, as we will see, is central to any review of the legitimacy of legal protection of commercial rights to events.

The discussion in the following chapters will evaluate the legitimacy of the measures used to protect these contractual rights, especially, in respect of such measures' consequences for outside parties and the public at large. But first we need to consider how the system functions in practice.

2.2 Commercial Rights to Mega-Events: The 'Nuts and Bolts' of How It Works

In examining the immense scale of commercialisation of modern sport, we need to focus our attention on the 'crown jewels' of international sport, the mega-events. It is hard to find a comprehensive and truly definitive definition of the (sports) mega-event (referred to by some as a 'hallmark event' or 'marquee event') for the present context of this discussion. Roche has offered the following definition, which seems to have found general favour:

"Mega-events" are large-scale cultural (including commercial and sporting) events which have a dramatic character, mass popular appeal and international significance. They are typically organised by variable combinations of national governmental and international non-governmental organisations and thus can be said to be important elements in "official" versions of public culture.³³

More succinctly, O'Reilly et al. define it (in the sponsorship context) as 'a property that garners significant international media exposure, offers sponsors millions of dollars in promotional value and has a global impact'.³⁴ A working committee of the International Association for the Protection of Intellectual Property (AIPPI) recently defined 'major sports events' as 'sports events to which a high level of both spectator interests and interests by all forms of media to cover the event are attached and the realisation of which is dependent on substantial contributions of official sponsors'.³⁵ The following does well to sum up the main

³² As has been observed: 'Simply put, [sponsorship] exclusivity is difficult to control, but it would be impossible without contractual stipulations'. Graham et al. 1995, p. 103.

³³ Roche 2000, p. 1.

³⁴ O'Reilly, N; McCarthy, L; Seguin, B; Lyberger, M 'Sponsorship and the Super Bowl: A longitudinal analysis' (2005) at 55—available online at the time of writing at http://luxor.acadiau.ca/library/ASAC/v26/03/26_03_p052.pdf

³⁵ In guidelines published by the AIPPI's Working Committee, Project Q210 ('The protection of major sports events and associated commercial activities through trademarks and other IPR'; in a call for country reports compiled for purposes of a draft resolution to be submitted to the AIPPI

characteristics (and a little bit of history) of such events, including the motivation of those who bid to host these spectacles:

Nations around the world try to use large events in order to regenerate and promote particular places. Mega-events, otherwise referred to as hallmark tourist events... or special events... are major fairs, festivals, expositions, cultural and sporting events that are most often held on a one-off basis... The event is the celebration or presentation of a theme and usually organised only once at a particular location and for a pre-determined period. Consequently, they have no permanent and uniform organisational structures; usually they are established some years preceding the event and cease following it. Notwithstanding its temporal nature (being a one-off event at a certain location), in the hope of a significant economic return, cities are willing to make enormous investments not only in the event itself, but also in the physical infrastructure in relation to the mega-event. This phenomenon, however, does not have a very long tradition; one can see a certain evolution in the impact of mega-events. For example, at the beginning of the history of the best known mega-event, the modern Olympic Games, it was small-scale, relatively poorly organised and its urban impact was minimal. It has become gradually larger-scale, better organised, and only in the mid 1900s started to include flag-ship building projects (sports facilities) and consequently attract more attention. Since 1960, the Games have often been used as a trigger for large-scale urban improvements and, as a consequence, had a much more substantial impact on the landscape and urban environment of the host cities... Ever since the 19th century (starting with the Olympics and Expos, joined by the football World Cup), mega-events served nation building, identity and citizenship construction functions, which have remained important through to modern times. Already the participation of a nation (represented by athletes, artists, sport teams, exhibitors) at such events are regarded as very important national symbols, but it is even more the case in terms of the ability of a nation to act as a host for a mega-event. The mega-event obsession of today is the most spectacular in the tense intercity and international competition during the bidding processes to win the right to stage them.³⁶

In respect of attractiveness to sponsors (the focus of this chapter) the following has been observed in respect of the Olympic Games as sponsorship product, which identifies some of the distinguishing features of such a mega-event:

[T]he Olympic Games may be the most unique, prestigious sporting event with which a sponsor may wish to identify. Its worldwide audience, relative infrequency, human drama and patriotic overtones making it highly desirable to marketers.³⁷

In essence, the sports mega-event—which has also been referred to as ‘the leisure industry’s “super-nova”’³⁸—is a large sporting event that is international in nature (in having international teams or individual athletes compete and/or with the intention of crowning a world champion). It is not organised on an annual (or more frequent) basis, and is hosted by countries or cities that bid for the right to host the event. It is also organised under the auspices of an international

(Footnote 35 continued)

Exco meeting in Buenos Aires, October 2009)—available online at the time of writing at <https://www.aippi.org/download/committees/210/WG210English.pdf>.

³⁶ Nemeth 2010.

³⁷ McDaniel and Kinney 1998.

³⁸ Horne and Manzenreiter 2006, p. 3.

organisation (either one that governs the relevant sporting code in the case of single-sport events, or which governs the competition in the particular event in the case of multi-sport events). Two central features of these events are that they are deemed to have significant consequences for the host city, region or nation where they occur, and that they attract considerable media coverage.³⁹ In fact, if one considers that the president of the International Olympic Committee in 2005 predicted that the total value of television rights to the Olympics would rise to USD 3.5 billion in 2012, it is not surprising that media representatives easily outnumber athletes at the Games (e.g. more than 16,000 press and broadcasting reporters were involved with the 2000 Sydney Games).⁴⁰ Host broadcasters have dedicated increasing numbers of broadcasting feed hours to the two-week long Games, with the 2008 Beijing instalment totalling 5,000 h. It is the ability of these events to reach billions of viewers across the globe (e.g. cumulative totals of 40 billion and nearly 29 billion, respectively, for the 2004 Athens Olympics and the 2002 FIFA World Cup, and 35,000 and 41,000 h, respectively, of programming dedicated to these two events⁴¹), which makes them so important and valuable as promotional tools. Corporate sponsors pay huge amounts of money to obtain the right to advertise their products and services by means of the marketing vehicle that these events provide.

When I use the term ‘sports mega-event’ in this book I am referring to the following (and similar) events, based on their size and the popularity of the relevant sporting code or the competition⁴²

- The Olympic Games;
- The FIFA football World Cup;
- The ICC Cricket World Cup;
- The IRB Rugby World Cup;
- UEFA’s Euro (European) football championship;
- The Commonwealth Games;
- The Asian Games;
- The American football Super Bowl; and
- The NCAA men’s basketball tournament (‘March Madness’).⁴³

³⁹ Ibid. 2.

⁴⁰ Ibid. 5.

⁴¹ Ibid. 3.

⁴² Compare the following classification:

‘Mega-sporting events include specialist world-level international sports competitions (e.g. the World Cup competitions in soccer, athletics, rugby and Grand Prix events for horseracing and motor racing) and also the ‘world regional-level’ versions of these events. These are mainly connected to the multi-sport Olympics, such as the Asian Games, the Pan-American Games and the Commonwealth Games, and to a lesser degree to the world-level specialist events such as the European zone competition for the soccer World Cup’. Malfas et al. 2004, p. 211.

⁴³ In 2011 the NCAA agreed to a 14-year, USD 10.8 billion deal with CBS and Turner Sports for the US broadcast rights.

More to the point, in respect of the subject matter of this book, these events are the ones that attract 'the big sponsors and so the big money' and they are 'sufficiently important to the body politic and the public for legislative time to be dedicated to protecting the brand'.⁴⁴ Of course, much of what will be said here about the commercialisation of sports events and the use of law to protect commercial rights is also relevant in respect of other sporting 'events', i.e. competitions or leagues which are presented on a more regular (e.g. annual) basis. Examples are the FIA Formula 1 World Championship, the English football Premier League competition, the Indian Premier League cricket competition, the Tri-Nations rugby competition, etc.

With such (very loose) definition and terminology in mind, the focus should shift to an examination of the commercialisation of these events. The gist of the commercial exploitation of mega-events can be succinctly distilled to two distinct rights, namely the right to associate with and the right to broadcast.⁴⁵ By way of illustration, by far the two largest sources of revenue for FIFA in respect of its 2010 World Cup South Africa⁴⁶ were the sale of broadcasting rights (a total of more than USD 2.4 billion) and the sale of 'marketing rights' relating to sponsor investment (a total of more than USD 1 billion).⁴⁷

In essence, the commercial arrangements surrounding a mega-event such as the football World Cup or Olympic Games involve a monopoly regulator of the commercial rights connected to such an event (e.g. FIFA, the sole rights holder and regulator in respect of the football competition, in terms of rights claimed in the organisation's founding documents⁴⁸) inviting bids from would be sponsors and broadcasters to obtain rights to broadcast or to associate with (for the purposes of commercial exploitation of such association) the event to the exclusion of all

⁴⁴ Johnson 2008, p. 29.

⁴⁵ Broadcasting rights to sports mega-events will not be considered in this book.

⁴⁶ With event-related revenue the single largest source of income for the organisation (at 93% of the total for the relevant period).

⁴⁷ Source: *FIFA Annual Financial Report 2010*—available online at the time of writing at www.fifa.com.

⁴⁸ Compare Article 74 of the FIFA Statutes (August 2009 version, currently in force at the time of writing), and discussion in Chap. 3. See also the description of FIFA in the preamble to the 2010 FIFA World Cup South Africa By-laws as published by the eThekweni Municipality for the host city of Durban, which describes FIFA as 'both the world governing body of association football and the lawful owner of the world-wide Marketing Rights, Media Rights and all other commercial rights in respect of the [World Cup] Competition'. Such description does, of course, not qualify such 'rights' in respect of their nature and status (i.e. the personal nature—read: unenforceability against third parties—of contractual rights flowing from commercial agreements with sponsors). FIFA's web site (at www.fifa.com) proclaims that 'The FIFA World Cup and all other FIFA competitions are privately funded—without state subsidies for either FIFA or the Local Organising Committee. FIFA carries the costs of staging the Event and in exchange retains all commercial rights'.

others.⁴⁹ I shall leave aside, for now, the potential competition law or anti-trust issues regarding such arrangement (which will be considered elsewhere in this book⁵⁰) or other potential problems regarding the ‘free and fair’ nature of the auctioning off of these rights by the governing bodies concerned.⁵¹

Underlying and demarcating both the boundaries and the ‘rules of the game’ in the rights bidding process are rules set by the sports organisation which are aimed at ‘legislating’ to all and sundry—i.e. interested sponsors or commercial partners and everyone else—what ‘rights’ may or may not be up for grabs, and from whom such ‘rights’ must be obtained. For example, Rule 7 of the Olympic Charter⁵² provides as follows regarding ‘Rights over the Olympic Games and Olympic Properties’:

7.1 The Olympic Games are the exclusive property of the IOC which owns all rights and data relating thereto, in particular, and without limitation, all rights relating to their organisation, exploitation, broadcasting, recording, representation, reproduction, access and dissemination in any form and by any means or mechanism whatsoever, whether now

⁴⁹ Gardiner et al. 2006, p. 458 explain the value of sports sponsorship for sponsors as follows:

‘[T]he sponsor’s association is with the sponsored party’s sports event and also with the emblems, logos and mascots (the event marks) that identify and distinguish the particular sports body and its event ... Sports sponsorship results in a transfer of the essential values and properties of the sponsored party and its events to the sponsor’s business organisation and, ultimately, to its products and/or services, thereby raising the sponsor’s profile and standing in the community (offering public relations opportunities and advantages) and amongst its existing and potential customers ... [The value of sports sponsorship] also lies in the fact that the sponsor is given exclusivity in the particular product or service category in respect of which the sponsorship rights are granted by the owner of the rights’.

⁵⁰ In Sect. 2.4 in this chapter and in Chap. 6.

⁵¹ It should be noted in passing that the bid processes in respect of commercial rights to major events are not always transparent and have, allegedly, at least once in the past been manipulated in an apparently anti-competitive manner by FIFA executives in respect of the football World Cup (See discussion of the bid process for the sale of television broadcasting rights to the 2002 and 2006 FIFA World Cups in Jennings 2006, Chap. 7). It has also been reported that Match Event Services, which was FIFA’s exclusive official accommodation provider for the 2010 World Cup and no stranger to controversy, was apparently appointed without any tender process. Rob Rose writes (in Schulz-Herzenberg 2010, pp. 99, 100) as follows:

‘While [Match Event Services] officially warns accommodation providers to keep room rates low because tourists are ‘sensitive to pricing’, an investigation by the author has confirmed that tourists will have to pay Match 1000% more than they would normally pay for accommodation in certain cases, such as for units at South Africa’s Kruger National Park. Match Event Services is owned entirely by a family-owned UK-registered company called Byrom PLC. The circumstances of its appointment remain cloudy: there was never any public tender for the multi-million rand contract, for example. Riding on those coat-tails is the closely linked Match Hospitality, which has FIFA’s official stamp of approval to provide exclusive hospitality packages to large companies seeking to impress clients at the South African event. Not only does Match Hospitality refuse to disclose its exact shareholding structure, but it has emerged that one of the four shareholders in the company is Infront Sports and Media, a company headed by Philippe Blatter—nephew and godson of the FIFA supremo’.

⁵² The Olympic Charter in force from 11 February 2010 (currently in force at the time of writing).

existing or developed in the future. The IOC shall determine the conditions of access to and the conditions of any use of data relating to the Olympic Games and to the competitions and sports performances of the Olympic Games.

7.2 The Olympic symbol, flag, motto, anthem, identifications (including but not limited to “Olympic Games” and “Games of the Olympiad”), designations, emblems, flame and torches... shall be collectively or individually referred to as “Olympic properties”. All rights to any and all Olympic properties, as well as all rights to the use thereof, belong exclusively to the IOC, including but not limited to the use for any profit-making, commercial or advertising purposes. The IOC may license all or part of its rights on terms and conditions set forth by the IOC Executive Board.

In addition, By-law 3 to Rule 41 of the Olympic Charter provides as follows:

Except as permitted by the IOC Executive Board, no competitor, coach, trainer or official who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games.

The IOC clearly and unequivocally claims a ‘property right’ in the Games. Compare Article 40(a) of the Host City Contract for the 2012 London Olympic Games, which provides that ‘[t]he City, the NOC and the OCOG acknowledge, without limiting any provision of the Olympic Charter, that the Games are the exclusive property of the IOC’. It is clear that the cumulative effect of the above provisions is that the IOC appropriates all rights to the Games (which ‘rights’ are themselves created in the Charter—we will see later that in most jurisdictions there exists no independent basis for legal recognition of such property outside of such founding documents) to itself and assumes the role of the exclusive provider of licenses or consent to the use of such rights in relation to the event, while also prohibiting the very persons whose performances at the event form the core of its entertainment product from entering into any commercial arrangements with anyone who has not taken the official route of negotiating for and obtaining access to such ‘rights’ from the IOC. One Olympic insider⁵³ has characterised the last-quoted by-law above as the very backbone for the feasibility of the practice of providing category exclusivity⁵⁴ to event sponsors (specifically in the context of the category of apparel sponsorships), which is central to the commercial monopoly in mega-events and will be discussed in more detail below.⁵⁵ The IOC’s own *Technical Manual on Brand Protection* in respect of the Games is at pains to

⁵³ See the response by John Coates (president of the Australian Olympic Committee and Executive Board Member of the International Olympic Committee) to an article by Malcolm Maiden (‘The Olympic monopoly and why it harms sport’, *Sydney Morning Herald*, 20 November 2009—available online at the time of writing at <http://www.smh.com.au/business/the-olympic-monopoly-and-why-it-harms-sport-20091119-iowz.html>), available online at the time of writing on the web site of the Australian Olympic Committee at <http://corporate.olympics.com.au/news.cfm?ArticleID=10495>.

⁵⁴ See the discussion in Sect. 2.4.

⁵⁵ Former Olympic marketing manager Michael Payne has also been emphatic in stressing the importance of sponsorship exclusivity for the success of the Olympic commercialisation model—see Payne 2006, pp. 142, 143.

emphasise the importance of category exclusivity for the Olympic marketing programme:

Official Olympic marketing partners are granted exclusive Olympic marketing rights within a given product category, for a specifically defined territory on a national, multi-national, or worldwide scale. This is an essential characteristic of Olympic marketing, and the value of the rights granted to the Olympic marketing partners is directly related to the Olympic Family's ability to protect that exclusivity. Ambush marketing occurs when this exclusivity is violated by any entity.⁵⁶

Lawyers should tread lightly when assessing such claims of rights in the founding documents of sports governing bodies to consider that not all the 'rights' claimed necessarily have wider legal substance (in the meaning of being enforceable against all the world as opposed to only the parties to these commercial agreements). This is especially important in those jurisdictions where no proprietary right to an event is recognised by-law. It has been pointed out that sponsors need to be satisfied that the sponsored party can show a good title to rights being granted, and that the sponsorship agreement should contain a warranty by the event rights grantor to the effect that it is free and able to grant the particular sponsorship rights,⁵⁷ because '[p]roving title to commercial rights in a sporting event may be easier in theory than in practice'.⁵⁸ Gardiner et al. refer to the fact that a potential sponsor of broadcast coverage of the FIFA World Cup will be faced with a 'bald statement' contained in FIFA's Statutes (namely, that 'FIFA, its member associations, confederations and clubs own the exclusive rights to broadcast and transmissions of events'), and that '[i]nquiries beyond this statement will produce a blank'.⁵⁹ Of course, organisations like the IOC and FIFA clearly do commonly enjoy legal protection for their intellectual property (e.g. symbols such as the Olympic Rings, or event logos for the football World Cup) as well as common law protection in the form of e.g. unlawful competition or passing off. But these wide claims of rights in the Olympic Charter or the FIFA Statutes often imply wider protection than is traditionally to be found in most jurisdictions. For example, FIFA consistently claimed 'marketing rights' in respect of their 2010 World Cup event in South Africa, which 'rights' do not exist in terms of the

⁵⁶ The version available at the time of writing on the web site of <http://www.gamesmonitor.org.uk> in respect of the 2012 London Olympics, in Section IV: Ambush Marketing Prevention, at p. 13 (this document refers to an updated version of the Manual which was scheduled for publication in July 2005, although such updated version (if it exists) is not available online at the time of writing).

⁵⁷ The sponsor or other purchaser of rights should generally obtain a warranty from the event organiser that it is entitled to hold the event at the venue, that it controls access to the event, and that it own trademarks and other relevant intellectual property rights relating to the event (and, in addition, an undertaking from the event organiser that it will take specific steps to combat unauthorised commercial exploitation of the event, for example by means of ticket terms regulating access and participation agreements regarding teams and athletes)—see Becker 2006, p. 23.

⁵⁸ Gardiner et al. 2006, p. 449.

⁵⁹ Ibid.

domestic law of the host nation.⁶⁰ It is these types of rights that, in fact, exist only by virtue of sponsorship and other licensing arrangements with sponsors and other commercial partners; they are really no more than contractual rights (most often in the form of *pacta de non petendo*, or agreements not to take legal action against 'rights holders' for exploitation of such 'rights' in marketing relating to the event). In this way this last category of 'rights' are important to consider, as it could be argued that the governing bodies' apparent belief in the creation of these legally ambiguous concepts may have formed the basis for what we have come to know in recent times as 'association rights' to events. Such association rights will be discussed elsewhere.⁶¹

Through the event rights bidding processes, large multinational corporations that are able to afford the very substantial rights fees enter into agreements with the sports organisation which effectively close the market (and often for a long period of time⁶²) to all non-sponsors, e.g. also small business entities in the particular country or geographical area where the event is to be hosted, which entities are rarely able to compete on a level playing field (or at all) with the official sponsors and commercial partners in terms of the financial outlay required by the sports organisation. Vassallo et al. are quite direct in describing the big bucks scenario surrounding modern mega-event sponsorships: 'Clearly the stakes are high and event organisers are reaping the rewards. Just as clearly, small companies cannot afford to be sponsors'.⁶³ And as it has also been succinctly described: 'Since such sponsorships are extremely expensive and often are long-term commitments, this advertising strategy is available only to a handful of large corporations... The little guy need not apply'.⁶⁴ So, basically, if you can't pay, you can't play.

This clear bias towards the larger, predominantly multi-national corporations able to afford to pay for such rights has invoked the ire of a variety of stakeholders when it comes to the passing of special legislation to protect such corporate interests from ambush marketing by 'unofficial sponsors'. For example, the following criticism was expressed regarding the protection for the 2012 London Olympic Games: '[T]his sort of legislation is insulting. It is specific and unprecedented protection for a small group of internationally based, predominately non-UK companies to the detriment of all other businesses'.⁶⁵ When evaluating such arrangements one is confronted with

⁶⁰ See Burrell, T 'FIFA's money grab a blatant foul', *Daily News*, 12 April 2010.

⁶¹ See, specifically, the discussion in Chap. 8.

⁶² Organisations such as the International Olympic Committee and FIFA enter into long-term contracts which span multiple major events with their most attractive high profile sponsors (e.g. VISA is currently involved in a long-term agreement with FIFA as a 'FIFA Partner' in the financial services segment until the year 2014; Coca-Cola earlier entered into a 16-year deal with FIFA at a cost of USD 500 million).

⁶³ Vassallo et al. 2005, p. 1354.

⁶⁴ Fortunato and Richards 2007, p. 34.

⁶⁵ Marina Palomba, legal director of the UK's Institute for Advertising Practitioners, quoted in a report entitled 'UK businesses upset over London Olympics Law', 25 August 2005, available online at the time of writing on the web site of www.GamesBids.com at http://www.gamesbids.com/eng/other_news/1125074698.html.

the potential for serious abuse of economic power in an apparently significantly skewed competitive environment founded upon the notion of providing exclusivity⁶⁶:

[A]dvertising appears to offer advantages as a predatory strategy for economically dominant corporations that wish to maintain or advance their position in a particular marketplace. A sponsorship agreement that grants exclusivity for a brand within a product category to a contained audience exacerbates an already problematic issue.⁶⁷

By way of example of the size of corporate entities involved and the scale of their investment in mega-events-related commercial rights, it has been observed that sponsors who participate in the TOP ('The Olympic Partner') programme,⁶⁸ which is the highest level of Olympic sponsorship that provides international exposure to brands and gives sponsors the right to sponsor one quadrennial cycle of the Winter and Summer Games, invest between USD 200–300 million for the privilege (with the sponsorship fee amounting to more than USD 70 million and a further investment of between three and four times that amount in activation expenditures ('leveraging the brand') such as marketing programmes to give effect to the sponsorship). Some observers suggest that successful activation and leveraging may require sponsors to spend anywhere up to a 10:1 ratio of leveraging to sponsorship fee when discussing major sport properties.⁶⁹ This for *an event that, in real time, lasts just over two weeks*. One source claims that, between 1980 and 2000, the IOC generated nearly USD 15 billion from its marketing and licensing programmes.⁷⁰ Accordingly, and in common parlance, what may be compared to a very exclusive and elite 'old boys' club' is created to profit from the event.

Having created such a phenomenally mutually beneficial commercial partnership by means of contract, the next link in the chain of establishing a system for the generation and maintenance of such monopolistic arrangements is that the interests of the members of such club are vigorously protected by (ever-increasingly rigid and far-reaching⁷¹) legislation and other anti-ambush marketing measures in the host country. Such legislation is obtained through very real pressure by the sports organisation on the host government by means of rigid requirements

⁶⁶ See discussion of sponsorship exclusivity in relation to mega-events in [Sect. 2.4](#).

⁶⁷ Fortunato and Richards, p. 36.

⁶⁸ See the discussion in [Sect. 2.3](#).

⁶⁹ Seguin et al. 2005.

⁷⁰ Magdalinski and Nauright 2004, p. 194.

⁷¹ Compare the voluminous Major Sporting Events Bill 2009 of the Parliament of Victoria in Australia (the status of which in the legislative process is at the time of writing unknown to the author). This document runs to over 200 sections, dealing with safety at sporting events, ambush marketing, ticketing etc. By way of illustration of the types of ambush marketing conduct prohibited by this Bill, compare the wording of section 38, which provides that it is an offence for a person to use protected event logos or images or protected event references without authorisation, if such use would (*inter alia*) 'suggest a sponsorship-like arrangement to a reasonable person' (section 38(1)(e) of the Bill).

(demanded as a matter of course) related to the provision of guarantees in the bidding process.⁷² Andriychuck explains it as follows⁷³:

[T]he very format of auctions for the selection of organisers of major sports events enables rights holders to leverage their commercial power in order to reach better protection of their media products... Inasmuch as competition for the right to hosting the major sports

⁷² The New Zealand Rugby Football Union failed to secure co-hosting rights to the 2003 IRB Rugby World Cup due to its inability to guarantee “clean stadia” for the event to the IRB. As part of New Zealand’s successful bids to host the 2011 Rugby World Cup and the 2015 ICC Cricket World Cup a commitment was given to ensure adequate provisions were in place to protect sponsors. New Zealand subsequently passed much-criticised and very extensive anti-ambush marketing legislation in the form of the Major Events Management Act, 35 of 2007. Since the promulgation of the Act three events have to date been identified as protected events, namely the 2011 Rugby World Cup, the FIFA U-17 Women’s World Cup and the FIBA U-19 World Championship—see the report by Ironside “Ambush Marketing Law Passes First Test”—available online at the time of writing at <http://www.baldwins.com/ambush-marketing-law-passes-first-test> (posted 2009-09-04). The Hon Trevor Mallard, New Zealand’s Minister for the Rugby World Cup, was quoted as explaining the need for this legislation as follows:

‘[T]he legislation will make New Zealand more attractive to major event organisers. Without it, New Zealand’s success when bidding for similar events in the future, may be at risk. It is impossible to host major events these days without enormous financial contributions from large sponsors. These companies will not provide sponsorship dollars if others are allowed to manipulate public perceptions by falsely suggesting a link with these events’.

From the undated (last updated 2009-09-16) report entitled “Proposed Ambush Marketing Bill Explained” <http://www.med.govt.nz/templates/MultipageDocumentTOC41944.aspx>. Kelbrick 2008, pp. 38, 39 refers to the criticism voiced by the New Zealand Law Society in response to the promulgation of this very extensive Act. The Law Society recognised that the justification for the Act was that some major international events could not be hosted unless such legislation existed, and suggested (which suggestion was not accepted) that an event should only be declared a protected event in terms of the Act if the relevant Minister is satisfied that this is necessary in order to secure hosting rights in respect of the specific event—from the New Zealand Law Society Submission on the Major Events Management Bill (see Kelbrick 2008, p. 39, note 74).

In respect of the position in Australia, Curthoys and Kendall 2001 observe the following (at par. 43) in showing that the relevant legislative amendments prior to the Sydney 2000 Olympics were, primarily, in order to serve the commercial interests of event organisers and their sponsors:

‘The [Sydney 2000 Games (Indicia and Images) Protection Act] itself is a comment on the power of the advertising dollar associated with the Olympic symbol and the Sydney 2000 Games—this intersection being made explicit in sub-section 3 of the Act which provides:

(1) The objects of this Act are:

- (a) to protect, and to further, the position of Australia as a participant in, and a supporter of, the World Olympic and Para-Olympic movements; and
- (b) to the extent that it is within the power of the Parliament to assist in protecting the relations and ensuring the performance of the obligations of the Sydney 2000 Games bodies with and to the World Olympic and Para-Olympic movements, in relation to the holding of the Sydney 2000 Games.

(2) These objects are to be achieved by facilitating the raising of licensing revenue in relation to the Sydney 2000 Games through the regulation of the use for commercial purposes of the indicia and images associated with the Games’.

⁷³ Andriychuck 2009, p. 133.

events is highly fierce, because the very commercially attractive market is at stake, the conditions regarding legislative restriction of unauthorised broadcasting and unselected merchandising can be imposed by the event organisers during the tender procedure. The country/city, which wins the auction, would become bound by the obligation to provide the strongest protection for media rights. Such restrictions from event organisers, to a large extent, is a forced measure. Rights holders seek to protect their investment and maximise revenue. The lack of legal protection forces them to lobby ad hoc legislation of a highly political nature.

It is commonly accepted nowadays that this ‘political and economic coercion’ takes place and that the chances of obtaining hosting rights without committing to passing special event protection laws are slim to nil. Is it any coincidence that the Brazilian Congress passed its special *Olympic Act*, 2009 just one day before the IOC officially selected Rio de Janeiro to host the 2016 Games?⁷⁴ Stuart and Scassa confirm the sense of coercion in observing the following:

[T]he IOC has successfully used its coercive power to achieve the extraordinary outcome whereby sovereign states enact national legislation solely for the protection of the Olympic brand, its revenues and those of commercial organisations associated with the Games. In the light of comprehensive pre-existing legislation, many consider these additional legal instruments wholly unnecessary. Such is the allure and perceived, though often illusory, material benefit of hosting the Olympic Games, that national authorities are willing to expend significant scarce resources, such as time and tax revenues, to protect the [intellectual property rights] of an external agency: the IOC.⁷⁵

Canadian law academic Jon Heshka has reminded me that such coercion may be overstated when viewed in respect of the host governments’ complicity in passing these laws: ‘Bidding countries go into the process with their eyes wide open cognizant of the conditions to which they would be expected to comply. They may not be happy about it and indeed they may pinch their noses while passing it but pass it they do’.⁷⁶ I have to agree, but would submit that this does not detract from the coercive nature of the demands made by event organisers and, at best, it serves only to show poor judgment and/or a lack of concern for the potential impact of such laws for their citizens on the part of such governments.

Accordingly, while we have seen that commercial rights to mega-events are, essentially, self-proclaimed and -created contractual rights that arise from sports governing bodies’ founding documents and are subsequently incorporated in contracts with sponsors and commercial partners, such rights are further clothed with a public visage through ostensible legal legitimacy by means of another high profile contract. This is the hosting contract entered into between the governing body and the host nation or city government. While such rights, therefore, in essence remain contractual in nature, the relevant government is contractually obligated to enact relevant domestic laws to give effect to these rights, which is where the lawmakers then become actively involved. For example, in the 2010

⁷⁴ See Bacalao-Fleury 2011, p. 200.

⁷⁵ Stuart and Scassa 2011, par. 18.

⁷⁶ From personal correspondence, December 2011.

football World Cup bid, South African national government departments provided a total of 17 guarantees to FIFA, which were subsequently (as per FIFA's requirements) consolidated in the 2010 FIFA World Cup South Africa Special Measures Act.⁷⁷ These guarantees included, for present purposes, FIFA's ownership of media and marketing rights (Ministry of Communications; Ministry of Trade and Industry) and exploitation of marketing rights (Ministry of Trade and Industry).⁷⁸ As was subsequently observed by a South African court, in examining the public nature of the functions performed by the Local Organising Committee (or LOC) for the event, which was incorporated as a company:

[T]he legislation passed by various legislative authorities such as the bye-laws passed by the local authorities of Johannesburg and Tshwane, give legislative underpinning to the LOC's obligations to FIFA. Unlike an ordinary private contract only enforceable by the parties to that contract, in this case many of the LOC's contractual obligations, having been captured in substance in legislation, have become enforceable against the public at large.⁷⁹

The special event legislation and legislative efforts to provide *sui generis* protection for the relevant event encompasses a wide a range of measures. These generally include everything from tax breaks for event organisers and their partners (see below), special immigration measures aimed at facilitating entry into and egress from the host nation for event organisers and their officials, and special laws facilitating not only the protection of existing rights but also the establishment of new rights for event organisers. For example, a questionnaire as part of the bid requirements sent to applicants to host UEFA's Euro 2012 championship included special treatment for the organisation and its sponsors in respect of the registration of intellectual property such as trademarks relating to the event. This included demands for written guarantees from relevant government departments regarding the appointment of a dedicated set of examiners to administer all registrations relating to the Euro 2012 tournament and to consider any opposition by UEFA to registrations; guarantees to expedite all registrations and opposition proceedings brought by UEFA (which are to take no longer than 6 months); and government guarantees to 'monitor all applications for intellectual property registrations... in order to quickly identify applications which conflict with any UEFA application or registration and that it shall reject any such conflicting application without UEFA having to take any action'.⁸⁰ In South Africa, the governmental guarantees not only included the express undertaking to ensure the passing of laws to protect FIFA against ambush marketing and the provision of personnel to assist in the protection of 'marketing rights, broadcast rights, marks and other intellectual

⁷⁷ Act 12 of 2006.

⁷⁸ For more on the FIFA 2010 bid guarantees, see Davies 2009, pp. 38–40.

⁷⁹ *M and G Media Ltd v 2010 FIFA World Cup South Africa Organising Committee Ltd* South Gauteng High Court Case No. 09/51422 (unreported at the time of writing) at par. 123.

⁸⁰ Guarantee 12 as contained in the Phase II Questionnaire as part of the UEFA European Football Championship 2012 Final Tournament bid requirements.

property rights'. It also included guarantees relating to tax breaks and special customs clearances, and even an undertaking by the Minister of Tourism to 'ensure that the hotel prices for the FIFA delegation are 20% less than the frozen rate at 1 January 2010'.⁸¹ Such special treatment of event organisers brought about under the threat of the withholding of events in a bidding process must surely provide some food for thought to fair-minded persons who subscribe to the rule of law and to the principle of equal treatment for all before the law. More will be said in this regard in Chap. 4.

Once host government guarantees and the passing of special legislation have been obtained, the final link in the chain of ensuring universal application of such purely contractual rights to individuals and business entities situated outside the relevant contractual matrices then swiftly falls in place. Following the establishment of the required legislative framework, the sports federations or their local event organisers employ a veritable army of top flight local lawyers in the host jurisdiction to protect these 'rights' (often by focusing their efforts on the 'small fry' rather than the powerful non-sponsor corporations that may be skirting the bounds of legitimate marketing relating to events but who also have the deep pockets to enter into protracted and expensive litigation). FIFA in 2003 reported a budget of USD 13 million in 'Rights protection—rights delivery', with averages of between USD 5 and USD 6 million budgeted annually for protection of the 2006 World Cup, in addition to around USD 9 million per year in general legal expenses.⁸² That's quite a chunk of change which I'm sure will cover substantial postage fees for all those threatening letters that are invariably sent out to would be infringers. Although that might be a tad optimistic—the (impressively named) Atlanta Centennial Olympic Properties Sponsor Protection Department reportedly sent out approximately 4,000 such letters during the 1996 Atlanta Games.⁸³

The lawyers are generally an advance guard, which proceeds to establish the required 'legal climate' for commercial rights protection of the events well before the actual event. One of FIFA's local lawyers for the 2010 World Cup in South Africa has been quoted as observing that 'Many of the legal elements we saw in South Africa are now prerequisites for a country wishing to host major sporting events. As a law firm you cannot hope for a better instruction'.⁸⁴ Environmentalists may baulk at the mountain of paperwork created, which ranges from countless applications to register trademarks and designs and to the dispatch of threatening letters to perceived infringers of the event organisers' rights. As Johnson explains, it is an advisable tactic for organisations like FIFA to make sweeping trademark applications (i.e. in a large number of categories for goods

⁸¹ *M and G Media Ltd v 2010 FIFA World Cup South Africa Organising Committee Ltd* supra at par. 107.

⁸² Schwab 2006, p. 8.

⁸³ Tripodi and Sutherland 2000, pp. 412–422.

⁸⁴ Mike du Toit, partner of South African firm ENS, as quoted in a report entitled 'Sporting Chance', available on the web site of the International Bar Association at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=1a43e1e6-e207-4aa7-a21f-6d0435bba7e7>.

and services) in the relevant jurisdiction(s) roughly 4–5 years before the end of the event (as ‘non-use’ provisions in trademark laws generally require non-use over a period of 5 years), as this can serve to cover the ‘whole field of sponsorship’ (the application can cover all conceivable goods or services which might attract sponsorship, while also closing the field to potential ‘ambushers’ of the event in respect of less likely goods or services).⁸⁵ Jon Heshka points out that ‘The monopolistic and draconian nature of [the special event laws] serves to legally protect and enhance the interests of international companies. What the laws do is to widen the gap between ‘big business’ (official top flight sponsors and high-end ambushers) and small and medium-sized enterprises, appreciating it is the [small and medium enterprises] who are promised the benefits of hosting the mega-event but who make an easy target if they stray outside the lines of these laws’.⁸⁶

Some of the efforts to create ‘special’ rights in respect of the events may seem strange. The London Organising Committee for the 2012 Olympic Games (or LOCOG), for example, has even commissioned its own font (called ‘2012 Headline’), which is used on the cover of all its guidance material and also on the words ‘London’ and ‘Paralympic games’ inside the 2012 logo, which enjoys copyright protection. Accordingly, permission should be sought from LOCOG to use any of these.⁸⁷ It was reported that by November 2009, more than 6 months before the start of the 2010 FIFA World Cup in South Africa (and only shortly after the end of the 2009 Confederations Cup), FIFA had already registered more than thirty event-related marks for its 2014 World Cup in Brazil with the Brazilian Institute for Intellectual Property, and that the cease-and-desist letters were already flying out of the lawyer’s offices in Brazil.⁸⁸ Kelbrick⁸⁹ observes that, for example, FIFA’s tactics are to threaten litigation in respect of every reference to its events, and that the organisation ‘singles out smaller concerns with few financial or legal resources to defend themselves’, and the author quotes a statement by FIFA’s legal counsel prior to the 2006 FIFA World Cup:

Big companies know where the grey zones are because they are well-advised ... We don’t touch the grey areas ... [M]any companies, especially the smaller firms, won’t take risks with this.⁹⁰

⁸⁵ Johnson 2007, p. 26.

⁸⁶ Heshka is a law professor at the Thompson Rivers University in British Columbia, and has published on ambush marketing and the 2010 Vancouver Winter Olympic Games—from personal correspondence with the author, December 2011.

⁸⁷ Montagnon, R and Smith, J ‘Marketing, advertising and the Olympics: How to avoid falling at the first hurdle’, April 2010, available online at the time of writing at <http://www.herbertsmith.com/NR/rdonlyres/24175EF6-DA81-4B1B-8C75-F39DEACC4DD2/14743/FeatureOlympicswithcopy.pdf>.

⁸⁸ See the report dated 2 June 2010 available online at the time of writing at <http://www.v-brazil.com/world-cup/2014/cbf-files-lawsuits-for-ambush-marketing/>.

⁸⁹ Kelbrick 2008.

⁹⁰ Martin Stopper as quoted by Doreen Carvajal in the *International Herald Tribune*, 31 May 2006.

In light of the fact that when FIFA encountered an alleged ambush by the South African subsidiary of electronics giant LG Electronics in respect of the 2006 World Cup in Germany, FIFA only followed the complaint procedure of the Advertising Standards Authority rather than to instigate litigation,⁹¹ it is interesting to note the controversial litigation instituted by FIFA in South Africa in respect of alleged ambush marketing of the 2010 World Cup event against what can only be termed ‘small players’.⁹² This might be ascribable to a belief that FIFA’s local legal representatives had formulated a foolproof litigation strategy in the light of the extensive and extremely stringent South African anti-ambush marketing legislation (which will be discussed elsewhere). In recognition of the potential for a public relations nightmare and backlash following from such heavy-handed tactics, some sports governing bodies and event organisers appear to display more common sense in this regard. The 2012 London Olympics organisers refrained from taking legal action against a Dorset sausage maker who in 2007 used a sign featuring a ‘five rings’ logo made up of sausage links; in the words of a senior London 2012 sponsorship lawyer ‘[w]e don’t want to be seen to be heavy-handed—we will choose a case carefully’, and ‘[i]f we had taken legal action against the sausage maker it would not have looked very professional’.⁹³ The IOC’s response to FIFA’s handling of the Bavaria ambush in Johannesburg (see below), however, was to reiterate its zero tolerance approach to ambushing on the basis that ambushing threatens grassroots sport through its potential to decrease event revenues from sponsorship.⁹⁴ The ICC’s head legal counsel was recently quoted as stating that the organisation had decided to take a more common sense approach in respect of attempts to ambush the 2011 Cricket World Cup than that followed by FIFA in South Africa.⁹⁵ One wonders why, in the light of the frequently negative press that follows reports of event organisers flexing their muscle against small fry ‘infringers’ or ‘ambushers’, common sense appears to be in such short supply. When faced with such ‘pedantic sabre-rattlers’,⁹⁶ the words of a well-known intellectual property law expert bear considering: ‘Possessing a right does

⁹¹ See discussion in Chap. 3.

⁹² As discussed in Sect. 4.4.5 in Chap. 4.

⁹³ Dalton Odendaal, as quoted in an April 2008 BBC report (available online at the time of writing at <http://news.bbc.co.uk/2/hi/business/7364391.stm>).

⁹⁴ ‘IOC vows to continue ambush marketing crackdown’, 22 June 2010, available online at the time of writing at http://www.sports-city.org/news_details.php?news_id=12128&idCategory=1.

⁹⁵ David Becker was quoted as follows in an interview available online at <http://www.sportzpower.com/?q=content/interview-david-becker-head-legal-icc-0&page=0%2C1>:

‘We did review the procedures and guidelines during the 2010 FIFA World Cup and have taken valuable lessons from them. We are determined to strike the right balance between protecting our sponsors and recognising the public’s rights to interact with and enjoy the event. Our team will be carefully accessing every situation and dealing with each case according to our established protocols. A common-sense approach will be taken based on the individual circumstances of each case’.

⁹⁶ From a posting (‘How the World Cup ambushed itself’, 18 June 2010) on marketing guru Kim Skildum-Reid’s blog at <http://blog.powersponsorship.com>.

not mean that it is a good idea to enforce it always, and to the hilt. Discretion may be nine parts of possession'.⁹⁷ The danger of over-zealous enforcement by event organisers has been observed by an American commentator in the Olympic context:

Every time the [United States Olympic Committee] and IOC attack ambush marketers, they dilute the value of their brand to sponsors, because research reveals fan support for sponsors is greatest when they believe that without the sponsors the property would go away. The more heavy-handed, commercially driven and powerful the Olympic movement appears, the less consumers believe in the need to support its sponsors.⁹⁸

The more blatant the enforcement message from event organisers as communicated to the fans, the crasser the commercialisation of events will appear. In the context of the FIFA World Cup it was once observed that 'football supporters, already enraged by the number of tickets doled out to sponsors rather than real fans, may object if they find themselves as extras in somebody else's corporate video'.⁹⁹ A case in point on the issue of ill-conceived enforcement, which matter was eventually quickly and quietly disposed of through a reported settlement, is FIFA's response to the 'Bavaria girls' stunt during the 2010 FIFA World Cup South Africa in the opening round of the tournament.¹⁰⁰ FIFA was subsequently lambasted for its conduct towards the young women involved (along with the alleged conduct of the South African police) and the consensus seems to be that FIFA's not unexpected response was Bavaria's biggest asset in ensuring the success of its publicity stunt. In a similar vein, compare the provocative advertisement promoting a gay dating web site ('ManCrunch'), 'where many, many men come out to play', which was rejected by CBS before the 2010 Super Bowl but garnered huge public attention due to the controversy surrounding the decision not to air the ad.¹⁰¹ The ad was subsequently 'all over the internet'—more than one observer has called this an advertisement that was probably never made with the intention of being screened. Such stories raise the question why event organisers engage in heavy-handed responses to ambushing and, specifically, in the litigation that (infrequently) results from organisers' claims of attempted ambushes by often insignificant little entities that would, left to their own devices, most probably just

⁹⁷ From an address presented by Professor David Vaver, Reuters professor of Intellectual Property and Information Technology Law, Oxford University, at the Victoria University of Wellington, 30 August 2000—available online at the time of writing at <http://kirra.austlii.edu.au/nz/journals/VUWLawRw/2001/2.html>.

⁹⁸ Lesa Ukman, writing (16 February 2010) on the IEG sponsorship blog available online at <http://www.sponsorship.com/About-IEG/Sponsorship-Blogs/Lesa-Ukman/February-2010/The-Other-Side-Of-The-Current-Ambush-Marketing-Deb.aspx>.

⁹⁹ 'Ambush marketing: War minus the shooting', *The Economist*, 16 February 2006, available online at the time of writing at <http://www.economist.com/node/5536128>.

¹⁰⁰ See discussion in Chap. 7.

¹⁰¹ The CBS rejection letter noted that 'CBS Standards and Practices has reviewed your proposed Super Bowl ad and concluded that the creative is not within the Network's Broadcast Standards for Super Bowl Sunday'.

fade into the background of event lore. Some event organisers may be savvy enough to avoid potential negative publicity fall-out; might that be the reason for the IOC's complete lack of action over what appeared to be a clear ambush in the form of Comedy Central comedian Stephen Colbert's 'Vancouverage 2010' shows during the 2010 Vancouver Winter Olympics?¹⁰²

Such efforts at pursuing legal action against small fry 'ambushers' of events may be viewed as having a deterrent effect. A 2010 brand protection survey¹⁰³ conducted amongst leading sports marketers, sports leagues and corporate sponsors found that, when asked 'What measures are being used to ensure brand protection in your organisation?', 16% of respondents indicated the answer 'Selectively targeting perpetrators to make an example'.¹⁰⁴ Of course, a cynical view might be that such litigious posturing may be one (or both) of two things. The constant barrage of threats of legal action may be a shrewd tactic not unknown to trademark owners, namely the use of 'strike suits' to stifle competition.¹⁰⁵ It may also be little more than a clear message meant for the official sponsors. When one examines the nature of the rights granted to official sponsors in return for the sponsorship investment, one might conceivably ask what benefit does Coca-Cola (for example) receive for its USD 100 million investment in an Olympics sponsorship? As I've remarked above, in essence what the sponsor receives is a *pactum de non petendo*, or a contractual undertaking from the event organiser to not sue it for associating itself or its product or service with the event in its marketing. The sponsorship rights are a license to do what would otherwise be unlawful. The actual tangible benefits received in exchange for the sizeable investment are less easy to identify; it appears to be limited to the provision of access to support in the sponsor's marketing campaigns (e.g. access to logos and event *indicia*) and the provision of hospitality packages. This, of course, is the garnishing that adorns the agreement not to get sued; it is the sponsorship property for which the big bucks are paid. In this light, would it be fanciful to speculate that high profile litigation (or threats of such litigation) against nobodies who effectively pose a very limited

¹⁰² See the short piece available online at the time of writing at <http://www.deep-alliance.com/?p=624>. Canadian law professor Jon Heshka explains that Colbert was also the official sponsor of the US Speed-skating team and had raised more than USD 300,000 for the team, and he suggests that VANOC would have been outgunned by Colbert and they wisely chose not to go after him (from personal correspondence with the author, December 2011).

¹⁰³ A survey was conducted by the Chief Marketing Officer (CMO) Council (a six-month qualitative and quantitative research campaign, 'Doing Away With Foul Play in Sports Marketing', aimed at sensitising sports sponsors and franchises to trademark trespassing, property rights violations and online scams, frauds and infringements) with the assistance of MarkMonitor. The CMO Council surveyed more than 180 senior-level sports marketers across relevant industries for an assessment of how brands are safeguarding themselves and whether those measures are effective. The study also drew from interviews with executives at top leagues and corporate sponsors. See Gannon, N 'Foul play in sports branding—the marketer's perspective' October/November 2010 *World Trademark Review* 67.

¹⁰⁴ Gannon 2010, p. 68.

¹⁰⁵ See the discussion in Sect. 5.2.2 of Chap. 5.

threat to the event organiser and the sponsors may be little more than attempts by the organisers to justify the sponsorship investment? I.e. that such litigation may actually often be a marketing exercise on the part of the event organiser in order to show its sponsors that it is serious about protecting the sponsorship investment (and maybe even an element of 'See what would happen if you had not paid the millions you have?')? Bikoff et al., in referring to the Bavaria ambush at the 2010 FIFA event, observe that 'aggressive enforcement is necessary to appease official sponsors injured by such activities and to protect the value of future endorsements'.¹⁰⁶ As mentioned, this is speculation, although it may be generous to attempt to explain conduct by event organisers that sometimes seems to beggar belief in terms of the apparent lack of common sense. In rare cases, threatened or actual litigation might even be used in order to turn an 'ambusher' into an official sponsor.¹⁰⁷

Also, it should be noted that some observers actually encourage use of the litigation route by event organisers. McKelvey and Grady, for example, state that 'the deterrent effects of bringing a highly publicised lawsuit against an ambush marketer may seem self-evident', but they question why event organisers have brought so few law suits against 'ambush marketers'. One possible reason that they advance is the risk of adverse court rulings (such as that encountered by FIFA in its wrangling with chocolate-maker Ferrero before the German federal supreme court in respect of its claims to trademark protection for its 'Fussball WM 2006' mark).¹⁰⁸

Apart from the potential for litigation to enforce anti-ambushing laws being rather skewed in respect of its target defendants, warnings about the potential for a discrepancy in respect of the impact of such laws have been expressed for years. For example, compare the following opinion expressed at the time of the tabling of the London Olympics and Paralympic Games Bill¹⁰⁹:

¹⁰⁶ Bikoff et al. 2010, p. 91.

¹⁰⁷ Chase and Kernit 2010, p. 386 recount a case in the USA involving the United States Olympic Committee:

'[I]n *United States Olympic Committee v. Asics America Corporation* [No. CV-08-00522 Complaint (C.D. Cal. 9th May, 2008)], the USOC sued Asics for running multiple print and Internet advertisements supporting its endorsed athletes' accomplishments in connection with the 2008 Olympics... [T]hese advertisements included a print advertisement featuring a photograph of Asics-endorsed marathoner Ryan Hall that stated: "Good luck in the 2008 Summer Olympic Games. From all your fans at Asics", as well as congratulatory messages on Asics' website for its endorsers making the US Olympic team. Although the USOC voluntarily dismissed its complaint, the parties apparently settled their differences, as Asics subsequently entered into a multi-year agreement with USA Field Hockey, the national governing body for field hockey affiliated with the USOC, to become the "Official Partner and Exclusive Sponsor of footwear, apparel, and accessories".'

¹⁰⁸ McKelvey and Grady 2008, p. 581. See further Chap. 5.

¹⁰⁹ For discussion of the London Olympic and Paralympic Games Act, 2006, see Sect. 4.4.3 in Chap. 4.

Sponsors need protection but it is a question of balance. Is this bill going too far? We are concerned about an overreaction to the problem and, of course, the bill favours the multinational companies with deep pockets.¹¹⁰

This criticism may have been prophetic, especially if one considers this same observer's prediction at the time that '[i]t is possible that any unauthorised association with [the London 2012 Games] could contravene the law—even a pub advertising that it is screening an event'.¹¹¹ Five years later FIFA managed to obtain just such special protection in respect of the screening of matches in its 2010 World Cup in South Africa. In early 2010 the draft Liquor Control Policy for the 2010 FIFA World Cup was gazetted by the South African Department of Trade and Industry,¹¹² to be greeted by public outcry especially from the hospitality industry. Initial reactions to what was perceived as a requirement for existing liquor license holders to obtain a costly special license during the event were highly critical (in reaction to the draft policy's wording, which required venues hosting 'any public viewing event' where matches are broadcast 'to the general public or otherwise' to obtain a special license). The DTI attempted to set the record straight by explaining that the liquor control policy would only require a special license in respect of venues such as pubs, clubs, bars and restaurants that intend to charge an admission fee or similar surcharge for the screening of 2010 World Cup games (which establishments would require the permission of FIFA for this purpose). According to reports, such license would have to be obtained at a cost of ZAR50000 each and 2% of traders' revenues.

When one considers the potential need for new laws it is traditional to not only focus on the relevant mischief it is proposed to address, but also to consider and weigh the potential costs and benefits for the public at large. One often wonders whether this process occurs with the hosting of mega-events. We will see later that a specific requirement for the designation of the 2010 FIFA World Cup as a 'protected event' for purposes of the relevant legislation¹¹³ was that it was deemed to be in the public interest to do so. The reality, however, is that very little benefit for the public was to be seen from this event, and FIFA's conduct during and surrounding the event was widely criticised for the organisation's apparent monopolisation of all related commercial opportunities and blatant disregard for the interests of ordinary South Africans, apparently with the full blessing of the South African government. Mark James has observed the following in respect of the legislative protection for the commercial rights to the 2012 London Olympic Games¹¹⁴:

¹¹⁰ Marina Palomba, legal director of the UK's Institute for Practitioners in Advertising, as quoted in 'Olympics Bill to blitz 'ambush advertising'', *Daily Telegraph*, 9 July 2005.

¹¹¹ Ibid.

¹¹² *Government Gazette* No. 32878 Vol. 535 (18 January 2010).

¹¹³ The Merchandise Marks Act, 1941 (as amended in 2002), discussed in [Chap. 4](#) and elsewhere in this book.

¹¹⁴ Which will be discussed in more detail in [Chap. 4](#) and elsewhere in this book.

[S]ome sections of the London Olympic and Paralympic Games Act 2006 appear to have been inserted at the behest of a purely private body, the International Olympic Committee, rather than on the basis of a rational legal justification. Why the Olympic and Paralympic Games are so special that the use of their symbols and sales of tickets to their events need legislative protection—protections not previously extended to other national or international sporting or cultural events held in the UK—has never been fully debated either in Parliament or before the courts.¹¹⁵

I will further examine the process of legislating for special, extended, rights protection for mega-events in Chap. 4, but for present purposes it is hoped that the reader will consider such wider public interest in events that are, after all, sporting in nature and at least ostensibly targeted at the fans (and, one hopes, not only at fans as potential consumers of soft drinks or purchasers of sports utility vehicles):

There is a perception that no event can now be successfully held without draconian protections against so called ambush marketing. This has led to international federations being able to demand rights even after countries have been awarded the right to host the event in question. There is an argument, which host countries appear to be ignoring, that these often private and highly profitable businesses are changing the intellectual property laws of host nations to protect the event holders’ investment and profits... Like most laws there is a fine balance between protecting rights holders and allowing free and fair competition.¹¹⁶

In evaluating the impact of the legal framework for commercial rights protection in the host country (and particularly such special legislation as demanded by the rights grantors through their hosting requirements), it should be noted that such requirements also generally include demands for income for the sports organisations from commercial rights exploitation to be completely tax-free. Compare, for example, Article 49(a) of the Host City Contract for the 2012 London Olympic Games:

The City and/or the OCOG shall bear all taxes, including direct and indirect taxes, whether they be withholding taxes, customs duties, value added taxes or any other indirect taxes, whether present or future, due in any jurisdiction on a payment to be made to the IOC or any third party owned and/or controlled by the IOC, including Olympic Broadcasting Services and Meridian Management SA, with respect to the revenues generated in relation to the Games. In particular, if a withholding tax, a value added tax or any other indirect tax is due to the Host Country, to Switzerland or to any other jurisdiction on a payment to be received by the IOC or any of the above-noted third parties pursuant to this Contract and/or pursuant to an agreement with an Olympic sponsor, broadcaster or other commercial partner, the payment shall be increased and paid by the OCOG so that the IOC or such third party, after the applicable tax, receives an amount that equals the amount it would have received had there been no such tax. The City and/or the OCOG shall indemnify the IOC or such third party for any direct taxes and/or indirect taxes that could be borne by the IOC or such third party in the Host Country, so that if the IOC or such third party is liable

¹¹⁵ James 2010, p. 10.

¹¹⁶ Palomba, M ‘Is ambush marketing dead?’ Reed Smith Advertising Compliance Team Client Alert No. 10-097 (May 2010)—available online at the time of writing at <http://www.advertisingcompliancelaw.com/uploads/file/10-097%20ReACTS%20-%20Is%20ambush%20marketing%20dead.PDF>.

for the payment of direct taxes and/or indirect taxes in the Host Country, it shall be put in the same situation as if such direct and/or indirect taxes had not been due.¹¹⁷

Compare also paragraph 4.4 (contained in Chap. 4: Government Guarantees) of South Africa's Bid Book for the 2010 FIFA World Cup South Africa:

The Government guarantees that South Africa and its tax authorities (including any governmental authority with jurisdiction over the assessment, determination, collection or imposition of any taxes, duties or other levies) shall not impose any kind of taxes, duties or other levies on FIFA, FIFA's subsidiaries, the FIFA Delegation and the Host Broadcaster. They are to be treated as tax exempt persons/entities. In particular South Africa and its tax authorities recognise... that the exploitation of FIFA's Marketing and Broadcasting Rights shall not subject FIFA, FIFA's subsidiaries and the Host Broadcaster to any kind of taxation in the country... The government guarantees that it will, if required by FIFA, issue in advance written, unconditional and binding tax rulings on the above or any other tax issues relating to FIFA. In addition, the government, as well as 'the South African Football Association], guarantee that they will provide FIFA, the Commercial Affiliates and the Broadcast Rights Holders, including the Host Broadcaster, with the highest level of administrative assistance and support with regard to the handling of any tax issues related to the organisation of the 2010 FIFA World CupTM.¹¹⁸

¹¹⁷ Article 49(b) of the London 2012 Host City Contract further provides as follows:

'Payments to be made by the IOC or certain third parties: The City and/or the OCOG shall bear all taxes, whether they be withholding taxes, customs duties, value added taxes or any other indirect taxes, whether present or future, due in any jurisdiction on a payment to be made by the IOC or any third party owned and/or controlled by the IOC, including without limitation Olympic Broadcasting Services and Meridian Management SA, with respect to the revenues generated in relation to the Games, including without limitation pursuant to any agreement with an Olympic sponsor, supplier, licensee, broadcaster or other commercial partner. The amount of a payment to be made by the IOC or any of the above-noted third parties pursuant to this Contract shall not be increased by any taxes due on such payment. If the IOC or such third party is liable for the payment of such tax, the net payment received by the City, the NOC or the OCOG shall be reduced by an amount corresponding to such tax or, if the payment to the City, the NOC or the OCOG has already been made, the tax subsequently paid by the IOC or such third party shall be reimbursed in full to the IOC or such third party by the City, the NOC or the OCOG, as the case may be'.

¹¹⁸ Another example of such a provision for tax exemption can be found in section 16(1) of Jamaica's.

ICC Cricket World Cup West Indies 2007 Act, 2006:

'Income arising from [Cricket World Cup 2007] earned by:

- (a) CWC 2007 Inc., ICC and its members, [ICC Development (International) Ltd], [Global Cricket Corporation Ltd] and [the West Indies Cricket Board] and its members and their respective advisers not ordinarily resident in Jamaica;
- (b) a member of a squad;
- (c) a CWC 2007 official; or
- (d) the staff of ICC, IDI or GCC, shall be exempt from taxes of every description'. See also article 21 of the Russian Federation's 'Olympic and Paralympic Law' (Federation Law 310-FZ) for the hosting of the 2014 Sochi winter Olympic Games, which adds the following to Part Two of the Tax Code of the Russian Federation:

'The organisations who are foreign organisers of the Olympic Games and the Paralympic Games according to Article 3 of the Federal Law "On the Organisation and Holding of the XXII Olympic Winter Games and the XI Paralympic Winter Games 2014 in Sochi, the

In fact, in England's (ultimately unsuccessful) bid to host the 2018 FIFA World Cup, FIFA controversially demanded as a government guarantee exemption from a key piece of UK money-laundering legislation, the Proceeds of Crime Act, 2002. The FIFA demand required that the government must provide for 'the unrestricted import and export of all foreign currencies to and from the UK, as well as the unrestricted exchange and conversion of these currencies into US dollars, euros or Swiss francs', which allowance would apply to hundreds of individuals ranging from the delegates and staff of FIFA, its confederations and member associations, match officials, as well as an unspecified number of unnamed 'FIFA Listed Individuals'. This guarantee has been described as 'an incredible carve-out from existing laws',¹¹⁹ the reason for which was unexplained. But this is not an isolated case. It was reported in September 2009 that FIFA was embroiled in a stalemate with the Brazilian tax service, Receita Federal, regarding the claimed tax exemptions for the 2014 FIFA World Cup. The Brazilian government had agreed to the tax exemptions for FIFA, but FIFA subsequently demanded that all its contractors (i.e. including its commercial partners) should be completely exempted, which Receita Federal refused to allow. In another illustration of the substantial power wielded by the event organiser, it was subsequently reported that the sports minister had announced in April 2010 that a draft law was to be sent to Congress for approval in order to meet FIFA's demand for a full exemption of its contractors, and in May 2010 it was reported that the law had been passed.¹²⁰

The Dutch government, which was also unsuccessful in its bid to host the 2018 FIFA World Cup, must have upset Mr. Blatter when they published the details of FIFA's required government guarantees in bidding for the event. In a draft form letter in the name of the Netherlands government and addressed to FIFA (entitled 'Government Guarantee No. 3: Tax Exemption', available on the Internet at the time of writing¹²¹) the following is found:

FIFA and/or FIFA Subsidiaries, irrespective of whether resident in the Netherlands or not, will be fully exempt from any Taxes in the Netherlands. FIFA and/or FIFA Subsidiaries will be treated as fully Tax exempt entities. The full Tax exemption is not limited to the Events and is not limited time-wise.

The exemption stated in this section shall encompass all revenues, profits, income, expenses, costs, investments and any and all kind of payments, in cash or otherwise,

(Footnote 118 continued)

Development of Sochi as a Mountain Climate Resort and the Amendment of Certain Legislative Acts of the Russian Federation" shall not be deemed to be taxpayers in relation to the transactions made as part of the organisation and holding of the XXII Olympic Winter Games and the XI Paralympic Winter Games 2014 in Sochi'.

¹¹⁹ See the report by Scott, M 'FIFA's demand to be exempt of UK money-laundering legislation' *The Guardian*, 1 December 2010, available online at the time of writing at <http://www.guardian.co.uk/football/2010/dec/01/fifa-government-government-exemptions?INTCMP=ILCNETTXT3487>.

¹²⁰ From a report available online at the time of writing at <http://www.v-brazil.com/world-cup/2014/fifa-claims-full-tax-exemption/>.

¹²¹ At <https://zoek.officielebekendmakingen.nl/blg-63037.html>.

including through (i) the delivery of goods or services, (ii) accounting credits, (iii) other deliveries, (iv) applications, or (v) remittances, made by or to FIFA and/or FIFA Subsidiaries.

Paragraph 3 of the document makes it clear that the above exemption shall ‘in particular and without limitation’ mean that ‘[n]o Taxes will be levied on any profits made by FIFA and/or FIFA Subsidiaries’.

Of course, FIFA can probably not be faulted for the energy expended on obtaining such tax exemptions—it has been estimated that FIFA left South Africa with a GBP 2 billion tax-free profit¹²² from what some observers called FIFA’s ‘African tax bubble’.¹²³ Also, one should remember that the big boys in international sports governance tend to base themselves in friendly tax havens—FIFA is registered (as a ‘non-profit organisation’) in a tax-friendly Swiss canton; the Dublin-based International Rugby Board is incorporated under the laws of the Isle of Man; and the International Cricket Council recently moved from its historic base at Lords Cricket Ground in London to that paragon of a cricketing mecca, Dubai.

The end result of such tax exemption and related arrangements, as demanded by the relevant sports governing body, is that members of the public and entrepreneurs in the host nation are effectively deprived of most opportunities to benefit financially from the hype and excitement around such events—ironically, while these same persons are often by means of their tax dollars forced to assist to foot the bill for the often vastly expensive infrastructure, stadium construction, transport etc. expenses that are necessitated by bid guarantees. And, of course, the rationale for footing the bill is the direct and indirect benefits to be accrued from hosting the mega-event which are disingenuously promised in order to build support for hosting it.¹²⁴

This is highly ironic (some might say obscene) when one considers that budgeting for mega-events in government bids appear to often (if not always) constitute masterpieces of pseudo-science, painting an extremely rosy picture which subsequently, invariably, turns out to be anything but realistic. Some respected sports economists have suggested that after the-event audits of economic impact serve an important role, because they ‘can serve as filters through which the hyperbole that may be present in some prospective economic impact estimates can be captured and eliminated’.¹²⁵ That may be fine for the next potential mega-event

¹²² See, for example, the report available online at the time of writing at <http://www.guardian.co.uk/football/2010/jul/18/fifa-world-cup-sepp-blatter>.

¹²³ See, for example, the discussion on the Tax Justice Network website (e.g. at <http://taxjustice.blogspot.com/2010/10/fifa-versus-south-africa-total-victory.html>).

¹²⁴ My thanks to Jon Heshka for reminding me of this point (from personal correspondence with the author, December 2011).

¹²⁵ Baade, R A and Matheson, V ‘Bidding for the Olympics: Fool’s Gold?’ (at 7)—Undated paper available online at the time of writing at <http://harbaugh.uoregon.edu/Readings/Sports/olympics.pdf>.

host (assuming they'll learn from the past), but does little for the taxpayer who may have just been subjected to a huge and long-term debt by politicians. In the later chapters I will express criticism of the fact that, contrary to the traditional notion of what constitutes illegitimate 'ambush marketing' of events, the modern day special legislation passed to outlaw such conduct generally does not require proof by event organisers that consumers (the public) have actually been deceived by means of misrepresentation by the ambusher. In this light it is ironic to consider whether event organisers, rather than ambushers, should not be exposed to legal sanctions for deception of the consumer public when it comes to possible misrepresentation of the scale of potential benefits their events may bring (although the host nations or city governments are, of course, largely complicit in this regard). Leaving that issue aside, the result of such rosy forecasts of boom times is that taxpayers are presented after the fact with highly inflated costs which are to be borne by the domestic tax base. Compare the South African government's extremely optimistic stadium infrastructure budget for the 2010 event, as one example. Even though '[the South African Football Association] has developed a sophisticated financial model to facilitate a clear, credible and accurate understanding of the business imperatives involved in staging the 2010 FIFA World Cup' and such model 'created in accordance with the highest international standards, is inherently flexible and can be easily configured to reflect the impact of changing economic conditions in various scenarios through to 2010',¹²⁶ the initial amount budgeted for all stadium upgrades and refurbishments, namely ZAR 1.1 billion, eventually ballooned to an impressive ZAR 16.5 billion (half the South African government's 2010 national budget for defence and, more troubling in a developing nation with such pervasive socio-economic problems, approximately 20% of the national housing and community amenities budget for the same year). South Africa's deputy president was quoted in media reports as attributing the escalation to increasing material costs,¹²⁷ which seems to make a nonsense of the 'sophisticated financial model' developed for the bid budgeting exercise. A South African economist recently made the following rather worrying assessment:

[T]he difference between the original budget and current estimated expenditure indicates that the original budget was hopelessly incorrect. The total tangible costs for the South African government was supposed to be "minimal", estimated at ZAR 2.3 billion in 2003. Currently the 2010 estimated cost for the South Africa government is ZAR 39.3 billion—a whopping 1,709% increase from the original estimate.¹²⁸

¹²⁶ Chap. 7 of the South African government's Bid Book for the 2010 FIFA World Cup South Africa.

¹²⁷ Tolsi, N 'The World Cup Bid Book fiasco' 13 June 2010, *The Mail and Guardian* (available online at the time of writing at <http://www.mg.co.za/article/2010-06-13-the-completely-miscalculated-world-cup-bid-book-that-cost-us-a-bundle>).

¹²⁸ Cottle, E 'A preliminary evaluation of the impact of the 2010 FIFA World Cup South Africa', 2 September 2010—available online at the time of writing at <http://www.sah.ch/data/D23807E0/ImpactassessmentFinalSeptember2010EddieCottle.pdf>.

Of course, this is not even to mention the fact that economists, more fundamentally, question the very use of sports mega-events to boost local economies in circumstances where often the required investments should be made by governments without the need for such drivers. These events are extremely expensive to stage, and one may justifiably ask whether the money can be better spent. It was observed, for example, that when Rio de Janeiro won the right to host the 2016 Olympic Games with a USD 15 billion bid, this represented a sum equal to over USD 2,000 for each citizen of Rio, even before the expected cost overruns.¹²⁹

Such developments are, however, of little concern to the sports governing bodies, who may often have ‘flown the coop’ by the time that the true implications of hosting mega-events enters the public consciousness.¹³⁰ In terms of the government guarantees required to obtain hosting rights, governments are (possibly in many cases, justifiably) left to face the public outcry when the true facts come out, and when, in any event, it is too late to do anything about prior commitments and legal obligations entered into in the heady fiesta atmosphere of mega-event bidding. The taxpayers, generally, keep paying for a long time after the events, and the mega-event hangover is a persistent one. South Africa’s public broadcaster employed the slogan ‘Feel it, it is here’ in the run-up to and during the 2010 World Cup. It might not be inappropriate for the national revenue service to print, on their future tax return forms (and for some time to come), the slogan ‘Feel it, it is *still* here’.

Of course, members of the public only tend to get hot under the collar when they are actually allowed access to information about their governments’ dealings in the bidding process. There is an apparent widespread trend to lock away such information from the prying eyes of democratically elected host governments’ constituencies, which one might suggest adds insult to injury. The South African government’s Bid Book for the 2010 FIFA World Cup was subsequently posted on the web site of the *Mail and Guardian* newspaper, after reportedly unsuccessful efforts by the democratic governance and rights unit of the University of Cape Town to obtain access to the document in terms of the Promotion of Access to Information Act, 2 of 2000 (or ‘PAIA’). The *Mail and Guardian* also obtained a court order from the South Gauteng High Court in Johannesburg a week before the opening matches of the 2010 World Cup to obtain access to the Local Organising Committee’s tender awards for the event (where the court ruled that ‘[r]efusing access to these records would enable the organiser of this event to keep from the public eye documents which may disclose evidence of corruption, graft and incompetence in the organisation of the World Cup, or which may disclose that

¹²⁹ Rose and Spiegel 2010, p. 12.

¹³⁰ It was reported in October 2010 that the nine South African host cities for the tournament were considering taking legal action to recover an amount of approximately ZAR 500 million from FIFA, which FIFA had allegedly contractually undertaken to pay the host cities for certain construction work, for ‘rehabilitation’ of parts of the host cities after the event, and in respect of the host cities’ alleged entitlement to 10% of revenues from ticket sales during the event.

there has been no such malfeasance'¹³¹). The Local Organising Committee not only argued that it was 'too busy' to provide such information, but also attempted to defend a claim for access to such documents in terms of PAIA on the basis that the Local Organising Committee was not part of government and was not performing a public function in its organising of the World Cup. Its legal counsel argued unsuccessfully (not surprisingly) that FIFA was essentially a 'Swiss club' and that the hosting agreement was between FIFA and the South African Football Association, and not the South African government.¹³² The Games Monitor web site in respect of the 2012 London Olympic Games¹³³ reports that the 2012 London Host City Contract requirements were successfully kept from the public and elected representatives by the Mayor of London from July 2005 to December 2009, on the grounds of allegedly being exempted from public disclosure in terms of section 41 of the Freedom of Information Act of 2000 as 'information provided in confidence'. This position was successfully challenged and, at the time of writing, the Host City Contract is available from the Greater London Authority.¹³⁴ Of course, 'secret' commercial contracts in international sport are nothing new; compare the elusive Concorde agreement in Formula 1 motor sport, which has, in its various incarnations, managed to baffle pundits outside the hallowed halls since 1981.

The restrictions imposed in the form of bid guarantee requirements for mega-events are also not only financial; issues such as 'spring-cleaning' by event organisers through the forced removal of the homeless from the precincts of event venues,¹³⁵

¹³¹ See the *Mail and Guardian* report available online at the time of writing at <http://mg.co.za/article/2010-06-08-mg-wins-bid-to-access-world-cup-tender-documents>; *M and G Media Ltd v 2010 FIFA World Cup South Africa Organising Committee Ltd* South Gauteng High Court Case No. 09/51422 (unreported at the time of writing).

¹³² From a report available online at the time of writing at <http://mg.co.za/article/2010-05-24-loc-too-busy-for-mg-court-battle>.

¹³³ See <http://www.gamesmonitor.org.uk/node/935>.

¹³⁴ At <http://www.london.gov.uk/freedom-information>.

¹³⁵ See the report by Raquel Rolnik, United Nations Special Rapporteur on adequate housing, of March 2010, which calls on FIFA and the IOC (and host governments) to ensure that mega-events such as the football World Cup and the Olympic Games do not lead to the displacement of the poor, through forced evictions, criminalisation of homeless persons and informal activities, and the dismantling of informal settlements—see the report entitled 'Olympics and World Cup soccer must take up cause of right to housing—UN expert', 9 March 2010, available on the web site of the UN News Centre at www.un.org [accessed 20 March 2010]. It was reported on 7 April 2010 that the City of Cape Town's efforts to move the residents of informal settlements had caused controversy and were claimed to be aimed at removing an 'eyesore' for tourists in the run-up to the 2010 FIFA World Cup. City officials denied that such efforts were aimed at city beautification for the event, and claimed that they were part of a longer term strategy to provide permanent housing for such residents.

At the time of writing (in early 2011) a major Indian housing advocacy group was in the process of taking a claim for compensation and rehabilitation to the high court of Delhi, arguing that a programme of forced evictions ahead of the 2010 Commonwealth Games violated rights. The Housing and Land Rights Network produced a report in February 2011, alleging that the

severe restrictions on the informal economic activities sector¹³⁶ and often extensive restrictions on freedom of expression and of the media (e.g. through extremely restrictive accreditation requirements) are, sadly, nothing new (also not in respect of the 2010 football World Cup event).¹³⁷

The preceding discussion of how the commercial monopolies to sports mega-events are established may appear to be very negatively slanted against those involved. It is by no means the intention here to deny the existence and value of the very real commercial interests and expense that are at stake in staging some of the greatest entertainment spectacles on earth. However, what I find troubling is the apparent and all-pervasive trend to seek to, at least ostensibly, protect such interests at all costs and by trumping all other considerations and interests—including, especially, the public interest in the hosting of major events—which I submit needs to be considered much more critically. Specifically, it will be contended here that the apparently sacrosanct nature of such events and of the commercial interests of those hosting and sponsoring them should be more closely scrutinised, from a legal perspective, as I will attempt to do in the later chapters. The fact that FIFA and other international sports governing bodies conduct ‘business as usual’ in all the jurisdictions where they operate, does not take away from the fact that Mr. Blatter et al.—if they want to conduct such business in South Africa, Brazil, Qatar or anywhere else—must respect and comply with the relevant host nation’s laws as well as accepted principles of international law.

The following section will briefly examine how and why the modern mega-event sports sponsorship model developed in recent years, with a view to evaluating, in the chapters that follow, the legal implications of such model and how it operates for the rights and interests of parties other than the event organisers (sports organisations) and their commercial partners.

2.3 The Development of the Modern Mega-Event Sponsorship Model

Sponsorship involvement with sport and sports mega-events has been around for many years, and this book will not undertake a historic overview of developments in this field. Coca-Cola, for example, is very proud of its continuous involvement

(Footnote 135 continued)

forced evictions by the local government had violated people’s rights and even led to a number of deaths before the games in October 2010. Four months before the games, authorities in the city of Delhi announced that street vendors and other stall holders were a ‘major security risk’ and would be evicted—see the report available online at the time of writing at <http://www.radioaustralia.net.au/asiapac/stories/201102/s3144899.htm>.

¹³⁶ Compare the very extensive restrictions on informal street traders as contained in the various 2010 host city municipal by-laws, as referred to in Chap. 7.

¹³⁷ See the discussion on human rights implications of mega-events commercial rights protection in Chap. 7.

with the Olympic Games since as far back as 1928, while Kodak was already there in 1896, and sports equipment manufacturer A.G. Spalding managed to wangle the job of director of sport for the US Olympic team at the Games of 1900 and to orchestrate the selection of his products as ‘official’ equipment for the 1904 Games in St Louis. The 1924 Games in Paris saw outrage on the part of the International Olympic Committee at the level of in-stadium advertising, which prompted it to proclaim a ‘clean venue’ policy which is still in force today. When former IOC president Samaranch (ever-vigilant in chasing the ‘hidden pot of gold’ for the Olympic movement) went so far as to direct an enquiry to Coke’s head of marketing as to how much more it would pay if the IOC were to allow venue advertising, Coke threatened to cancel its Olympic sponsorships if the IOC ever scrapped the clean venue policy as it would change ‘what makes the Games so special’.¹³⁸

The modern phenomenon of commercial sponsorship arrangements between sports governing bodies and corporate sponsors, however, had its genesis in a landmark agreement signed in Lausanne on 28 May 1985 between the International Olympic Committee and Horst Dassler’s¹³⁹ sports marketing company, ISL Licensing AG of Switzerland. ISL, which specialised in sports sponsorship marketing, was founded shortly after the 1982 FIFA football World Cup, and established its reputation through exclusive marketing contracts with FIFA and the European and South-American football confederations. In a bid to extend its global reach ISL targeted the Olympic movement and the Olympic symbol of the five rings as the most recognised and powerful symbol in world sport, and envisioned a global sponsorship programme of the Olympics which would provide a second main revenue source for the IOC, apart from television rights revenues.¹⁴⁰

The May 1985 agreement¹⁴¹ facilitated the implementation of a new sponsorship programme for the Olympic Games, which came to be known as The Olympic Programme (or ‘TOP’, later known as ‘The Olympic Partner Programme’) and was to become the model for modern mega-event commercial rights exploitation also beyond the Olympic Games. These developments were instrumental in the International Olympic Committee’s ‘transformation from the instrument of peace and goodwill envisioned by its founder... to a transnational nongovernmental commercial giant of imposing power and influence in global sporting matters’.¹⁴² It has, however, been hinted that the modern Olympic movement may, in fact, have been created on a platform at least partly influenced by commercialism, which holds a measure of irony in light of later developments: When de Coubertin devised the Olympic five-ring symbol he wrote (in 1913) of how the rings

¹³⁸ Payne 2006, pp. 143, 144.

¹³⁹ Son of Adi Dassler (founder of Adidas) and brother to Rudi (founder of Puma). See the discussion in Chap. 9.

¹⁴⁰ See Schaus and Wenn 2007, p. 316.

¹⁴¹ Which was to become known as ‘TOP I’ and which operated from 1985–1988—see the discussion in the text below.

¹⁴² From the preface to Barney et al. 2004.

represent ‘the five parts of the world, now won over by Olympism, ready to accept its fruitful rivalries’. An alternative suggestion is that the Baron got the inspiration for the Olympic symbol from an advertisement for Dunlop tyres which depicted angels holding interlaced bicycle tyres representing continents.¹⁴³ Be that as it may, ‘[t]he IOC’s decision to embrace commercialisation and create an innovative marketing programme has changed the essence of the organisation... on the verge of bankruptcy in the 1970s, the IOC went from an “amateur” run sport organisation to a multi-billion dollar international corporation’.¹⁴⁴ As has been mentioned above, the global sponsorship industry was estimated to amount to more than USD 43 billion in 2008, from a rather more humble figure of USD 2 billion in 1984.¹⁴⁵ The Olympic Games has been a pioneering sponsorship product in contributing to the globalised appeal of sport, and of the sports mega-event, as marketing tool, and its explosion in magnitude in the past few decades.

TOP was officially inaugurated at the 1988 Seoul Olympics, and was devised at a time when the International Olympic Committee was experiencing serious financial problems and when hosting the expensive Games was not an attractive option for potential host cities (e.g. only Los Angeles bid for the 1984 Games, but it managed to report a USD 225 million surplus).¹⁴⁶ This came in the wake of the most recent instalments of the Games at the time, which had been financial disasters, compare Moscow in 1980 and Montreal in 1976. Montreal mayor Jean Drapeau famously assured taxpayers that ‘The Olympics can no more have a deficit than a man can have a baby’. Ah, those lovable politicians—the City of Montreal was ultimately faced with an unenviable CDN 990 million deficit, and it reportedly took more than 30 years to repay the debt incurred to host the Games (earning the Olympic Stadium known as the Big ‘O’ the nickname of the Big ‘Owe’¹⁴⁷). Not all post-1984 Games have managed to avoid the potential pitfall for their host taxpayers, however (it was reported, for example, that Nagano, host city of the 1998 Winter Games, faced severe financial consequences for hosting such a big event and taxpayers suffered debts of up to GBP 20,000 per household to balance the city’s books!).¹⁴⁸ Along with the financial implications, the IOC was also faced with other serious issues—after the terrorist attack at the 1972 Munich Summer Games, voters of Colorado rejected the right to host the 1976 Winter Games even after it was awarded to the state, and the IOC had to scramble to find any willing host.¹⁴⁹

¹⁴³ Payne 2006, p. 112.

¹⁴⁴ Seguin and O’Reilly 2008, p. 62.

¹⁴⁵ Burton and Chadwick 2009, p. 3.

¹⁴⁶ See Johnson 2008, p. 3. At the time fewer cities were interested in bidding for the Games: Munich, Madrid, Montreal and Detroit bid for the 1972 Games, Montreal, Los Angeles and Moscow bid for 1976, Moscow and Los Angeles for 1980, and only Los Angeles bid for 1984.

¹⁴⁷ Taken from <http://www.atkearney.com/index.php/Publications/building-a-legacy.html>.

¹⁴⁸ Malfas et al. 2004, p. 213.

¹⁴⁹ See Matheson, V A and Baade, R A ‘Mega-sporting events in developing nations: Playing the way to prosperity?’ (draft document, March 2003)—available online at the time of writing at <http://web.williams.edu/Economics/wp/mathesonprosperity.pdf>.

On the commercialisation side of things, the Montreal Games, which saw the first time that the Olympic symbol and trademarks were granted protection by the legislature in a host country,¹⁵⁰ was characterised by an aggressive campaign by the local organising committee to source sponsorship from the private sector in order to facilitate its goal of ‘self-financing the Games’. As a result, the organisers had obtained signed agreements with 628 companies each for a fee of CDN 50,000 (the total corporate sponsorship initiative netted revenues of barely CDN 5 million dollars after the deduction of administrative and management costs).¹⁵¹ Los Angeles was an anomaly in respect of the commercial facet of the Games. Because of the growing reputation of the Olympics as a proverbial black hole sucking in money as if it was going out of fashion, interest in hosting the event was conspicuously absent. The city of Los Angeles, the state of California and the US government had made it clear that no public money would be provided to finance the event. The IOC had no replacement host city to fall back on, and consequently the Los Angeles Olympic Organising Committee (or LAOOC) enjoyed unprecedented bargaining power in negotiating its contract with the IOC. It could insist that its own lawyers draw up the contract, which included cast-iron guarantees against losses that would otherwise have fallen on the shoulders of tax-payers. The Games were handed to the LAOOC as an independent organising committee which accepted financial responsibility jointly with the US Organising Committee (USOC), which sought financial guarantees from private industry to cover losses, as opposed to such burden falling on the city of Los Angeles (which was contrary to the Olympic Charter¹⁵²).¹⁵³ The organisers directly approached private sponsors to pay for the rights to use Olympic symbols in their marketing, but chairman of the local organising committee, Peter Ueberroth (who would go on to be named *Time* magazine’s Man of the Year for 1984, and to be appointed as Major League Baseball’s 6th Commissioner in late 1984), had learnt from the mistakes of Montreal, where the organisers, by sourcing a large number of corporate sponsors for relatively small individual sponsorship fees, had failed to generate significant revenues.¹⁵⁴ Ueberroth’s marketing campaign led to contracts with 35 commercial ‘partners’, 64 ‘suppliers’ and 65 companies holding licenses (with each product category enjoying designated rights and exclusivity), and the Los Angeles marketing programme alone generated USD 157 million in the form of cash, equipment, goods, ‘value-in-kind’ products and services provided.¹⁵⁵

From the phenomenal commercial success of the LA Games came the realisation that the Olympics could be a real money-spinner. In fact, this was rather serendipitous at a time when another major concern for the IOC (apart from the

¹⁵⁰ The Olympic Act passed by the Parliament of Canada on 27 July 1973.

¹⁵¹ Barney et al. 2004, p. 155.

¹⁵² The host city contract was subsequently amended by the IOC.

¹⁵³ De Lange 1998, p. 105.

¹⁵⁴ Barney et al. 2004, p. 155.

¹⁵⁵ Ibid. 160.

high cost of hosting its spectacle) was the fear that the Olympic Movement had heretofore placed all its eggs in a rather shaky basket—in the 1970s the sale of television broadcasting rights to the Games was the source of nearly 98% of Olympic revenues, and there were fears that broadcasters might in future at some point decide to refuse to pay what was then (and still is) spiralling rights fees.¹⁵⁶ One should consider the context; apart from the Los Angeles experience the IOC was also at the time particularly obsessed with the protection of the symbols of its Games as its ‘property’. It had only recently managed (after involved machinations) to obtain trademark protection for the Olympic symbols in Switzerland, as a prelude to its lobbying of governments which would culminate in the WIPO¹⁵⁷-administered Nairobi Treaty on the Protection of the Olympic Symbol in 1981¹⁵⁸ (the movement to protect the Olympic symbols at the time was aimed primarily at developing Olympic merchandising rights rather than to protect the event against unauthorised commercial conduct by outsiders such as ambush marketing,¹⁵⁹ discussed later). The IOC was at the time facing the prospect of the expiry of copyright protection in respect of the Five Rings symbol in 1987, fifty years after the death of its creator (the founder of the modern Olympic Movement, Baron Pierre de Coubertin).¹⁶⁰ So the race was on to obtain proper protection for its intellectual property, and then to ensure that such property would yield revenues through their commercial exploitation.

As mentioned above, the inception of the TOP programme must be understood in light of developments in financing the expensive to-host Games since the mid-twentieth century, and more specifically in the post-World War II era. The first television broadcast (by means of a closed circuit system) of the summer Games had occurred at the last instalment of the Games before the interruption of the war years (the infamous ‘Nazi Olympics’ in Berlin in 1936).¹⁶¹ At the time, the Third Reich was only capable of delivering live feed from one of three cameras, and that only while the sun was shining. It appears to be commonly accepted that what would come to constitute the foremost source of revenue for Olympics organisers and the IOC, namely television broadcasting rights, first attained a measure of official recognition at the first post-war Games, the 1948 Olympics in London,

¹⁵⁶ Barney et al. 2004, p. 163.

¹⁵⁷ The World Intellectual Property Organisation, a specialised agency of the United Nations established by the WIP Treaty adopted in Stockholm on 14 July 1967.

¹⁵⁸ Adopted on 26 September 1981, which in its Article 1 places an obligation on states party to the Treaty ‘to refuse or to invalidate the registration as a mark and to prohibit by appropriate measures the use, as a mark or other sign, for commercial purposes, of any sign consisting of or containing the Olympic symbol, as defined in the Charter of the International Olympic Committee, except with the authorisation of the International Olympic Committee’.

¹⁵⁹ Johnson 2008, p. 25.

¹⁶⁰ See Barney et al. 2004, pp. 156–163.

¹⁶¹ This television broadcast was famously fictionalised as the first major television broadcast to emanate from Earth and to be received by an alien civilisation, in the 1997 Warner Bros Pictures film *Contact*, directed by Robert Zemeckis.

when the BBC was charged the then huge sum of one thousand pounds for the rights to broadcast the event by the organising committee. When the BBC subsequently pleaded poverty but wrote a cheque in payment, the local organisers reportedly (in classic British gentleman fashion) never cashed the cheque.¹⁶² The IOC appeared to recognise the potential value of television and the money it could bring to the event and its organisers. Although the IOC president of the time who was elected to the position shortly after the 1948 Games, the controversial Avery Brundage,¹⁶³ was apparently sceptical of the appropriateness of the IOC's involvement in the marketing of TV rights, Rule 49 of the Olympic Charter was amended in 1958 to make provision for the negotiation of television rights by each organising committee.¹⁶⁴

Toohy and Veal recount an amusing incident at the first live broadcast of the winter Games (in Cortina in 1956), which might be a metaphor for the love-hate relationship between the purists (reverence of the amateur ethos of the Games) and commercialism in the form of the television and media industries: the final torch bearer reportedly tripped on a television cable placed on the ice surface of the Olympic stadium and dropped the torch, temporarily extinguishing the Olympic flame...¹⁶⁵

While the inevitable influx of large amounts of money into the organisation of the Olympics by means of television revenues would play a significant role in the development of the Games as the world's pre-eminent social/cultural spectacle, developments regarding commercialisation that followed would serve to also pose one of the biggest challenges to the Olympic Movement in modern times. The exposure that television (and, more recently, other digital media) has brought to the event is the prime driver behind the involvement of corporate sponsors, especially the large multi-national corporations who are best placed to capitalise on the international exposure provided by broadcasts that truly circle the globe and reach billions of potential consumers. This is easy to grasp if one considers that the revenues from the sale of broadcasting rights to the Games escalated from USD 1.2 million for the 1960 Rome Games to more than USD 1.7 billion for Beijing in 2008.¹⁶⁶

The IOC's interest in the development of a marketing programme such as TOP is commonly attributed to Juan Antonio Samaranch's increased anxiety over the IOC's nearly sole reliance on television revenues at the time (when approximately 95–98% of its revenues derived from this, rather mercurial and unpredictable,

¹⁶² Toohy and Veal 2007, pp. 153, 154.

¹⁶³ Brundage, who had been IOC vice-president since 1942 and who was elected president in 1952, was famously instrumental in the removal of the only two Jewish competitors in the US team for the 400 meter race at the Berlin Olympics of 1936. He has been labelled a Nazi sympathiser, who was also opposed to the inclusion of women in the Games.

¹⁶⁴ Ibid. Rule 49 of the Olympic Charter (7 July 2007, in force at the time of writing) deals with 'Media Coverage of the Olympic Games'. Rule 49.2 provides that '[a]ll decisions concerning the coverage of the Olympic Games by the media rest within the competence of the IOC'.

¹⁶⁵ Ibid.

¹⁶⁶ From the 2010 edition of the IOC's *Olympic Marketing Fact File*, available online at the time of writing at http://www.olympic.org/Documents/fact_file_2010.pdf.

source). Recent instalments of the Games at the time had been tainted or affected by geopolitical baggage and the previous two administrations of the organisation (under Brundage and Lord Killanin) had fought a running battle with organising committees regarding the apportionment of such revenues (not to mention the vagaries of the periodic contract negotiations with broadcasters).¹⁶⁷ A newly-formed IOC Commission on New Sources of Financing made recommendations in favour of the concept of a worldwide sponsorship programme based on a proposal developed by ISL, and the IOC's Executive Board approved this in principle at the IOC's Session in New Delhi in March 1983.¹⁶⁸ The IOC was clearly swayed in its decision to finally accept the ISL proposal for a global programme with multinational corporate sponsors by the success of the LAOOC to source private sponsorships to cover the costs of the Los Angeles Games. Negotiations, quite involved and protracted, followed with the NOCs to sign up to the new programme, although the US Olympic Committee (USOC) was a constant thorn in the IOC's side due to its reluctance to give up its already lucrative marketing programme in the United States (and fears that, while TOP would benefit the NOCs in countries without proper marketing campaigns, the USOC would gain few benefits from its association with the programme that it did not already enjoy at the time). The USOC was also sceptical about the IOC's insistence for it to participate in this new international programme which would see mostly American-based multinational corporations as its headline sponsors, and USOC felt that it was entitled to a greater share of revenues than would be paid to other NOCs participating in TOP.¹⁶⁹ The USOC's position would appear to have been justified. Houlihan observes that, at the time of the Salt Lake City bribery scandal in the late 1990s the IOC was concerned about the response from America when the US government launched its own investigation through a series of congressional hearings and the involvement of the FBI. The IOC was 'acutely aware' of the fact that 60% of all its commercial revenue came from the States, which provided 9 of the 11 largest corporate sponsors at the time and accounted for the bulk of broadcasting income.¹⁷⁰ Dick Pound explains that most of the IOC's difficulties with the introduction of TOP arose out of the negotiations with the NOCs as to what their shares would be, but once 'everyone was equally unhappy, we knew we had it pretty well right'.¹⁷¹ The continued importance of the American market for the Olympics bosses is illustrated by NBC's USD 2 billion Olympics broadcasting rights fee for the 2010–2012 period, which dwarfs the broadcasting rights fees paid in all other territories or countries.¹⁷²

¹⁶⁷ Schaus and Wenn 2007, p. 316.

¹⁶⁸ Ibid.; Barney et al. 2004, pp. 170, 171.

¹⁶⁹ See Barney et al. 2004, pp. 171–179.

¹⁷⁰ Houlihan 2004, p. 66.

¹⁷¹ Pound 2006, p. 150.

¹⁷² From the 2010 edition of the IOC's *Olympic Marketing Fact File*, available online at the time of writing at http://www.olympic.org/Documents/fact_file_2010.pdf.

Along with the introduction of TOP the IOC also adopted a new system in order to ensure maximum benefit from the new sponsorship revenue source. 1992 was the last year in which the summer and winter Olympics took place in the same year; since then it has been staggered so that there is currently a 2-year cycle between mega-events (the summer Olympics take place in the same year as UEFA's Euro football championship, while the winter Olympics shares its year with the FIFA World Cup finals and the Commonwealth Games).

TOP was not only a response to the growing realisation of the potential for massive sponsorship revenues to be generated in respect of the Games, but also an attempt to address a practical hurdle to the sourcing and management of sponsorships that had been identified by Organising Committees (the 'OCOGs').¹⁷³ The Olympic sponsorship activities were dependent on the use of the Olympic symbols (notably the five rings), and sponsors in essence bought the right to associate with the Games by using these symbols in their promotional campaigns. The practical problem, however, lay in the fact that the rights to use and license the use of the Olympic symbols were vested in the National Olympic Committees (or 'NOCs'). The Olympic Charter required that any marketing activities by an OCOG in the territory of a NOC required the consent of the local NOC. Accordingly, the relevant OCOG for the Games, along with its potential sponsors, had to individually negotiate the use of symbols with each relevant NOC within whose territory such use was to take place. This clearly created huge problems for sponsors, especially large multinational corporations such as Kodak, Coca-Cola and McDonalds, who had enjoyed long association with the Games and desired truly international exposure from such association in future. Accordingly, the TOP programme was created by the IOC in response to requests by the major sponsors to simplify the international marketing programme.¹⁷⁴ These sponsors reportedly also indicated that they would be willing to contribute much more to the Olympic Movement if the IOC could offer exclusivity on a world-wide basis.¹⁷⁵ As a result, the TOP programme introduced the concept of category exclusivity¹⁷⁶ of Olympic sponsorships, whereby sponsors would receive exclusive international rights within certain product or service categories (i.e. banking services, soft drinks or apparel). The TOP Programme was initially centred around 44 international product or service categories, which categories are susceptible of sponsorship on an international basis, by reason of the nature of the product or service or of the size and international scope of the corporations dealing therein.¹⁷⁷ Prior to the establishment of the TOP programme, fewer than ten NOCs in the world had a

¹⁷³ Organising Committee for the Olympic Games.

¹⁷⁴ This issue of 'centralising' negotiations for sponsorship rights was specifically cited as one of the reasons for the IOC Executive Board's approval of the recommendation to pursue the ISL proposal for a new global sponsorship programme—see Barney et al. 2004, p. 171.

¹⁷⁵ Pound 1986, p. 84.

¹⁷⁶ See discussion in Sect. 2.4.

¹⁷⁷ Pound 1986, p. 85.

source of marketing revenue, and the programme also saw OCOGs launch independent marketing programmes for the first time while the IOC now required the relevant OCOG to form a joint marketing programme with the host country NOC.¹⁷⁸ The 2010 edition of the IOC's *Olympic Marketing Fact File* describes the working of the TOP programme as follows:

The TOP programme provides each Worldwide Olympic Partner with exclusive global marketing rights and opportunities within a designated product or service category. The global marketing rights include partnerships with the IOC, all active NOCs and their Olympic teams, and the two OCOGs and the Games of each quadrennium. The TOP Partners may exercise these rights worldwide and may activate marketing initiatives with all the members of the Olympic Movement that participate in the TOP programme.

The TOP programme leaves space—although limited—for local or domestic sponsorships outside of the programme, whereby sponsors can obtain rights outside the categories on the international list. This does, however, not preclude the earning of revenues by OCOGs in respect of the ‘worldwide exclusive’ categories under TOP. Separately, the OCOGs receive 50% of the revenue from the IOC's worldwide sale of marketing rights across about ten business categories under TOP. In return for surrendering marketing rights for these business categories in their territories, the 203 NOCs which participate in the Games each receive a share of the 20% of TOP revenue that is allocated to the NOCs.¹⁷⁹ By way of example, the Australian Olympic Committee's share of TOP for the 2005–2008 quadrennial amounted to approximately one-third of its total revenue from sponsorship sales and licensing (in the amount of AUD 34 million).¹⁸⁰ In addition, the OCOGs also receive 50% of the broadcast revenue, after the costs for the Host Broadcaster have been deducted. Since the Sydney Olympics the IOC has become the Host Broadcaster (or producer of content) of the Games through its joint venture (it holds 80%) in Olympic Broadcasting Services (OBS). After the costs of OBS are deducted, the 50% payments to the OCOGs are made and the 12.75% of United States broadcast fees is paid to the USOC, the IOC pays a further share of broadcasting revenues to the international federations with sports on the Olympic programme (a total of around USD 296 million to 26 international federations for the 2012 London Games and USD 121 m to seven international federations for the 2010 Vancouver winter Games).¹⁸¹

Since the inception of the new TOP sponsorship model—which one observer has referred to as ‘a corporatization and McDonaldisation of the world sporting

¹⁷⁸ See the 2010 edition of the IOC's *Olympic Marketing Fact File* (available online at the time of writing at http://www.olympic.org/Documents/fact_file_2010.pdf).

¹⁷⁹ See the letter by John Coates, president of the Australian Olympic Committee and Executive Board Member of the International Olympic Committee, available online the time of writing on the web site of the Australian Olympic Committee at <http://corporate.olympics.com.au/news.cfm?ArticleID=10495>.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

event¹⁸²—all subsequent instalments of the Olympic Games (except Athens in 2004) have either broken even or made a profit for its organisers.¹⁸³ In the 2005–2008 Olympic quadrennial, the 12 TOP sponsors paid a total of USD 866 million in sponsorship fees, of which revenues approximately 40% was allocated by the IOC to national Olympic committees and 50% to local organising committees.¹⁸⁴

The ‘TOP I programme’, the first TOP programme, operated from 1985–1988, was supported by nine multinational corporate partners and generated USD 97 million for the Olympic movement. TOP II (1989–1992) comprised twelve corporate partners (including eight of the original sponsors from TOP I) and generated USD 175 million. TOP III (1993–1996) comprised ten corporate partners and generated more than USD 350 million, while TOP IV (1997–2000), with its eleven corporate partners, generated more than USD 550 million to the movement. TOP V, which concluded in 2004, had ten worldwide corporate partners and reportedly generated more than USD 600 million.¹⁸⁵ As mentioned above, in the 2005–2008 Olympic quadrennial, the twelve TOP sponsors paid a total of USD 866 million in sponsorship fees. At the time of writing, the TOP VII programme, which is in place during the 2009–2012 Olympic quadrennium (where TOP VII Partners sponsor the 2010 Olympic Winter Games in Vancouver and the 2012 Olympic Games in London), is nearing conclusion.

The IOC severed its relationship with ISL in 1996, and established (and holds stock in) Meridian Management (now IOC Television and Marketing Services, SA), which drives the commercial marketing programme of the IOC. The current Olympic sponsorship model encompasses six revenue-generating programmes as sources of funding. These are the following:

- IOC-managed broadcast partnerships;
- The TOP programme of international partners of the Olympic Movement;
- The IOC’s official supplier and licensing programme;
- Domestic sponsorship programmes run by the individual OCOGs;
- Ticketing programmes in the host country; and
- Licensing programmes in the host country.¹⁸⁶

A significant benefit for the IOC in selling the TOP programme to the members of the Olympic Movement (although, as mentioned, this was a tough sell for the USOC) has been the distribution of revenues by the IOC to OCOGs and NOCs. At

¹⁸² Gruneau 1984, p. 36.

¹⁸³ Ibid. 24–25. The Winter Games in Albertville in 1992 reportedly made a USD 57 million loss. By way of example, the Sydney 2000 Summer Games cost an estimated USD 3.24 billion to present (including a bid cost of USD 12.6 million) and broke even; The Salt Lake City Winter Games of 2002 cost an estimated USD 1.3 billion to present (including a USD 7 million bid cost) and showed an estimated USD 100 million profit—see Davis 2008, p. 68.

¹⁸⁴ See Davis 2008, pp. 163, 164.

¹⁸⁵ Schaus and Wenn 2007, pp. 317, 318.

¹⁸⁶ Davis 2008, p. 156.

the time when negotiations were still ongoing in order to get the NOCs on board with the programme, the IOC was promising that more than 70% of its revenue share from the programme would be distributed to NOCs. In the period between the 1993–1996 and 2001–2004 quadrennials the IOC has retained 8% of the total revenues generated by all the above programmes and 92% of such total revenues have been allocated to NOCs, OCOGs and international federations.¹⁸⁷ The revenue distribution model and the TOP programme have facilitated a significant revenue injection for NOCs, many of whom at the time of the introduction of TOP had no sponsorship income, by means of e.g. a fixed fee and flat fee per athlete participating in the Games being paid to the NOCs by the IOC from sponsorship income in terms of TOP.¹⁸⁸

The revenues generated by domestic sponsorships is larger than that from the TOP programme (e.g. in the 2001–2004 quadrennial, USD 796 million compared to USD 663 million). As an indication of the extent of the success of all six the above revenue streams, the total revenues in the 2001–2004 quadrennial were approximately USD 4,189 million (of which more than half was generated through the broadcast programme).¹⁸⁹

Along with TOP, which operates on the corporate sponsorship side of things (the focus of this book), a significant development occurred in the late 1990s in respect of the IOC's other main revenue stream, the sale of broadcasting rights to the Games. In 1995, America's National Broadcasting Company (NBC), which had been involved in constant bidding wars with its rivals ABC and CBS in the 1980s and early 1990s, made a very lucrative offer to Samaranch, which was attractive for the measure of financial security it promised to provide the IOC in respect of future Games. NBC offered, in a package deal, USD 1.25 billion for the US rights to the 2000 Sydney summer Games and the 2004 Salt Lake City winter Games, an offer that was time-sensitive and also included a prohibition on discussion with NBC's competitors (which now included the Fox television networks). The IOC felt that it could not pass up the advantages of this deal, and within months the parties also discussed a package deal in respect of the US broadcasting rights to 2004, 2006 and 2008, which culminated in a USD 2.3 billion agreement (which the parties called 'the Sunset Project').¹⁹⁰ It subsequently proved that the IOC's acceptance of the NBC package deal (which was to form the template for negotiations with other broadcasters in 1996 and 1997 and which culminated in similar deals in respect of the other international markets) had been shrewd. Schaus and Wenn observe that the Sunset Project brought with it three distinct advantages for the IOC. First, it allowed for a more realistic cost planning process in future bid competitions, as the money from television rights available to future host cities was known (up to and including 2008). Secondly, the security provided by this

¹⁸⁷ Ibid. 157.

¹⁸⁸ Pound 1986, p. 85.

¹⁸⁹ Davis 2008, p. 157.

¹⁹⁰ Schaus and Wenn 2007, pp. 312, 313.

arrangement assisted the IOC's budgeting committee, who now knew how much television revenue was available in the medium term, Thirdly, this arrangement proved very valuable when the Salt Lake City scandal broke in 1998, as the television contracts for future events were already in place and the IOC was not forced to deal with a compromised negotiating environment in respect of television rights for the upcoming Games.¹⁹¹ David Andrews explains how profitable the deal was for NBC, which managed to purchase the right to 'creatively suture the network's trademark peacock logo to the accumulated and emotive symbolism of the Olympic rings'.¹⁹² He recounts how NBC managed, with this huge capital investment, to become a puppet-master that could manipulate the 1996 Atlanta Games into a product aimed primarily at female viewers because the female market provided its best chance of lifting Olympic ratings. The IOC, understandably, acquiesced; as its marketing supremo Dick Pound put it: 'If you owe the bank \$10,000 you're a customer, if you owe them \$10 billion you're a partner'.¹⁹³

The IOC sells television rights to the Games on an exclusive territorial basis to television organisations who bid for the rights, thereby becoming rights holders in respect of such broadcasts who acquire the right to broadcast the Games on free-to-air television, cable television and closed circuit television (and, to a limited extent, satellite and high definition television). Such rights generally include pre-Olympics events and cultural events associated with the Games.¹⁹⁴ Following the Sydney Olympics the IOC has become the Host Broadcaster (or producer of content) of the Games through its joint venture (it holds 80%) in Olympic Broadcasting Services (OBS). After the costs of OBS are deducted, the 50% payments to the OCOGs are made and the 12.75% of United States broadcast fees is paid to the USOC, the IOC pays a further share of broadcasting revenues to the international federations with sports on the Olympic programme.¹⁹⁵ Other sports organisations involved in mega-event organising are less generous in sharing the proceeds of broadcasting rights deals and of marketing arrangements such as the IOC's TOP programme. For example, in respect of the football and rugby union world cup events, all broadcasting rights fees and worldwide marketing revenue is retained by the 'owners' of the events, namely FIFA and the International Rugby Board respectively, and is used for the development of their games worldwide. All venue (and infrastructure) costs are borne by the host country, a frequent bone of contention in recent years.¹⁹⁶

¹⁹¹ Ibid.

¹⁹² Andrews 2004, p. 18.

¹⁹³ Ibid.

¹⁹⁴ See the discussion of the 2000 Sydney Olympics in Still et al. (2009), pp. 182, 183.

¹⁹⁵ See the letter by John Coates, president of the Australian Olympic Committee and Executive Board Member of the International Olympic Committee, available online the time of writing on the web site of the Australian Olympic Committee at <http://corporate.olympics.com.au/news.cfm?ArticleID=10495>.

¹⁹⁶ Ibid.

Of course, in light of the above, one needs to consider where the corporate culture of the Olympic Games (and, indeed, the other mega-events such as the FIFA World Cup) is heading. I've referred to a number of changes brought about to the Olympic Movement in the interests of commercialising the Games during the past few decades. Examples are the decision to allow professional athletes at the Games (in 1981, when NOCs were given the right to pick the athletes to participate), the decision to allow category exclusivity of sponsorship in 1983 (which, as we've seen was so phenomenally successful in Los Angeles in 1984), and the decision to stagger the winter¹⁹⁷ and summer Games (i.e. to shorten the cycle between these events and provide more frequent opportunity for corporate sponsors to obtain marketing opportunities to two separate major events rather than two events in the same year). One must ask: Where is it all heading? Apart from the increase in sponsorship fees (compare, for example, that it was reported that to purchase a space for a company logo on a sponsor medal stand for the 2002 and 2004 winter and summer Olympics cost USD 55 million or 10 times the amount charged in 1984), it can be expected that sponsors will start to claim increasingly expansive leverage in order to ensure a return on the vast amounts of money invested. When M&M Mars sought permission for its M&M characters to jump out behind marathon runners and appear on television as the athletes passed through city streets at the 1992 Barcelona Games, the IOC refused, concerned that such crass advertising could devalue the Games' marketing image. The company dropped its sponsorship and directed its investment into marketing youth soccer, as it felt that it would not obtain the required returns from an Olympic sponsorship.¹⁹⁸ In light of the increasingly cluttered marketing environment surrounding these mega-events (which I will refer to again in the later chapters) and the ever-escalating rights fees paid by sponsors, it is to be expected that such 'creativity' in respect of efforts to heighten brand awareness and exposure—if that is what it is—will be seen more and more at these events in years to come. I believe that event organisers will be under severe pressure to maintain (or aspire to) the moral high ground in respect of commercialism, especially when their own efforts at generating profits from the events continue apace and serve as the invitation to corporate sponsors to join the party. When your 'guests' are charged exorbitant fees for the privilege of your company or to visit 'the place to be seen', it is hard to ask them not to smoke in your house or play their music too loud.

¹⁹⁷ A separate Winter Olympics dates from 1924—figure skating and ice hockey were Olympic events before 1924, but the larger programme hosted by France in 1924 was so successful that the IOC in 1925 retroactively labelled it the Winter Olympics and subsequently solicited separate bids to host the Winter Olympics. As has been observed (with a bit of tongue-in-cheek, I'm sure): 'The 1928 Olympics were hosted by Amsterdam, which was not a good location for downhill skiing, and the Winter Olympics were held in St. Moritz, Switzerland'—Pomfret et al. 2009, p. 11.

¹⁹⁸ From an article by Phillips, R 'Big business demands a corporate Olympics', 16 March 1999, available online at <http://www.wsws.org/articles/1999/mar1999/olymp-m16.shtml>; see also Payne 2006, p. 144.

2.4 Category Exclusivity of Sponsorships of Mega-Events

As mentioned above, a major component of the Olympic commercialisation model that developed with the TOP programme is the system of category exclusivity of sponsorships to the Olympic Games and to related properties¹⁹⁹ of the Olympic Movement. This measure of exclusivity is the very object of the legal protection against ambush marketing of events (which we'll consider in the chapters that follow). I will accordingly briefly examine this phenomenon, which has come to characterise the modern commercialisation model in respect of all sports mega-events, by way of background to the discussion in the chapters that follow. But before I attempt to do so, let's first ask 'What is sponsorship?'

Sponsorship is often defined as an investment in cash (the 'sponsorship fee') or kind ('value-in-kind' denoting the provision of products, services or other facilities) in an activity in return for access to the 'exploitable commercial and marketing potential' associated with that activity.²⁰⁰ Those capable of being sponsored (e.g. a sports team, athlete or, in the context of this book, a sports mega-event) are referred to, in marketing speak, as 'properties', and the ability for the sponsor to associate itself with such a property is known as a 'right'.²⁰¹ The sponsor obtains a right to associate with the event organiser's event marks (such as logos, emblems and mascots), combined with 'designations' (i.e. the right of the sponsor to describe itself 'official sponsor' in advertising and promotional literature and on product packaging, labelling and merchandising material).²⁰² The 2010 edition of the IOC's *Olympic Marketing Fact File* contains the following definition of Olympic sponsorship:

Olympic sponsorship is an agreement between an Olympic organisation and a corporation, whereby the corporation is granted the rights to specific Olympic intellectual property and Olympic marketing opportunities in exchange for financial support and goods and services contributions. Olympic sponsorship programmes operate on the principle of product category exclusivity. Under the direction of the IOC, the Olympic Family works to preserve the value of Olympic properties and to protect the exclusive rights of Olympic sponsors.²⁰³

The sponsored event provides its sponsors with 'unsurpassed visibility, invaluable exclusivity and impressive associative and branding potential'.²⁰⁴ Some commentators in the late 1990s predicted that sports sponsorship would become

¹⁹⁹ I use the word 'properties' here in the sense that it is understood in the sponsorship industry. As will be clear from discussion elsewhere in this book I am not convinced that what the sports mega-event rights grantors (the international sports governing bodies) and rights holders (the sponsors or commercial partners) refer to as their 'property' necessarily always enjoys such status in the legal sense.

²⁰⁰ Lewis and Taylor 2007, p. 706 (par. D5.4).

²⁰¹ Ibid.

²⁰² Gardiner et al. 2006, pp. 446, 447.

²⁰³ Available online, at the time of writing, at http://www.olympic.org/Documents/fact_file_2010.pdf.

²⁰⁴ Schwab 2006, p. 7.

the optimal positioning tool for international marketers seeking to communicate global messages, which seems accurate at the time that I write this.²⁰⁵ The sports mega-event provides a ‘platform’ upon and around which a marketing campaign is based in order to leverage the rights sold:

The sponsorship is a payment that buys the company a platform that offers a central theme around which a focused, integrated promotional message can be communicated through an array of different communication vehicles. Leveraging the platform involves developing a promotion plan which specifies the role of each vehicle and the extent to which it will be used.²⁰⁶

This leveraging of the sponsorship is sometimes also referred to as ‘activation’ or ‘maximisation’ in order to complete the integration of the event sponsorship into the sponsor’s overall communications programme.²⁰⁷ Leveraging around a mega-event can be done very successfully, or sometimes less so—compare the case of Sony (sometimes perceived as ‘owning football’ or the ‘go-to brand for football fans’), who made much of 3D coverage of the 2010 FIFA World Cup but failed to release its 3D televisions in time for the event, with the result that Australians who watched the tournament in 3D did so on a Samsung TV.²⁰⁸

The mega-event, therefore, offers a ‘thematic space’²⁰⁹ (something I will examine more closely in Chap. 8) for the commercial exploitation of the marketing value of the event for sponsors (such marketing value being determined by and consisting of a number of factors, including the advertising reach in respect of the size of the broadcast market, the nature and characteristics of the event, etc.). In recent years the reach of the event in terms of garnering and capturing public (consumer) attention has increased significantly. The ‘360 degree commissioning of sports content’ (producing content that can be delivered across platforms such as television, the Internet and mobile devices)²¹⁰ and the interactive nature of the Internet and the role played by web sites (such as YouTube, fan-sites, fantasy league sites, etc.) and, especially, social media such as Facebook and Twitter,²¹¹ means that the mega-event thematic space has become extremely pervasive and lucrative as a marketing tool. And it is aimed increasingly at a ‘younger demographic of digital natives’.²¹²

²⁰⁵ Farrelly and Quester 1997, pp. 5–7.

²⁰⁶ Crompton 2004a, p. 9.

²⁰⁷ See Masterman 2009, p. 305 et seq.

²⁰⁸ See Avenell, P ‘Sharp slips under Sony’s radar to steal Euro 2012 sponsorship’, available online at the time of writing at <http://www.current.com.au/2011/05/25/article/Sharp-slips-under-Sonys-radar-to-steal-Euro2012-sponsorship/OBRIXLDFAM>.

²⁰⁹ Which, in marketing terms, one could define as ‘the definitional categories within which products and services are positioned, categorized, and described, and within which they are, therefore, considered for purchase by consumers’—see http://welshmktg.com/WMA_thematic_spaces.pdf.

²¹⁰ Boyle and Haynes 2009, p. 63.

²¹¹ More will be said about the (potential) role of social media in this regard in Chap. 10.

²¹² Boyle and Haynes 2009, p. 63.

The sponsorship of the event is viewed as a mutually-beneficial exercise, whereby the event organiser directly earns revenues by means of the sponsorship fees paid, and the sponsor is provided with access to the thematic space in order to further leverage its investment with dedicated marketing or otherwise. Crompton has explained the underlying theory of sponsorship as follows:

The central concept underlying sponsorship is exchange theory, which is one of the most prominent theoretical perspectives in the social sciences. It has two main precepts: (i) two or more parties exchange resources, and (ii) the resources offered by each party must be equally valued by the reciprocating parties. In response to the first precept of exchange theory, sport organisations and businesses have multiple resources that they may use as “currency” to facilitate an exchange. The sport facility or event may offer businesses increased awareness, image enhancement, product trial or sales opportunities. Companies in return may offer support through investments of money, media exposure, or in-kind services. The second precept of exchange theory suggests that a corporate partner will ask two questions, “What’s in it for me?” and “How much will it cost me?” The trade-off is weighed between what will be gained and what will have to be given up. A key feature of this second precept is that the exchange is perceived to be fair by both sides.²¹³

This role of the exchange theory, however, may be open to criticism as ignoring some of the realities of the sponsorship market (a few of which we will encounter elsewhere in this book when considering the relationships between event organisers, ‘official sponsors’ and ‘ambush marketers’, and when evaluating the interests of these stakeholders in the sports sponsorship market):

By basing ideas about sponsorship on the concept of exchange, scholars who have studied this practice have provided an image of neutrality and of choices that are limited only by the skill of the people involved in the sponsorship transactions. Such a view ignores the underlying inequalities of power that are part of the sponsorship process, presents an overly simplistic account of the complexities of such interactions and neglects to address how structures of domination and exploitation shape and mediate these relationships.²¹⁴

While the above characterisation of inequalities in the relationship and exploitation may very well hold true, others argue that the sports sponsorship relationship should be approached as a strategic alliance, where the corporate sponsor and sports property should be encouraged to take ‘a deliberate, collaborative approach to instigating a partnership that emphasises a mutual understanding of both parties’ objectives and commitment to a long-term vision’.²¹⁵

Such issues of theory aside, the benefits for potential sponsors of sports or sports-related sponsorships, as a form of ‘life-styled marketing’ (i.e. which targets consumers through their lifestyles), are well-recognised, and probably account for the phenomenal world-wide growth of the industry which has seen sponsorship reach an estimated expenditure of USD 44.8 billion in 2009 (and capturing nearly a 20% share of overall marketing budgets).²¹⁶ The previous section has briefly

²¹³ Crompton 2004b, p. 268.

²¹⁴ Slack and Amis 2004, p. 270.

²¹⁵ Cobbs 2011 (my thanks to the author for providing me with an advance copy of the article).

²¹⁶ Cobbs 2011, relying on an IEG *Sponsorship Report* 2009.

considered the evolution of the modern mega-event sponsorship model. The value of sport, for sponsorship and otherwise, was realised during the last two decades of the 20th century and those governing ‘the game’ lost little time in capitalising on this unique product:

Sports were once cheap production numbers that drew viewers to their screens in millions. Those days have long since gone. While negotiating various deals with television, major sports governing organisations must have been taking notes. They quickly learnt that the same principles that applied to marketing beer or shaving foam, also applied to sports... From the 1980s, sports began marketing themselves, turning themselves into commodities; not commodities with use-values, but ones with symbolic values. Consumers were sold images they could blend with their personal histories or their identities: sports became a means of self-expression, a statement of lifestyle... Sports used the same techniques as car makers, soft drink manufacturers and computer companies, attempting to manipulate consumer “needs”, using art and design to create agreeable images and packaging their products to make them appealing. Today, it is virtually impossible to find a major sport that does not have a logo.²¹⁷

Sport as entertainment shows significantly unique characteristics that are different from other entertainment products. One of its central virtues is the role of competition and the entertainment value of unscripted competitions. This key requirement for the entertainment value of the sports product forms the rationale behind some of the measures and practices which provide fertile soil for the application of law to sport, such as doping control, gender testing and anti-corruption measures aimed at curbing match fixing. However, it has been observed that the core of the sports entertainment product has moved beyond this ‘uncertainty of outcomes’ regarding the sporting competition, to include ‘a product/service associated with the excitement of the event’.²¹⁸ This is well-illustrated in the context of sporting mega-events such as the FIFA football World Cup, where significant marketing and revenue-generating activities relate solely to the hype and excitement of the event as opposed to the actual on-field competition. The very entertainment product provided by sports teams (and individual star athletes) can also be differentiated from the entertainment product provided by other industries, in terms of the impact on the psyche of the relevant consumers of the product.²¹⁹ As one observer remarked:

²¹⁷ Cashmore 2010, p. 372.

²¹⁸ Schaaf 1995, p. 22.

²¹⁹ Sutton et al. 1997, p. 15 describe the phenomenon of ‘fan identification’ in professional team sports as follows:

‘Fan identification is defined as the personal commitment and emotional involvement fans have with a sport organisation. When a customer identifies closely with an organisation, a sense of connectedness ensues and he or she begins to define him- or herself in terms of the organisation... Sport differs from other sources of entertainment through evoking high levels of emotional attachment and identification... Sport promotes communication, involves people jointly, provides common symbols, a collective identity and a reason for solidarity’.

Sports marketing is unique because of the way sports fans follow their teams. They identify with and gain allegiance to sports teams and individuals. People don't have the same enthusiasm for Holiday Inn.²²⁰

And this phenomenon has even more verity in the context of the modern technology and Internet-based society. In such an environment, merchandising images become key dialogic resources: 'Widely disseminated, textured through the process of audience adaptation, these signifiers enable like-minded individuals to identify one another and coalesce into what public choice theorists would recognise as interest groups'.²²¹ For the potential sponsor of a sports event this may, for example, be a more subtle ('less commercial') alternative to normal advertising which, due to the phenomenal popularity of sport, still achieves a significant measure of brand exposure. Sponsorship, generally, is a form of 'below-the-line' advertising which is not carried by the traditional media—rather than paying for actual brand advertising in the media, the sponsor can raise awareness indirectly (e.g. by having its name mentioned in an event title where the sponsorship involves event naming rights, or in the venue title where it involves stadium naming rights, or having its name applied—on the periphery of the viewer's vision—to a top golfer's bag). Or, sometimes, rather more directly—compare the 7–11 sponsorship of the Chicago White Sox baseball team, where the team owners agreed to start all their home games at 7.11 pm. Such generally more 'subtle' means of bringing the brand to the attention of sports fans may be preferable as being perceived as being less intrusive than actual mainstream advertising, and the repetitive encountering of the brand by the spectator whose attention remains on the sporting action free from the distraction of annoying advertisements may have a subliminal effect in creating brand awareness as well as a more positive consumer perception of the brand than might be the case with 'in your face' advertising.²²²

It was also realised that, with the proliferation of media (e.g. television networks in the 1990s and, more recently, the Internet and mobile media), has come a significant amount of advertising 'clutter', and that sponsorship provides an alternative to advertising which can go some way towards avoiding this problem.²²³ In fact, clutter, which leads to fragmentation of the market and difficulty for the consumer in diffusing messages, has been identified by some of the TOP Olympic sponsors as a major concern regarding Olympic-related marketing. Even though ambush marketing (which will be discussed in Chap. 3) is one source of clutter, it was identified that the large number of sponsorships granted by the IOC

²²⁰ Hofacre, writing in Burnett J, Menon A, Smart DT 1993, p. 22.

²²¹ Cooper Dreyfuss 1996, p. 139; Coombe 1991, p. 1877.

²²² For some interesting discussion of an example of why advertising during broadcasts may have an ever-increasing bad rap amongst consumers (at least in the United States), see Bollier 2005, pp. 197–201 ('The quest for perfect control').

²²³ See Mullin et al. 2000.

also contributes to the problem.²²⁴ In fact, some sponsors indicated that they were less concerned about ambush marketing than with what they viewed as the ‘increasingly cluttered environment’ of Olympic sponsorship.²²⁵ Some marketing experts have characterised the usefulness of sponsorship as a strategic tool to achieve a competitive advantage as being based largely on its heterogeneous distribution, inimitability, imperfect mobility, and pre-emptive limits to competition, which qualities, taken together, characterise sponsorship as a ‘scarce resource that provides the capacity to differentiate affiliating sponsors’ brands from their competitors in the minds of consumers’.²²⁶ In this light, the dangers of advertising clutter in the realm of mega-event sponsorship should be clear.

Another benefit of a sports product for the sponsor is what is referred to as ‘brand association transfer’:

In addition to brand exposure, many authors suggest that developing and communicating an association between the sponsoring brand and a sponsored property, such as a league or a team, is an objective that can be achieved through a sponsorship... [S]ponsorship goals assume that the target audience—the “consumers” or fans—will transfer their loyalty from the sponsored property or event to the sponsor itself. To help achieve this transfer, the sponsorship often permits the advertiser to communicate its association to a league or team by being able to place that logo on product packaging and in its advertisements. The popularity and the positive image and reputation of these sports teams and events can precipitate and indeed foster a similar favourable feeling by fans and consumers alike towards their brand.²²⁷

And this can translate into increased sales by changing the very way in which consumers think about a product (which is particularly pertinent in the sports merchandising market but also relevant in respect of sponsorship):

Research indicates that achieving a brand association transfer through sponsorship strategies potentially could influence consumers’ behaviour, including increasing purchases of the sponsoring brand product... Loyalty towards a preferred team may have beneficial consequences for corporate sponsors. Consistent with the idea of in-group favouritism, higher levels of team identification among attendees of a sporting event appear to be positively related to intentions to purchase a sponsor’s products.²²⁸

FIFA’s web site (at www.fifa.com) explains that licensing of event marks in the event merchandising market makes a lot of sense:

²²⁴ See Seguin and O’Reilly 2008.

²²⁵ Ibid. 72.

²²⁶ Cobbs 2011, with reference to Amis, J; Pant, N and Slack, T ‘Achieving sustainable competitive advantage: A resource-based view of sport sponsorship’ 11(1) *Journal of Sport Management* (1997), pp. 80–96; and Fahy, J; Farrelly, F and Quester, P ‘Competitive advantage through sponsorship: A conceptual model and research propositions’ 38(8) *European Journal of Marketing* (2004), pp. 1013–1030.

²²⁷ Fortunato and Richards 2007, pp. 40, 41. See also O’Reilly, N; McCarthy, L; Seguin, B; Lyberger, M ‘Sponsorship and the Super Bowl: A longitudinal analysis’ (2005) at 55—available online at the time of writing at http://luxor.acadiau.ca/library/ASAC/v26/03/26_03_p052.pdf.

²²⁸ Ibid. 41. See also Grohs et al. 2004, pp. 119–138.

Research has shown that applications of sports event symbols to packaging and products—or as a component of an advertising campaign—provide a significant marketing advantage: consumers are more than 50% more likely to buy the products. This is now widely recognised, with the result that the licensing of sport marks has become a significant aspect of the sports marketing business.

The lifestyle element of sports sponsorship is also further accentuated by the social and cultural significance of mega-events, which draws in consumers who want to be involved in such historic events by ‘owning a piece’ of the event. In the Olympic context, it has been observed that most spectators only ever witness a mediated version of the Games, and the Olympic movement has through its licensing of symbols broadened opportunities for viewers to ‘participate’ personally—spectators can ‘relish their Olympic experience by drinking official Olympic beer, nibbling on official Olympic mascot cheese shapes, wearing official Olympic clothing, sitting on official Olympic rugs, clutching official Olympic toys while talking to friends on official Olympic telecommunications devices’.²²⁹ This might explain why (or how) revenues from licensing for the OCOGS has increased from USD 18 million for Seoul in 1988 to USD 163 million for Beijing in 2008 (where over 8,000 different items of merchandise were available from 1,000 retail units across China and beyond, and reportedly netted more than USD 100 million in royalties).²³⁰ This side of the commercial exploitation of events, namely the sports merchandising industry, thrives on the licensing of intellectual property and is a significant money-spinner for event organisers or sports rights holders. It can, however, also generate legal challenges (for example, in respect of competition or antitrust law issues, which I will examine in more detail later). The following description found in the judgment of the U.S. Court of Appeals for the 7th Circuit in *American Needle, Inc v NFL*²³¹ of the rise of merchandising in one of the major American professional sports leagues does well to explain the trend, and the potential for disputes:

Realising that the success of the NFL as a whole was in their best interests, in the early 1960s the individual teams sought to collectively promote the NFL Brand—that is, the intellectual property of the NFL and its member teams—to compete against other forms of entertainment. With this promotional effort in mind, in 1963 the NFL teams formed NFL Properties: a separate corporate entity charged with (1) developing, licensing, and marketing the intellectual property the teams owned, such as their logos, trademarks, and other indicia; and (2) “conduct[ing] and engag[ing] in advertising campaigns and promotional ventures on behalf of the NFL and [its] member [teams].” Among other things, the NFL teams authorised NFL Properties to grant licenses to vendors so the vendors could use the teams’ intellectual property to manufacture and sell various kinds of consumer products that bear the teams’ logos and trademarks—products such as team jerseys, shirts, flags, and, as pertinent here, headwear, like baseball caps and stocking hats. For a while after its

²²⁹ Magdalinski and Nauright 2004, p. 185.

²³⁰ From the 2010 edition of the IOC’s *Olympic Marketing Fact File*, available online at the time of writing at http://www.olympic.org/Documents/fact_file_2010.pdf; see also Bacalao-Fleury 2011, p. 198.

²³¹ 538 F.3d 736 (2008) at 737–738—for more on this case, see the discussion in Chap. 6.

establishment, NFL Properties granted headwear licenses to a number of different vendors simultaneously; one of those vendors was American Needle, which held an NFL headwear license for over 20 years. But then in 2000, the NFL teams authorised NFL Properties to solicit bids from the vendors for an exclusive headwear license. Reebok won the bidding war, and in 2001 the NFL teams allowed NFL Properties to grant an exclusive license to Reebok for ten years. NFL Properties thus did not renew American Needle's headwear license, or the licenses of the other headwear vendors. American Needle responded to the loss of its headwear license by filing an antitrust action against the NFL, NFL Properties, the individual NFL teams, and Reebok. As relevant here, American Needle claimed that the exclusive headwear licensing agreement between NFL Properties and Reebok violated § 1 of the Sherman Antitrust Act, which outlaws any "contract, combination... or conspiracy, in restraint of trade."

I have touched on sports merchandising here because the above-mentioned range of disparate products and services marketed through use of reference to or association with the mega-event as marketing vehicle or platform highlights the fact that mega-events nowadays are characterised by a veritable publicity 'carpet-bombing' by the event organiser (such as FIFA or the IOC), sponsors, and the local organisers. This brings to mind the words of Justice Frankfurter on the use of trademarks, expressed nearly 70 years ago:

[W]e live by symbols, [and] it is no less true that we purchase goods by them. A trademark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol.²³²

I will revisit the relevance of such marketing strategies in the context of ambush marketing and of allegations of infringement of modern 'association rights' to mega-events in [Chap. 8](#), where I will try and throw some light on the thematic space of the mega-event as marketing tool and object of legal protection.

For the sponsor or supplier the 'official' designation of its involvement with the event lends a measure of prestige for being selected by e.g. Olympic authorities as being good enough to be associated with the Games, while the consumer is left with a perception that such official status denotes superior quality of the product or service. Of course, this 'official' status and exclusivity of the merchandise sometimes goes to extremes—compare the use of a 'genetic stamp' by incorporation of DNA material of Olympic swimmer Dawn Fraser into the labels of Olympic merchandise sold prior to the 2000 Sydney Olympics.

When sponsorship consists of exclusive rights to such an already attractive marketing vehicle, the sponsor will enjoy a high level of exposure accompanied by the significant benefits of a lack of competition and the avoidance of the clutter associated with normal advertising.²³³ For the rights grantors (the sports organisations) the benefits of providing exclusive exploitation rights are obvious,

²³² *Mishawaka Rubber and Woollen Manufacturing Co. v S S Kresge Co.* (1942) 13 US 203, at 205.

²³³ See Mullin et al. 2007, p. 322.

namely, primarily, the higher rights fees that can be charged in terms of the greater value provided. While their legal advisors need to be alert to potential conflicts (e.g. the provision of conflicting rights to competing sponsors), which might in itself cause clutter and expose the organisations to litigation, the substantial cost of exclusive rights provide a significant source of revenues in respect of mega-events. Michael Payne, former marketing director of the IOC, has stressed the importance of exclusivity for sponsors of the Games:

Exclusivity has been one of the cornerstones of the Olympic Movement's marketing programmes. The knowledge that a company can invest in the Olympic movement and be certain that they are not going to be undermined by a last-minute surprise promotional campaign by their competitor, was a key factor in driving the value of Olympic sponsorships. The TOP programme was designed to be as ambush-proof as possible, providing partners with one of the highest levels of protection of any major sports property.²³⁴

Category exclusivity of sponsorships can be defined as 'the right of a sponsor to be the only company within its product or service category associated with the sponsored property'.²³⁵ These rights as granted to sponsors may also sometimes be referred to as 'sector rights':

[S]ponsors with sector or category rights enjoy uncompetitive status with the event in that they are the sole representation from the sector/market in which they operate. These rights offer sector, market or category exclusivity for the sponsor. Title or presenting sponsors may also have these rights... These rights, once seen as a negotiable right, are now generally viewed as being a prerequisite. Sector exclusive sponsors can sit more comfortably into an event sponsorship programme and work together productively and so most events now understand that they will not be able to attract any level of sponsor without ensuring that they have exclusive sector rights.²³⁶

The development of event sponsorship since the introduction of exclusivity at the highest level of global sports sponsorship (with the 1988 Seoul Olympic Games, as mentioned earlier) has brought this form of sponsorship to the fore, to the extent of having created an expectation of such rights on the part of event sponsors. Masterman notes that it is arguable that 'while sector exclusivity is not entirely 100% used at all events it is, nevertheless, now a virtual necessity... The implications for event managers are that, whereas previously this might have been the cutting edge in recruiting a sponsor, the fact now is that sponsors expect such status as standard'.²³⁷ I would suggest that this expectation plays an important role in respect of the pejorative and highly critical view of 'ambushing' of events that one encounters amongst event sponsors as well as the often overly-aggressive

²³⁴ Payne 2006, pp. 142, 143.

²³⁵ Govoni 2004, p. 32; see also Carrie Urban Kapraun 'Fun with category exclusivity', 7 October 2009, writing on the IEG sponsorship blog available online at the time of writing at <http://www.sponsorship.com>.

²³⁶ Masterman 2009, p. 286.

²³⁷ Masterman 2009, p. 300.

responses to alleged ‘ambushes’ on the part of event organisers (both of which we will examine more closely in [Chap. 3](#)). If sponsors expect exclusivity and that it is their privilege to exclude all competitors from the sponsored event, the organisers will naturally feel bound (and contractually so) to deliver such a state of affairs (not only because this expectation allows the organisers to demand a higher sponsorship fee). I would also suggest that this expectation on the part of sponsors has played a central role in what I will argue (in [Chap. 8](#)) to be the bloated and unrealistic conception amongst sponsors and event organisers of the scope of the thematic space of the modern sports mega-event. And, in [Chap. 10](#), I will refer to the observation by some commentators that this sponsor expectation may, in fact, be a significant danger to the funding of sports mega-events in future.

Joe Cobbs explains what category exclusivity is and how it works, and why it is so important for the parties involved:

In the context of commercial sponsorship, a designation of product category exclusivity acts to exclude competitors within a sponsor’s product or service category from a controlled sports environment. In such cases, the sponsored team or event agrees to refrain from affiliating with any of the sponsor’s rivals within a product or service category. Such category exclusivity has been recognised as among the most valued rights afforded corporate sponsors of sport, and therefore, sponsors often pay a premium price to achieve such a restricted promotional position... To ensure three of the four strategic elements [of sponsorship, namely] (heterogeneous distribution, imperfect mobility, and limits to competition), sponsored enterprises often offer multi-year product category exclusivity to potential corporate partners in exchange for a price premium. Category exclusive sponsorships contain an agreement by the sponsored enterprise to forgo any potential promotional affiliation with a corporate partner’s competitors in a defined product/service category for the duration of the sponsorship arrangement. In doing so, the sponsored enterprise has confined both the distribution and mobility of their sponsorship resource. A common additional clause that grants the sponsor the right of first acceptance/refusal to continue the relationship at the conclusion of the initially specified term also sets a strict limit to competition for the sponsorship resource going forward. Many corporate sponsors are not only willing to marginally increase their right payment for this type of rival exclusion, but research has shown product/service category exclusivity to be the most important criteria in sponsorship selection.²³⁸

Such exclusivity can extend throughout the property (e.g. the mega-event) and cover all sponsor benefits, or different levels of exclusivity may exist (e.g. whereby a sponsor may enjoy exclusivity within a certain category of product or service—for example, telecommunications services or sporting apparel—but where other sponsors (competitors) may, for example, have advertising rights in respect of broadcasts of the event). The benefits of exclusivity for the sponsor may also differ according to the nature of the product or service and its potential relationship to the sponsored property:

Exclusivity avoids competitive interference that would be incurred in other media contexts. For some industries, such as beer, soda, and credit cards, the characteristic of exclusivity provides not only brand exposure but the additional advantage of selling their

²³⁸ Cobbs 2011.

product through point of-purchase at the stadium without competition. Other exclusivity agreements could include an athlete only using his or her sponsors' equipment, i.e., Tiger Woods only using Nike golf balls, or a league only using its sponsors' product or service, i.e., the NFL only having Reebok manufacture its licensed headwear.²³⁹

I will later (in Chap. 6) examine the potential competition (antitrust) implications of sponsorship exclusivity arrangements, and it should be borne in mind that this nature of the product or service and the resultant benefits of exclusivity for the sponsor in any given case may be relevant in this regard (e.g. in respect of determination of the relevant market for purposes of anti-trust review, and of the impact of such arrangements on that market—compare pouring rights and equipment sponsorship exclusivity, which may both have a more limited impact and/or may relate to a smaller market than other forms of product/service exclusivity deals with a wider reach beyond the event venue or playing field). As Fortunato and Martin observe:

[P]erhaps in antitrust cases that concern sports leagues the courts will begin to recognise a distinction based on the product category. A beer sponsorship with a team is limited by geography, for example, while a sponsorship with a clothing manufacturer has fewer limitations of that sort any more.²⁴⁰

The exclusivity of the arrangement derives, of course, from negative contractual obligations undertaken by the rights grantor to refrain from granting similar rights to other potential sponsors (and such purported grants of rights would, therefore, constitute breach of the sponsorship contract²⁴¹ and, I would suggest, might even be argued to constitute a form of ambush marketing *vis a vis* the existing exclusive sponsor).

Once it is established that category exclusivity is on offer, sponsor and rights grantor should negotiate and agree upon which categories will be covered as well as the extent of the exclusivity within such categories. It is usually in a sponsor's best interest to have total category exclusivity, but that may be prohibitively expensive from the perspective of the would be sponsor, or it may not be in the best interest of the property, it may not be possible because of existing agreements with third parties, or the rights grantor might not control certain aspects of the property for the purposes of granting exclusive rights. Total category exclusivity is the most costly form of sponsorship, and not having any category exclusivity could significantly lower both the cost and the value of a sponsorship.²⁴² Of course, it is not only the above-mentioned potential constraints to the availability of category exclusivity which might determine whether (or the extent to which) exclusivity is

²³⁹ Fortunato and Martin 2011.

²⁴⁰ Ibid.

²⁴¹ Compare the facts of *Force India Formula 1 Team Ltd v Etihad Airways and Aldar Properties* [2010] EWCA Civ 1051.

²⁴² Kapraun *supra*.

obtained. Potential sponsors will make a determination of their need for exclusivity based on their objective with the relevant sponsorship. If the potential sponsor is convinced that an association with the property (e.g. mega-event) will affect its target audience's perception of the sponsor or their purchase intent, it should pursue category exclusivity as a means of locking out competitors from associating with the property. If its objective is more focused it may not make sense to pay the premium for exclusivity (e.g. where the sponsor is simply trying to leverage a particular soft drink brand it may not make sense to demand and pay for exclusivity within a category that might include energy drinks, fruit juices, etc.). Other than that, it has been observed that exclusivity is not a rigid status; depending on the negotiating power of the event it may be possible to 'segment very finely certain market sectors and still achieve exclusivity'—the example cited is the Wimbledon tennis event, which in 2005 had seven distinct official drink sponsors (in 2008 there were five, in categories including official wine, official water, official champagne, official coffee and official still soft drink).²⁴³

Finally, in respect of the cost of exclusivity there is another aspect that has received little attention to date, namely that the protection of exclusivity (by the rights grantors, local organisers etc. in terms of the commercial agreements providing such exclusivity) may in fact be counter-productive from the sponsor's perspective, i.e. by being a factor in raising the cost of such exclusive sponsorships. The rights grantors, though, are unlikely to ever raise such an argument (in the interest of maintaining maximum revenues from sponsorship) and the potential sponsors are faced with a monopolistic supply of opportunities for sponsorship from the rights grantor governing bodies.

In respect of sports mega-events it is important to note that, while the category exclusivity sponsorship model has become the norm, the extent of exclusivity provided may differ from event to event and between the different sports governing bodies who act as rights grantors in respect of mega-events. As discussed above, the IOC's TOP programme in respect of the Olympic Games, which pioneered this form of exclusivity for mega-events, provides far-reaching benefits to sponsors regarding the exclusivity of their rights and the exclusion of competitors. A TOP sponsor pays a premium, but receives exclusivity that is international and extends across the structure of the Olympic Movement and includes different entities. A TOP sponsor obtains global category exclusivity that extends to the IOC, to all National Olympic Committees (NOCs) and their national Olympic teams, to the relevant Organising Committee (or OCOG) in respect of the Games, and to the Olympic Games event itself, while also providing preferential access to Olympic Games broadcasts (i.e. a 'right of first refusal' in respect of broadcast sponsorship or advertising in order to prevent 'ambushing' of event broadcasts by competitors). What the TOP sponsor does not receive is category exclusivity in respect of the

²⁴³ Masterman 2009, pp. 300, 301.

sponsoring of individual athletes or of national governing bodies for participating sporting codes.²⁴⁴

FIFA pioneered its own (what one observer calls) ‘exclusive competitive sponsorships’ at the 1972 FIFA World Cup in Mexico,²⁴⁵ but in recent years has followed the lead of the Olympic Movement’s TOP model. In contrast to TOP, sponsors of FIFA’s football World Cup receive considerably less ‘bang for their buck’ in respect of exclusivity of their rights. A ‘FIFA Partner’ for the World Cup (the highest level of corporate sponsor for the event) has category exclusivity that extends to FIFA, the FIFA World Cup and all other FIFA tournaments (for example, the Confederations Cup which precedes each instalment of the football World Cup as a ‘dress rehearsal’). It does not extend to regional football confederations (such as UEFA), country federations, individual national teams, club teams, players or qualifying matches leading into the World Cup.²⁴⁶ Of course, there are other differences between event organisers’ treatment of sponsors. One example where FIFA sponsors receive more for their outlay than the IOC’s sponsors relates to the IOC’s ‘clean venue’ policy which is not in place for FIFA’s events. The IOC, ostensibly in the interests of promoting the focus on sport rather than commercialisation (and, one might assume, largely as a result of the earlier criticism of the swiftly creeping commercialism surrounding the Games during the last decades of the 20th century), does not allow any advertising within its venues,²⁴⁷ which clearly impacts on the marketing value received by sponsors (also from event broadcasts). A positive spin-off from the clean venue requirements is that broadcasters can charge a premium to fewer (official) sponsors, who are given a right of first refusal to sponsor event broadcasts, because of the removal of clutter and the potential for such sponsors to fully leverage their involvement in the event.²⁴⁸ The Union of European Football Associations (UEFA) has taken broadcast sponsorship protection a step further, by buying and controlling all advertising time during matches, and allotting time to sponsors (protecting

²⁴⁴ See Kapraun *supra*, writing on the IEG sponsorship blog available online at the time of writing at <http://www.sponsorship.com>. The 2010 edition of the *Olympic Marketing Fact File* contains the following description of the TOP programme and the benefits that it brings to TOP sponsors:

‘The TOP programme provides each Worldwide Olympic Partner with exclusive global marketing rights and opportunities within a designated product or service category. The global marketing rights include partnerships with the IOC, all active NOCs and their Olympic teams, and the two OCOGs and the Games of each quadrennium. The TOP Partners may exercise these rights worldwide and may activate marketing initiatives with all the members of the Olympic Movement that participate in the TOP programme’.

²⁴⁵ Schwab 2006, p. 6.

²⁴⁶ *Ibid.*

²⁴⁷ See Rule 51.2 of the Olympic Charter (2010):

‘No form of advertising or other publicity shall be allowed in and above the stadia, venues and other competition areas which are considered as part of the Olympic sites. Commercial installations and advertising signs shall not be allowed in the stadia, venues or other sports grounds’.

²⁴⁸ Magdalinski and Nauright 2004, p. 196.

sponsors from potential ambush campaigns and also forcing them to better leverage their investment).²⁴⁹

The benefits arising from sponsorship of sport, especially when coupled with category exclusivity, for sponsors and sports federations alike should be clear:

Because sport with its self-governance has an exceptional and internationally acknowledged status, enjoying monopolistic elements in its governance and management, advertisers can indirectly enjoy similar benefits. For instance, being the sole provider of certain category of products that is allowed to enjoy the benefits of associating with a certain sport or event. Also, when the rights are acquired from a sole existing seller and in packages, it is arguably easier to conduct advertising campaigns, the strategy usually by default unanimously covering all the channels for the message to reach the audience. In most cases it is probably also easier to negotiate, enter into agreements and implement them, when a sole rights holder needs to be contracted, provided that the acquirer is able to provide substantial financial injections.²⁵⁰

By way of summary, therefore, the main advantages of category exclusivity sponsorship for potential sponsors in the marketing marketplace are the following:

- The sponsor receives a high measure of brand exposure through its official status and the often significant rights afforded official sponsors (e.g. the rights to use event logos and intellectual property in its advertising and other marketing campaigns);
- Apart from the brand exposure, research has shown that sports represent a conducive environment for sponsors to achieve brand association transfer, where (in essence) the fans transfer their loyalty to the sports product (e.g. a team like Manchester United or an event like the Olympic Games) to the sponsor's brand;
- It has also been shown that, through such brand association transfer, the sponsorship can influence consumers' behaviour in a positive manner;
- The sponsor also receives, by dint of the exclusivity of the sponsorship, the ability to exclude its competitors, in essence creating an environment for the marketing of its brand without fear of competition (compare, for example, arrangements which prohibit competitors of official sponsors to buy advertising time in respect of event broadcasts). In addition, these exclusivity arrangements contain legal obligations for event organisers (rights grantors) to actively take steps to protect such exclusivity in the interests of protecting the sponsor's investment (this is why event hosting bids include demands for organisers or host governments to establish a legal framework conducive to commercial rights protection for the event, and hosting contracts create legally enforceable obligations in this regard); and
- Sports sponsorship, and specifically sponsorship exclusivity as discussed here, provides an ideal opportunity for would be sponsors to obtain rights to the commercial exploitation of a desirable property, which rights can often be tailored to best suit the sponsor's needs (more so than in other sponsorship or marketing environments):

In addition to the brand exposure, the image association possibilities, and the possibility of influencing purchasing behaviour that have been demonstrated by scholars, another aspect that makes sponsorship a particularly attractive strategy for many corporations is that all of the parameters of the sponsorship agreement are negotiable. This flexibility in negotiations makes the promotion much more malleable than other forms of marketing communication. Indeed, it is the sponsoring corporation's

²⁴⁹ Burton and Chadwick 2009, p. 9.

²⁵⁰ Gradauskaite 2010, par. 34.

responsibility to negotiate and attempt to control for factors that could otherwise hinder the success of a sponsorship agreement. In other words, it is a custom-fit strategy where sponsors can be surgically selective in choosing their sponsorships and bargaining for the best conditions. Like most other aspects of these agreements, exclusivity is a frequently negotiable element for the sponsoring corporation.²⁵¹

The importance of sponsorship exclusivity for the hosting of sports mega-events was acknowledged in a 2009 resolution issued by the International Association for the Protection of Intellectual Property (AIPPI) in response to a working committee's examination of the efficacy of trademark and unlawful competition protection for major sports events in different jurisdictions:

The value of the sponsorship of major sports events will partially depend on the nature of the exclusive rights which can be licensed or awarded to official sponsors. One of the important issues with major sports events is therefore the value which sponsors place on the exclusive rights available to them. The value of the exclusive right available to official sponsors will depend, *inter alia*, on its scope and enforceability.²⁵²

While sponsorship exclusivity is thus a key component of the commercial exploitation of mega-events, I do not believe it to be immune from legal scrutiny. When we consider the law's protection of commercial rights to sports mega-events in the chapters that follow, it will emerge that this notion of sponsorship exclusivity is central to the exercise of determining the legitimacy of such protection. More specifically, in Chap. 6, I will re-examine the concept of sponsorship exclusivity in the context of a competition (antitrust) law review of mega-event rights protection. Sponsors and organisers may often jealously guard the exclusivity provided in these agreements, which may include, *inter alia*, provisions making athlete eligibility for top-level competition dependent on toeing the line in using only official sponsors' equipment²⁵³ or even disparagement of exclusive sponsors' competitors.²⁵⁴ The potential competition law implications of such conduct (and of the agreements they aim to enforce) should be clear.

²⁵¹ Fortunato and Richards 2007, p. 42.

²⁵² AIPPI Resolution on Question Q210: 'The protection of major sports events and associated commercial activities through Trade Marks and other IPR', adopted at the AIPPI Executive Committee meeting in Buenos Aires, 14 October 2009—English version available online at the time of writing at <https://www.aippi.org/download/committees/210/RS210English.pdf>.

²⁵³ Compare the recent litigation involving the Dutch badminton federation and its exclusive equipment sponsor Yonex, which is discussed in Chap. 6.

²⁵⁴ Compare the antitrust litigation between *TYR Sports, Inc v Warnaco Swimwear, Inc et al.* 679 F. Supp. 2d. 1120 (2009), which included federal antitrust claims in terms of the Sherman Act, of conspiracy and disparagement against Warnaco (manufacturer of the Speedo brand of clothing), U.S. Swimming and the U.S. national swimming coach. The plaintiff's claims included allegations (which it failed to prove in evidence) that U.S. Swimming had refused it to advertise in its official magazine, *Splash*, the largest-selling swimming magazine in the USA, and that photographs in the magazine had been airbrushed to remove the logos of competitors of Speedo from view. It was also alleged that Schubert, the U.S. national swimming coach had prior to the 2008 Beijing Games told athletes that 'I would strongly advise them to wear the [Speedo] at trials, or they may end up at home watching [the Olympics] on NBC'.

2.5 Conclusion

Developments in respect of the marketing of the Olympic Games during the last two decades of the twentieth century were pivotal in establishing the trends and practices in commercialisation of sports mega-events today. More specifically, it should also be clear that the developments described above have contributed significantly to the establishment of the current model of commercial monopolies regarding such events. First, the TOP programme emanated from fears regarding the uncertainty of the television rights market and was, specifically, developed in an attempt to address potential problems for the IOC (in respect of expectations as to the revenues to be derived from future Games) caused by the open market and free competition between broadcasters and media companies. TOP itself is based in the very exclusivity of rights granted to a limited number of corporate sponsors to associate with the Games. Furthermore, as described above, the long-term sale of television rights in the form of package deals (such as that first seen with the Sunset Project) has become the norm, and such ring-fencing of rights happens not only in respect of broadcasting rights but also in the context of sponsorship programmes modelled on TOP (for example, VISA is currently a TOP Olympic Partner until 2020).

In the next chapter we will examine ambush marketing of sports events and developments in this regard in recent years (in respect of both ‘ambushing’ practices and the measures used to combat them). It will be shown that, in fact, ‘ambush marketing’ appears to have come to exist in large part as a result of the above development of the modern mega-event sponsorship model. When the IOC first moved to category exclusivity of sponsorships and the commercial value of the related rights skyrocketed, many businesses (also those who may in the past have been actively involved in sports sponsorship) found themselves on the outside looking in, and unable to afford the now hefty price tag of involvement in sports-related marketing. Octagon’s head of Olympic marketing, Bob Heussner, observed that when the TOP programme was first implemented in Seoul in 1988, entry level was about GBP 8 million, which had escalated to GBP 53 million (and a multiple of that amount to activate) in 2008.²⁵⁵ Apart from the prohibitive cost of mega-event sponsorship, the TOP model as it has developed is of course also restrictive in terms of the number of sponsors who may attain involvement with the event. We have seen that the ‘all comers welcome’ approach followed at the Montreal Games (which saw a total of 628 sponsors and suppliers involved, providing a paltry USD 7 million) and in Sarajevo in 1984 (where the organising committee signed 447 foreign and domestic sponsorship agreements)²⁵⁶ was seen

²⁵⁵ From the short article entitled ‘Bush-Whackers’, 21 August 2008 in *Marketing Week* (available online at the time of writing at <http://www.mad.co.uk/Main/Home/Article/17d67f5e4e9e42fc9cd8d88de18c2749/> ‘Bush-whackers.html’).

²⁵⁶ See the 2010 edition of the IOC’s *Olympic Marketing Fact File* (available online at the time of writing at http://www.olympic.org/Documents/fact_file_2010.pdf).

to be unsuccessful, and that the number of sponsors for subsequent Games has been limited in order to charge a premium for the granting of exclusive rights. Club membership, simply, is not open to everyone, and only the wealthiest applicants need apply.

While the Olympic Movement's (and other sports organisations') move to the TOP programme type of event commercialisation model accordingly brought with it very significantly increased income, such development also saw those who so frequently and vocally complain about and who so actively seek to combat ambush marketing, to a significant extent, having been the masters of their own fate.²⁵⁷ Exclusivity of opportunities and rights to the sports product has served to create a lack of opportunities for many, and has apparently seen necessity as the mother of invention in respect of often creative new forms and ways of sports-related marketing and advertising.²⁵⁸ It should also be noted that, apart from the fact that category exclusivity in a sense created ambush marketing, such sponsorship arrangements may also serve to facilitate ambushing and the efficacy of an ambush campaign. Johnson has observed, for example, that the complexity and fluidity of sponsorship category arrangements (in the context of the Football Association's rather involved system) make it difficult for consumers to understand who is, and who is not, an official sponsor.²⁵⁹ The proliferation of official sponsors in a multitude of sponsorship categories may serve to create advertising clutter, thereby in fact adding value to an ambusher's campaign by causing the ability to create confusion amongst consumers regarding its own status or involvement with the event.

The sports organisations' and official sponsors' response to the 'ambush' may be attributable, on the one hand, to greed (i.e. wanting an even bigger slice of the

²⁵⁷ Johnson observes that '[t]he rise of ambush marketing was a result of the increasing sophistication of sports sponsorship', and '[t]he rise of ambush marketing is directly related to the media attention given to sporting events'—Johnson 2007, p. 6. Elsewhere (Johnson 2008, p. 24) Johnson also observes:

'In real terms ambush marketing is the result of exclusive sponsorship deals. Sport has involved some form of sponsorship from the very beginning. The early days of sports marketing, during the 1950s and 1960s, witnessed a substantial growth in sponsorship deals and those wanting to be sponsors, but during this period anyone who wanted to become a sponsor could arrange some sort of deal. Accordingly, everyone was welcome and the varying levels of competition that existed meant that there was no need to ever ambush an event. The problem with this open access model was that it did not provide sufficient funds to host major sporting events and, in particular, the Olympic Games. By the late 1970s the International Olympic Committee had serious financial problems and hosting the Olympic Games was seen as an albatross around the neck of the host city'.

²⁵⁸ See, for example, Barney et al. 2004, p. 236:

'The question of whether ambush marketing is an unethical or imaginative practice is widely debated within the sponsorship industry. Arguments for or against ambush marketing vary widely depending on whether one adopts a narrow or broad view of the practice itself. One thing remains certain, however: the growth of Olympic sponsorship expenditure world-wide has been accompanied by a parallel growth in the practice of ambush marketing'.

²⁵⁹ Johnson 2007, p. 6.

pie or trying to close the door on the competition) or, on the other hand, to a justified fear of sabotage and misappropriation of expensive to obtain rights and a resultant threat to revenue streams that are integral to the ability to host such spectacles. We will consider these possibilities in more detail below, after a brief examination, in the following chapter, of what ambush marketing is—and what it is not.

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