PROTECTING SPORTS EVENTS FROM AMBUSH MARKETING ATTACKS

The Role of Passing Off and Section 9 Fair Trading Act 1986

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TABLE OF CONTENTS

ABSTRACT

This paper examines the law concerning the intellectual property that resides in events. In particular it looks at the remedies available to those organising events where their event is subject to an ambush marketing campaign. An ambush marketing camping is an attempt by a firm that is not a sponsor of the event in question to claim, by insinuating it has an association with the event or its organiser, some of the benefits reserved for official sponsors. The paper examines the some of the basic law surrounding sports events, noting in particular that there is no proprietary right in the spectacular provided by the event. It also discusses some of the major ambush marketing techniques. The bulk of the paper, however, discusses the two major remedies for events organisers subject to an ambush marketing campaign: the common law tort of passing off and the statutory remedy under s 9 Fair Trading Act 1986. The paper notes the difficulty in applying the existing law to sports events. It also notes the need for Court in approaching these two causes of action to apply a principled approach. This approach, it is argued, should attempt to balance the requirements of fair competition with free competition. The paper concludes that the Courts do not always adopt this principled approach and in general favour fair trading values over free trading values.

The word length of this paper, excluding preliminary material and footnotes is approximately 12,500 words.

INTRODUCTION

Professional sports are big business. They generate billions of dollars every year for their organising bodies from the sale of broadcast and sponsorship rights. This paper deal with the question of sports sponsorship rights under New Zealand law. Determining the precise scope of these rights is of vital importance to both the event's organisers and the sport's sponsors. The organisers wish to obtain a secure source of income from sponsorship. Similarly, sponsors need to obtain tangible benefits from the money they invest. The question of selling a valuable sponsorship rights is intimately connected with the question of how closely a non-sponsor can associate itself with a particular event. The sale of sponsorship rights are, in essence, the sale of rights of association with a event, team, or sporting personality. If a non-sponsor can create the public perception that it possesses the same rights of association as an official sponsor, then the rights sold by the sports organising bodies become essentially worthless. The central question examined by this paper is, then, what legal protection is given to the intellectual property that exists in a sports event so that the organisers can sell valuable rights to their sponsors.

There is no single answer to that question. No single legal mechanism exists to protect sports sponsorship rights. Instead, sports organising bodies must employ a range of techniques if their are to sell to their sponsors valuable rights of association. Broadly, the sports organising body must engage in an integrated preventative strategy based in contract law reinforced by recourse to common law actions in passing off , statutory actions under the Copyright, Trademarks, and Fair Trading Acts, and possible recourse to particular quasi-legal remedies.

This paper does not deal with the contractual issues in anything but a broad outline. Its focus, instead, is on the remedies available to sports organising bodies when they discover a non-sponsor attempting to associate itself in an unauthorised manner with a particular event. This unauthorised association is, for the purposes of this paper, called ambush marketing.[1]

Part I of this paper examines ambush marketing and the techniques employed by non-sponsoring, or ambushing, firms to associate themselves with events or to detract from the value of sponsorships sold to other firms. Part II discusses the contractual relationships surrounding events. It notes briefly the contractual techniques which sports bodies may employ to minimise the incidence of ambush marketing. The rest of the paper is concerned with the possible remedies open to sports organising bodies if they become the subject of an ambush marketing campaign. Part III discusses the common law remedy of passing off, while Part IV discusses the complementary statutory remedy under ss 9 and 13 Fair Trading Act 1986. Other potential statutory remedies under the Copyright Act 1994 and the Trade Marks Act 1953 and the quasi-legal, avenues of redress under the general legislation regulating broadcasting in New Zealand, fall outside the scope of this paper.

This paper argues that while the current protection is not complete, they do provide sufficient protection for the sports organising bodies. In other words, events organisers have sufficient tools at their disposal to enable them to sell valuable sponsorship rights. While the protection provided for these rights is not absolute, it is not clear the rights ought to be completely protected. Rather, it is necessary to balance the competing interests of what can loosely be called fair trade and free trade. Sports organising bodies are entitled to protection from unscrupulous traders seeking to reap where they have not sowed. Of equal force, however, is the contention that sports bodies ought not to be given a legal monopoly of such breadth that the ability of firms to trade freely is hindered. While it is not possible to fully reconcile these objectives, the current state of the law can provide a workable balance between these two objectives. Unfortunately, however, because of the nature of the subject matter and the fragmented legal processes involved, the means by which the balance is reached does not always appear rational or consistent. Indeed, it is difficult to disagree with Wadlow's assessment of the modern

1 The term "ambush marketing" was coined by Alan Bayless, " 'Ambush' Marketing is Becoming Popular Event at Olympic Games", *Wall Street Journal*, 8 February 1988.

developments in the tort of passing off: "far from unfolding in a consistent and purposeful manner, passing off has largely developed through *ad hoc* decisions which were often motivated primarily by a desire not to let an unmeritorious defendant escape liability".[2] A similar assessment is also arguably applicable to the development of the law under the Fair Trading Act 1986.

2 Christopher Wadlow, *The Law of passing Off*, London, 1990, p 10.

I
AMBUSH MARKETING

Defined narrowly, ambush marketing is direct effort of one company to attack a competitor's sponsorship of a particular organisation or event. The aim is to misrepresent the official sponsor to consumers and thereby confuse them.[3] Ambush marketing also occurs where non-sponsors attempt to become associated with a sporting event, in effect attempting to appropriate the value of the event without paying the associated sponsorship fees.[4] One of the few academic studies into ambush marketing defines it as follows:[5]

> "A planned effort (campaign) by an organisation to associate themselves indirectly with an event in order to gain at least some of the recognition and benefits that are associated with being an official sponsor."

Two points may be made about this definition. First, although ambush marketing may require less planning than obtaining an official sponsorship and may be more easily implemented at the last moment,[6] ambush campaigns are still very costly, especially as the ambusher may have to pay premium prices to advertise during the event. Secondly, "The main objective is to create miscomprehension in the consumer's mind about who the sponsor is and therefore gain the benefits of being associated with being a sponsor or weaken the impact of a main competitor being the exclusive sponsor of an event."[7] While ambushing is most notably associated with the Olympics and World Cup soccer—the world's two biggest sporting events—it occurs in the case of a number of lesser events.[8]

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3 Lori L Bean, "Ambush Marketing: Sports Sponsorship Confusion and the Lanham Act" (1995) 17 Boston U L Rev 1099, at 1099, 1100; S McKelvey, "NHL v Pepsi, Uh-huh! Legal Parameters of Sports Ambush Marketing" Ent & Sports Law, Fall 1993, 5.

4 Bean, above n 3, p 1100.

5 Dennis M Sandler and David Shani, "Olympic Sponsorship vs 'Ambush Marketing': Who Gets the Gold" (1989) Journal of Advertising Research (August/September) 9, 11.

6 Jeff Jensen, "Ambush league", *Advertising Age*, 17 July 1995, 25.

7 Saddler and Shani, above n 5, p 11.

8 Tony Meenaghan, "Ambush Marketing: Immoral or Imaginative Practice?" (1994) Journal of Advertising Research (Sept/Oct) 77, 80.

Concern over ambush marketing has been closely associated with the growth of large-scale sponsorship of events. This can be traced to the 1984 Olympics held in Los Angeles.[9] The organisers of that event turned to corporate sponsorships as a means of avoiding the large debts which previous host cities had incurred.[10] Sponsors of events gain positive recognition and response from consumers. Other firms also wish to obtain these positive benefits.[11]

Events organisers are naturally concerned about the effects of ambush marketing on their ability to raise sponsorship. They are concerned that ambush marketing will so effect the market for sponsorship that the viability of their events will be compromised.[12] This concern is shared by some sponsors. In the UK the Institute of Sports Sponsors has issued a code of conduct which requests that its members refrain from taking up broadcast sponsorships of events unless the official sponsors of the events have been offered those rights and have refused.[13] This is part of what has been described as a process of "rapid cumulative learning taking place among sponsors, event owners, and ambushers alike."[14]

The success of ambush marketing is difficult to gauge. First, there is little research on the commercial benefits of sponsorship, either by itself or in relation to other forms of promotion. There exists an attitude that sponsorship is different from other forms of advertising and therefore the traditional methods of measuring success are inappropriate. This has led to a less-rigorous approach to evaluating sponsorship opportunities. Further, when it comes to ambushing, those firms which have been successful are less likely to crow about their successes, while those that have been successfully ambushed are most likely to complain privately than in public.[15]

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9 Barbara Ettorre, "Ambush Marketing: Heading Them Off at the Pass", *Management Review*, March 1993, 55, 56.

10 The host city of the 1976 Olympics, Montreal, Canada, is said to lost $US1 billion.

11 Ettorre, above n 9, p 56.

12 Bean, above n 3, p 1100.

13 Alex Benady, "ISS wants code on TV hijackers", Marketing, 29 September 1994, p 6.

14 Meenaghan, above n 8, p 80.

15 Ibid, p 82.

A MAIN TECHNIQUES

The techniques of ambush marketeers are many and varied—as many and as varied as the minds of advertising copywriters can devise. The central core of ambush marketing, as noted above, is the attempt by non-sponsors to associate themselves with particular anticipated and popular events. A particularly prevalent technique is for companies to time special promotions to coincide with then events. The promotions can include competitions that tie in with the particular event,[16] supporting individual teams or athletes,[17] or giving away tickets to the event. Firms may also purchase television advertising time during the coverage of the event. Normally that advertising will refer indirectly to the event, and may counter the advertising of a competitor which is an official sponsor of the event.[18] Other tactics may take place at the event itself. For example a non-sponsor may erect billboards on the routes of televised events.[19]

Most events, especially those with an international character will have many levels of sponsorship, for example international, national in the country where the event is held, and national television broadcasts. This creates many opportunities for sponsorship and as many opportunities for becoming involved in ambush marketing.[20] Indeed, an ambusher may also be a sponsor of the event but in a lesser product category. It may,

16 This is the tactic employed Pepsi Cola Canada Ltd in relation to the National Hockey League's Stanley Cup Playoffs. See *National Hockey League v Pepsi-Cola Canada Ltd* (1992) 92 DLR (4th) 349 (BCSC) (hereinafter *NHL v Pepsi*).

17 At the 1984 Olympics in Los Angeles, Fuji Photo Film USA Ltd was the offical 35 mm film of the Games. However Kodak, a major competitor, payed a lot less to sponsor the US track and field team and the US television coverage of the event. At the 1992 Olympics in Barcelona, Nike set up its own Olympic headquarters away from the main village and held press conferences there featuring Nike sponsored athletes such as Michael Jordon. See Geoffrey Brewer, "Be Like Nike?", Sales and Marketing Management, September 1993, p 67, at p 68

18 Visa, an official sponsor of the 1992 Winter Olympics in Albertville, France, ran an advertisment featuring the Czechoslovak ice hockey goal keeper, Milan Hnilicka a voice over stating: "If you think it's tough to get something by him, wait 'til you see the guys at the ticket window if you don't have your Visa card. Because, onc again, the Olympics don't take American express." American Express countered with an advertisment which did not use the word "Olympics" but referred instead to "winter fun and games" and pointing out that the American Express card was accepted throughout Albertville. See Ettore, above n 9, p 54.

19 For example at the 1992 Olympics at Barcelona, Nike placed large murals of US basketball players it sponsored on buildings throughout the city. See Brewer, above n 17, p 69.

20 Meenaghen, above n 8, p 80.

for example, not be a worldwide sponsor but the sponsor of a particular national team with correspondingly fewer rights of association with the event. The ambushing firm will then aggressively promote that association to persuade the public it is a larger sponsor that it in fact is. However this requires a lot of co-ordination, especially in the case of a global event with global competitors.[21]

B EXAMPLES

Ambush marketing can be employed by firms with limited financial resources in ways which provide them with large media exposure. In one exceptionally successful ambush campaign, the Peterson Bank of Chicago capitalised on the popularity of the 1994 soccer World Cup held in the USA. Peterson Bank offered a "World Soccer" bank account which would pay double interest if the USA won the World Cup. By promoting this offer to journalists covering the Cup rather than directly to customers, the bank gained large-scale press coverage, including front page articles in the *Wall Street Journal* and *USA Today*.[22] This example illustrates one of the prime techniques of ambush marketing: the identification of the event in indirect or generic terms. It also identifies one of the prime hurdles that those wishing to prevent ambush marketing have to overcome: the attitude in the media and general public that such marketing is clever, cute, or sassy.[23] Indeed, both events owners and sponsors regard ambushing as an immoral practice. However ambushers believe that their activities are part of normal business competition, and choose to do so on economic grounds.[24]

Another example of a successful campaign is that undertaken by Nike in relation to the London marathon. The official sponsor, NutraSweet was ambushed by Nike purchasing billboard space along the route of the

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21 Ibid, p 81.

22 Anonymous, "Peterson Bank Successful in World Cup Marketing Foray", Bank Marketing, August 1994, p 6.

23 See, for example, the comments of Richard Pound, head of the International Olympic Committee's sponsorship efforts, quoted in Geoffrey Brewer, above n 17, at pp 68, 69: "The problem is that the media sees ambushing as sort of clever and sharp. There's nothing cute abut it. All of this confusion created in the minds of consumers by parasitic marketers hurts the Games and hurts the atheletes. No one gains from this."

24 Meenaghen, above n 8, pp 85-86.

race. Nike's billboards dominated the television coverage of the event, effectively diminishing the value of NutraSweet's sponsorship.[25] This campaign demonstrates the need for official sponsors to aggressively defend their sponsorships by ensuring that as far as possible they close any opportunities for ambushers.

A further example illustrating the role of sponsorship and ambush marketing in the wider competition between rival firms occurred during the 1984 Olympics. The photographic equipment and supplies firm, Fuji, was an official sponsor of the event. However, its rival Kodak, obtained a sponsorship of the US broadcast of the event. For the duration of the competition it was permitted to use the composite Olympic logo created by NBC, the official broadcaster. Kodak clearly recognised that this would cause confusion among consumers and took advantage of the broadcast sponsorship to dull the impact of Fuji's sponsorship.[26]

C DEFENCES AGAINST AMBUSH MARKETING CAMPAIGNS

Events organisers and sponsors can protect themselves against ambush marketing campaigns in five different ways. First, sponsors can place pressure on the events owners to protect their events. This is something which the International Olympic Committee does very aggressively, by either bringing legal action or creating adverse publicity for the ambushers. Secondly, the event organising body must as much as possible link sponsorships for the events and sponsorships for the broadcasts of those events. Thirdly, sponsors must also anticipate possible competitive promotions. This is especially important where a firm is not a sole sponsor. The ability to do so is inevitably linked back to the rights secured in the sponsorship contract and will require careful weighing of the rights granted to other sponsors. There may also be opportunities to 'close off' some of the obvious avenues for ambushers if this is financially feasible. Fourthly, Sponsors must aggressively promote and support their sponsorship. This requires spending money promoting

25 Connor Digman, "Fighting the offside track", *Marketing*, 28 September 1995, p 14.

26 Ettorre, above n 9, p 56

the fact that the firm is an official sponsor.[27] Finally, both sponsors and events organisers may resort to legal action.[28]

27 See Saddler and Shani, above n 5, p 13.
28 Meenaghen, above n 8, p 84.

II

THE SPONSORSHIP OF SPORTING EVENTS

Reduced to its barest essentials, an event is, in law, little more than the sum of the contracts surrounding it: it has virtually no independent legal existence apart from those contracts. They give the event almost its entire legal meaning and substance. In particular there is no proprietary or quasi-proprietary right in the spectacle provided by the event.

In *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*,[29] the plaintiff owned a racecourse at Randwick at which it held horse races. The course was surrounded by a high fence and to observe the races spectators had to pay to enter the course. The plaintiff did not permit any radio broadcast of the races. The defendant, Taylor, owned land adjacent to the racecourse. He contracted with a local radio station for it to erect scaffolding on his land from which an announcer could broadcast commentary of the races. The plaintiff sought an injunction to prevent Taylor from using its land in this manner, alleging that in doing so he breached the plaintiff's right to privacy. Latham CJ held: [30]

> It has been argued that by the expenditure of money the plaintiff has created a spectacle and that it therefore has what is described as a quasi-proprietary right in the spectacle which the law will protect. The vagueness of this proposition is apparent on its face. What it really means is that there is some principle (apart from contract or confidential relationship) which prevents people in some circumstances from opening their eyes and seeing something and describing what they see. The court has not been referred to any authority in English law which supports the general contention that if a person chooses to organise an entertainment or do anything else which other persons are able to see he has a right to obtain from a court an order that they shall not describer to anyone what they see. . . . [T]he mere fact that damage results to the plaintiff from such a description cannot be relied upon as a cause of action. . . . A 'spectacle' cannot be 'owned' in the ordinary sense of the word."

29 (1937) 58 CLR 479.
30 Ibid, pp 496-497.

The central proposition from this case has recently been upheld in both Australia[31] and New Zealand.[32]

Other legal relationships may arise in tort between those attending the event and the organisers,[33] and in some rare cases between the sports persons themselves.[34] For professional sports these contracts these contracts can be conveniently analysed in four categories: those regulating a public's attendance at events, those selling broadcasting rights, those selling association rights, and those between the various participants in the event. These varieties of contract are interdependent, and the sports organising body must have some overall strategy to ensure that the event is commercially exploited in an orderly manner to maximise public exposure and financial return, and minimise adverse publicity.

A THE INTERPLAY OF SPONSORSHIP AND BROADCASTING RIGHTS

The centrepiece of any successful event is the sale of broadcasting rights. It is of critical importance for the sports organising body to co-ordinate the sale of broadcasting rights with the sale of sponsorship rights. Failure to do so will leave official sponsors open to easy attack through ambush marketing campaigns. This is graphically illustrated by the fact situation in the Canadian case *National Hockey League v Pepsi-Cola Canada Ltd*.[35] This case concerned the interplay of broadcasting and sponsorship rights for the National Hockey League's ("NHL") Stanley Cup, the premier professional ice hockey championship in North America.[36]

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31 *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* 91984) 156 CLR 414.

32 *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720. See also *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415.

33 See *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205. The organisers of an event were liable in negligence after spectators were injured as a result of a collision between two cars competing in the event.

34 See, in the Australian context, *Re Lenfield* [1993] Australian Tort Reports 62,249 (criminal liability in assualt for a "spear" tackle in a schoolyard game); and *Johnston v Fraser* (1990) 21 NSWLR 89 (participants in a sporting event owe a duty of care to each other).

35 (1992) 92 DLR (4th) 349.

36 The trial Judge, Hardinge J, found that "There can be little doubt but that, in North America, the NHL is at the pinnacle of professional hockey." Ibid, p 352.

NHL had entered into a sponsorship agreement with Coca Cola Ltd ("Coke") by which Coke was designated an official sponsor. Coke also obtained rights to call its product Diet Coke the official soft drink of the NHL and to use NHL symbols and the marks of various NHL teams in its advertising in the US and Canada. For those rights Coke paid NHL through its associated marketing company, National League Hockey Services Ltd ("NHLS"), $C2.6m.[37]

However, the agreement did not include rights for Coke to advertise its products during Canadian broadcasts of NHL games. Those rights had earlier been sold for five years to Molson Breweries of Canada Ltd ("Molson"). Molson had then on-sold portions of those rights to the Canadian Broadcasting Corporation ("CBC"). It also granted Pepsi Cola Canada Ltd ("Pepsi"), Coke's arch-competitor, the right to be the exclusive advertiser of soft drinks during all NHL broadcasts on CBC. Thus, although Coke was an official sponsor of the NHL it did not possess any rights to advertise its products during broadcasts of NHL games in Canada. Rather, those rights were held by its rival Pepsi, which then proceeded to fully exploit them. In effect the rights sold by NHLS to Coke were worthless as they could not be fully exploited during television broadcasts.

A similar situation occurred during the 1991 Rugby World Cup, held in the United Kingdom. Although Heinz secured official sponsorship of the event, Sony secured the sponsorship of the television broadcast. As a result the Heinz sponsorship was overshadowed by Sony's efforts. Sony's name appeared in the television coverage before, during, and after each match, and commentators began referring to the event as the Sony Rugby World Cup.[38]

Clearly, then, sports organising bodies must tie-in broadcasting and sponsorship rights. Failure to do so will clearly erode the value of the sponsorship rights sold and prevent both the organisers and sponsors from obtaining maximum benefits from the event. Although some industry organisations have attempted to impose codes of conduct to

37 Ibid, p 353.
38 Connor Dingham, "Fighting the Offside Track" *Marketing*, 28 September 1995, p 14.

stamp out the practice,[39] the best solution is for sports organising bodies to work closely with the broadcaster and sponsors. However, given the huge power of broadcasters achieve through their purchase of rights, sports organising bodies may not be able to provide much protection for their sponsors. The maximum protection that may be available is a requirement that broadcasters give sponsors a right of first refusal to purchase advertising time during the event.[40] Inevitably, sponsors must spend as much if not more as they did purchasing the sponsorship to obtain exclusive advertising rights in the sponsor's particular product category from the broadcaster.[41]

B THE INTERPLAY BETWEEN SPONSORSHIPS

Sports organising bodies must ensure that the sponsorships they sell are in meaningful product categories that do not overlap. This may cause real difficulties, especially for events which have worldwide appeal and for which sponsorships are sold both at the international and the national level. It will also cause problems where events organisers attempt to extract the maximum possible revenue from sponsorships. This can lead to a proliferation of sponsorships and create antagonisms where sponsorship categories are perceived to overlap. The international and national organisers must ensure that their efforts are well co-ordinated in order to forestall any conflicts between national and national sponsors.

These issues were highlighted in litigation surrounding the 1994 Soccer World Cup held in the United States.[42] The sports organising body for the event, FIFA, delegated the sale of sponsorships to the Zurich-based ISL Football AG ("ISL").[43] In 1991 ISL sold Mastercard International Inc ("Mastercard") an official sponsorship. This included exclusive rights to use the 1994 World Cup trademark on "all card-based payment

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39 See Benady, above n 13, discussing the ISS code.

40 See Ken Florin and David Carlin, "Ambush Protection for Olympic Sponsors".

41 For example, Coca Cola Inc is reported to have paid $US40 m to become a premier sponsor of the 1996 Atlanta Olympics. Coca Cola also exercised its right of first refusal to be an exlusive advertiser in its particular product category at a further cost of $US60 m.

42 *Mastercard International Inc v Sprint Communications Co* 1994 WL 97097 SDNY, Mar 23), aff'd 23 F 3d 397 (2nd Cir, 1994).

43 Bean, above n 3, p 1120.

and account access devices (including, without limitation, credit cards, charge cards, travel and entertainment cards, on-line and off-line point of sale debit cards, check guarantee cards, and cards that combine two or more of the foregoing functions)."[44] The US-based organising committee ("UOC") of the World Cup was granted by ISL the right to sell limited sponsorships which designated the sponsors as official partners. This was very similar to the designation official sponsor but included lesser rights to use the World Cup trademarks.[45] The UOC could not grant the official partners rights that infringed the rights of the official sponsors.[46] However, the UOC entered into an agreement with Sprint Communications Co ("Sprint") under which Sprint issued over 100,000 calling cards embossed with the World Cup logo. These cards did not contain a magnetic card that could be read electronically. However, they did contain a number unique to each card.[47] Mastercard sought a preliminary injunction, based on its delegated trademark rights, to prevent Sprint issuing the cards.[48] The District Court found that Sprint's calling cards were "card-based payment devices" because of the number printed on them. The Court further found that Mastercard's contract with ISL was intended to grant Mastercard exclusive rights over such calling card. The contract between ISL and the UOC specifically prevented the UOC from selling sponsorship packages involving any card-based payment and account access devices.[49]

In this case there was a clear gap in the understanding of the contract between ISL and the UOC. While the UOC believed it possessed authority to sell Sprint the right to issue calling cards, the wording of the contract was found to preclude this.

C OTHER RELATIONSHIPS

Any sports event will have many more relationships than have been discussed above. However, not all of these will have intellectual property

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44 *Mastercard International Inc v Sprint Communications Co*, above n 42, at *1.
45 Bean, above n 3, p 1122.
46 *Mastercard International Inc v Sprint Communications Co*, above n 42, at *1.
47 Ibid.
48 Ibid, at *2.
49 Ibid.

implications. One relationship which does is the exploitation of the images of the sports persons participating in the event. The discussion of personality merchandising is outside the scope of this paper, but obviously does have some similarities and overlap with the commercial exploitation of the events themselves.

Finally, regard must be had in formulating the contractual relationships between the various parties to competition law aspects. A contract may have the effect, the likely effect, or purpose of substantially lessening competition in a market;[50] it may contain an exclusionary provision;[51] or its terms may result from the exercise by one of the parties of its dominant position in a market.[52] Such problems may arise in the contracts between the sports organising body and its constituent associations or participants, or in relation to the sale of rights, such as broadcasting rights, in relation to an event.[53]

50 Commerce Act 1986, s 27.
51 Ibid, s 29.
52 Ibid, s 36.
53 See, for example, *Amalgamated Television Services Pty Ltd v NSW Rugby Football League* [1979-1980] ATPR ¶17-076.

III
PASSING OFF

A INTRODUCTION

Passing off provides a primary remedy for events organisers subjected to a ambush marketing campaign. The action for passing off has its origins in Elizabethan times,[54] but only became firmly established in the late-Victorian era at a time of growth in industry and commerce.[55] While some basic principles concerning the action are relatively clear, the tort has grown in a haphazard fashion. Much of this is due to the nature of most of the actions brought. Many are for interlocutory injunctions, the decisions in which effectively bring an end to the matter. This is especially true in the case of events. At most it may be possible to bring an application for an interlocutory injunction before the event commences. However, whatever the outcome it will generally not be worthwhile to continue with the action after the event is completed. The interlocutory application will in effect decide the substantive issue.[56] This has the consequence that points of law and principle are not subject of full argument before the Court. This has led to the law being developed in an ad hoc manner, possibly without full regard to developing a truly principled approach.

B GENERAL NATURE OF THE DOCTRINE

The tort of passing off is normally analysed as consisting of two different varieties: the "classic" and the "modern" form. The classic form describes those cases where on trader "passes off" its goods as those of another by any of a number of devices such as using the other

54 See *Southern v How* (1617) Pop 143, 144; 79 ER 1243, 1244.

55 M L Blakeney and J McKeough, *Intellectual Property: Commentary and Materials*, Sydney, Law Book Co Ltd, 1987, p 287.

56 See, for example, *NZ Olympic and Commonwealth Games Assn Inc v Telecom NZ Ltd* (1996) 7 TCLR 167.

trader's product name or packaging.[57] As such, the tort assists the promotion off both fair and free competition in the market place. It allows traders in the crowded market place to differentiate their products and create a reputation for their products and goodwill for their business providing the opportunity for different traders to compete freely on the merits of their products. Product differentiation also serves a consumer protection purpose by allowing consumers to choose between brands without the prospect of confusion. Free trade as well as fair trade is encouraged by passing off as the tort prevents rivals from trading on the reputation or goodwill in particular brands or marks created by others.

The modern action does not seek to protect against slavish copying; such infringements of intellectual property rights are normally subject to various statutory remedies. Rather, passing off in its modern looks at more subtle representations which are likely deceive or confuse those to whom they are made. As put by Jeffries J in *McBean's Orchids (Australia) Pty Ltd v McBean's Orchids Ltd*:[58] "Passing off is to be subtle and shrewd, not blatant and obvious. It is to be clever with deception."[59]

As with all intellectual property rights, questions of public policy require that the scope of protection be closely examined. This issue is thrown into sharp relief by modern developments is the tort. In a series of cases culminating in *Erven Warnink BV v J Townend and Sons*[60] the rationale of passing off moved from protection of the plaintiffs goods and packaging to the protection of the goodwill of the trader's business.[61] Somers J in *Sutton v The House of Running*[62] stated:

> "The general nature of a passing off action is not in doubt. The basis of the action is that the passing off injures a right of property of the plaintiff, that being his right to the goodwill of his business."[63]

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57 See Brown and Grant, *The Law of Intellectual Property in New Zealand*, Wellington, Butterworths, 1988, p 137; and *Erven Warnink BV v J Townend and Sons* [1979] 2 All ER 927, 929, 935.
58 (1982) 1 NZIPR 406.
59 Ibid, p 414.
60 [1979] 2 All ER 927.
61 See Brown and Gant, above n 57, pp 138-140.
62 [1979] 2 NZLR 750.
63 Ibid, p 753.

Cooke P in *Dominion Rent A Car Ltd v Budget Rent A Car Systems (1970) Ltd*[64] put the matter thus:

> "Decisions of the Privy Council and the House of Lords have treated the tort of passing off as dependent essentially on damage to business goodwill".[65]

Arguably, the tort has expanded even further than this in some jurisdictions, notably Australia.

In *Erven Warnink BV v J Townend and Sons*,[66] Lord Diplock and Lord Fraser set out the requirements of the tort. Lord Diplock listed the elements of the tort:[67]

1. A misrepresentation,
2. Made by a trader in the course of trade,
3. To prospective customers of his or ultimate consumers of goods and services supplied by him,
4. Which is calculated to injure the business or goodwill of another trader in the sense that it is a reasonably foreseeable consequence, and
5. Which causes actual damage to the business or goodwill of the trader by whom the action is brought or in a qua timet action will probably do so.

Lord Diplock later held that any finding of liability was subject to overarching policy consideration. His Lordship said:[68]

> "It does not follow that because all passing-off actions can be shown to present these characteristics, all factual situations which present these characteristics give rise to a cause of action for passing off. True it is that their presence indicates what a moral code would censure as dishonest trading, based as it is on deception of customers and consumers of a trader's wares, but in an economic system which has relied on competition to keep down prices and to improve products there may be practical reasons why it should not have been the policy of the common law not to run the risk of hampering competition by providing civil remedies to everyone competing in the market who has

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64 [1987] 2 NZLR 395.

65 Ibid, p 405, Ruchardson and McMullin JJ concurring. See also *Erven Warnink BV v J Townend and Sons* above n 57, where Lord Diplock said that the facts of that case "seem to me to disclose a case of unfair, not to say dishonest trading of a kind for which a rational system of law ought to provide a remedy to other traders whose business or goodwill is injured by it." Ibid, p 931.

66 Ibid.

67 Ibid, at pp 932, 933.

68 Ibid, p 933.

> suffered damage to his business or goodwill in consequence of inaccurate statements of whatever kind that may be made by rival traders about their own wares."

In a later passage of his judgment, his Lordship stated:[69]

> "Prima facie, as the law stands today, I think the presence of those characteristics is enough, unless there is also present in the case some exceptional feature which justifies, on grounds of public policy, withholding from a person who has suffered injury in consequence of the deception practices on prospective customers or consumers of his product a remedy in law against the deceiver."

Lord Fraser listed the five elements the plaintiff must prove:[70]

1. That his business consists of, or incudes, selling a class of goods to which a particular trade name applies.
2. That the class of goods is clearly defined, and that in the minds of the public, or a section of the public, the trade name distinguishes that class from other similar brands.
3. That because of the reputation of the goods there is goodwill attaching to the name.
4. That he, the plaintiff, as a member of the class of those who sell the goods, is the owner of goodwill in England which is of substantial value.
5. That he has suffered, or is really likely to suffer, substantial damage to his property in the goodwill by reason of the defendants selling goods which are falsely described by the trade name to which the goodwill is attached.

It has been held that the two formulations are complementary: Lord Diplock showing what the defendant must do and Lord Fraser explaining what the plaintiff must prove to complete the action.[71] However, it is quite clear that Lord Diplock's is the broader formulation and it is the test most commonly applied.[72] Both formulations also leave important questions unanswered. Foremost of these are the nature of the misrepresentation required and what constitutes damage to goodwill.

It should also be noted that, despite the phrasing of Lord Diplock's fourth element, fraudulent intent is not essential. However, it must also be said that in many or most cases the defendant will have deliberately

69 Ibid, p 938.
70 Ibid, at pp 943, 944.
71 *Anheuser-Busch Inc v Budejovicky Budvar NP* [1984] FSR 413, 463 per Oliver LJ.
72 Brown and Grant, above n 57, p 142.

set out to "cash in" on the plaintiff's goodwill.[73] The Courts have little sympathy for such defendants and the presence of intent makes it easy for the Court to find that the intent has been put into practice successfully.[74]

C COMMON FIELD OF ACTIVITY

One blind avenue which hindered the development of the tort was the earlier belief that passing off could only occur where the plaintiff and defendant were in competition, or engaged in a common field of activity. This requirement arose from *McCulloch v May*,[75] an early case in the area of character merchandising. In that case the plaintiff McCulloch, a popular radio personality known by the pseudonym "Uncle Mac" brought a passing off action against the manufacturer of a breakfast cereal called "Uncle Mac's Puffed Wheat". After reviewing several authorities, Wynn-Parry J concluded that:[76]

> "on analysis I am satisfied that there is discoverable in all those [cases] in which the courts has intervened the factor that there was a common field of activity in which, however remotely, both the plaintiff and the defendant were engaged and that it was the presence of that factor which grounded the jurisdiction of the court."

His Honour was satisfied that if the plaintiff succeeded in this case a new action would have been created. Wynn-Parry J was not prepared to take that step.[77]

The requirement of a common field of activity has hindered the application of passing off to character merchandising and events marketing cases. However, in New Zealand, since at least 1988 there has been no requirement that the plaintiff and defendant are engaged in a common field of activity, although it is still a relevant factor in deciding the question of whether there has been a misrepresentation. In *Taylor*

73 See David I Bainbridge, *Intellectual Property* London, Pitman, 1992, p 393.
74 Brown and Grant, above, n 57, pp 205-7.
75 [1947] 2 All ER 845.
76 Ibid, p 851.
77 Ibid.

Bros Ltd v Taylors Textile Service Ltd[78] McGechan J found he was free to choose between the two lines of authority and stated:

> Approaches which regard the existence of a so called common field of activity as decisive, and its absence as an unsurpassable barrier, with respect mistake sign for substance. The question to be determined is whether an activity on the part of the defendant may mislead potential consumers into thinking the activity is that of the plaintiff. If the business of the plaintiff and the business of the defendant are in totally unrelated fields, the risk of confusion is diminished. If, conversely, the fields of activity of the plaintiff and defendant are closely related, the risk is increased. And, of course, there are gradations in between. The important point is this: the existence of a common field of activity is merely one pointer towards the probable presence or absence of confusion. It is no more."[79]

D DAMAGE TO GOODWILL

Where firms are not competitors the injury to the plaintiff's goodwill is different to that which characterised the injury in the classic form of the action. In the classic form, the plaintiff suffered damage by loosing custom to the defendant. However, where the parties are not engaged in a common field of activity, damage to goodwill can also be found in two different ways, both of which amount to a diminution in the value of the plaintiff's goodwill rather than a direct diversion of trade from the plaintiff. These are injuring the reputation of the plaintiff by selling inferior quality products or providing inferior service, and creating confusion by falsely suggesting an association or connection of some sort between the defendant or the plaintiff.[80]

This latter category of damage is most relevant to events marketing. It is highly unlikely that the event organiser and the ambushing firm will compete in a common field of activity. Rather, the business of the events organiser will be either organising the event in question or selling licenses to firms giving those firms the right to use the trademarks, etc, associated with the event and the right to call itself an sponsor or some such other designation. However, by misrepresenting that it is associated

78 [1988] 2 NZLR 1.
79 Ibid, p 20.
80 See *Chelsea Man Menswear Ltd v Chelsea Girl Ltd* [1987] RPC 189, 202 per Slade LJ.

in some way with the events organiser, the ambushing firm narrows the ability of the events organiser to enjoy the full value of the goodwill subsisting in the event.

McGechan J adopted these categories of damage in *Taylor Bros Ltd v Taylors Textile Service Ltd.*[81] He noted that damage by association with inferior products can be equated with a poisoning of the plaintiff's goodwill, while a false suggestion of association amounts to a dilution of that goodwill.[82] His Honour then stated, "A plaintiff who is entitled in principle to the protection of his property right in goodwill is entitled to protection against all such forms of attack without nice distinctions being drawn."[83]

E APPLICATION TO EVENTS MARKETING

i Misrepresentation

To found an action in passing off there must be an effective misrepresentation, a misrepresentation which has damaged or is likely to damage the plaintiff's goodwill.[84] That is, there must be some causal connection between the misrepresentation and damage sustained or likely to be sustained by the plaintiff. If there is no damage or likelihood of damage, the action fails. This can be contrasted with the position under s 9 Fair Trading Act 1986, which requires only that the defendant engaged in misleading or deceptive conduct or conduct that is likely to mislead or deceive in trade.[85] There is no requirement that the plaintiff or any other person suffered or is likely to suffer damage.

In part, this reflects the consumer protection focus of the statutory remedy in contrast with the trader protection emphasis of the common law action. It also arguably reflects a legislative intent to place fair trade values over free trade. The Fair Trading Act prohibits unconscionable conduct without the requirement that the plaintiff prove that the defendant's conduct caused or is likely to cause any damage at all. The

81 Above n 78.
82 Ibid, p 22.
83 Ibid.
84 Brown and Grant, above n 57, p 164.
85 The Fair Trading Act 1986 is more fully discussed below in Part IV.

Act, then, provides an absolute norm based on standards of ideal conduct, effectively proscribing conduct which a fair trader would not undertake. The common law action in passing off, on the other hand, allows traders greater freedom. This is achieved by requiring the plaintiff to prove harm or likely harm before the action is complete. A trader is free to engage in any number of misrepresentations without liability in passing off unless there is actual or potential damage to the plaintiff's, and only the plaintiff's, goodwill.

The misrepresentation in passing off cases concerning events marketing differs from that which provides the basis for the normal run of passing off actions. There is normally in the events marketing situation no misrepresentation about the source of goods or services. Often goods or services are not actually sold, offered for sale, or promoted. Instead, the ambushing trader looks simply to promote its corporate image or identity in conjunction with a particular event. If goods are sold or services provided, there may well be no misrepresentation concerning their source. Rather, the misrepresentation complained of by the plaintiff is one of connection. This is an implied misrepresentation that the defendant is in some way connected or associated with the plaintiff by some means of permission, approval, sponsorship, or endorsement.[86]

In the fields of events marketing, this requires the law to interpolate an important step: that the public have knowledge of the practice or merchandising and licensing, and that they expect that a firm which appears to be associated with an event has the permission of the organising body to be so associated. Once the Court assumes that there is an expectation of licensing, it is open for it to conclude that the defendant has misrepresented that there is a connection between it and the plaintiff. However, this reasoning appears quite unsound in that it assumes the existence of the very right in question. In effect the reasoning states that because it is generally accepted that licensing occurs and generally expected that a trader using the image of a fictional character will have obtained permission to do so, then that trader must in law do so. Such reasoning is quite circular. The reasoning also applies to events marketing.

86 Hazel Carty, "Character Merchandising and the Limits of Passing Off" (1993) 13 Leg Studies 289, 294.

Although, as noted above, the misrepresentation in events marketing cases is one of connection, it is not clear that this misrepresentation would actually occur in the majority of cases. The classic ambush marketing campaign attempts to trade on the good associations the event possesses in the collective mind of the public. This may be because the ambusher wishes to sell to that section of the public that follows a particular sport, or to capitalise on the large audience watching a particular event. The ambush may also be "corrective", that is an attempt to alter public perceptions created by an official sponsor of the event. None of these sorts of promotion necessarily implies any connection between the ambushing firm and the event organiser. There is no deception beyond stating that a particular event exists and that the ambushing firm has mentioned that event in an advertisement for its products. There may well be cases of deception, where the ambushing firm represents falsely that there is an association between it and the event organiser, such as a false claim for sponsorship. However, in many other cases there will be no misrepresentation in the statements of the ambushing firm.

ii Goodwill

Turning to the question of goodwill, two questions extremely relevant to the question of protection for events marketing have emerged. These are (1) in what can goodwill subsist; and (2) can goodwill be international. An international sporting event is not a good or a service in the conventional sense of the word. Further, the business of the sports organising body of most relevant to any passing off action is the sale of merchandising rights, licenses, and sponsorships. This is a distinct business from the event itself. Further, and event can quite easily be international in scope. Although that event may be well known in a certain country, the sports organising body may not in engage in any real trade in the country. Indeed with the global expansion of some sports, the existence of international reputation opens some serious questions as far as expansion into new markets is concerned.

The definition of goodwill most commonly adopted is that of Lord Macnaughten in *Inland Revenue Commissioners v Muller and Co's Margarine Ltd*:[87]

> "It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom."

However, in UK case law, the seemingly wide scope of that definition has been restricted by the Courts. In *Star Industrial Co Ltd v Yap Kwee Kor*,[88] Lord Diplock held that:[89]

> "Goodwill, as the subject of proprietary rights, is incapable of subsisting by itself. It has no independent existence apart from the business to which it is attached"

In particular, this approach has restricted the development of the law relating to character merchandising in the UK. It would also prevent the protection of events using passing off.

Goodwill is acquired by selling products and promoting them. The power of the modern media allows goodwill to be developed widely in a very short time. As Eichelbaum J said in *Johnson & Johnson v The Caxton Printing Works Ltd*:[90]

> "The Court should not be unmindful of the fact that thanks to modern technology, advertising and promotional exposure, what might once have taken years to achieve can now be obtained almost overnight."

In *Green v BCNZ*,[91] Gallen J noted that "The number of persons necessary to [establish goodwill in New Zealand] involves a question of degree and will vary from case to case. It may be in certain specialised situations, a very small number would be significant. In others the number would need to be very considerable."

Determining the appropriate penetration of knowledge of the plaintiff's business into the public consciousness depends on the market in which the plaintiff operates. For example it would be of no use for a plaintiff to prove that a certain section of the public had widespread knowledge of

87 [1901] AC 217, 223.
88 [1976] 2 FSR 256.
89 Ibid, p 269.
90 (1983) 1 NZIPR 496, 502.
91 Unreported, 22 September 1988, CA40/84.

its products if those people were unlikely to purchase those products. No matter how well they regarded the plaintiff, those persons would not take their custom to it. That knowledge would not be "the attractive force which brings in custom."[92] So knowledge alone is arguable insufficient if it is not accompanied by a desire to purchase the plaintiff's product.

The question of international reputation was considered somewhat inconclusively by the Court of Appeal in *Dominion Rent A Car Ltd v Budget Rent A Car Systems (1970) Ltd.*[93] Cooke P, with whom a majority of the Court agreed, noted that there was some divergence of authority and that no distinct New Zealand approach had at that time emerged. Some cases had taken a conservative approach requiring trading activity and the development of a separate goodwill within the jurisdiction.[94] Other cases had required simply the existence of an international reputation,[95] or at least some form of trading activity or promotion, no matter how minor, to create sufficient goodwill to found an action.[96] In the *Dominion* case, Cooke P declined to give a decided view on the matter, finding that the case could be disposed of on the facts.[97] However, Somers J, in the same case noted that:[98]

> "In the end the question of the existence and extent of reputation and goodwill must be a matter of fact. In the case of a business having international reputation which extends to New Zealand not much in the way of activity in New Zealand would I think be required to establish a goodwill. In such cases the reputation itself may be almost tantamount to goodwill, activity having importance in localising that reputation in New Zealand."

The dicta of Somers J suggests that some business or promotional activity is necessary to establish goodwill in New Zealand; international reputation alone is not sufficient. However, where a reputation is "truly

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92 *Inland Revenue Commissioners v Muller and Co's Margarine Ltd* above n 87.

93 [1987] 2 NZLR 395.

94 See *G J Coles & Co Ltd v G J Coles (NZ) Ltd* [1933] NZLR 1189.

95 See *Green v BCNZ* (1983) 1 IPR 195.

96 See *Fletcher Challenge Ltd v Fletcher Challenge Pty Ltd* [1982] FSR 1 and *Gallagher Ltd v International Brands Ltd* (1976) 1 NZIPR 43.

97 *Dominion Rent A Car Ltd v Budget Rent A Car Systems (1970) Ltd* above n 93, p 405.

98 Ibid, p 420.

international in character"[99] this activity will be minimal, and may amount simply to announcing its intention to trade in New Zealand and making preparations to do so.[100]

F REMEDIES

Several varieties of remedy are available to successful plaintiffs in a passing off action. Normally, a plaintiff in a claim relating to events marketing will apply for an interim injunction. On the rare occasions that a full defended hearing follows, the successful plaintiff may also obtain other remedies.

Often an application for interim relief will be the only feasible option for the plaintiff in an events marketing case. It will normally be the only effective remedy available for a plaintiff wishing to prevent an existing or threatened ambush marketing claim before the event in question occurs. In most, if not all cases, there will be insufficient time before the event to allow for a full trial. For this reason, it is also likely that in events marketing cases, the application for interim relief will settle the matter. Further, damages may prove inadequate compensation for the harm done to the plaintiff's goodwill.

The Court will assess the application for the interim injunction in accordance with the *American Cynamid*[101] requirements. However, more attention may be given to the strength of the parties' case than might normally be the case. The recent decision in *NZ Olympic and Commonwealth Games Assn Inc v Telecom NZ Ltd*[102] shows how the Court will normally approach such applications for interim injunctions. In that case, McGechan J held that in assessing the overall justice as required by *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*,[103] the fact that the interim judgment will in effect be a final judgement should be taken into account. This required that the plaintiff's case

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99 The phrase is from *Baskin Robbins Ice Cream Co v Guttman* [1976] FSR 545, 548 per Graham J.

100 See *Keg Restaurants Ltd v Brandy's Restaurant Ltd* (1983) 1 NZIPR 453 and *Midas International Corp v Midas Autocare Ltd* (1988) 2 NZBLC 102,915.

101 *American Cynamid Co v Ethicon Ltd* [1975] AC 396.

102 Above, n 56.

103 [1985] 2 NZLR 129, 142.

should disclose that there is "more than a marginally serious case to be tried. One does not make final decisions on shadowy contentions."[104] This approach gives the Court the flexibility necessary to reach a just resolution of the issue.[105]

Also of importance to the Court in deciding whether to grant an interim injunction was whether compensation, should the plaintiff be successful at trial, would be difficult to quantify or would properly compensate the plaintiff. McGechan J noted that damages would not adequately compensation the plaintiff as the damage it would suffer—the loss of sponsorship opportunities—was difficult to measure in advance. However, the Court also found that the prospect of actual damage was only an unpredictable possibility. In particular, the Court noted there was no definite announcement that the plaintiff would loose sponsorships because of the defendant's actions.[106]

Of the other remedies available at the conclusion of a full hearing, perhaps the least important is that of damages. In general, the plaintiff is entitled to damages for all the loss which arises as a direct and natural consequence of the defendant's action. This includes:[107]

> "any loss of trade actually suffered by the plaintiffs, either directly from the acts complained of, or properly attributable to injury to the plaintiff's reputation, business, goodwill, and trade and business connection caused by the acts complained of; in other words, such damages as flow directly, and in the usual course of things, from the wrongful acts, excluding any speculative and unproven damage."

A successful plaintiff in an ambush marketing case may not be in any position to claim damages. The damage the events organiser will sustain will occur only if it is unsuccessful. It is only then that the plaintiff will see a possible diminution in its sponsorship revenues. If the plaintiff is successful, it will not see a diminution in its sponsorship revenues. Further because any damage relates only to future revenues, the plaintiff will not have sustained damage while the ambush campaign is in progress.

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104 *NZ Olympic and Commonwealth Games Assn Inc v Telecom NZ Ltd* above n 56, 170.

105 Ibid.

106 Ibid, p 174.

107 *Spalding v Gamage Ltd* (1918) 35 RPC 101, 117 per Swinfen Eady LJ.

Accordingly, then, the plaintiff in an ambush marketing case may be best advised to claim an account of profits from the defendant. As this is an equitable remedy, there are certain limitations on its availability. First, it will not be ordered in the case of an innocent defendant and is limited to the period during which the defendant had knowledge of the plaintiff's rights. That will not normally cause a plaintiff any concern in an ambush marketing campaign as by definition the defendant will have intentionally attempted to create the impression of an association with the plaintiff and the event it has organised. Secondly, delay in seeking a remedy may affect the availability of the remedy. An account of profits will be limited to those profits directly attributable to the passing off. This may be a difficult calculation to make.[108]

G FUTURE DEVELOPMENTS

i **Misappropriation doctrine**

It has been suggested by a number of commentators that the common law in Australia has evolved to the point where there exists a doctrine which prevents the misappropriation of a person's or a fictitious character's reputation.[109] This trend began in *Henderson v Radio Corp Pty Ltd*,[110] where Evatt CJ stated:[111]

> "without the permission of the respondents the appellant has appropriated the professional reputation of the respondents for its own commercial ends. It claims that a court of equity has no power to restrain the appellant from falsely representing that the respondent recommends its products, unless the respondent can prove their professional reputation has thereby been injured, or that in some other way their capacity to earn money by the practice of their profession has thereby been impaired. We do not think that is the law. . . . [T]he wrongful appropriation of another's professional or business reputation is an injury in itself, no less, in our opinion, than the appropriation of his goods or money."

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108 See *My Kinda Town Ltd v Soll* [1983] RPC 15 (CA).

109 See, for example, Carty, above n 86, 301; Abraham I van Melle, "Passing Off and Character Merchandising" [1996] NZLJ 303, 308.

110 [1969] RPC 218.

111 Ibid, p 236.

It has continued in the character merchandising cases *Hogan v Koala Dundee Pty Ltd*,[112] *Pacific Dunlop Pty Ltd v Hogan*,[113] and, most recently, in *Twentieth Century Fox Film Corp v South Australian Brewing Co Ltd*.[114]

This doctrine simply requires the plaintiff to have some sort of reputation and for the defendant to misrepresent that there is some sort of business connection between it and the plaintiff. Proof of misrepresentation is easily found as the Courts accept that character merchandising is a fact of commercial life well known to the public.[115]

However, it is unclear whether this approach can be applied to events marketing. The primary objection must be the clear authority that there is no proprietary or quasi-proprietary right in the spectacle provided by an event.[116]

Secondly, ambush marketing cases normally present a greater degree of subtlety in the alleged misrepresentation that character or personality merchandising cases. In such cases, the defendant must make reference in a clearly recognisable manner to the individual, fictional character, or fictional prop. If the misrepresentation is to be effective there must be some reasonably explicit representation to the character in question, or the desired effect will be lost. In the Crocodile Dundee cases[117] the defendant in each case made obvious references to the "Mick Dundee" character. In the "Duff Beer" case,[118] the reference was the use of a fictional brand of beer which formed part of thebackground of *The Simpsons* cartoon series. For there to be a misrepresentation, there must be some direct reference to the character, the personaility, or to a fictional setting.

However, in ambush marketing cases, the references are normally generic and more subtle. There is, for example, no need to refer to the name of an event. This is because sports events have a public character.

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112 (1988) 83 ALR 187.
113 (1989) 87 ALR 14.
114 (1996) 34 IPR 225.
115 *Children's Television Workshop Inc v Woolworth (NSW) Pty Ltd* [1981] RPC 187.
116 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* above n 29.
117 *Hogan v Koala Dundee Pty Ltd* above n 111, and *Pacific Dunlop Pty Ltd v Hogan* above n 112.
118 *Twentieth Century Fox Film Corp v South Australian Brewing Co Ltd* above n 113.

They are based exclusively on existing sports which are well known to the public; their format and rules form part of the general public knowledge. The event itself is public, while particular sports and events may form part of the consciousness of a nation and contribute to national identity. In that sense the sports and the events are public rather than private property. Some legislative recognition of this can be seen in the Australian legislation which requires that certain sports must be shown on "free to air" television.[119] Further sports are enduring in a way that many characters are not. Many sports and many sports events have a long history and a devoted following among the public that passes from generation to generation. In contrast, characters, especially fictional characters may appear in the public imagination only once and are at the centre of the public's attention for an indeterminate though normally fleeting time. Clear examples are the Wombles,[120] Kojak,[121] and the Teenage Mutant Ninja Turtles.[122] For the Courts to recognise a proprietary right in the promotion of events would be to significantly expand the boundaries of the tort, even as it exists in Austrlia, because it would require the Courts to censure very subtle representations which trade on the collective consciousness. This is very different to the private images involved in character and personality merchandising cases, and any extention should be approached with care.

ii Unfair competition

Brown and Grant suggest that the Fair Trading Act 1986 diminishes the need for the judiciary to adapt passing off into a tort of unfair competition. This has been the case in Australia. In *Moorgate Tobacco*[123] the High Court rejected the suggestion that passing off should develop into unfair competition. However, the Court did not that existing actions should remain flexible "when such an approach is necessary to adapt them to new situations and circumstances".[124] In *McBean's Orchids*

119 Section 115 Broadcasting Services Act 1991 allows the Minister for Communication and the Arts to promulgate an "anti-siphoning list" of events which must be shown on "free to air" television.

120 *Wombles v Wombles Skips* [1977] RPC 99.

121 *Taverner Routledge v Trexaplam Ltd* [1977] RPC 275.

122 *Mirage Studios v Counter Feat Clothing Co Ltd* [1991] FSR 145.

123 Above n 31.

124 Ibid.

(Australia) Pty Ltd v McBean's Orchids Ltd,[125] Jeffries J noted that the tort was undergoing change and had clearly departed from the classic form.[126]

It is arguable that such an imprecise term, which refers to at least three types of possible action,[127] should not be the basis of an emerging common law action without further definition. To do so risks a situation where "the boundaries of protection continue to expand in an endless ratcheting of protection to encompass more and more kinds of trade identities."[128] In other words there would be too much of an opportunity to increase protection based on "deserving" cases without reference to other important values such as free competition, which can only thrive where it is clear what is owned and what is not.[129]

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125 Above n 58.

126 Ibid, p 413.

127 D R Shanahan, *Australian Law of Trade Marks and Passing Off*, Sydney, Law Book Co Ltd, 1990, 326.

128 Marshall Laeffer, "Character Merchandising in the UK: A Nostalgic Look" (1994) 11 U Miami Ent and Sports L Rev 453.

129 Ibid, p 454.

IV

SECTIONS 9 AND 13(e) FAIR TRADING ACT 1986

A INTRODUCTION

The Fair Trading Act prohibits trading practices which are unfair to the consumer or general public. However, although the Act is primarily aimed at protecting consumers, it may be enforced by rival traders and they are the usual applicants. As noted by Cooke P in *Taylor Bros v Taylor Group Ltd*,[130] "the Act operates partly for the benefit of the ethical trader."[131] This means that traders can use the Act to enforce their interests in a manner which complements and overlaps with the common law action in passing off.

The statute is modelled on part of the Australian Trade Practices Act 1974 (Cth), and is complemented by the Commerce Act 1986, which aims to promote competition in New Zealand markets. The Australian provision has generated an enormous volume of case law and provides New Zealand Courts with persuasive authority given the close similarity of the provisions.[132]

The essay examines two provisions only of the Fair Trading Act 1986 as they apply to the marketing of events. Section 9 states:

> No person shall, in trade, engage in conduct that is misleading or deceptive or likely to mislead or deceive.[133]

Section 13(e) states:

> "No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion of any means of the supply or use of goods or services,—

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130 Above, n 78.

131 Ibid, p 39.

132 See Stephen Todd (ed) *The Law of Torts in New Zealand*, 2nd ed, forthcoming, ch 14.

133 The relevant Australian provision, s 52 Trade Practices Act 1974, is limited by constitutional requirements to corporations. It is complemented by State legislation, namely, s 42 Fair Trading Act 1987 (NSW), s 38 Fair Trading Act 1989 (Qld), s 56 Fair Trading Act 1987 (SA), s 14 Fair Trading Act 1990 (Tas), s 11Fair Trading Act 1985 (Vic), and s 10 Fair Trading Act 1987 (WA).

(e) Falsely represent that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits".

Most attention will be given to s 9, as plaintiffs prefer to rely on that provision's general wording, of which the other provisions, such as s 13(e), are simply elaborations.[134]

B SECTION 9

Liability under s 9 is very simply established. There is no need to prove that the defendant intended to mislead or deceive.[135] Nor is there any need to show that any person has actually been misled or deceived. It sufficient that the conduct in question was misleading or deceptive or likely to mislead or deceive and in trade for liability to attach.[136] Although evidence of person who have been misled or deceived is admissible, it is not necessarily determinative. The Court determines this question, which is objective.[137]

The words of s 9 are clear and there has been much judicial comment warning against reading too much or additional concepts into the provision. McGechan J in *Taylor Brothers Ltd v Taylors Group Ltd*, McGechan J said:

> "One the recognised Australian approach, the provisions concerned are to be construed in their natural and ordinary meaning. In particular, they are not to be read down either by reference to other provisions of the legislation or by reference to the general law relating to intellectual property: *Parkdale Custom Built Furniture (Pty Ltd) v Puxu Pty Ltd* (1982) 149 CLR 191; 4 ATPR 40-307. The intention in New Zealand no doubt is similar, but with an obvious consumer protection orientation room may exist for application of s 5(j) Acts Interpretation Act 1924."

On appeal, Cooke P considered dicta of the High Court of Australia in *Parkdale*. His Honour noted that Brennan J believed that the Australian

134 See *Tot Toys Ltd v Mitchell* [1993] 1 NZLR 325, 367, where Fisher J observed that s 13 "involves particular forms of deception which in a case like the present one do not seem to add anything material to the general words of s 9."
135 *Taylor Brothers Ltd v Taylors Group Ltd* above n 78.
136 *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177.
137 Ibid.

provision should not be read expansively so as to provide an opening for a monopoly in areas already covered by statutory intellectual property rights. However, Cooke P preferred the view of Mason J who believed the provision should be construed generously. In particular, Mason J refused to read down the provision by reference to other specialised intellectual property legislation. It appears, then, that the New Zealand Courts will interpret the provision broadly according to its intent. Further, it is unlikely that their interpretation will be influenced by the existence of other intellectual property rights, whether statutory or common law.

Central to s 9 is the concept of misleading or deceptive conduct. However, there is little case law in either Australia or New Zealand to illuminate what is meant by "misleading or deceptive". In *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*[138] Gibbs CJ noted that:[139]

> "Those words are on any view tautologous. One meaning which the words 'mislead' or 'deceive' share in common is 'to lead into error'. If the word 'deceptive' in s 52 stood alone, it would be a question whether it was used in a bad sense, with a connotation of craft or overreaching, but misleading carries no such flavour, and the use of that word appears to render 'deceptive' redundant."

In *Chase Manhattan Overseas Corp v Chase Corp*,[140] Wilcox J summarised the applicable factors in determining whether the conduct in question is misleading or deceptive. In particular, his Honour noted that conduct to be misleading or deceptive will normally contain or convey a misrepresentation. This misrepresentation is determined by the Court considering an identified section or sections or the public, "including the astute and the gullible, the intelligent, and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations."[141]

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138 (1982) 149 CLR 191.
139 Ibid, p 198.
140 (1985) 63 ALR 345.
141 *Taco Co of Australia Inc v Taco Bell Pty Ltd* above n 136, 202.

Misleading or deceptive conduct can be contrasted with conduct that merely causes confusion. Cooke P in *Taylor Bros Ltd v Taylor Group Ltd*[142] noted that it is not sufficient to establish liability under s 9 if:[143]

> "the conduct causes a state of wonder or doubt in the minds of people about, for example, the identity or otherwise of two businesses. The line in the latter respect can be fine one, we think, for if the Court is satisfied (on the balance of probabilities) that some consumers will wonder, it may at times not be difficult to take the further step of concluding that some are likely to by mislead; but of course this is not necessarily so."

Therefore it is not enough for the plaintiff in an ambush marketing case to show only that some consumers will wonder whether the defendant is associated with the plaintiff. Those consumers have not reached a concluded position on way or the other and cannot be said to be actually misled.[144] Accordingly, there must be some demonstration that consumers are actually misled to likely to be misled.

It must be emphasised that whether conduct is misleading or deceptive or likely to mislead or deceive is a question for the Court. Thus in *Poulenc Agrochimie SA v UIM Chemical Services Ltd*[145] an admission by the defendant that its conduct was dishonest as well as misleading or deceptive was not determinative. Wilcox J eventually found that the conduct in question was not misleading or deceptive or likely to mislead or deceive. In *Taco Co of Australia Inc v Taco Bell Pty Ltd*,[146] Deane and Fitzgerald JJ noted that:[147]

> "evidence that some person has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential. Such evidence does not itself establish that conduct is misleading or deceptive or likely to mislead or deceive."

142 Above n 78.
143 Ibid, p 39.
144 See French, "A Lawyer's Guide to Misleading or Deceptive Conduct" (1989) 63 ALJ 250.
145 (1985) ATPR (Digest) ¶46-001.
146 Above n 36.
147 Ibid, p 202.

However, in most cases some evidence will be called by the plaintiff. Some issues concerning the admissibility and effect of various types of evidence are discussed above in relation to passing off.[148]

Turning to the question of conduct which is "likely" to mislead or deceive, there is some judicial uncertainty over the precise import of the term. In some cases, the word "likely" has been compared with the word "liable" used in s 10. In *CC v A & W Hamilton*,[149] Judge Bisphan viewed conduct "likely" to mislead or deceive as having a greater chance of occurring than conduct which was "liable" to do so.[150] However in *Westpac Banking Corp v Northern Metals Pty Ltd*,[151] Northrop J in a dissenting judgement the opposite. In *Bonz Group Pty Ltd v Cooke*,[152] Tipping J held that likely did not require something to be more probable than not, rather simply that there must be a real risk, not a mere possibility. This was upheld on appeal.[153]

A further important question is the relevant section of the public affected by the misleading or deceptive conduct. This may be the public at large or a particular section or sections. Often this will include those members of the public likely to purchase the defendant's product. This can be an important question in ambush marketing cases.

The question of defining the relevant section of the public arose in *World Series Cricket v Parish*.[154] This was an appeal against the granting of an interim injunction restraining the respondent from breaching s 52 Trade Practices Act 1974 (Cth). The appellant organised a series of international cricket matches which it called "Super Tests". The respondent was the chairman of the Australian Cricket Board ("ACB") which organised international cricket matches called "Tests" and had been for many years the only Australian body involved in organising test cricket. The appellant's matches were widely publicised, including the publication of a brochure in a widely circulated magazine. The ACB claimed the use of the words "Super Test" was misleading or deceptive

148 See above, text accompanying notes xx to xx.
149 (1988) 3 TCLR 398.
150 Ibid, pp 401-402.
151 (1989) ATPR ¶40-953.
152 [1994] 3 NZLR 216.
153 *Bonz Group Pty Ltd v Cooke* unreported, 8 July 1996, CA196/94.
154 (1977) 16 ALR 181.

conduct. It argued that members of the public would believe that the matches had been organised by the ACB. The Full Federal Court held that the promotion by the appellants was designed to reach a very large section of the public, including people with little knowledge of cricket. The Court further held that the use of the words "Test", "Test series", or "Super Tests" were capable of misleading members of the public into believing that the matches were organised by or had the approval of the ACB. Further, it also found that the use of the words "Australia" or "Australian team" in relation to the matches breached s 52.

Whatever might be argued about the merits of the decision, the Court's approach to the question of what was the relevant section of the public was relatively clear. In particular, Bowen CJ noted that the advertisements in question were designed to be seen by a very wide audience, as evidenced by their inclusion in a mass-circulation magazine. Further, this audience would possess "the widest possible knowledge or lack of knowledge about cricket and previous association or lack of association with it."

In most situations the ambushing firm will be attempting to promote its products to the public at large. However, in some cases a firm may be promoting to only a specific section of the public. For example, a sports equipment maker may wish to promote its goods to persons who play a particular sport. While there are no cases that illustrate the point, it is suggested that an ambushing firm may be able to argue that the section of the public to which it is promoting has special knowledge. This knowledge may mean that the group is not misled or deceived by the ambushing firm's promotion whereas members of the general public may have been. For example, a firm may promote its goods to the serious supporter of a particular sport using an approach which could suggest to the general public there was an association between the firm and the sports organising body. However, members of that particular section of the public may have knowledge both of the ambushing firm's activity and of the sports organising body which enables to recognise that there is no such association. Such an argument may be difficult to mount in practice. It would require some clear evidence of the special knowledge shared by the particular section of the public to which the ambushing firm was promoting its goods. This may be difficult or expensive to obtain.

Further, such an argument may fail due to the way the test for misleading and deceptive looks at the effect of the representation made on both the gullible and the astute.

Attempting to subdivide the target audience of the promotion is possibly of more use where it can be shown that the particular section of the public is indifferent to the misrepresentation. That is, that it would have purchased the ambusher's particular goods or services whether or not there was an association between the ambusher and the sports organising body. This scenario is illustrated by *Weitmann v Katies Ltd*.[155] In that case, Franki J heard evidence from witnesses in the clothing trade that they were likely to be deceived by the defendant selling shirts labelled "Saint Germain". However, the Judge rejected their evidence as they were not likely purchasers from the defendant. Rather, the likely purchasers were assessed as "a fairly typical member of the community who is not seeking to purchase a particularly high fashion article, but seeking what may be described as good value for money."[156] Clearly, the likely purchasers in that case were indifferent to any misrepresentation made by the defendant.

It may be possible to mount a similar argument in ambush marketing cases. One possible example would be where the defendant could prove that the public were indifferent to its representations of association with the sports organising body. Alternatively, the defendant may be able to claim that the relevant material representation of association with the event itself rather that its organisers. This argument is more fully discussed in the context of the tort of passing off.

Given the consumer protection focus of s 9 it is not surprising that defendants have found it difficult to rely on disclaimers to eliminate liabilty under the section. A disclaimer will not work so as to reduce liability, but rather prevents conduct which might otherwise have been misleading of deceptive from being so. The question of whether a particular disclaimer is effective is a question of fact.[157] The defendant must show that the disclaimer would be seen and understood by almost all potential customers who might otherwise have been misled before

155 (1977) 29 FLR 336.
156 Ibid, p 343.
157 *Kewside Pty Ltd v Warman International Ltd* (1990) ATPR ¶46059.

they entered into the transaction.[158] Therefore, where a seller of t-shirts depicting but unauthorised by a popular musical group attempted to rely on a disclaimer it was unsuccessful. The Court held that although the stand from which the t-shirts were sold was labelled "bootleg" not all purchasers would have recognised the significance of the term. Further, the presence of a sticker on the t-shirts reading "The manufacturer does not warrant that the depiction hereon has been authorised" was also found to be inadequate as it might not have come to the attention of purchasers before they purchased a t-shirt, and even if it had, many would not have understood what the sticker meant.[159]

Clearly, then, an ambusher, if purporting to rely on a disclaimer must follow at least the following two steps. First, it must ensure that the disclaimer is brought to the attention of potential purchasers before they make any purchase. Therefore, it should accompany any advertising for the good or services and should also appear clearly at the point of sale. Secondly, the disclaimer must be in very clear and unambiguous terms. The disclaimer should use terms the meaning of which would is obvious to the most ignorant of potential purchasers. In particular, any disclaimer should not use language which smacks of legalese. Given these rigorous requirements, it unlikely that a completely foolproof disclaimer could be devised. Any potential ambusher would be well advised not to rely solely on the presence of a disclaimer to justify its actions under s 9.

C SECTION 13(e)

Section 13(e) suffers from a split personality in that it prohibits at least two different types of false representations. It firstly prohibits representations that falsely state the product has association with persons or organisations. It also prohibits false representations dealing with the qualities of the goods or services themselves or qualities the goods or services may impart. This disjunction between the different kinds of proscribed misrepresentation adds unnecessary difficulties to the task of interpretation and may reflect confusion in the minds of the drafters of

158 *M K Hutchencc (t/a INXS) v South Sea Bubble Co Pty Ltd (t/a Bootleg T-shirts)* (1986) ATPR ¶40-667.
159 Ibid, p 47,378.

the provision. This confusion originates in the corresponding Australian provision, s 53(c) Trade Practices Act 1974 (Cth).[160] The New Zealand provision differs in two minor and unimportant respects. First, the addition of the seemingly redundant term "endorsement" and, second, the removal of the tautologous phrase "they do not have" that concludes the Australian provision. As Collinge has stated in relation to s 13, albeit in a slightly different context, "It is a good example of poorly drafted legislation being repeated upon the grounds, presumably, that it exists and that it would make for harmonization between the two countries."[161]

It is important at the outset to examine the relationship between s 9 and s 13. The latter is clearly one of a number of elaborations of the conduct more generally prohibited by s 9. Section 13 prohibits "false or misleading representations", a subset of the misleading or deceptive conduct proscribed by s 9. Thus not all conduct prohibited by s 9 will necessarily amount to a false representation under s 13. However, all representations which breach s 13 will necessarily also breach s 9.[162] Further, if a plaintiff fails to prove an allegation of breach of s 9, it will be unable to rely on s 13.[163] A plaintiff, therefore, is unlikely to bring an action under s 13 in preference to one under s 9, unless it wants to avail itself of the remedies available only after breach of s 13 is established. In particular, in cases of a particularly clear breach of the section, the Commerce Commission may bring a criminal prosecution in the District Court.[164]

In common with s 19, s 13 does not contain any element of intent. This extends to whether the representation made was false. The word in the context of the section simply means that the representation was in fact untrue, erroneous, or incorrect. It is of no importance that the maker of the representation did not know that the representation was untrue.[165] The degree of the misrepresentations falseness or its materiality is also of

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160 The comparable state legislation is s 44 Fair Trading Act 1987 (NSW), s 40 Fair Trading Act 1989 (Qld), s 58 Fair Trading Act 1987 (SA), s 16 Fair Trading Act 1990 (Tas), s 12 Fair Trading Act 1985 (Vic), s 12 Fair Trading Act (WA), s 14 Fair Trading Act (ACT), and s 44 Consumer Affairs and Fair Trading Act (NT).

161 Collinge, *The Fair Trading Act 1986*, NZLS Seminar, 1987, p 32.

162 Ibid, p 27.

163 *Coory v ARI Realty* 4/8/93, Master Hansen, HC Dunedin CP53/93.

164 Fair Trading Act 1986, ss 40.

165 *Given v C V Holland (Holdings) Pty Ltd* (1977) 29 FLR 212; 15 ALR 439.

no relevance in determining liability under the section,[166] although it will be relevant in determining the remedies granted to the plaintiff or the appropriate penalty in a prosecution.

In accord with the consumer protection focus of the Act, the term "representation" has been defined in extensive terms by the Courts. In *Marcol Manufacturers Ltd v CC*,[167] Tipping J suggested that a two-step test was appropriate for those rare cases where it was in issue whether a representation has been made. The first step is to determine whether the conduct alleged to be a representation could in law constitute a representation. Secondly, the Court must determine as a matter of fact whether the conduct amounted to the alleged misrepresentation. His Honour then went on to define the term representation in the following manner:[168]

> "The essence of a representation for present purposes is that the representor must be saying something to the representee either by words (whether spoken or written) or other means. The representee may of course be a specific person or group of persons or indeed persons generally such as shoppers who may come into a particular shop. The representor must be communicating a statement of fact to the representee either directly or by clear and necessary implication. It will usually be convenient to consider whether a representation has been made alongside the question of the subject-matter of the representation."

The question of whether a particular representation has been made will normally by the major issue in any character merchandising case. There will normally be no doubt that a representation has been made, in the sense that the defendant has communicated to a class of persons or the public generally. The real issue will be the factual question of whether the defendant made the particular representation alleged by the plaintiff.

The term sponsorship has been defined as conveying "that a commercial or other organisaton or person stands behind and, perhaps, wholly or partly finances some activity—for example, a sporting event or television show."[169] There has been no case law on the meaning of the term

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166 *Megavitamin Laboratories (NZ) Ltd v CC* (1995) 6 TCLR 231.
167 [1991] 2 NZLR 502.
168 Ibid, p 506.
169 *10th Cantanae Pty Ltd v Shoshana Pty Ltd* (1988) ATPR ¶40-851, p 49,003 per Pincus J.

endorsement, while "approval" was considered in *McDonalds System of Australia Pty Ltd v McWilliam's Wines Pty Ltd (No 2)*,[170] where Franki J applied a dictionary definition of the term.

Such terms will quite easily catch ambushing firms who claim sponsorship or approval in explicit terms. In *Green v Ford*[171] the defendant was convicted of an offence against s 53(c) Trade Practices Act 1974 when a magazine falsely claimed it has the sponsorship of a a coast guard squadron. Again, in *Given v Snuffa Pty Ltd*[172] the defendant was convicted for representing it has the approval of an organisation that did not in fact exist. However, where the representation is of a more subtle nature, there is little judicial guidance as to the correct approach to take. This is of course understandable as each case will be decided on its facts. Further, the lack of cases relating to ambush attacks makes it impossible to make any comment about the approach the Court's will take.

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170 (1979) 41 FLR 436.
171 (1985) ATPR ¶40-063.
172 (1978) ATPR ¶40-083.

CONCLUSION

The field of events marketing and ambush marketing campaigns presents the Courts with peculiar difficulties. The most important of these relates to the remedies available to a plaintiff events organiser. Firstly, the Court may consider an action in passing off. This is a tort which has recently undergone rapid expansion. Indeed the boundaries of its application are still being tested by the Courts. The range of trade values protected by the action have increased markedly even within the last 30 years, and it is uncertain where the development will stop. This expansion has been driven by a number of factors. Unfortunately a principled approach has not been one of them. The continued expansion of the tort suggests that fair trade values have been sacrificed to free trade values. Secondly, the tort of passing off has been moulded by interaction with the statutory remedies available under the Fair Trading Act 1986. While it was initially thought that the Act would see the end of the common law action, what has happened has seen the common law thrive and adapt in unexpected ways under the influence of its statutory sibling.

Where this leaves the protection of events is difficult to gauge. The only reported cases so far have been unsuccessful for the plaintiffs. There are difficulties in proving a the necessary representation or misrepresentation which are not faced by other similar areas of the law, such as character merchandising. However, it is submitted that given the manner in which the law has recently developed, the law will soon provide clear protection for events both in passing off and under the Fair Trading Act 1986. Almost inevitably, this will be the result of ad hoc extension rather than principled development. This will create uncertainty detrimental to event organisers and ambush marketeers alike.

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