



I was rather alarmed that the AA response did not address our concerns about the proposal for an 'Association Right' and I therefore immediately, though in some what of a hurry, put together the IPAs objections to this proposal, which I now attach again.

I appreciate the time for responding has now expired. I hope it is not too late for our concerns to be considered at least and if possible we would like the IPA Response made available to the public, it is not confidential and indeed I feel obliged now to commence active lobbying to prevent what we consider a totally inappropriate extension of UK IP law.

I feel the consultation and the Bill is also being unnecessarily rushed and pushed through before any of us have even the chance to see the Host City Contract and its requirements. We feel very strongly that an "association right" is not necessary and certainly not in the best interest of local business in Scotland.

The IPA hopes that the advertising industry can be part of discussions as to what is a fair and balanced response to alleged ambush marketing - and please be assured I have member agencies who act for both official sponsors and non official sponsors so I come to this issue as a neutral party.

If I can be of any assistance in future advertising related discussions then please feel free to call. The IPA has many Scottish advertising agencies as members who all have a very serious vested interest in Glasgow holding the Games and in the opportunities the event will mean.

RESPONSE OF THE INSTITUTE OF PRACTITIONERS IN ADVERTISING TO THE CONSULTATION BY THE SCOTTISH EXECUTIVE ON THE DRAFT GLASGOW COMMONWEALTH GAMES BILL

1. Background of the IPA

The Institute of Practitioners in Advertising (the "IPA") is the trade association and professional institute for UK advertising agencies, including many in Scotland. Our 269 corporate members are primarily concerned with providing strategic advice on marketing communications, including creating and/or placing advertising. Based throughout the country, they are responsible for over 85%¹ of the UK's advertising agency business and play a pivotal role in advising the nation's companies on how they should deploy their total marketing communications spend of £42 billion².

Further information about the IPA can be found at the following location:
www.ipa.co.uk

¹ Nielsen MMR 2005

² Bellwether Report 2005

2. Support for Advertising Association Response

The IPA is a member of the Advertising Association and supports the AA response to this consultation. However, the IPA feels that the industry's serious concerns about the introduction of another major event association right are insufficiently emphasised in the AA response, and the objections made are somewhat obscured by other issues of lesser concern to the IPA. This paper will therefore focus purely on the association right element of the Draft Bill.

3. Association Right and Limit of this IPA Response

The IPA is surprised that such a speedy consultation is being undertaken by the Scottish Executive on its draft Glasgow Commonwealth Games Bill and the Pre-Regulatory Impact Assessment (PRIA) which accompanies it, prior to winning the tender to hold the Commonwealth Games.

Even more surprising and of considerable concern to the IPA is that the draft Bill provides for an association right similar to that contained within the London Olympic Games and Paralympic Games Act 2006. Throughout the London Olympic Association Right (LOAR) discussions the IPA and other advertising representatives were comforted by MP promises that the Olympics are a unique event and that no similar association right would be available to other major event holders, for very good reasons as we elaborate below.

The IPA wish to make plain that it entirely supports the adequate protection of official sponsors but that there has to be a balance between protection and freedom of commercial expression. The wonderful success of the UK in winning the 2012 Games has been correctly trumpeted as a major opportunity for all Londoners and small businesses that could never hope or afford to be official sponsors.

Should Scotland win the right to host the Commonwealth Games this will be a similar triumph and it ought to be a wonderful opportunity for local and regional business. The proposed introduction of an association right seriously threatens such opportunities and in particular it will:

- Greatly extend existing law that already offers rights holders considerable protection
- Limit genuine freedom of commercial expression
- Set yet another unfortunate precedent for other major event holders to seek to emulate with serious consequences for business, advertisers, agencies and fair competition
- Create greater power for event holders that will also lead to price increases for official sponsors so that they, as well as those who will never be able to become official sponsors, are worse off.
- Unfairly prevent smaller businesses from legitimately benefiting from the Games even though promoters of the Commonwealth Games have emphasised the benefits to the region.

With this in mind the IPA make some suggestions, observations and objections.

What is ambush marketing?

Ambush marketing is an attempt by a third party to associate itself directly or indirectly with an event or the event's participants without their permission, thereby potentially depriving official sponsors of the commercial value derived from the 'official' designation.

Examples of blatant ambush marketing include:

- Advertising on the perimeter of an event
- Handing out unofficial merchandise such as Heineken giving away branded foam megaphones/hats outside venues at Euro 2004.
- Linford Christie's Puma logo contacts at the 1996 Olympics, where Reebok was an official sponsor.
- American Express's ad campaign in the VISA-sponsored 1994 Lillehammer Winter Olympics, featuring the slogan "If you are travelling to Lillehammer, you will need a passport, but you don't need a Visa!"

However there is a big difference between ambush marketing and referring to or associating an event with a third party that is not an official sponsor. Where there is no implied suggestion that the advertiser is an official sponsor and consumers are not going to be confused into thinking there is any such association there is no ambush marketing.

If legislation has to be introduced, though the IPA would argue it is unnecessary and anti competitive, any legislation should distinguish between "unfair association" which includes any implication of endorsement by the advertiser of the Games on the one hand and mere reference to the Games on the other. The latter is permissible under normal trade mark law. Sec 10 (6) of the Trade Mark Act allows use of a trade mark for the purpose of identifying goods and services unless the use "*without due cause takes unfair advantage of or is detrimental to the distinctive character or repute of the mark*".

Mere reference to the Games, or allusion to them, without any use of logos or protected words, should be subject to the same sought of proviso of fairness, providing there is no implied endorsement/sponsorship of the Olympics. We believe this complies with the Commonwealth Federation requirements, which themselves must also be balanced and compliant with EU competition rules.

Existing Legal Protection

All brands, creative ideas and concepts deserve protection under both law and regulation. Under English law, such work is protected by copyright and trademark law, and the law of passing off. It is our strong view that these laws provide the protection the Commonwealth Federation requires, and this is borne out by the evidence of the Manchester Commonwealth Games, which is discussed in detail below.

There are also other statutory protections contained in The Trade Descriptions Act 1968 and The Control of Misleading Advertising Regulations 1988 (as amended).

The protections afforded by the 1968 Act and the 1988 Regulations to sponsors will also shortly be substantively enhanced. This is due to their partial and full repeal respectively as a consequence of implementing Directive 2005/29/EC “on unfair business-to-consumer commercial practices” and (re-)implementing Directive 84/450/EEC “concerning misleading advertising” (as amended by Directive 97/44/EC to cover comparative advertisements and since codified as Directive 2006/114/EC). The secondary legislation superseding the 1968 Act and the 1988 Regulations will be the Consumer Protection from Unfair Trading Regulations 2007 and the Business Protection from Misleading Marketing Regulations 2007.

In addition event holders such as the Commonwealth Federation, the IOC and BOA have incredible power to make participation in the Games by sportsmen and women, sponsors and ticket holders dependent upon strict contractual terms.

It is also worth noting in this context the success of the organisers the last time the Commonwealth Games were held on UK territory, in Manchester in 2002. The body of law available then did not include the additional protections afforded by the secondary legislation as now suggested yet the experience of and the conclusions drawn by the brand protection team at those Games responsible for combating ambush marketing was very positive. (See Volume 3 of *The Manchester Commonwealth Games 2002: Post-Games Report* published by the Organising Committee). In it the team responsible for brand protection concluded that they had been very successful in combating ambush marketing. The brand protection team was of the view that this success had been achieved by relying solely on the intellectual property rights they enjoyed over the official marks for those Games and introducing with Manchester City Council, restrictions on planning permission for temporary structures and prioritising action against illegal poster sites.

What the law should not do is provide event holders with particular protection that goes above and beyond what is available to other commercial undertakings and amounts to protectionism and unfair competition.

Commonwealth Games Federation Requirements

The IPA and the AA have not been permitted access to or sight of the Host City contract. On the basis of the material provided to us thus far, however, the CGF does not appear to require that certain words, for example, enjoy additional protection over and above what the existing body of law offers. No doubt the Scottish Executive would otherwise have cited such a CGF requirement to support its case for introducing an association right?

Until the industry and indeed others, has had sight of *The Commonwealth Games Manual: Brand Protection*, in the event that the Glasgow bid is successful, the IPA can only surmise that the CGF does not actually require the Scottish Executive to introduce any intellectual property rights over certain words.

The IPA does not comment on the necessity for any change to the intellectual property laws in the UK as a whole and the fact that any association right would need to be delivered through the Westminster Parliament (given that intellectual property is a reserved matter). Indeed the IPA does not know how, in the event the Scottish Bill is passed in its present form, changes in IP law can be imposed in England and Wales? Presumably it can not and the IPA will of course be objecting to the national government about the proposal to introduce an association right that is enforceable nationwide.

Protectionism

Despite the extensive existing laws there is a growing trend for governments to bow to pressure from event organisers, to introduce specific anti-ambush laws that go beyond the traditional protections. We believe there is a grave danger that the balance between fair competition and censorship is being tipped too far in favour of government backed event holders. While there are obvious reasons why the Olympic Games fall into a special and unique situation, the same arguments can not be said to apply to other sporting events such as the football world cup. In particular the Commonwealth Federation has not sought to demand an association right when none has been required. Additional “gold plating” in this manner is simply unjustified.

It is also our view that given the cost of sponsorship of major events that can be afforded only by large multi national companies, issues of fair competition arise for those local businesses unable to participate in, or support, the events occurring on their doorstep.

Revenue Raising

The Scottish Executive will of course have concerns about raising sufficient sponsorship revenue. However given the high-profile nature of the Commonwealth Games; the evidence of successful revenue generated by previous Games; the application of sensible and proportionate additional perimeter protections, and existing law, there is no evidence or reason why a Glasgow based Games would not be successful in generating sufficient revenue from sponsorship.

Getting a fair balance

Any specific anti-ambush laws should give marketers a high level of certainty as to whether particular activities are permitted or not, and incorporate remedies/sanctions that are fair and proportionate in all the circumstances.

For example there is the potentially difficult issue for sponsors of teams or individual athletes which conflict with the rights of the event sponsors. At the Athens Olympics, the IOC was faced with enforcing a ban on any advertising within the arenas, and this was so literally interpreted that anyone wearing branded items of clothing were barred from entry. While any event holder can of course reject any ticket holder there needs to be a balance between preventing genuine attempts to advertise by an

unofficial sponsor and alienating the public with big-brother type antics, which in the end bring the official sponsors and the event organisers into disrepute.

4. Inclusion of a duty to consult with the advertising industry

The IPA also entirely supports the AA's call for a specific duty to be placed on the face of the final version of the Bill which requires the Scottish Executive to consult with the advertising industry when drawing up any secondary legislation relating to advertising.

Conclusion

The IPA supports swifter and easy legal access to deal with advertisers genuinely involved with illegitimate ambush marketing tactics but is concerned about the necessity for further legislation extending protection to a small elite group of official sponsors. The IPA does not believe the proposed action to introduce an association right is in the best interest of Scottish businesses or the Commonwealth Games Federation.

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