THE LEGITIMACY OF THE PHENOMENON OF THE ESCALATION OF COMMERCIAL RIGHTS PROTECTION FOR SPORTS MEGA-EVENTS THROUGH THE MEANS OF *SUI GENERIS* LAWS AND THE DEVELOPMENT OF 'ASSOCIATION RIGHTS' TO THESE MEGA-EVENTS

*by Primrose E.R. Kurasha**

1 Introduction

At the core of any society is a pursuit of harmony. Society is composed of human clusters and their interactions. One of these key interactions is in business. Sport is also a thriving 21st century business as it is a form of entertainment.[1] In order to realise this harmony in sports, the law, in the form of sports law, strives to bring about justice in sports by ameliorating unlawful competition such as ambush marketing between competitors through, for example, legislation which guards against ambush marketing and confers exclusive association rights on specific sponsors.[2] Be that as it may, many authors, such as Andre Louw, have advocated for a complete free for all approach towards the sponsorship of mega sporting events which is characterised by a zero regulation of sports mega-events and is usually in the form of awarding exclusive association rights to sponsors.[3] This has been met with intense criticism from the likes of Steve Cornelius who hold that a certain degree of protection of sponsors is obviously necessary lest the sponsors terminate their sponsorship contracts with sport federations and the world of sports is left to die a natural death.[4]

In this article, I am, from a legal perspective, going to critically evaluate the creation, nature and working of such 'association rights' as contained in the relevant provisions in legislation such as the Merchandise Marks Act 17 of 1941 (as amended) and the Olympics Act

* Final year LLB student, University of Pretoria.

1 A Louw *Sports law in South Africa* (2010) 418.

2 The focus of this article is unlawful competition in the form of unlawful parallel marketing and more specifically, ambush marketing. This is because ambush marketing is a component of parallel marketing.

3 A Louw *Ambush marketing and the mega-event monopoly: How laws are abused to protect commercial rights to major sporting events* (2012) 716.

4 S Cornelius 'Ambush marketing in sport' (2011) 4 *Global Sports Law and Taxation Reports* 12.

(Law 12035 of 2009) as passed for the 2016 Rio Olympic Games (Brazil).

I am going to critically evaluate the legitimacy of this phenomenon of escalation of commercial rights protection for sports mega-events through the means of *sui generis* laws, specifically in respect of its culmination in recent years with the development of so-called 'association rights' to these events.

In order to enable a deeper understanding of my position on the aforementioned issue, I am first going to define 'ambush marketing' and other key concepts as this will enable the reader and I to have a common foundation and understanding. Furthermore, I am going to give an important theoretical understanding of commercial rights and sponsorship in sports to enable the reader to understand what is at stake when legislation creating association rights is passed and to show that there is this phenomenal spike in the protection of commercial rights. I am then going to proceed to finalise the issue by critiquing and evaluating as aforementioned.

2 Definition of ambush marketing: What is ambush marketing?

Ambush marketing is defined as any activity which creates a false or unauthorised commercial association with an event thereby detracting from the rights of the official sponsors of the event.[5] Section 15A of the Merchandise Marks Act protects sponsors from having their events ambush marketed provided the event is an event which is designated by the Minister of Trade and Industry. This definition addresses the 'what' and the 'when' (ambush marketing occurs) questions concerning ambush marketing.[6]

There are two types of ambush marketing namely, ambush marketing by association of a specific event and ambush marketing by intrusion.[7] Each will be discussed separately. It is to be noted that with both types of ambush marketing, illustrations better define them as compared to mere theoretical definitions.

5 HB Klopper & P de W van der Spuy *Law of intellectual property* (2012) 55.
6 Act 17 of 1941 (as amended).
7 L Leone 'Ambush marketing: Criminal offence or free enterprise?' (2008) 3-4 *The International Sports Law Journal* 75.

2.1 Ambush Marketing by association[8]

Ambush marketing by association can be defined as the classic example whereby an ambusher seeks to create an association between itself and the event according to Meenaghan.[9] The best example of this form of ambush marketing is that of the Pringles chips at the 2009 Wimbledon games.[10] Pringles, a Procter & Gamble brand ambush marketed the Wimbledon games in 2009 by the packaging of their chips. As tennis fans lined up to head into Wimbledon's famous All England Club on 1 July 2009, representatives from Pringles distributed 24 000 specially marked Pringles 'crisps' tubes that read 'These are not tennis balls!!' (playing off the fact that Pringles tubes mirror the packaging that tennis balls are sold in). Pringles drew extra attention to the campaign by featuring Roger Federer and Bjorn Borg look-a-likes (termed 'doubles') on-hand to interact with consumers. The guerilla tactic worked because Pringles received so much exposure on the Daily Telegraph, the Daily Mail and the Washington Business Journal.[11] So not only does this give the consumer the false impression that Pringles is one of the sponsors of the Wimbledon Championship but a general public perception that Pringles is one of the sponsors of the Wimbledon Championships is also created, as was the case in this unfortunate incident.

2.2 Ambush Marketing by intrusion

According to Bartlett, ambush marketing by intrusion involves merely placing one's trademarks, or other indicia, in event spaces where they will be captured by television cameras or seen by those attending the event.[12] An apt example is when years ago, during mega sporting events, aircrafts would simply fly over a sporting venue with a banner or it would simply drop these bags of parachutes in stadia. These were parachutes which were branded, bearing the signs of a company. Another example is that of Paddy Power at the Ryder Cup golf tournament of 2010.[13] On 28 September 2010, Paddy Power, the biggest betting and gambling company in the UK, placed its enormous Paddy Power Cleeve Hill Sign near the golf holes in the Ryder Cup golf

8 DM Sandler & D Shani 'Olympic sponsorship v "ambush" marketing: Who gets the gold?' (1989) 29 *Journal of Advertising Research* 9-14.

9 T Meenaghan 'Ambush marketing: Corporate strategy and consumer reaction' (1998) 15 *Psychology and Marketing* 305-322.

10 B Gainor 'Pringles goes ambush at Wimbledon' http://www.partnership activation.com/sportsbiz/2009/8/5/pringles-goes-ambush-at-wimbledon.html (accessed 1 April 2016).

11 As above.

12 P Bartlett 'Ambush marketing' (2007) 3 *Convergence* 31-37.

13 S Lepitak 'Paddy Power head of mischief to speak at The Drum's conference on future marketing' http://www.thedrum.com/news/2012/10/05/paddy-powers-best-stunts-bookmakers-head-mischief-speak-drums-first-conference (accessed 1 April 2016).

tournament which was watched by hundreds of millions of people. They received tremendous exposure in this successful ambush marketing campaign.

3 How to prove ambush marketing

In litigation, the context test is what is applied by the courts in order to determine whether or not a party is guilty of ambush marketing.[14] According to the context test, the specific advertisement must be taken out of the context of the sports event and be considered against the backdrop of a normal everyday situation. If the message in the advert is still meaningful, then lawful parallel marketing would have taken place. However, if the message is rendered senseless after having taken it out of the context of the event, then this is tantamount to ambush marketing.

The final step would be for the judge or presiding officer to apply the context test to the particular advertisement. Firstly, the presiding officer should address the images and the wording used. Secondly, he should look at whether there is a direct or indirect reference made to the sporting event. Finally, he should ensure that it is one of the listed lawful techniques to advertise and compete, but should also be wary of any exceptions.

4 Body

Sport is a multibillion Rand industry. Sport is big business and is bigger than any company in the world based on its financial value. For example, according to IEG's annual report, the projected global sports sponsorship spend for 2015 was US$58 billion.[15] This is the value of sports sponsorship. The sponsorship market alone is clearly worth billions of dollars. Sponsors put in at least US$100 million to US$200 million to become involved in major games for example, the Olympics.[16] Hence commercial rights is the heartbeat of the sports fraternity. Colloquially, one would say, 'it's what makes sports tick'.

The protection of sponsors' investments, in the form of legislation granting sponsors 'association rights' or commercial rights, was

14 Klopper & van der Spuy (n 5 above) 105. This context test was applied in the case of *Federation Internationale de Football Association (FIFA) v Bartlett* 1994 (4) SA 722 (TPD). Although the principle in question was that of passing on, the same context test as that of ambush marketing was applied because the goodwill of a company had also been prejudiced because of unlawful competition.

15 International Events Group (IEG) *Sponsorship spending report: Where the dollars are going and trends for 2015* (2015) 2.

16 DL Yohn 'Olympics advertisers are wasting their sponsorship dollars' http://www.forbes.com/sites/deniselyohn/2016/08/03/olympics-advertisers-are-wasting-their-sponsorship-dollars/#6177513a6c65 (accessed 19 October 2016).

necessitated by unlawful competition which was mainly in the form of ambush marketing at sports mega-events.[17] This concept of unlawful competition, which can alternatively be labelled as 'unfair competition', was discussed in the cases of *New Zealand Olympic and Commonwealth Games Association Inc. v Telecom New Zealand*;[18] and *National Hockey League v Pepsi Cola Canada Ltd*.[19] There are bragging companies who actually specialise in ambush marketing and they rhetorically ask why they should even bother investing R300 million to become one of the official sponsors when they can actually get the exposure without paying, by, for example, ambush marketing an event and getting the same or even more exposure than the official sponsor.

Ambush marketing began in the 1994 Soccer World Cup in Los Angeles, USA.[20] Burger King was the official sponsor of the World Cup, but McDonald's ambush marketed the event in the sense that, whenever one bought from McDonald's, they would give him a World Cup souvenir in the form of a football. All of these companies carry out thorough research before and after a big event. So they wanted to find out their 'return on investment' (ROI) and whether they would have actually benefited from sponsoring the World Cup, let's say for US$100 million. After the World Cup, they did this research, including public surveys asking people who the official 1994 World Cup sponsor was and the majority (55%) of the public believed that McDonald's was the official sponsor, solely based on their giving away of World Cup souvenirs to their customers. Unsurprisingly, there was no ROI on the Burger King's investment into the World Cup sponsorship (which was worth millions of dollars) and McDonald's actually benefited. McDonald's got more exposure from the World Cup and were seen as the 'good guys' because they had 'sponsored' the World Cup.[21] In other words, the goodwill and loyalty towards the McDonald's brand increased.

In South Africa however, when the real first major event took place in 1995, there was ambush marketing at the Rugby World Cup Finals at the Ellis Park stadium. Coca-Cola was the official sponsor of the Rugby World Cup in 1995 but at the finals game, Pepsi, just at the start of the game, employed over 400 girls wearing Pepsi clothing to distribute free Pepsi caps as the spectators entered Ellis Park. It goes without saying, therefore, that tens of thousands of spectators wore these Pepsi caps in the stands and, considering that this game was played in the afternoon, the cap then proved a useful accessory,

17 Cornelius (n 4 above) 12.
18 1996 7 TCLR 167.
19 42 C.P.R. (3rd) 390, 1992 C.P.R. Lexis 1773.
20 G Nufer *Ambush Marketing in Sports: Theory and Practice* (2013) 64.
21 B Wilson 'World Cup brands eye winning results' http://www.bbc.com/news/10244711 (accessed 19 October 2016).

especially in the open stands. So Pepsi seemed like they were the official sponsors of the Rugby World Cup and therefore got a lot of exposure. Many also thanked them for sponsoring the World Cup.

This set a dreadful trend for many other ambush marketing incidents in the world and became common in South African sports. All the while, this was allowed to get out of hand over the years because a conducive environment for such ambush marketing existed in the sense that, no penalties were given to pseudo-sponsors who ambush marketed mega sporting events, as there was no legislation to protect the sponsors and give them exclusive sponsorship rights, until 2003.

In 2003, the Cricket World Cup was to be hosted by South Africa and the official sponsor was Pepsi. Remembering its 'past-sins' of ambush marketing a Coca-Cola sponsored 1995 Rugby World Cup final, Pepsi quickly ran to the government to ask for protection in the form of intellectual property legislation on trademarks and copyrights which protect companies from ambush marketing. The legislation was tabled and passed and its enactment saw the ushering in of new legislative protection being granted to sponsors, and them enjoying exclusive association rights to sporting mega-events.[22] Inherently, their commercial rights were protected as well. The two main ways in which the legal protection was rendered was in the form of, namely, intellectual property legislation on trademarks and copyrights or a claim based on passing off which is a form of misrepresentation.[23] The following legislation was passed in order to implement this, namely:

- The Trade Practices Act 76 of 1976 (as amended in 2001) which, in its section 9(d), provides that ambush marketing is now a criminal offence.
- Section 15A of the Merchandise Marks Act 17 of 1941 which was also introduced to prevent ambush marketing and as a move to criminalise it.
- The Consumer Protection Act 68 of 2008.
- The Safety at Sports and Recreational Events Act 2 of 2010. It also made ambush marketing a criminal offence.
- The Advertising Standards Authority (hereafter referred to as 'ASA') also provided a Sponsorship Code.[24] In this Sponsorship Code, an arbitration tribunal was created within the ASA. Therefore, if you have an issue with any ambush marketing, you can go to the ASA arbitration tribunal and resolve anyone of these issues within one — two weeks. It is a speedy process and this is what makes it an attractive option. Instead of approaching the court and bringing an

22 Louw (n 1 above) 418.
23 Klopper & van der Spuy (n 5 above) 109.
24 The Advertising Standards Authority of South Africa 'Sponsorship code' http://www.asasa.org.za/codes/sponsorship-code (accessed 19 October 2016).

> urgent application etc., this ASA tribunal route is a cheaper and faster way of resolving anyone of these disputes.

In this 'dog eat dog' world where, according to Thomas Hobbes, man is a brutish animal who has got to be tamed by the law, one might wonder whether one piece of legislation would not suffice to guard against the unethical and unlawful business practice of ambush marketing in order to protect sponsors and grant them exclusive association rights to sporting mega-events.[25] After all it would seem as though the human animal would have been tamed by that one piece of legislation. In other words, this observer would basically ask why the South African legislature would make much ado about nothing and amend so many Acts to guard against ambush marketing. The answer is simple if one is to not only look at the millions of dollars which the sponsors invest in these sporting mega-events but the ROI which they expect from the investment. This ROI is so well-calculated and virtually has got to be a certain business forecast into the future on which the well-being and continued existence of the sponsor in the business world depends. In light of such an amount of pressure, both on the sponsors and the event organisers, these many Acts and their amendments cover every fathomable legal loophole.

Furthermore, if one is to secure sponsorship, it is important that they match specific products and consumers. Sponsors require a ROI on their sponsorship deals, hence, legislation protects it by granting them exclusive 'association rights' and regulating ambush marketing through legislation.[26] There are no 'freebies' or gratuitous tokens in sport, and sponsors just do not sponsor a game or a particular sport merely because they love it. So for example, if a sporting body is given US$1 million, the sponsor will need to know what his exposure in terms of broadcasting and commercial rights will be, and whether there will be an increase in the sales of the product. Therefore, the sport federation must know the profile of its players namely, their gender, ages, etc. It must also know the profile of its spectators namely, their ages, gender, income bracket, etc. For example, the governing body of table tennis must know the profile of its spectators, namely that their average age is 50 years, the gender ratio and that their income falls within the bracket of R200 000 – R250 000 per annum. The sport federation would then use this information when approaching sponsors. In this same table tennis example, there would be no use in having the table tennis body approach Bentley Motors for sponsorship for instance, because the spectators' income bracket clearly shows that they would never be able to afford a Bentley but,

25 F Viljoen *Beginner's Guide for Law Students* (2014) 1. In this chapter, Viljoen explains this Hobbesian theory of human nature.

26 T Scassa 'Ambush Marketing and the Right of Association: Clamping Down on References to That Big Event with All the Athletes in a Couple of Years' (2011) 25 *Journal of Sport Management* 357-370.

spectators in equestrian sports can afford this Bentley so the sport federation can approach Bentley Motors for sponsorship. Evidently, therefore, it's imperative that the sponsor matches with the specific sport otherwise the sponsorship will never be secured or it will be an epic fail. This is because, the whole idea is that if a sponsor sponsors a specific sport, its spectators should end up becoming consumers of its product(s) and its client.

The best illustration of a ROI is the Carling Black Label campaign.[27] This was brilliant advertising. This campaign sponsored and marketed the great match between the Kaizer Chiefs and the Orlando Pirates, as well as the millions of spectators. Carling Black Label actually registered all the intellectual property rights on this whole campaign. The campaign allowed for spectators to vote for their favourite players and coaches, and create teams which would play against each other in this derby. In order to vote, a spectator first had to buy a beer and at the bottom of the beer cap he would find a code which would enable him to participate by SMSing his preferred coach and player to the specified number.[28] The ROI was astronomically high as Carling Black Label sold over ten million beers in seven weeks! Over 10 000 000 votes were cast in a seven week period. The prize money was huge if one had to just look at the income that was generated on the sales of beers alone. Over ten million beers were sold in seven weeks which implies that more than R10 million was generated as one beer costs more than R1. This was therefore a brilliant campaign and ROI.

The Economist reported that, in order to ensure the influx of this ROI, sponsors take a firm and uncompromised stance of sport federations, keeping their sports clean, well governed and avoiding such things as doping scandals in sporting mega-events such as the Olympics and the World Cup.[29] This is important because it safeguards the sponsors' reputation and this reputation and image are a vital component of the association rights to any event that a sport might have. It is therefore not surprising that the protection of these association rights is escalating because these association rights are invaluable for any sponsors' ROI. It is vital for a sport to remain clean and untainted if it is to secure sponsorship of any sorts. No doping, no match-fixing and no bribery for instance, are all requirements that must be met by a sporting federation before it secures sponsorship. A present day illustration of this 'clean stance' is how some of the main sponsors of FIFA simply terminated their agreements with FIFA,

27 Anonymous 'Orlando Pirates official Carling Black Label squad' http://carlingblacklabelbeer.co.za/bethecoach/cupnews/7-orlando-pirates-official-carling-black-label-squad (accessed 19 October 2016).

28 Anonymous 'Carling Black Label Cup starting XIs' http://www.kickoff.com/news/44933/carling-black-label-cup-starting-xis (accessed 19 October 2016).

29 S Chadwick 'Market-driven morality' http://www.economist.com/blogs/gametheory/2013/04/corruption-sport-0 (accessed 2 April 2016).

because of the bribery in football, as this was all about good governance.

According to Cornelius, laws against ambush marketing evidently prioritise protecting these sponsors and there are very few sports federations or event organisers who realise the importance of the protection of these sponsors because, if the event organisers do not look after their sponsors, they will simply terminate their contracts and sport will eventually die.[30] This is so as to safeguard their economic interests. The sponsors must be protected because they are willing to invest millions into the sport federation or the event and should therefore benefit from it in the form of a high ROI and marketing exposure. The sport federation must therefore assist them to benefit from the specific event in the form of providing protection for them.

On the other hand, Louw argues for a free for all approach towards the sponsorship of mega sport events, which is characterised by a zero regulation of sports mega-events, and is usually in the form of awarding exclusive association rights to sponsors.[31] He treats Cornelius' stance as a mere excuse to monopolise the sporting world.

To a certain extent Louw is right because, for example, if a country hosts an event as big and as lucrative as the FIFA World Cup major events, the locals must also benefit socio-economically from the hosting of such an event. Typically these World Cup events are officially sponsored by huge multi-national companies, such as Budweiser, who get all the exposure and economic benefits, yet local industries and businesses of the host nation do not. During the 2010 FIFA Soccer World Cup Championship, which was held in South Africa, a small restaurant in Pretoria called Eastwoods had the FIFA World Cup logo on its signage.[32] FIFA filed an application for Eastwoods to remove that logo as they were located 500 metres from the Loftus stadium, which was the exclusion zone, and was therefore deemed to be illegal ambush marketing. Eastwoods obviously removed the logo as a lawsuit would have left them bankrupt had FIFA decided to sue them. This application was unreasonable on FIFAs part because Eastwoods is so small and insignificant to FIFAs World Cup campaign that no one would have ever believed that Eastwoods was the official sponsor of the 2010 FIFA World Cup and thus no impression would be created by them that they were the official sponsors of the 2010 FIFA World Cup. This legal protection of sponsors which is in the form of them being awarded exclusive association rights to mega sport events is what Louw is advocating against because, in this case, in its efforts

30 Cornelius (n 4 above) 16.
31 Louw (n 3 above) 716.
32 O Dean 'FIFA wins first 2010 ambush marketing ruling' *Managing Intellectual Property Magazine* 2009 1-2.

as an event organiser to protect Coca-Cola, which was its official 2010 World Cup sponsor, FIFA literally harassed the small, insignificant restaurant, Eastwoods. That harassment was unjust and unfair because, in the end, a paradox was evident in the sense that, whilst FIFA sought to pursue justice for mighty Coca-Cola, it was unjust in its harassment of Eastwoods. Ultimately, Louw believes that a certain extent of ambush marketing is ethical and should be legalised more so if it is as harmless as Eastwoods'.[33]

Ultimately, one sits with the dilemma as to whether or not ambush marketing should be legalised or regulated. Furthermore, one would ask whether or not there should be exclusive rights which are awarded to the official sponsors of these major sports events.

In my opinion, it is to a very limited extent that I agree with Louw that ambush marketing should not be regulated and exclusive rights should not be exclusively granted to sizable official sponsors during major sports events. This is tantamount to him saying that everyone must be allowed to associate with an event. It is to a limited extent that I agree with him because his free for all approach towards the regulation of ambush marketing and the sponsorship of major sport events is impractical and only works in a utopian state where everything is virtually perfect, fair and ethical. Louw is being very myopic in taking such a stance. This is evident in the history of ambush marketing in that before it was even regulated and sponsors for major sports events were protected through the granting of exclusive association rights, these sponsors were prejudiced by the lack of exclusive association rights being granted to them because their competitors would freely intrude on their events and ambush market. Removing these laws that regulate ambush marketing and grant exclusive association rights to sponsors would unnecessarily take us back to the drawing board in order to seek solutions to problems which have already been solved.

One might further argue that the solution to the problem of ambush marketing — which is its regulation through legislation — is in and of itself another problem, in the sense that it has robbed local industries of host nations (of these major sport events) of the opportunity to benefit economically. However, in my view, this is a containable problem and for it I provide the solution below which is based on Cornelius' argument.

I largely agree with Cornelius' aforementioned argument and hold that the investments of these big sponsors of major sporting events should continue being protected by the granting of exclusive association rights. It need not be a monopoly on the whole, but to a

33 Louw (n 3 above) 723. Under the heading 'When prohibiting an "association" with an event', Louw explains this type of a scenario as an exaggeration and unbalanced way of regulating ambush marketing.

limited extent, monopolising the major sporting events would actually be wise. The best solution would be to grant more investors and companies the opportunity of exposure through sponsorship but, at the same time, the event organisers must ensure the ultimate protection of their sponsorship investment by granting them exclusive association rights. Therefore, the granting of exclusive association rights by event organisers must be more open to local industries of the host nations of major sporting events and not be a total ban like what FIFA does. Leniency is imperative.

The other reason I do not agree with Louw's 'free for all' approach towards sponsorship and the granting of association rights to sponsors, is that it is allowing a cancer of unethical business practices, in the form of ambush marketing, to perpetuate. On face value, his free for all approach sounds reformative, fair and legally sound. This is especially true in a South African economy, which is characterised by an uneven distribution of wealth amongst its locals, firstly, because of an apartheid history, which economically marginalised the majority of the population. Secondly, this is also because of modern policies which have been manipulated to maintain the appalling economic status quo, such as the abuse of the tender processes under the new Black Economic Empowerment (BEE) programme which have benefited a very few of the black majority. In the face of such a chequered history, local industries of the host nations of major sporting events, such as South Africa in the 2010 World Cup, would definitely embrace Louw's free for all approach which promotes a zero regulation on ambush marketing and the granting of exclusive association rights to a few multi-national companies, and inherently create free marketing exposure. Be that as it may, the unregulated ambush marketing, which castigated the big multi-national companies or sponsors, will backfire and also haunt the locals, especially if one considers that it is these small local companies which sometimes ambush market the events of these big sponsors. Louw is fails to address the problem of unethical business practices in the form of ambush marketing.

On the other hand, at least, Cornelius attempts to address this problem by suggesting that current legislation, which regulates ambush marketing, should stay in place but he suggests a more open solution to solving the problem of locals also securing association rights and sponsorship deals. He does this by reiterating that the best solution would be to grant more investors and companies the opportunity of exposure through sponsorship but, at the same time, the event organisers must ensure the ultimate protection of their sponsorship investments by granting them with exclusive association rights.

I agree with Cornelius on several matters. Firstly, with Cornelius' stance on advocating for the regulation of ambush marketing and the

granting of exclusive association rights to sponsors of major sporting events because of the logic behind his reasoning, which includes evidence as cited above. Secondly, I agree with Cornelius in this debate solely based on a psychological impression given in the form of the 'security' of his argument, as opposed to Louw's position characterised by a subtle oscillation on his zero regulation on ambush marketing approach. By 'security' of argument, I mean that Cornelius stands by his assertion that ambush marketing has got to be regulated by the law no matter the circumstance. Louw on the other hand starts off by criticising the regulation of ambush marketing but, in his conclusions contained in his book entitled 'Ambush Marketing and the Mega-Event Monopoly: How Laws are Abused to Protect Commercial Rights to Major Sporting Events', evidence abounds that he has subtly accepted the need to regulate ambush marketing and in some ways he is actually providing procedures on how to go about it. Louw's shifting of positions works in Cornelius' favour as even his opponent Louw is now viewing this same matter from Cornelius' perspective. For example, under the heading 'Guard the guardians,' Louw states that checks and balances should be put in place when legislation is enacted by host nations for sporting mega-events because the legislation wields considerable power for these private sponsors which it seeks to protect.[34] One would expect that based on his zero regulation on ambush marketing approach, Louw would provide for this checks and balances mechanism 'if' legislation is enacted by host nations for sporting mega-events and not 'when' legislation is enacted by host nations for sporting mega-events. Clearly Louw has accepted the status quo of ambush marketing regulation and the granting of exclusive association rights and this makes futile his pursuit for a zero regulation on ambush marketing. Furthermore, to this he adds procedural mechanisms which can be employed by the advertising watchdogs.[35] These include, a retired judge or an independent legal expert (such as an intellectual property lawyer) vetting claims of infringement rights by local organisers prior to the threatening of legal action.[36] In the same text Louw continues to argue that such a person could be called upon to consider claims of ambush marketing and to pronounce, on an urgent basis, on the potential lawfulness or otherwise of the relevant conduct, before the issuing of a cease-and-desist letter or summons. Louw has not only accepted the status quo of the regulation of ambush marketing and the granting of exclusive association rights, but he has also provided Cornelius with ideas on how to further enforce the regulation of ambush marketing by giving a procedure on how to go about it.

34 Louw (n 3 above) 727.
35 As above.
36 As above.

If one is to look closely at Louw's checks and balances proposition concerning the legislation which regulates ambush marketing, and the procedural mechanisms thereof, one would realise that he is not making any ground-breaking intellectual discovery of any sort. This is because his retired judge or independent legal expert procedural solution has already been provided for by the aforementioned ASA Sponsorship Code. Clause 9 of the ASA Sponsorship Code provides for a tribunal which determines whether certain claims can be challenged in courts as ambush marketing claims. This is also Louw's purpose of hiring this retired judge or independent legal expert. It is rather academically frustrating that Louw is taking us round and round in circles of theoretical argument only to arrive at the same spot as Cornelius, which is that of the showing the legal feasibility and reasonableness in regulating ambush marketing.

I agree with Louw's argument on the monopolisation of language. He argues that event organisers should not monopolise the language by enacting laws which prohibit the use of certain generic terms which happen to be associated with the sporting mega-events.[37] For example, 'gold', 'games', rings' and 'summer'. He says it is only the dishonest commercial use of such generic terms by sponsors' competitors which should be prohibited. He is right as this protects one's right to freedom of speech and expression.[38]

However, one would wonder in what other way such a prohibition on the monopolisation of language can be made other than enacting laws which prohibit the dishonest commercial language use. Louw brings us back to Cornelius' proposition that the regulation of ambush marketing is vital. Moreover, in his argument against the monopolisation of language by event organisers, Louw states that if the sponsors of sporting mega-events want a prohibition on the use of certain words or symbols associated to a specific sporting mega-event, by non-sponsors, then the sponsors must pitch a sound case of why this should be so by explaining in what way the use of this language by anyone other than the official sponsor might infringe on their association rights to the event.[39] In this argument, law clearly makes provision for the enactment of legislation which protects the association rights of official sponsors of sporting mega-events in the form of language, but he just recommends stricter measures or requirements which have to be met by the sponsors before the legislation is passed. This is an apt illustration of the regulation of ambush marketing which Louw gives and so he eventually ends up seeing this whole matter the way that Cornelius does. However, I would like to commend Louw for being the only authority, amongst

37 Louw (n 3 above) 725.
38 Sec 16 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
39 As above.

Cornelius, Strauss, etc., who has clarified this confusion on the monopolisation of language in accordance with the granting of exclusive association rights.

5 The legal implications of the regulation of ambush marketing in South Africa: Chapter 2 of the Constitution of the Republic of South Africa: Bill of Rights

The Bill of Rights entrenches certain inalienable fundamental rights to which both natural and juristic persons are entitled.[40] I am going to discuss those fundamental rights which are relevant to this discussion.

According to section 16(1) (a) and (c) of the Constitution, 'everyone has the right to freedom of expression, which includes freedom of the press and other media' and the 'freedom of artistic creativity.'[41] Whilst this provision entitles one to advertise his brand, its meaning can be misconstrued as entitling anyone to advertise or market his brand as and when he pleases. This would be unfair on the official sponsors of sports mega-events who would have exclusively been awarded exclusive association rights for the exposure of their products and brand because they would have poured in millions to secure such a business opportunity. This is Cornelius' assertion that, whilst he recommends that event organisers open up the official sponsorship of sporting mega-events to more local investors and companies of host nations, the regulation of ambush marketing cannot, however, be abolished lest companies who ambush market sporting mega-events and unfairly enjoy the exposure of their brand at the expense of the official sponsor, would inappropriately raise the defence of 'freedom of expression'.

In terms of section 18 of the Constitution, 'everyone has the right to freedom of association'.[42] This clearly means that any company can choose to associate its brand with a particular sport and sporting mega-event without any restriction. Louw would agree with this legal provision and its application in context. Be that as it may, the company must thus first seek permission or approval to be associated with the game or sporting mega-event and consequently sponsor it because, opening up the major event to anyone would be unfair on the official sponsors of sports mega-events (who would have been awarded exclusive association rights for the exposure of their products and brand because they would have poured in millions to secure such a business opportunity). This condition is in line with the

40 Ch 2 of the Constitution.
41 *Afri-Forum v Malema* 2011 (6) SA 240 (EqC) para 20.
42 Ch 2 of the Constitution.

new legislation which grants exclusive rights to official sponsors of sports mega-events. This is a justifiable limitation in terms of section 36 of the Constitution which I discuss below.

Section 22 of Constitution is an interesting provision in that it has the special feature of a qualification unlike, for example, section 18 which just bestows a fundamental right on a person. Section 22 provides the qualification that the practice of a trade may be regulated by the law.[43] In other words, whilst one may be entitled to choose their trade freely, this same trade may be regulated by the law. The main aim of getting into business is to make a profit and the only way that this profit can be made is through the exposure which is brought about by marketing.[44] Therefore, when a company assumes its status as a going concern after having chosen its trade, it is obvious that it wants this entitlement of marketing its brand at sporting mega-events for instance, and thus associate itself with the major sport events. Louw and the law are still of one mind up to this point. However, an application of the qualification of section 22 provides that this marketing, in the form of ambush marketing is regulated so as to ensure fair and ethical business practice in business and in sport. This tallies with Cornelius stance on the regulation of ambush marketing and sponsorship.

Section 30 of the South African Constitution provides that everyone has the right to participate in the cultural life of their choice, but no one doing so may do so in a manner inconsistent with any provision of the Bill of Rights.[45] This provision definitely supports Louw's position on allowing ambush marketing to take place because, in terms of this constitutional provision, any company is entitled to partake in any sport or sporting mega-event of its choice as sport is a component of culture. Be that as it may, in terms of the provision's qualification, the company can only do so in a way that is consistent with the Constitution. The Constitution is founded on values of fairness, equality and justice.[46] Therefore, the company has got to associate itself with the sporting mega-event by partaking in marketing in a fair manner and this is definitely not ambush marketing because this would be unfair and unjust on the official sponsors of the sports mega-events — who would have exclusively been awarded exclusive association rights for the exposure of their products and brand because they would have poured in millions to secure such a business opportunity. Cornelius is again supported by the Constitution.

43 *The Law Society of the Northern Provinces v Mahon* [2011] 2 All SA 481 (SCA) para 20.
44 *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL).
45 *Minister of Home Affairs v Fourie* 2006 (1) 524 (CC); *Lesbian and Gay Equality Project v Minister of Home Affairs* [2005] ZACC 19.
46 Sec 1(a) of the Constitution.

According to section 34 of the Constitution, 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, where appropriate, another independent and impartial tribunal or forum'.[47] Contrary to Louw's zero regulation on ambush marketing assertions, which criticise the legitimacy and existence of the ASA Code, in terms of this constitutional provision, the ASA Code, which provides for an arbitration tribunal, is evidently a necessary regulation on ambush marketing because it provides a disciplinary forum for all those official sponsors who would have been disadvantaged by the repercussions of ambush marketing such as a low ROI. Furthermore, the *audi alteram partem* principle entitles the claims of ambush marketing to be heard in a tribunal which is similar to that of the ASA Code. This truly makes Louw's position dismissible because, in this application of section 34, his assertion flies in the face of the Constitution and this is legally unpardonable in terms of section 2 of the Constitution. Section 2 entrenches the supremacy of the Constitution by providing that the 'Constitution is the Supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

In light of these Constitutional arguments one would conclude that Louw is clutching at straws in his free for all approach and zero regulation on ambush marketing position. This is because the Constitution, in all its impartiality, is still found to be agreeing and 'siding' with Cornelius in this ambush marketing regulation debate. Clearly I am not the only one agreeing with Cornelius nor am I being naïve as a mere law student in agreeing with Cornelius.

6 Section 36-Limitations Clause

Section 36 of the Constitution contains a limitation clause. According to this limitation clause, the human rights which are entrenched in the Bill of Rights are not absolute however, they can be limited and encroached upon in a way that is justifiable in an open and democratic society such as South Africa. Section 36 provides:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including;
>
> (a) The nature of the right;
>
> (b) The importance of the purpose of the limitation;
>
> (c) The nature and extent of the limitation;

47 *Legal Aid South Africa v Magidiwana* 2015 (6) SA 494 (CC).

(d) The relation between the limitation and its purpose; and

(e) Less restrictive means to achieve this purpose.

Whilst all the aforementioned legal qualifications which promote the regulation of ambush marketing can be highlighted, they are all anchored in the limitation clause of section 36 which also, like them, provides a limitation on these fundamental rights. These fundamental rights which could potentially allow for companies to ambush market at sporting mega-events are limited by laws of general application in the form of all the aforementioned legislation which was passed in order to curb ambush marketing, such as the Merchandise Marks Act[48] and the Olympic Act.[49] This is the legitimate way to limit any fundamental rights in an open and democratic society such as South Africa.

In order to come up with a legitimate limitation of these fundamental rights, the procedure which the courts employ is that of a proportionality test. The court weighs the business interests of the company accused of ambush marketing against the interests of the prejudiced official sponsor of a sporting mega-event, coupled with public policy considerations which focus on the impact of the ambush marketing on the Constitution and society as a violation of the Constitution thereof. As an illustration, in the previously cited ambush marketing incident on the 1995 Rugby World Cup,[50] had Pepsi's ambush marketing of the 1995 Rugby World Cup occurred under the current constitutional dispensation, the court would have considered Pepsi's right to market its brand and exposure thereof versus Coca-Coca's exclusive association rights to the sporting mega-event, which would have come about as a result of the millions of dollars that it would have invested into the event. Moreover, the court would have also considered qualifications such as that of section 22 which allows it to regulate ambush marketing. With this in mind, the court would have then determined whether illegal ambush marketing took place and the type of penalty that would best suit Pepsi's violation of the Constitution. In this case, Pepsi would have probably been found guilty of ambush marketing. This proportionality test was first employed in the precedent setting case of *S v Makhwanyane*.[51] It is in light of these constitutional priorities that the courts will be willing to limit the constitutional values of athletes in terms of the limitations clause.

In light of the regulation of ambush marketing, it is likely that this purpose orientated approach, coupled with the constitutional value orientated approach, will be applied by courts when deciding on how

48 Merchandise Marks Act 17 of 1941.
49 Federal law 12,035 of 2009.
50 See para 4 (pg 5) above.
51 1995 (3) SA 391 (CC) 104.

to address ambush marketing in terms of the limitation clause, in future sport mega-events which are to be held in South Africa. This regulation of ambush marketing is encouraged.

7 Conclusion

In conclusion, this is the middle ground that lies between Louw and Cornelius' arguments in that, the major sponsors must be protected but leniency is being called upon from event organisers and, exclusive association rights should be granted to locals of these nations which host major sport events in order for all to benefit. Nonetheless, Cornelius' endorsement of the regulation of ambush marketing and the granting of exclusive association rights seems more laudable at this point in time, especially if the sporting fraternity would want to survive and not die a natural death due to a lack of oxygen, of which in its case, this oxygen is sponsorship.