

MAJOR EVENT REGULATION: LESSONS FOR AND FROM NEW ZEALAND

Louise Longdin*

A number of jurisdictions have now enacted special interest (major event management) legislation prohibiting ambush marketing and other related trade practices that in many cases were lawful, if sometimes cheeky or unethical. Supporters urge such legislation is necessary to safeguard the interests of those who officially invest in underwriting or associating themselves with a major event. However, the new laws have the capacity to erode freedom of expression and undermine carefully constructed statutory intellectual property and consumer protection codes, as well as judicially pedigreed causes of action based on allegations of misrepresentation, connection confusion or misappropriation without offering the checks and balances that these mechanisms afford. New Zealand's one size fits all Major Event Management Act 2007 goes further than most in this direction by presuming infringement and creating new quasi property rights and open ended criminal offences. The writer examines the theoretical underpinnings, scope and likely application of New Zealand's recent initiative against some of its overseas counterparts and argues that concessions made during the Act's passage in an attempt to balance new against existing private rights are too half-hearted to make up for its underlying deficiencies.

Introduction

Countries or cities hosting a large sporting event of international significance are invariably moved to do so in the expectation that the event will deliver not only a substantial boost to infrastructure development and the tourism industry but also leave a lasting legacy in the form of a range of additional benefits contributing to their economic, social and cultural wellbeing. While potential hosts have always had to prove their viability to secure selection, this until recently merely meant that they had to convince the relevant selection panel of their commitment to the event and ability to provide venues, transport, catering arrangements, accommodation, and other infrastructure up to an appropriate level by a particular date. Nowadays, however, that is not enough. International sporting

* Professor of Law, Director of the Intellectual Property Research Centre, Auckland University of Technology. While all errors remain mine, my thanks go to Professor Ian Eagles, Auckland University of Technology for help and interest extended towards this research and to the two anonymous referees for their valuable comments.

organisations backed by giant, deep pocketed, multinational brand owners (together with the host national sporting organisations and event organising committees largely responsible for meeting the sponsorship budget) have succeeded in convincing governments that the appropriate *quid pro quo* for a host jurisdiction staging a major event is an undertaking to restrict any person from promoting or attempting to promote their business in connection with (or even in the vicinity of) that event unless they are an official organiser or sponsor (or authorised by one).¹

An increasing number of would-be host jurisdictions have thus bound themselves to provide and enforce strict advertising and trading rules which prohibit and even criminalise ambush marketing, a practice which, despite the rather derogatory connotations² attached to the name, may involve “a spectrum of behaviour, from the glaringly obvious to the ambiguous and subtle”.³ For present purposes, the practice can conveniently and loosely be defined as “the unauthorised association by businesses of their names, brands, products or services with a sports event or competition through any one or more of a wide range of marketing activities, “unauthorised” [only] in the sense that neither the controller of the commercial rights in such events, usually the relevant government body, nor its commercial agents, has sanctioned or licensed the association”.⁴ The term, if not the practice itself, sprang into world wide prominence during the Atlanta Summer Olympic Games in 1996. Reebok was

¹ For example, in 1997 the International Olympic Committee (“IOC”) firmly indicated that for any city to be successful in its bid to host the Olympic Games, it would have to ensure that all advertising space (including that on billboards, posters, buildings and advertisements on buses) within the city limits of the Games would be under the control of the Olympic Games organisers for the entire month in which the Games were to be held. Even before that announcement, however, the Host City Contract that was signed in 1993 by the IOC, the Australian Olympic Committee (“AOC”) and the City of Sydney required AOC, the City of Sydney and the Sydney Organising Committee for the Olympic Games (“SOCOG”) which had subsequently interposed to assume contractual obligations to IOC) to ensure legal protection would be obtained (if it did not already exist under the Olympia Insignia Protection Act 1987 (Cth) and the Corporations legislation regulating the use of certain phrases as company names) for the Olympic symbol; the words “Olympic” and “Olympiad”; the Olympic motto; the AOC emblem; SOCOG’s emblem and mascot. Thus the Sydney Olympics in 2000 were the first to be protected by legislation aimed at preventing non-sponsor companies from using official Olympic insignia and phrases. Even China (never a fast mover in relation to granting or enforcing intellectual property rights) in order to host the 2008 Olympics in Beijing, had to appease the 12 firms, including Coca-Cola, Samsung and Visa who had agreed to pay a total of US\$866m to be official sponsors by allowing the Organising Committee (BOCOG) to take control of all prominent advertising sites in the Chinese capital, including those at train stations and airports, and limit their use to official sponsors (between 11 July and 17 September 2008).

² In one commentator’s view: “In the world of modern marketing, sponsor and ambusher are not moral labels to be assigned by the self-appointed arbiters of ethics, but merely the names to be given to two different- and complementary, if competing – roles played by competitors vying for consumer loyalty and recognition in the same thematic space.” J. Welsh, “Ambush Marketing: What it is, What it isn’t” <<http://www.poolonline.com>>.

³ J Sebel and D Gyngell, “Protecting Olympic Gold: Ambush Marketing and Other Threats to Olympic Symbols and Indicia” [1999] *UNSWLJ* 23.

⁴ Australian Senate Legal and Constitutional References Committee, *Cashing in on the Sydney Olympics: Protecting the Sydney Olympics from Ambush Marketing*, Canberra, 1995, 22.

one of the Games' official sponsors, but its arch rival Nike was able to purchase considerable advertising space around the city, set up a centre ("Nike Village") outside the main stadium and gave away to event attendees paper flags displaying its "swoosh" logo which were captured on television and subsequently aired to millions of viewers. It was said that Nike thereby gained just as much if not more brand recognition than Reebok from the event.⁵ Another much-publicised example of ambush marketing occurred a decade later when Emirates Airlines was one of the official sponsors of the 2006 FIFA World Cup. Its rival Lufthansa was able to paint soccer balls on the noses of its planes with impunity⁶ but its sheer bravado in doing so thrust the practice into the global spotlight and galvanised potential sponsors and organisers of major international events into lobbying aggressively against it as well as other conduct that in other contexts would be viewed simply as clever and ingenious marketing strategies.

This kind of special pleading by brand owners and sporting organisations has generally paid off and nowhere more so than in New Zealand. In order to enhance its capability as a major events destination, it has shed any reservations it might once have had⁷ and joined the United Kingdom⁸, Australia,⁹ Canada,¹⁰ South Africa,¹¹ nations of the Caribbean¹² and other jurisdictions in opting for a

⁵ For some, that incident remains "the ambush of all ambushes", see A. Shauer "Ambush Marketing Steals the Show" <http://www.brandchannel.com/features_effect.asp?pf_id=98>. Less spectacularly, at the same event in Atlanta, it happened that although Coca Cola was an official sponsor, its competitor Pepsi, with its tongue firmly in its corporate cheek, depicted the French 400 metres runner Marie-Jose Perec in its advertisements as the "official representative of the unofficial drink of the Atlanta Games".

⁶ This is because an ambush marketer does not necessarily set out to free ride on a particular sponsor's reputation (and thereby run the risk of becoming liable in passing off or under fair trading legislation) but rather seeks to give its own brands/products exposure through the medium of the publicity attracted by the event.

⁷ In 2002 New Zealand was poised to take advantage of its close proximity to its trans-Tasman neighbour by acting as co-host for the 2003 Rugby World Cup with Australia. The New Zealand Rugby Football Union ("NZRFU") had been offered the right to co-host the event on the same terms offered to Australia. However, in order to win the co-hosting rights, the NZRFU had to agree that all venues hosting the allocated game would be "clean", that is free of all sponsorship, advertising and pre-booked seating (including all corporate box space) so as to minimise the potential for ambush marketing. Australia agreed to provide clean venues but the NZRFU were unable to make similar promises resulting in the withdrawal of the invitation partly because of prior contractual obligations owed to corporate box-holders and partly because public controversy ensued as to the merits of providing clean venues.

⁸ London Olympic Games and Paralympic Games Act 2006 (UK).

⁹ Australia enacted the Sydney 2000 games (Indicia and Images) Protection Act 1996 specifically for the 2000 Sydney Olympic Games while New South Wales, the host state for Sydney 2000, enacted the Olympic Arrangements Act 2000 which prohibited advertising on buildings and structures, aerial advertising and broadcasting. The Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Act (Cth) received Royal Assent on 26 June 2005 and contained a sunset clause such that the Act would cease to have effect from the end of 30 June 2006.

¹⁰ The Olympic and Paralympic Marks Act, SC, c 25 (2007).

¹¹ See n 38 below.

¹² The ICC Cricket World Cup West Indies 2007 Act was enacted by Jamaica in 2006 in anticipation of the 2007 Cricket World Cup. The legislation was required of all nine Caribbean Nations hosting the event.

sui generis events management regime.¹³ Given that New Zealand is a relative latecomer to the world of major events management legislation it might have been supposed that the drafters of its statute would choose to draw on the experience of other jurisdictions in which major event management laws have attracted strong criticism¹⁴ for providing an excessive level of protection for sponsors, eroding freedom of commercial speech and not properly balancing the interests of all stakeholders not just those with a direct interest in the event such as the international sponsoring organisation, the national organising committee and financial underwriters. This, however, has generally not been the case and even lessons from across the Tasman have been ignored.

Without the benefit of any real investigation into the general impact of major event legislation on various stakeholders, New Zealand's as yet untried initiative seems likely to surpass its overseas counterparts in being a target for complaint. To the extent that it comes from competitors of the event sponsors, much of this complaint will be (and will be seen to be) self-interested. Opponents of the Major Event Management Act 2007 ("MEMA") do not, however, have a monopoly on self interest. The same accusation can be levelled with equal force at the sponsors and organisers themselves. As Jerry Walsh who claims to have coined the term "ambush marketing",¹⁵ points out:¹⁶

"[I]n buying a sponsorship, a company buys only that specific, packaged product, offered as it is, with its constituent parts and attendant rights (and its liabilities). In sponsoring, the company does not thereby purchase the rights to all avenues leading to the public's awareness of that property; and, more importantly, the company does not buy the rights to the entire thematic space in which the purchased property is usually only one resident. In other words, all else other than that which is specifically purchased is up for commercial grabs. That's as it should be in sponsorship and as it is in the larger world of both commerce and life: when you own and license Kermit you have only given the rights you own to one specific frog - not to all frogs, and maybe not even to all green ones."

The provenance of such criticism is as irrelevant as its content. What matters from the point of view of legal principle is first, MEMA's bypassing, without

¹³ The United Kingdom has, indeed gone further. As well as enacting *sui generis* event management laws (see n 8 above) it has also created a new intellectual property right, the London Olympics Association Right ("LOAR").

¹⁴ See, for example, J. Curthoys and C. Kendall, "Ambush Marketing and the Sydney 2000 Games (Indicia and Images) Protection Act (Cth): A Retrospective" (2001) 8 *Murdoch University Electronic Journal of Law*; H Padley, "London 2012: Five Years, Nine Months and Counting" (2006) 28 *EIPR* 586; M Geist, "Olympic Marks Bill on the Fast Track", <<http://www.michaelgeist.ca/content/view/1998/125>> at 3 June 2007.

¹⁵ See Welsh, n 2 above.

¹⁶ *Ibid.*

empirical justification, of the internal constraints on over expansion that all intellectual property regimes contain, and, secondly, MEMA's impact on constitutional rights and freedoms particularly those relating to freedom of expression and legal constraints on search and seizure.

Gazumping Intellectual Property's Internal Debate

Commentary on MEMA (both during and after its enactment) has sought to address the question of whether existing intellectual property law is up to the job of protecting sponsors' and organisers' interests, with MEMA's proponents holding that it does not¹⁷ and its critics saying either that it can in its present state or can be made to do so with some judicious legislative tweaking.¹⁸ Both critics and proponents, however, are asking and answering the wrong question. Implicit (and sometimes explicit) on both sides of the fence are two assumptions. The first is that lack of special protection for particular kinds of economic activity and for particular forms of investment over and above that given to any player in a market economy constitutes a gap in the law that courts or legislatures must fill whenever asked. This is to ask judges and legislators to take a considerable leap of faith. The "gap" may exist for perfectly valid social or economic reasons. The case for legal protection must be made. It cannot simply be asserted.¹⁹ The second assumption, obviously fallacious once stated but all the more tenacious for all that, is that all harms deserve compensation. Neither form of *a priori* reasoning is an appropriate starting point for an analysis of MEMA (or indeed for the analysis of the social utility or economic efficiency of intellectual property in general)²⁰. In common law legal systems, intellectual property rights exist not to protect the interests of any particular market player or players but to strike a balance between the need to encourage innovation and creativity and discourage consumer deception through the granting of temporary and limited legal monopolies, and the potentially adverse effect on the wider economy that such monopolies can entail. Liability rules such as those relating to passing off

¹⁷ Conspicuously absent from the parliamentary debates on, and Commerce Committee consideration of, the Bill is any sustained analysis of precisely why and where existing intellectual property rights, the action for passing off and the fair trading legislation fall short of protecting sponsors' and organisers' interests.

¹⁸ See S Corbett and Y Van Roy, "The Major Events Management Act" (2008] *New Zealand Law Journal* 211, 212.

¹⁹ As it was, for example, by one member of the House (Ron Mark) during the Third Reading of the Bill when he stated: "Here we have, in the passage of this Bill, an acceptance and a realisation ... that some people's investments have the right to be protected. The passage [of the Bill] shows the acceptance and pragmatic realisation of the fact that people who have invested huge amounts of money, and who have undertaken the responsibilities to their shareholders that come with that, have a right to conduct that business and continue to accrue the advantage of ... their risk taking without other people coming in from the side and exploiting it....Such activities can only damage New Zealand's reputation in the eyes of others internationally, and make it more difficult for us to secure major events." *Hansard*, Vol 641, page 11421 (23 August 2007).

²⁰ I Eagles, "Intellectual Property and Competition Policy: The Case for Neutrality" in CER Rickett & G W Austin (eds) *International Intellectual Property Law and the Common Law World* (Hart Publishing, Oxford, 2000) 285.

and fair trading serve the same purpose. In the nature of things no intellectual property regime will get this balance right all the time. Law and economics literature is full of vigorous debate as to where this balance should lie in particular cases²¹ but no one would say that such a balance is inappropriate or unnecessary or that the law should give up the attempt to strike it entirely. Again, even where the balance in the view of some commentators is wrongly struck there is at least the saving grace that because these are laws of general application any favouring of owners over consumers or competitors will apply equally to all forms of economic activity.

The problem posed by MEMA for the internal coherence of intellectual property law as a whole is that by outflanking this debate entirely, it encourages losers in the lobbying contest that usually accompanies legislative changes to intellectual property regimes to believe that the solution to their problems is a free standing custom built statute of their own. That is a problem for the future. Of more immediate concern is MEMA's lack of empirical underpinning and its ability to ignore the carefully crafted mechanisms that intellectual property law has evolved to guard against over protection in the present.

Failure to Lay the Empirical Groundwork

In a rational world a legislature, before enacting the statutory sledgehammer that is MEMA, would want empirical answers to the following questions:

- Are major events positive contributors to net economic welfare or do they simply edge out other forms of investment, private or public?²²
- Do sponsors and organisers need MEMA type sweeteners before investing or would they invest to the same level (or near it) anyway?
- What is the loss to the economy as a whole from restricting activities that were previously lawful?

²¹ For a maximalist view of intellectual property owners' rights, see W J Gordon, "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory" (1989) 41 *Stan L Rev* 1343; W. J. Gordon, "On Owning Information: Intellectual Property and the Restitutory Impulse" (1992) *Virg L R* 149; R. P. Merges and R. R. Nelson "On the Complex Economics of Patent Scope" (1990) 90 *Colum L Rev* 839 and P. Goldstein *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Hill and Wang, New York, 1994) 236. A tilt against owners in favour of users can be found in S. E. Sterk, "Rhetoric and Reality in Copyright Law" (1996) 94 *Mich L Rev* 1205 and J. D. Litman, "Copyright Legislation and Technological Change" (1989) 68 *Oregon L Rev* 275, 317.

²² Highly relevant in this context is that branch of economic analysis known as investment displacement theory according to which protecting activity A from competition will encourage investors to put their money into A when they would otherwise have put it into activities B or C (with no net gain to the economy). G. S. Lunney, "Re-examining Copyright's Incentives Access Paradigm" (196) 49 *Vand L Rev* 483; W. F. Baxter, "Legal Restrictions on the Exercise of the Patent Monopoly: An Economic Analysis" (1996) *Yale L J* 267; R. M. Hurt and R. M. Schuchman, "The Economic Rationale of Copyright" (1996) 56 *Am Ec Rev* 421. See also Eagles, n 20 above, 297.

- To what extent do the investments made represent sunk costs especially where infrastructure is under-utilised after the major event?

It could of course be objected that such evidence is both hard to find and hard to evaluate once found but the alternative is to accept major restrictions on previously unregulated corporate or individual activities on the basis of hunch alone. The onus of persuasion should surely lie with MEMA proponents and defenders. There are after all advantages to New Zealand not being an early mover in relation to events management legislation. Of particular relevance here is the fact-finding inquiry instituted in March 2007 by the Department of Communications, Information Technology and the Arts (DCITA) in its current Review²³ into the effectiveness of major events legislation.²⁴ As the Issues Paper for that Review states:

“The Review is interested in assessing the extent to which ambush marketing is perceived to be a problem in the staging of, or participation in, major events. This is necessary to determine whether the solutions in the [legislation] are proportionate and appropriately targeted. A variety of definitions of “ambush marketing” have been adopted, many of which include activities often viewed as legitimate marketing practices, and which do not involve any express misrepresentations as to sponsorship. The Review is interested in gauging how well the [legislation] targeted the perceived public detriment by establishing broader and more certain rights.”

In hindsight the kind of intelligent investigation Australia is actively conducting would have been of great benefit for New Zealand legislators had they been prepared to wait. Sadly that was not the case.

Bypassing Existing Constraints on Intellectual Property Owners

Traditionally, investment alone did not create legal rights under existing intellectual property law.²⁵ Some wider public good had always to be

²³ Funded by DCITA, the research for the project will be conducted by Frontier Economics and the Intellectual Property Research Institute of Australia (IPRIA).

²⁴ In particular, chapter 3 of the Olympic Insignia Protection Act 1987 (“OIPA”) and the whole of the Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Act 2005. OIPA as originally enacted applied only to the Olympic symbol (the five interlocking rings); the Olympic motto; and up to ten registered Olympic designs. Chapter 3 was added to OIPA by the Olympic Insignia Protection Amendment Act 2001 and regulates the commercial use of certain Olympic expressions for advertising or promotional purposes where such use would suggest a sponsorship or sponsorship-like association with Olympic bodies, athletes, teams and events.

²⁵ One of the rare examples of *substantial* investment alone creating intellectual property rights is to be found in the *sui generis* database protection laws of European Union member states, *Directive on the Legal Protection of Databases* 96/9/EC 11 March 1996; 1996 O J (L 77) 20; *Copyright and Rights in Databases Regulations* 1997 (UK). Even then to be protected, the investment must be directed towards the building of the database and not to some activity of which the database is merely a collateral by-product. *British Horse Racing Board v William Hill Organisation* ECJ Case C-203/02;

demonstrated. This was done through limitations built into the fabric of each intellectual property right. MEMA, on the other hand, makes only the briefest of nods (in s 7) towards the various limiting concepts contained in the law of copyright, trade marks, passing off and trade practices, concepts carefully crafted over time to balance the gains to innovation, enterprise and creativity against the rights of consumers and the needs of a competitive economy. Among the internal controls thus bypassed by MEMA are:

- The rules in trade mark law and passing off requiring proof of consumer confusion before infringement can be established.²⁶
- The requirement that trade marks be distinctive and not merely descriptive.²⁷
- The need to show damage to the plaintiff's pre-existing commercial reputation or goodwill in passing off cases.²⁸
- The probable need to establish a representation of some kind by the defendant in both passing off and cases brought under s 9 of the Fair Trading Act 1986 (NZ).²⁹
- The necessity of proving in copyright infringement claims that some kind of "work" has been substantially reproduced.³⁰

These limiting principles are either ignored by MEMA or considerably watered down as discussed in parts IV and V below.

Fixtures Marketing Ltd v Oy Veikkaus Ab C-46/02; *Fixtures Marketing Ltd v Svenska Spel AB* C-338/02; *Fixtures Marketing Ltd v Organismos Prognostikon Agonon Podosfairou AE* C-444/02. Interestingly, it appears that database protection may now be more easily achieved by reliance on contract and technological protection mechanisms. A further issue awaiting empirical analysis is whether investment in databases in the United States (where the much more restrictive threshold test for copyright subsistence in *Feist Publications Inc v Rural Telephone Service Co* 499 US 340 (1991) applies) is lower than in the European Union. For all these reasons the European experiment may not be a very convincing precedent for *sui generis* protection regimes.

²⁶ Trade Marks Act 2002 (NZ), s 18. Proof of confusion is unnecessary where the defendant uses a mark identical to the plaintiff's mark, (*ibid*, s 89(2)), or the mark is well known in New Zealand, (*ibid*, s 164). Similar restrictions are applied in passing off cases, see *Tot Toys Ltd v Mitchell* [1993] 1 NZLR 325. As to the link between consumer "confusion" and misleading and deceptive conduct see *Taylor Bros v Taylor Group Ltd* [1988] 2 NZLR 1, 39, per Cooke P and *Geddes v New Zealand Dairy Board* (unreported CA 180/03, 20 June 2005).

²⁷ *Tot Toys Ltd v Mitchell*, *ibid*; *Taylor Bros v Taylor Group Ltd*, *ibid*.

²⁸ *Erven Warnink B V v J Townend & Sons Ltd* [1979] AC 731.

²⁹ The misrepresentation requirement is marginally more established in New Zealand than in Australia. See L Trotman and D Wilson, *Fair Trading: Misleading or Deceptive Conduct* (Lexis Nexis, Wellington, 2006) 68.

³⁰ Neither the legislature nor the courts provide firm guidance on what constitute substantiality. However, trivial similarities do not amount to infringement. Courts have held that substantiality is a question of fact (*Chatterton v Cave* (1878) 3 AC 48) and a matter of impression (*Designers Guild Ltd. v Russell Williams (Textiles) Ltd.* [2001] FSR 11) and stressed that the test is not just a question of quantity, but also of quality (*Ladbroke (Football) Ltd. v William Hill (Football) Ltd* [1964] 1 All ER 465, 469).

A Generic Response to Highly Specific Events

Having assumed the mantle of future host of the Rugby World Cup in 2011 (one of the largest sporting events in the world) and that of future co-host of the Cricket World Cup in 2015, New Zealand acted to honour its government's assurances to the International Rugby Board and the International Cricket Council by passing MEMA.³¹ Hot on the heels of that enactment, the Rugby World Cup 2011 was declared to be a major event;³² the Rugby World Cup Limited³³ has been identified as the major event organiser and the Ministry of Economic Development has announced³⁴ that the Major Events Unit and Rugby World Cup Government Coordination Office has been integrated (as a new Directorate within its Industry and Regional Development Branch) to be responsible for coordinating the Government's investment in major events. Its responsibilities include the development and maintenance of effective public/private partnerships in line with the Government's objectives and maximisation of leveraging opportunities.³⁵

What sets MEMA immediately apart from comparable initiatives elsewhere is the fact that it is not limited to covering the running of any specific one-off event such as the 2000 Sydney Olympic Games,³⁶ the 2012 London Olympic Games,³⁷ the 2010 South African FIFA World Cup³⁸ or even the running of the same major event on more than one occasion (a situation that Canada has ambitiously anticipated)³⁹. Nor does it attempt to govern conduct that may occur in a particular situation across several different kinds of sporting events like the Australian Sporting Venues (Pitch Invasions) Act 2003 (NSW). Rather, New Zealand's initiative sets up a generic, one size fits all regulatory system capable of being applied to many different situations in relation to the many different

³¹ In force on 28 August 2007.

³² The Major Events Management (Rugby World Cup 2011) Order 2007 (SR 2007/291) 24 September, 2007 came into force on the day after it was notified in the *Gazette*. Much of the statute, however, remains dormant awaiting the advent and application of subordinate legislation (as discussed in the text below).

³³ A company wholly owned by the International Rugby Board, incorporated under the laws of the Isle of Man, and having its principal place of business in Dublin, Ireland.

³⁴ On 10 June 2008.

³⁵ Ministry of Economic Development, *Business Update*, June 2008, 99.

³⁶ Sydney 2000 Games (Indicia and Images) Protection Act 1996.

³⁷ Regulated by the London Olympic Games and Paralympic Games Act 2006 (UK). The Act received Royal Assent on March 30, 2006 and largely came into force on that day.

³⁸ Regulated in part by Article 11 of the Sponsorship Code of the Advertising Standards Authority of South Africa (ASA) in which several ambush marketing strategies are identified and prohibited. The Minister of Trade and Industry has, in the Government Gazette Notice 683 of 2006 designated 2010 FIFA World Cup (the World Cup) as a protected event in terms of s 15A of the Merchandise Marks Act, 1941 (SA).

³⁹ The Olympic and Paralympic Marks Act, SC, c 25 (2007) received Royal Assent on 22 June 2007. Its time sensitive provisions are to come into force at a later date. The Act addresses Olympic mark protection and ambush marketing practices as the Canadian government undertook to do when bidding for the Winter Olympic Games to be held in Vancouver in 2010.

kinds of event that New Zealand or its town or cities may choose to host in the future.

Apart from conferring permanent protection on specific words and emblems related to Olympic and Commonwealth Games,⁴⁰ the statute provides for special protection for the interests of official organisers and sponsors of *any* event that is declared to be a “major event” by the Governor General by Order in Council. The protection is extraordinarily wide and has the potential to come into force differentially throughout the country through the introduction of new concepts of “clean zones”, “clean transport routes” and “clean periods”.⁴¹ Thus, while a major event is occurring in New Zealand, the same conduct carried out by persons in different parts of the country or city (as the case may be) may be considered lawful in one place and time but unlawful in another.

MEMA displays several other unusual features. The statute is drafted in a distinctive new legislative style (hitherto largely confined to taxation and personal property securities statutes) that involves the use of hypothetical (and often quite lengthy) examples of conduct⁴² falling inside or outside the statute’s provisions. It contains provisions that reverse the normal burden of proof in relation to both civil and criminal proceedings by presuming infringement in certain situations. It also allows for the appointment (but not for the vetting, training, coordination or payment) of an army of part time enforcement officers (possibly over-zealous volunteers) who will be empowered to identify infringements, monitor and inspect “clean zones”, issue formal warnings and use reasonable force to seize and cover objects that they reasonably believe infringe the Act.⁴³

Protection for “Major Events” and “Major Event Words and Emblems”

The special protection MEMA confers upon sponsors and organisers of “major events” and those who are authorised to use or associate themselves with “major event emblems and words” lies dormant (apart from the permanently protected words and emblems related to Olympic and Commonwealth Games mentioned above), coming into play only when, pursuant to s 7, a major event is declared by the Governor-General by Order in Council and its organiser is identified and

⁴⁰ See MEMA, Part 3 and words and emblems contained in the Schedule to the Act.

⁴¹ By contrast, the London Olympic Games and Paralympic Games Act 2006 (UK) simply provides for the making of regulations about advertising and street trading in the vicinity of Olympic events.

⁴² The examples are only illustrative of the provisions to which they relate. Should inconsistency exist between an example and a provision, the latter prevails, MEMA, s 5. This is to grossly underestimate the role of ambiguity in statutory interpretation. There will be occasions on which the examples determine outcomes. If this were not the case, what purpose would they serve?

⁴³ Evoking in the minds of opponents loose parallels with the morals and dress code police in Saudi Arabia and the enforcement by vigilant “neighbourhood grannies” of the People’s Republic of China’s one child per couple policy.

when, pursuant to s 8(1), the Governor-General declares (again by Order in Council) that certain emblems, words or combinations of words are “major event emblems and words”.

What Kind of Event May Be a “Major Event”?

Because MEMA is generic and allows for the imposition of restrictions on marketing practices harmful only to brand owners and sponsors rather than consumers, its framers have made some effort to impose internal political and bureaucratic controls on the decision to declare that an event is a major event. That this was considered necessary was expressly conceded in parliamentary debates on the Bill during all its three readings and in the course of consideration by the relevant Select Committee. As one member at the Committee stage stated:⁴⁴ “There is a high test ... and that it is how it should be. There will be a temptation for various groups that are hosting events to want to elevate their event to the major event level.” For these reasons it is set out in s 7(4) of the Act that before making any recommendation to the Governor-General, the Economic Development Minister is bound to take into account whether the event *will*:

- Attract a large number of international participants or spectators and therefore generate significant tourism opportunities for New Zealand;
- Significantly raise New Zealand’s international profile;
- Require a high level of professional management and co-ordination;
- Attract significant sponsorship and international media coverage;
- Attract large numbers of New Zealanders as participants or spectators;
- Offer substantial sporting, cultural, social, economic or other benefits for New Zealand or New Zealanders.⁴⁵

The extent to which the Minister is free to treat the desired statutory outcomes as cumulative, alternative or a combination of both is not clear. (Curiously absent from the provision are the useful - if not always completely indicative - common clues to meaning: “and” and “or”.) Nor is it plain what level of certitude the Minister must reach in carrying out his or her duty to be satisfied that the event *will* result in one or more of the prescribed outcomes, or indeed whether the applicable test is a subjective or objective. These are matters that in the last resort can only be tested by litigation.

⁴⁴ *Hansard*, Vol 641, page 11370, 22 August 2007.

⁴⁵ Interestingly, for a country that prides itself on doing what it can to combat global warming in a world of climate change there is no requirement that the event result in zero increase to New Zealand’s carbon footprint and zero waste, a point at least touched upon if not emphasised during the first reading of the Bill, *Hansard* Vol 637, p 7494, 20 February 2007.

Much the same can be said for MEMA's other attempts to channel the Minister's discretion. It is true, for example, that while the event does not have to be conducted entirely or even substantially in New Zealand,⁴⁶ the Economic Development Minister is required to be satisfied before making any recommendation that the event organiser has the capacity and intention to "successfully and professionally stage and manage the event".⁴⁷ However, whether that requirement relates only to that part of the event taking place in New Zealand or all of it in whatever jurisdiction it takes place is not spelt out.

Again, although the Minister may also only make a recommendation if satisfied that the event organiser has the capacity and intention "to use all practicable measures available under the existing law to prevent unauthorised commercial exploitation of the major event and to protect its intellectual property and other legal rights, including, for example, registering relevant trade marks,"⁴⁸ just what active steps (if any) the event organiser is required to take to enforce its existing rights under this provision is deeply obscure. The one stated example, that of registering trade marks, is not particularly apposite to forms of intellectual property such as copyright that do not depend on registration.⁴⁹ Nor is it of much assistance when it comes to enforcing (or not enforcing) pure liability rules such as those relating to breach of contract, passing off or failure to observe the requirements of New Zealand's fair trading statute (presumably the "other", that is, non-proprietary legal rights referred to in the section). How then is the event organiser's intention to pursue existing rights (as far as this is practicable) to be demonstrated to the Minister? Will a mere assertion of the willingness to act be enough, or must proceedings actually be brought or threat of them conveyed to the alleged offender? If neither of these, what is the test to be? Practical realities require one to ask why the event organiser would wish to pursue rights whose inadequacy from its point of view was the reason for enacting the legislation in the first place. Few corporates are likely to want to exchange the uncertainties and in-built limitations of intellectual property law and allied liability rules for the satisfyingly draconian and instant remedies provided by MEMA.⁵⁰

A further difficulty is that the statute is not expressed to be in any way confined to major sporting events. Nor does it contain qualifying provisions that would limit its application in that regard. Thus, despite the focus during Parliamentary

⁴⁶ MEMA, s 7(3)(b).

⁴⁷ *Ibid*, s 7(3)(c)(i).

⁴⁸ *Ibid*, s 7(3)(c)(ii).

⁴⁹ No doubt the example is equally relevant to registered designs but this in itself is likely to impose difficult choices on major event organisers. Given that in New Zealand designers (and their assignees) have a free choice whether to register or rely on copyright law (they can do both), they generally prefer the latter. It could scarcely be said to be practicable to insist on registration for purely MEMA purposes.

⁵⁰ For an insightful analysis of the mismatch (as a sponsor or organiser might see it) between MEMA and existing intellectual property protection under New Zealand law see Corbett and Van Roy, n 18 above, 212-215.

debates on sport, MEMA could equally well embrace happenings of a purely cultural, religious or political nature. Indeed, s 7(4)(f) specifically refers events for ministerial recommendation that will offer substantial cultural, social, economic or other benefits for New Zealand or New Zealanders. Candidates for ministerial solicitude could thus include the Miss Universe Contest, a visit by the Pope, a G8 Summit Meeting or the filming in New Zealand of a high profile, blockbuster film along the lines of the famous *Lord of the Rings* trilogy. The Minister's powers may be limited as to the *scale* and *significance* of the event but they cannot in any way be said to be cramped as to subject matter.

What Kind of Emblems, Words and Combination of Words May be Protected?

Under s 8(1) of MEMA the Governor General may declare on the recommendation of the Minister of Economic Development ("the Minister") that certain words, combinations of words and emblems are "major event emblems and words". It was fully conceded when the Bill was first introduced into the House that the net cast by the legislation was intended to be wide, "going far beyond trade marking [sic] legislation in order to protect commercial interests".⁵¹ In framing his or her recommendation the Minister *must* however take into account under s 8(3) the extent to which the major event emblems and words (which can be both generic and non distinctive in trade mark terms and which need not constitute an original copyright work)⁵² require protection in order to obtain maximum benefits for New Zealanders and prevent unauthorised commercial exploitation at the expense of either a major event organiser or a major event sponsor.

The Minister is also required under s 8(2) to consult more widely than when making a recommendation in relation to the declaration of a major event.⁵³ He or she must not only consult the Commerce Minister and the major event organiser but also "persons the Minister considers are likely to be affected by the recommendation". However, any notion that the legislature intended this latter requirement to be treated seriously is quickly dispelled by s 8(4) which plainly states that a failure to comply with it does not affect the validity of an Order in Council made under s 8(1).

⁵¹ Hon David Parker, *Hansard*, Volume 637, p 7494 ff (20 February 2007). Cf the "skimpy – indeed minimal – legal protection that is accorded Maori cultural intellectual property," an irony pointed out by Te Ururoa Flavell (Maori Party) during the Third Reading of the Bill, *Hansard*, Vol 641, 11421 (23 August 2007).

⁵² This removes the sting of that line of cases which would deny copyright protection to individual words or a mere slogan or catch phrase. *Exxon Corp. v Exxon Insurance Consultants International Ltd* [1982] Ch. 119; *Francis, Day and Hunter Ltd. v Twentieth Century Fox Corporation* [1940] AC 112.

⁵³ See Corbett and Van Roy, n 18 above, 213 for a comparison of the difference in the evidential level required for protection words and emblems that are not particularly distinctive under MEMA and the Trade Marks Act 2002 (NZ).

The Protection Period

When a declaration of major event emblems and symbols is made by the Governor General by Order in Council, the Order must not only identify the relevant event but also declare the time for which protection is to operate.⁵⁴ Section 9(2) stipulates that the major event's protection period need not be limited to the period when major event activities are to occur but cannot end later than 30 days after the completion or termination of all major event activities. As to precisely when major events may be considered "completed" or "terminated" is not spelt out and nor is a "major event activity" defined in the statute. Thus the protection period cannot necessarily be taken to be the date on which, say, the last of a series of rugby or cricket matches takes place.

Parliamentary and Judicial Review of Declarations

While all decisions on the Minister's part feeding into his or her recommendations to the Governor General remain reviewable on ordinary public law grounds, the imprecision with which the various preconditions have been framed by MEMA's drafters makes predicting the outcome of that exercise even more than usually difficult.⁵⁵ Of perhaps more practical significance is the potential for parliamentary oversight of declarations made by the Governor General by Order in Council under s 7 or s 8 of MEMA. As a safeguard, MEMA, significantly, and rather unusually, expressly provides, in s 81(1), that an Order in Council made under s 7 or 8 declaring respectively that an event is a major event or that certain emblems, words or combinations of words are major event emblems and words is a regulation for the purposes of the Regulations (Disallowance) Act 1989. The effect of this deeming provision is to give Parliament's Regulations Review Committee jurisdiction to oversee what the Governor-General and his or her advisors have decided. It can review whether or not the event the Governor-General declares is a major event is likely to be one and whether protection of particular emblems, words and combinations of words is justified. Political oversight of this kind has perhaps more significance in a unicameral legislature such as New Zealand's elected on the basis of proportional representation in which coalition governments are the norm. Nevertheless, the effectiveness of what are in the end result purely political controls should not be overstated.

Ambush Marketing in MEMA

MEMA regulates certain marketing ploys it describes as ambush marketing. Two different types of "free riding" activity are identified and prohibited by the legislation as separate offences; ambush marketing by association and ambush

⁵⁴ MEMA, s 9(1).

⁵⁵ New Zealand, it will be noted, has no equivalent to Australia's system of overt administrative review on the merits via the Administrative Appeals Tribunal.

marketing by intrusion. This initiative thus negates pre-existing case law relating to the practice in New Zealand which treated the practice (admittedly at interlocutory level only)⁵⁶ as potentially legitimate in terms of existing statutory and common law prohibitions against various forms of unfair competition.

The rationale given for introducing criminalisation of ambush marketing by association during the first reading of the Major Events Management Bill was that without the legislation potential sponsors could be discouraged from investing in an event. As one member of the House of Representatives put it, the legislation was “aimed at businesses who are not the official sponsor who try to create [either explicitly or subtly] some kind of association between themselves and the event” and who are in essence “seeking to unfairly trade off the goodwill and reputation surrounding an event without making the significant financial commitment that official sponsors make”.

The Pre-Existing Law on Ambush Marketing

There is only one reported case on ambush marketing in New Zealand. This is *New Zealand Olympic & Commonwealth Games Association Inc v Telecom New Zealand Ltd*⁵⁷ in which the High Court was faced with an application for an interim injunction by the plaintiff “Games Association”⁵⁸ to prevent Telecom (who unlike its then rival Bell South had declined to become a sponsor) from republishing a newspaper advertisement (drawn up by Saatchi and Saatchi) which displayed the word “RING” three times across the top and twice across a lower line, interspersed with the words on the top line. The word “RING” appeared once in all five of the Olympic symbol colours, blue, black, red, yellow and green. Underneath the advertisement stated “with Telecom you can take your own mobile phone to the Olympics”. There then followed information about how to use Telecom mobile phones if travelling to the 1996 Atlanta Olympic Games.

The Games Association (pushed into action by Bell South) brought proceedings under the then trade mark legislation, s 9⁵⁹ and s 13(e) of the Fair Trading Act 1986 (broadly similar in their terms to s 52 and s 53 of the Trade Practices Act 1974 (Cth)) and in passing off. The Games Association’s grounds for complaint

⁵⁶ See *New Zealand Olympic & Commonwealth Games Association Inc v Telecom New Zealand Ltd* (1996) FSR 757 discussed in the text accompanying n 57-62 below.

⁵⁷ *Ibid.*

⁵⁸ Under Rule 17 of the Olympic Charter, all rights to the Olympic symbol belong exclusively to the IOC. The Olympic Charter (under By Law 2 to Rules 12-17) requires a national organising committee “to take steps to prohibit any use of the Olympic symbol...which would be contrary to the Rules or their By Law”.

⁵⁹ Proof of intention to mislead or deceive is not necessary to establish a breach of s 9, *Bonz Group v Cooke* (1996) 7 TCLR 206, 212 but it can be relevant when the statement in question suggests that particular process is effective when it is not, *Lorjona Pty Ltd v Lyttleton Engineering Ltd* [2006] BCL 57 or when it is sought to assess whether an opinion is in fact held (or can rationally be held) by the person giving it, *Trotman and Wilson*, n 29 above 103ff.

in relation to each of these causes of action were essentially the same, viz, that Telecom's advertisement had misrepresented, expressly or impliedly, that it had an association with, or was the sponsor of, the Olympic movement or the New Zealand team. With no time to conduct a substantive trial on the merits of case before the start of the Olympics the court was required to apply the standard New Zealand test for an interlocutory injunction laid down in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*⁶⁰ to determine whether there was a serious question to be tried. In gauging the effect the advertisement might have on readers, the court disregarded Telecom's intentions (which as admitted in the evidence by Saatchi and Saatchi had been "to raise the idea of the mark, that is the Olympic symbol, but without infringing the mark or passing off in doing so")⁶¹. In declining to grant the injunction, McGechan J observed that he was going to make up his own mind and apply commonsense. He went on to find:⁶²

"The advertisement is perceived as simply too different....I am not persuaded there is a sufficient likelihood that assumption by readers that Telecom is connected with or [is] a sponsor of the Olympics...."

"In reaching that conclusion I do not give significant weight to the absence of an express claim to official sponsorship in the advertisement itself....That is a factor but it is not a strong one. I rather doubt whether any average reader who did by chance wonder whether the advertisement was authorised by the Olympic Association would consciously look for a sponsorship claim, notice that there was none, and proceed to reason Telecom was not therefore claiming to be a sponsor. This is an analytical process which appeals in hindsight to lawyers. It is not, I think, the causal reality of the newspaper reader. I have no doubt advertising agencies would dearly love a ruling that the absence of an explicit sponsorship claim means that there cannot be a representation of sponsorship. I give no such ruling. It is a question of the circumstances in each case."

As to the claim made under New Zealand's trade mark legislation, this too was rejected by McGechan J because it depended on consumers devoting an unrealistically high level of attention to the advertisement and because no evidence had been adduced of a "deliberate falsehood". Interestingly, McGechan J declined to make any order for costs noting that Telecom and Saatchi and Saatchi had "ventured into a minefield and both of them knew it". He also proffered the opinion (which he declined to retract when requested to do so by

⁶⁰ [1985] 2 NZLR 129.

⁶¹ See n 57 above, 761.

⁶² *Ibid*, 763.

counsel) that the Games Association may have been perhaps “a little paranoid as to possible repercussions”.

The New Action for Ambush Marketing by Association

A raft of sections and definitions in MEMA applied in conjunction with each other create both a civil action and an offence of ambush marketing by association. The offence (which is required to be committed knowingly)⁶³ is punishable by a fine of up to NZ\$150,000.

The Parameters of the Prohibited Conduct

The type of conduct that is clearly being targeted includes the purchase of sub-category naming rights whereby companies unwilling or unable to be sponsors of an event, arrange to sponsor media coverage of that event⁶⁴ or sponsor an individual or team who is participating in the event. For example, the prohibition would cover the situation which occurred in New Zealand in 2004 when although Holden officially sponsored the New Zealand Olympic team, Ford promoted its sponsorship of track cyclist Sarah Ulmer and gave her a car from a new range it had recently introduced into the country.⁶⁵ However, since ambush marketing can take myriad forms limited only by marketing ingenuity, MEMA proceeds by way of proscribing attempts by persons to associate themselves with a major event rather than by listing exhaustively the various methods that might be used to achieve that result. Section 10(1) states that:

*“No person⁶⁶ may during a major event’s protection period, make any representation in a way likely to suggest to a reasonable person that there is an **association** [emphasis supplied] between the major event and -*

(a) goods or services; or

(b) a brand of goods or services; or

(c) a person who provides goods or services.”

“Association” in s 4 is defined to mean “a relationship of connection, whether direct or implied, such as approval, authorisation, sponsorship or commercial

⁶³ MEMA, s 13.

⁶⁴ A good example of this occurred during the Los Angeles Olympics in 1984 when Kodak became the sponsor of ABC TV Ltd’s broadcast of the Games as well as the official film supplier to the United States track team, thereby generating far more brand exposure on television for itself than the worldwide Olympic sponsor Fujifilm. See T. Meenaghan, “Ambush Marketing- A Threat to Corporate Sponsorship” [1996] Sloan Management Review 103.

⁶⁵ See Sebel and Gyngell, n 2 above for Australian examples of this practice.

⁶⁶ A person who makes such a prohibited representation *includes* one who pays for, or authorises the representation, or a person who receives consideration for the placement or the location of the representation, *ibid*, s 10(2)(a) and (b).

arrangement”. Although the definition is couched exhaustively, the use of the woolly phrase “direct or implied” may negate the court’s ability to read down the concept of representation to exclude purely enabling conduct in the way that sometimes occurs in fair trading cases.⁶⁷ The catch-all phrase is thus almost certainly wide enough to include the setting of links to websites where those links might be construed as creating an unauthorised association. The statutory definition also makes it plain that the prohibited practice of ambush marketing by association extends to “offering, giving away, or selling a ticket to a major event” where this use of the ticket is “in connection with the promotion of goods or services”. This last phrase, as pointed out in the parliamentary debates over the Bill,⁶⁸ would catch a radio station giving away a ticket because that would amount to a promotion of its own radio station. The same could be said about travel agencies including a match ticket in an airfare/accommodation package.

Default Presumption of Breach

For the purposes of applying s 10, s 11(1) creates a presumption of a breach if the representation in question includes any of the following:

- a major event emblem;
- a major event word or words; or
- a representation that so closely resembles a major event emblem, a major event word, or major event words as to be likely to deceive or confuse a reasonable person.

After a strong submission by the New Zealand Law Society to the Select Committee, Parliament inserted into the final version of the statute the words “likely to deceive or confuse” to replace the concept of “in a way likely to suggest” that had been used in earlier versions. That the earlier phrasing whereby a mere whiff of a suggestion of an association would suffice to infringe (at odds with the time honoured requirements laid down in the law of passing off) was no accident can be readily inferred from the Explanatory Note⁶⁹ to the Bill which states that many types of ambush marketing could not be caught without it. The Law Society’s submission had suggested that raising the threshold in the manner eventually chosen would bring the provision in line with the balance set in other jurisdictions. (For example, s 12 of the Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Act 2006 (Cth) uses the test that a “reasonable person” must be “likely to mistake” the infringing use as being lawful use.) However, reference to the concept of “confusion” still sets the threshold at a relatively low level because confusion may encompass merely having “cause to

⁶⁷ See the discussion of non disclosure and silence in Trotman and Wilson, n 29 above, 81ff.

⁶⁸ Keith Locke, *Hansard*, Vol 637, p 7494 ff (20 February 2007).

⁶⁹ At p 25.

wonder” (arguably a less demanding test than having to establish that a particular representation was in fact misleading and deceptive)⁷⁰.

The presumption of breach in s 11 stands even in the event of a disclaimer whereby representations made are qualified by such words as “unauthorised”, “unofficial” or “other words that are intended to defeat the purpose of section 10”.⁷¹ (This last seems likely to face an interpreting court with the same kind of knotty circularity problem that avoidance provisions in taxation statutes tend to generate.) The provision seems to be aimed at counteracting head-on the kind of situation that occurred at the 2002 Winter Olympics in Salt Lake City when after Anheuser-Busch had paid more than US\$50 million to use the OLYMPIC mark and the five rings logo, a local brewery marked its delivery trucks with the slogan “Wasutch Beers The Unofficial Beer 2002 Winter Games” thus avoiding Lanham Act liability it no doubt would have incurred had it used either the protected marks or logo.⁷² In similar vein, were facts similar to those that led to the Canadian case *National Hockey League v Pepsi-Cola Canada Ltd*⁷³ to occur in New Zealand, the outcome post MEMA would be very different. In *Pepsi* the National Hockey league claimed that Pepsi’s promotion of its “Pro Hockey Playoff Pool” had purposefully created confusion with its own Coco-Cola sponsored Stanley Cup playoffs. Since Pepsi took care to avoid appropriating any registered trademark and had used a disclaimer it was found not liable for either trademark infringement or passing off.

The New Zealand Parliament was not in any way deterred from giving the shape it did to s 11 by the fact that a similar presumption of breach was originally contained in the United Kingdom’s London Olympics 2012 legislation as introduced in the Commons and was removed in the Lords prior to its enactment following considerable debate and fierce opposition from peers from all three major parties. In the view of Lord Borrie:⁷⁴

“[T]he provisions would be disproportionate to the mischief of ambush marketing....[T]he Government seem so concerned to reassure sponsors that, as with the matter of presumption in paragraph 3 of Schedule 4, they are going over the top. They are not taking much note of the need to keep a balance between the perfectly legitimate interests of sponsors who are providing sums of money and need something in return, the interests of business generally in commercial freedom of speech and the interests of the public in such

⁷⁰ Another key point made by the New Zealand Law Society in their Submission to the Select Committee on the Bill. See also *Taylor Bros Ltd v Taylor Group*, n 26 above, at 39 per Cooke P.

⁷¹ MEMA, s 11(2).

⁷² See Pepsi’s similar coup at the 2006 Atlanta Olympics, outlined in n 5 above.

⁷³ (1992) 92 DLR 4th, 349.

⁷⁴ Lords, *Hansard*, 15 February 2006 (60215-38).

freedom and in ensuring that it is not unduly restricted by provisions in statutes such as this.”

The United Kingdom statute now provides that, while a court “may have regard to” whether any particular provision(s) on a list of specific provisions has or have been used in an infringing fashion, there will be no automatic presumption that the law has been broken. New Zealand, by contrast, with none of the same searching parliamentary debate on the merits of the presumption of infringement, has ended up imposing a more draconian rule. This outcome is hard to square with the Ministerial statement made when MEMA was first introduced into the House that: “Freedom of speech, including commercial freedom of speech is crucial in a fair and democratic society.”⁷⁵

Experience in other jurisdictions also suggests that the existence of s 10 and s 11 may chill social commentary particularly when it takes the form of parody or satire. For example, an Australian animal rights activist was prohibited from distributing T-shirts and badges depicting an image of a hen in a cage with five eggs beneath it. The Sydney Organising Committee for the Olympic Games successfully obtained an injunction and an order for delivery up against her, convincing the court that the five eggs bore a close resemblance to the five-ring Sydney 2000 Olympic Games logo in which it had copyright.⁷⁶ The fact that the respondent had accepted donations to her animal liberation organisation’s funds in return for the T-shirts and badges led the court to place no weight on any claim she might have made that she was using well known symbols to attract attention to a political issue rather than attempting to pass off her goods as genuine logo bearing merchandise. The judge found the donations were a mere sham to disguise the reality of sale. The point is here not whether SOCOG would have turned out to be right in its understanding that the law forbade such a satirical lampoon⁷⁷ (had the substantive issue ever gone to trial)⁷⁸ but that it had the capacity to shut down shallow pocketed protestors through intimidation aided by statutory ambiguity.⁷⁹

⁷⁵ Hon David Parker (Minister of Energy), *Hansard*, Vol 637, page 7494, 20 February 2007.

⁷⁶ *Sydney Organising Committee for the Olympic Games v Pam Clarke* [1998] FCA 792.

⁷⁷ See G. Orr, “Marketing Games: The Regulation of Olympic Indicia and Images in Australia” (1997) 9 *EIPR* 504, 507-508 for discussion of freedom of speech issues in the case and R. J. Coombe, “Tactics of Appropriation and the Politics of Recognition in Late Modern Democracies” (1993) 21 *Political Theory* 411 on the point that subordinated groups may be discriminated against by being denied any use (not just use in trade) of common symbols such as the Olympic symbol by authorities who have come to “own” them.

⁷⁸ Now that Australia has introduced a defence for parody and satire into its copyright statute, the question of the legality or illegality of such an action by the activist would be tightly argued.

⁷⁹ Whether the lampoon comes within MEMA’s personal opinion exception may be doubted, see n 80 below.

Exceptions to Sections 10 and 11

Section 12 specifies a number of situations where the prohibitions in s 10 and the default presumption of breach in s 11 do not apply. Thus, there is no breach where the representation or the association between the major event and the goods, services, brand of goods or services or person providing the goods or services has been authorised by the major event organiser in writing. Also exempted are representations by natural persons where they are of personal opinion for no commercial gain. (This provision promises to give rise to some fine distinctions when protests are arranged through or by organisations that happened to be incorporated or charities or where the “opinion” is deliberately obscured in the statement being objected to as will usually be the case in an effective parody or satire)⁸⁰. Interestingly, a *de minimis* exception present in earlier versions of the Bill was removed before enactment. This axed provision, rather like the incidental copying defence in copyright law would have exempted representations that were incorporated into a context in which the major event was largely irrelevant.

Section 12 creates a number of exemptions where representations are made in accordance with honest practices in industrial or commercial matters. These cover the situation in which the representation made:

- is necessary to indicate the intended purpose of goods or services;
- is made by an existing organisation continuing to carry out its ordinary activities (for example, a café called the Rugby Café many years before “rugby” became a protected major event word could clearly continue to use the name but not if the name was adopted relatively close to the build up to the major event)⁸¹; and
- is for the purposes of reporting news, information, criticism, or a review (including promoting that news, information, criticism or review) in a newspaper or magazine, or by means of television, radio, film, internet or other means of reporting⁸².

⁸⁰ In the view of one commentator, the whole point about effective satire or parody is that the political or other statement being made should be conveyed only by indirection and parodists or satirists should not be required to state up front in relation to their work “this is a joke” in order to avoid liability. See I Eagles, *New Zealand Moral Rights Law: Did Something Get Lost in the Translation* (2002) 8 NZBLQ 26, 65. Judges in moral rights and passing off cases have sometimes lost sight of this necessary artistic truth. See, for example, *Clark v Associated Newspapers* [1989] 1 ALL ER 959; *Norman v Bennett* [1974] 3 ALL ER 351.

⁸¹ The example provided by MEMA is not particularly helpful here since it is concerned with a hypothetical business that has been operating (in this case as “THE WORLD’S BEST CUP MAKERS”) since 1982 under what has become a protected name. This offers little guidance when the disputed use of a protected name starts much closer in time to the making of the Order in Council.

⁸² This seems to be an uneasy amalgam of the two fair dealing provisions in the New Zealand copyright statute. The wording is sufficiently different, however, to ensure that the extensive United

There is also no breach of s 12 where the representation is of a town, road or other place name in New Zealand, an existing registered trade mark or the legal trade name of the person making the representation provided (here repeating the circular question begging logic of s 11) it is not used for the purpose of defeating the intention of s 12.

Lastly, there is a defence under s 14⁸³ to an action or prosecution for breach of s 10 for publishers of an infringing representation who are able to prove that they did not know or had no reason to believe that the representation was infringing. The defence with the same reversed onus of proof also extends to those who arrange for the publication of advertisements. However, since the defence can be invoked only where the defendant “received the representation in the ordinary course of business, and did not know, and had no reason to believe, that publishing it would constitute a breach of s 10,” its benefit would be unlikely to be extended to the advertising agency who devised the allegedly infringing advertisement.

Ambush Marketing by Intrusion

During the First Reading of the Major Events Management Bill it was noted that ambush marketing by intrusion refers to the practice of “unfairly intruding on the attention of spectators who are essentially gathered solely for the purpose of a major event”.⁸⁴ In other words ambush marketing of this kind involves taking advantage of a captive audience. Perhaps the best example, known worldwide, is Pepsi flying a hot air balloon over Wembley during a Coca-Cola sponsored cup final.

A raft of offences (set out in s 17-20) have been created involving ambush marketing by intrusion, all requiring the alleged ambush marketer to have knowingly engaged in the prohibited conduct in order to be liable for a fine not exceeding NZ\$150,000.⁸⁵ All hinge around the prior creation of clean zones, clean periods and clean transport routes by the Minister of Economic Development. Section 16 allows him or her to declare in relation to a major event by Notice in the *Gazette* either or both of the following:

- Clean zones, and the clean periods that relate to clean zones;
- Clean transport routes, and the clean periods that relate to those clean transport routes.

Kingdom and New Zealand jurisprudence on the subject cannot easily be picked up. See Corbett and Van Roy, n 18 above, 215.

⁸³ This defence expressly overrides the default presumption of breach in MEMA, s 11, see s 14(2).

⁸⁴ *Hansard*, Vol 637, p 7494 (First Reading, 20 February 2007), Hon David Parker on behalf of the Minister for Sport and Recreation.

⁸⁵ MEMA, s 23.

The Minister is empowered to declare an area a clean zone (in which all unauthorised advertising that is clearly visible is prohibited during a clean period)⁸⁶ but only to the extent that the area consists of the venue of a major event activity and areas (excluding private land and buildings that are directly proximate to it) that are necessary to enable the major event activity to occur. Excluded land and buildings do not include billboards⁸⁷, the venue of a major event or land the public ordinarily has access to (for example, a railway station or a venue's car park).⁸⁸

The clean period may include times before and after the major event activity that are reasonable in the circumstances and an area can be declared a clean transport route for a clean period to the extent that the area extends no more than five kilometres from the closest point of the boundary of a clean zone.

Prohibition Against Street Trading

Under s 17(1) all street trading is illegal within a designated clean zone during a clean period if not authorised in writing by the major event organiser. "Street trading" is defined to mean selling, hawking, or giving away goods or services,⁸⁹ but excludes operating an existing business out of existing permanent premises of that business.⁹⁰ It is also an offence⁹¹ for a person outside a clean zone to engage in unauthorised street trading with a person inside a clean zone during a clean period. The three examples that MEMA provides all involve an itinerant hot dog vendor setting up his cart in various places in relation to a declared clean zone in a declared clean period. They make clearer the circumstances in which such an opportunistic person might or might not be in breach. For instance, the examples state, to infringe, an unauthorised vendor does not necessarily have to be sited in a street or on a footpath to be engaged in street trading but can be on private property (for example, the vendor could arrange to pay a private property owner for the right to sell things over her front fence to people walking through a clean zone). As drafted, however, s 17 has enormous potential for overkill through overly vigorous enforcement, catching those bored or electronically addicted souls who engage in selling through an online auction site while on public transport (or stuck in traffic) when passing through a clean zone using a laptop, cell phone or other portable electronic device. The ultimate irony in such

⁸⁶ MEMA, s 19 and see text below.

⁸⁷ There is no statutory definition of billboard but it seems it would appear to mean a board physically attached to a building or mounted on a structure resting on or set into the ground. It would not necessarily cover state of the art electronic messages displayed on or wrapped around a building or the use of a building's internal lighting system to convey messages and logos to the outside.

⁸⁸ MEMA, s 16(5).

⁸⁹ This would exclude any liability on the part of the other party to the sell/buy transaction or the recipient of free handouts.

⁹⁰ MEMA, s 17(3).

⁹¹ *Ibid*, s 17(2).

cases is that such an offender need not even be on his or her way to a major event activity or even be the slightest bit interested in it.

Prohibition Against Advertising

Section 18 prohibits all advertising in a clean zone during a clean period unless authorised in writing by the major event organiser. Advertising is very broadly defined to mean *any* form of communication (including selling or giving away any goods or services, but excluding communications of personal opinion made by a natural person for no commercial gain) made to the public or a section of the public in relation to any goods or services; brand of goods or services; or person who provides goods or services. What the drafters of MEMA intended to allow was individual freedom to carry or display on an item (such as a cap, bag, umbrella, T-shirt or drink bottle) the distinctive trademark of a non-sponsoring business but to prevent a group of two persons or more acting in concert from displaying or carrying the unauthorised advertising item. The framers of the prohibition intended no doubt to counter the kind of situation that occurred during the 2006 FIFA World Cup when about 1000 Dutch fans who had bought themselves a pair of patriotic orange *lederhosen*⁹² emblazoned with Bavaria (the name of a Dutch beer whose owner was not an official World Cup sponsor) had to relinquish them to stadium officials when they turned up to watch their team play the Ivory Coast in Stuttgart. The Dutch fans were thus forced to watch Holland's victory in their underpants.⁹³ It is not difficult to envisage that overly zealous enforcement of s 18 by lay volunteers in New Zealand could result in confiscation of a family's unauthorised drink bottles or food in situations where that family prefers to drink or eat products that are not distributed by a sponsor.

Section 19 extends the prohibition to a person advertising in a manner (again without written authorisation of the major event organiser) where the advertisement is clearly visible from anywhere within a clean zone during a clean period. Such advertising includes advertising on or by means of an aircraft but does not include normal markings and livery on an aircraft. MEMA also provides that "clearly visible" means visible to an extent that a reasonable person would consider the content, subject, message, or purpose of the advertisement to be able to be determined without the use of visual apparatus other than contact lenses or glasses. Thus the prohibition would cover unauthorised sky writing by vapour trail, laser images protected up in the air and blimps displaying an the name or logo of unauthorised brand or product.

⁹² Dubbed "lion trousers" because Dutch fans who purchased 12 cans of Bavaria beer could buy the trousers that came with the tail of a lion, Holland's national symbol, and two large pockets for storing beer cans.

⁹³ L. Harding and A. Culf, "The new World Cup rule: take off your trousers, they're offending our sponsor", see <http://www.guardian.co.uk/media/2006/jun/19/marketingandpr.worldcup2006>.

Section 20 baldly stipulates that there is to be no unauthorised advertising in a clean transport route during a clean period. Clean transport routes may be large in area, extending up to five kilometres from the closest point of the boundary of a clean zone. Provided they are likely to be used by a substantial number of people to travel to and from the relevant clean zone, they may consist of, or be directly proximate to, either a motorway or State highway or a railway line but not comprise “excluded land or buildings”.⁹⁴ As one commentator has rightly observed, the situation may be compounded by overlapping zones when a number of venues are being used for a particular event.⁹⁵ A lot of people are likely to end up falling foul of MEMA’s civil or criminal sanctions against unauthorised advertising.⁹⁶

Defendants in an action or prosecution for breach of s 18 to s 20 may invoke a defence by proving in relation to an advertisement that their business includes publishing or arranging for the publication of advertisements and that they received the advertisement in the ordinary course of business and did not know, and had no reason to know, that publishing it would constitute a breach.⁹⁷

Other New Offences

MEMA creates the two further offences of pitch invasion and ticket scalping. Both carry a maximum fine of NZ\$5000 but the former is viewed as more serious, exposing those found to have infringed the Act to an alternative punishment of up to three months imprisonment.

Pitch Invasion

The offence of pitch invasion created by s 27 of MEMA was inserted late in the legislative process by a Supplementary Order Paper⁹⁸ put before the Commerce Committee to whom the Bill had been referred for consideration. The offence is punishable by imprisonment for a term not exceeding three months, or a fine not exceeding NZ\$5,000. It comports with one of the three expressed purposes of MEMA which is to “ensure the smooth running of the major event”.⁹⁹

The offence which catches a person who ventures unauthorised onto the playing surface at any sporting event that is a major event is targeted at conduct that is no mere spectre. There have been several incidents of pitch invasion in New Zealand with the most famous occurring in 1981 during the Springbok Tour of New Zealand at Rugby Park in Hamilton which led to the cancellation of the

⁹⁴ See text above in Part V, B.

⁹⁵ C. Elliott, “Ambush Marketing: A Wide New Sponsorship Right” [2008] NZLJ 207, 208.

⁹⁶ *Ibid*, 210.

⁹⁷ MEMA, s 24.

⁹⁸ Supplementary Order Paper No 106. 5 April 2007.

⁹⁹ MEMA, s 3(1)(a)(iii).

match by the police. As noted in parliamentary debates on the Bill, “images of [350 anti-apartheid protestors breaking down a fence with wire cutters to invade the playing field, flour bombing it and generating anger and violent retaliation including beer can throwing on the part of the thwarted spectators] give the impression that New Zealand is on the brink of civil war”.¹⁰⁰ The concept of pitch invasion is broad enough to cover streaking (the act of running naked or skimpily clad through a venue) to amuse or divert the audience’s attention; the delivery of either the so-called “brown eye” or “half moon salute” to make a political statement and the kind of act that could be construed as ambush marketing which occurred in 2002 when a couple of streakers ran onto the playing field with the Vodafone logo painted on their bodies during a Bledisloe Cup rugby test match between New Zealand and Australia.

Section 27 also catches the “propelling” of any object onto the playing surface during a major event sporting activity, suggesting by way of example that that this may occur by a deliberate act of rolling, kicking, dropping or throwing the object in question. Clearly the provision is not intended to create an offender out of someone whose hat flies off onto the playing ground in a high wind but could catch someone in the crowd returning a cricket ball to the pitch.

Ticket Scalping

Section 25 of MEMA deals with distributive problems and fairness issues in relation to the availability of tickets to major event activities by banning the practice of ticket scalping (called ticket touting in some jurisdictions) which involves purchasing tickets to a major event and on selling or trading them “at a value higher than the original sale price of the tickets”. During the First Reading of the Bill the reasons given for creating the new offence which carries a maximum fine of NZ\$5000 were based on fairness and the argument that “recent events show, those who buy up tickets and then seek to sell them at an unfair profit have deprived many Kiwi sports fans of the opportunity to attend big events”.¹⁰¹

Under MEMA the original sale price realistically includes charges that are necessary to effect the sale or trade of a ticket including a booking fee, courier charges or postage. Selling or trading at more than the original sale price includes any transaction regardless of its form in which a substantial purpose of the transaction is the sale or trade of a ticket to a major event activity for a value greater than the original sale price of the ticket. Where a ticket is auctioned online for more than the original price, the owner of the online auction site (for example, the New Zealand based trademe.co.nz) could also face liability if it became aware of the situation and did not promptly remove the offending listing.

¹⁰⁰ *Hansard*, Third Reading of the Bill, Vol 641, page 11421 (23 August 2007).

¹⁰¹ *Hansard*, Vol 637, Page 7494, the Hon David Parker (on behalf of the Minister for Sport and Recreation).

Section 25 is not well aligned with any of the purposes of MEMA which (as well as ensuring the smooth running of the event mentioned above) are to “obtain maximum benefits from the major event for New Zealanders” (ticket scalpers could well be New Zealanders making a profit on reselling tickets to visitors from overseas) and to “prevent unauthorised commercial exploitation at the expense of either a major event organiser or major event sponsor” (it is true that ticket scalping means some end users pay more and probably some families on a budget miss out being able to attend major events but the practice, strictly speaking, is not being carried out at the expense of either a major event organiser or major event sponsor even where they have had a major input into setting the original price of the major event ticket).¹⁰²

Enforcement and Remedies

Lay Enforcers

One of the more troubling and open ended aspects of MEMA is the provision it contains¹⁰³ for the appointment of any number of lay enforcement officers by the Chief Executive of the Ministry of Economic Development. While the Act requires each officer to be issued with a warrant of appointment bearing his or her photo and other particulars that may be prescribed,¹⁰⁴ it remains silent as to whether enforcement officers:

- must be New Zealanders;
- can be paid overseas based employees of overseas based sponsors;
- can be charged for the privilege of being appointed;
- can be paid by the major event private/public enterprise or a sponsor for their enforcement activities;
- must not have a criminal record;
- must be over a minimum age; or
- must undergo training before or after being appointed to perform the functions and exercise the powers conferred by the Act.

¹⁰² The ticket scalping provision pays no heed to the “everyone’s dollar is equal” assumption now routinely applied by New Zealand courts in competition cases. See *Air New Zealand Ltd v Commerce Commission* (No 6) (2004) 11 TCLR 400.

¹⁰³ MEMA, s 38.

¹⁰⁴ *Ibid*, s 39. The Governor General is empowered to pass regulations by Order in Council under s 82(b) prescribing the form of a warrant of appointment and any other particulars the warrant must contain.

Enforcement officers have been given wide statutory powers to ensure compliance with MEMA. These include:¹⁰⁵

- identification of breaches or potential breaches and offences;
- issuing formal warnings;
- inspecting and monitoring clean zones;
- seizing or covering up things in clean zones using such force as is reasonable in the circumstances;¹⁰⁶
- obtaining search warrants, executing search warrants, seizing things during searches.

Interestingly, where examples are provided in MEMA they illustrate only the legality or illegality of persons engaged in advertising and other promotional activities (conduct at which the legislation is directed). No examples are provided which might usefully assist volunteers in knowing when they might overstep their powers. The only requirements expressly imposed upon enforcement officers to avoid liability are that they must exercise their powers in good faith, in a reasonable manner and in the reasonably held belief that the prerequisites for the exercise of the power have been satisfied.¹⁰⁷

Evidence Gathering By Coercion

Enforcement officers may be granted a search warrant for any place, vehicle or thing by a High Court Judge, District Court Judge, Community Magistrate, Registrar of a District Court or Justice of the Peace if he or she finds the officer has made out, in writing on oath, the requisite statutory grounds for it. These are that there are reasonable grounds for believing that there is at that place, vehicle or thing, anything:¹⁰⁸

- in respect of which an offence under MEMA has been or is being committed;
- that has been, is being, or is intended to be used by any person for the commission of an offence under MEMA; or
- that is evidence of the commission of an offence under MEMA by any person.

The Judge, Community Magistrate, Justice or Registrar may impose on the exercise of the warrant any reasonable conditions that he or she thinks fit, the emphasis on “reasonable” being a nod in the direction of s 21 of the Bill of

¹⁰⁵ *Ibid*, s 40.

¹⁰⁶ *Ibid*, s 42(3).

¹⁰⁷ *Ibid*, s 47.

¹⁰⁸ *Ibid*, s 67(1).

Rights Act 1990 (NZ) which provides: “Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise” and its subsequent judicial interpretation.¹⁰⁹ Pursuant to a search warrant, a lay enforcement officer (who must be accompanied by a police officer) is empowered to carry out a search (using reasonable force if necessary to gain entry to premises), seize items and break open any article or thing, again where it is reasonable to do. The power is a draconian one; for example, in order to access some computer files that may contain evidence, the computer hard drive containing all of the defendant’s (and possibly also some of his or her family’s) personal files may be seized.

The process of obtaining a search warrant under MEMA is much less exacting than, for example, the process for obtaining a warrant to intercept private communications under the Crimes Act 1961 when police must satisfy a Judge of the High Court (not merely a Justice of the Peace at his or her residence or the Registrar of a District Court) that it is unlikely that the investigation of the case by the police could be closed successfully were the warrant to be refused.¹¹⁰ Under that Act the judge also needs to be satisfied that the police have indeed explored other investigative avenues and employed other less invasive procedures without success or else be supplied with reasons why the case can be treated as being so urgent that it would be impractical to carry out the investigation without the warrant. Once obtained, the terms of the warrant can be executed only by the police.¹¹¹

Injunctive Relief

MEMA dispenses with the standard requirement laid down for civil cases by *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*¹¹² that the plaintiff must prove on the balance of probabilities that there is a serious question to be tried when seeking an interlocutory injunction. Section 52 allows the court in any civil proceedings to grant an injunction “on any terms that the court thinks fit” which clearly encompasses the giving of “to do” or mandatory orders (generally speaking, more difficult to obtain than prohibitory injunctions). Section 55 further provides that the Court, on the application of a major event organiser and if it is satisfied that a person has breached any part of s 10¹¹³ may make an order (a) requiring that person (or any other person involved in the breach) to disclose information, as specified in the order, to the public, to a particular person or to a particular class of persons, or (b) requiring that person to publish corrective

¹⁰⁹ In the view of the Court of Appeal in *R v Grayson and Taylor* [1997] 1 NZLR 399, 407 a search of premises “is an invasion of property rights and an intrusion on privacy”, the significance of which will depend on the circumstances, and there “may be other values and interests, including law enforcement considerations, which weigh in the particular case”.

¹¹⁰ See the discussion in Elliott, n 94 above, 210.

¹¹¹ *Ibid.*

¹¹² [1985] 2 NZLR 129.

¹¹³ See Part V, B in the text above.

statements as specified in the order.¹¹⁴ The provision requiring compulsory disclosure flies *prima facie* in the face of s 14 of the Bill of Rights Act 1990 (NZ) which stipulates that: “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.” The right to freedom of expression has been found not only to encompass all forms of communication that attempt to convey meaning and ideas¹¹⁵ but also the right to say nothing or to not to say certain things.¹¹⁶ However, Parliament by enacting s 55 of MEMA has aimed to counteract the impact of representations that could deceive or confuse the public (implicitly taking the approach that some forms of expression such as commercial expression and advertising may on occasion deserve less protection)¹¹⁷ and assumed that any inconsistency with s 14 of the Bill of Rights Act is justifiable under s 5 of that statute which provides that a limit on a right can be justified where it meets a significant and important objective, and where there is a rational and proportionate connection between the limitation on the right and that objective.

There is also no express requirement (as there is under the similarly open ended counterpart provision in New Zealand’s competition statute)¹¹⁸ that the court find actual or prospective damage to another person through the defendant’s “contravention” of the Act. Courts in New Zealand are bound to consider (before granting an interlocutory injunction) whether an award of monetary damages alone would adequately compensate the plaintiff and cases abound in references to the need for courts to be cautious in making such orders.¹¹⁹ Under the lower MEMA standard, on the other hand, an official sponsor may be granted an immediate injunction to stop distribution of goods that might infringe the Act if it merely provides the court with evidence that the alleged offender has used protected words or emblems in conjunction with promotional activity in such a way as to suggest a commercial association with the major event. Recompense is provided, however, for defendants against whom unjustified civil proceedings for a breach of MEMA have too zealously been brought in the form of a declaration or damages for any loss suffered.¹²⁰

Anton Piller and John Doe Orders

At common law a sponsor or organising committee could also apply to the court for two other coercive remedies that can be aimed at people who make or sell

¹¹⁴ Similar provisions exist under the Fair Trading Act 1986 (NZ) and the Defamation Act 1992 (NZ).

¹¹⁵ *Irwin Toy Ltd v A-G (Quebec)* (1989) 58 DLR (4th) 577 (SCC).

¹¹⁶ *RJR MacDonald v Attorney-General of Canada* (1995) 127 DLR (4th) 1.

¹¹⁷ *Ibid*, La Forest J dissenting on this issue.

¹¹⁸ Commerce Act 1986 (NZ), s 89(1). The words used here are, however, slightly different being “as [the court] thinks appropriate.”

¹¹⁹ See the raft of cases cited by A. Barker, in n 4 of Chapter 5 “Interlocutory Injunctions” in P. Blanchard et al (ed) *Civil Remedies in New Zealand* (Thomson, Brookers, 2003).

¹²⁰ MEMA, s 51(1).

counterfeit or pirated copyright works. First, it could seek an *Anton Piller* Order¹²¹ designed to prevent defendants who have documents or physical objects which the court needs as evidence from destroying, altering or hiding them. In such cases, the court will give permission to enter the defendant's premises to inspect, remove or copy the objects or documents in question. The *Anton Piller* Order has been described as the civil equivalent of a search warrant but this is misleading since, unlike the police, the plaintiff cannot enter by force. If the defendant refuses entry he or she can only retrospectively be jailed or fined for contempt of court. They are not given lightly, being *ex parte*, and will be made only where: (i) they are necessary in order for a plaintiff to make out his or her case; ii) no permanent harm will be done to the defendant if the plaintiff loses, and (iii) there is a grave and demonstrable danger of evidence being tampered with, hidden or destroyed.¹²²

Secondly, a sponsor or organiser could apply for a *John Doe* Order directed to no known person if there *is* no specific defendant at whom the court's coercive powers can be aimed. One such case was *Tony Blain v Splain*¹²³ in which a promoter, who had been licensed by the rock performers Paul McCartney and Metallica to use their names, pictures, likenesses and logos on various products, was successful in obtaining an interim injunction against nomadic groups of traders who followed rock bands around and set up stalls outside their concert venues selling pirated T-shirts, headbands and similar goods which were alleged to infringe various intellectual property rights. Because the hawkers had easily removable stalls, they could not be identified in advance, hence the need for the *John Doe* Order to seize the goods. Such an order, however, in no way alters the grounds on which relief may be obtained merely its targets. Both *Anton Piller* and *John Doe* Orders are thus subject to a set of explicit restraints not easily read into MEMA's open ended provisions concerning evidence gathering and injunctive relief.

Conclusion

While it is conceded that it has become difficult nowadays to host a major event without undertaking to protect the investment of the event's sponsors and organisers (who often include governments themselves) there is every reason for trepidation when jurisdictions relinquish control over everyday, generic and non-distinctive words and emblems to private entities restricting or excluding time honoured judicial and legislative safeguards and move toward criminalising activities that were hitherto actionable civilly (if at all), backing up that handover with heavy handed enforcement powers and criminal sanctions. Most jurisdictions that have gone down this route have at least ensured that the fine

¹²¹ Named after the case *Anton Piller KG v Manufacturing Processes Limited* [1976] Ch 55 although the first such order was granted in *EMI Limited v Pandit* [1975] 1 All ER 418 by Templeman J.

¹²² This three-step test is set out by Ormrod LJ in the *Anton Piller* case, *ibid*.

¹²³ [1993] 3 NZLR 185.

but bright lines required to be drawn between the interests of event organisers and the commercial and private interests of the public can be subjected to pre-emptive scrutiny and debate as event specific statutes go through the legislative process. New Zealand, however, has denied itself that safeguard and ignored advice delivered during the passage of the Bill through the House that there is a serious risk with generic legislation that over time it may be used in relation to events where it is not necessary, where there is less of a consensus that the unusual restrictions are appropriate, or in relation to events that New Zealand already hosts. Indeed it was expressly acknowledged by the Minister who moved the first reading that “it places a limitation on business practice and commercial speech, and to apply it too widely would be to cause more problems than it solves”. While such avowals of the need for Ministerial self restraint are commendable, they are not in the last resort justiciable.

Application of the new law in New Zealand may have other unintended consequences. By coincidence rather than design, the timing of New Zealand’s first major event, the Rugby World Cup in September and October 2011 coincides with the country’s three yearly general parliamentary election period. Overkill provisions in MEMA such as the advertising ban that allows no unauthorised advertising of any kind in designated “clean areas” and along “clean transport routes” during a “clean period” could well see the curtailment of political as well as commercial speech. Whether this will cause second thoughts among those who voted for the legislation remains to be seen.

MEMA is an attempt to provide a public law solution to a private law problem and the mismatch shows. This temporary renting out of the coercive powers of the state ironically takes us back to the world before the enactment of the Statute of Monopolies in 1623 in which a chronically cash-strapped Crown disbursed one-off privileges to those prepared to pay for them.