

# The 2003 Rugby World Cup: Player Image as Intellectual Property

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## Abstract

*International sporting events such as the Olympic Games, World Cup Soccer, World Cup Cricket and the Rugby Union World Cup are big business. They present an international showcase for particular sports and individual participants. However an issue that is often managed poorly by the administrators and organisers is the intellectual property rights of the participants. This is particularly evident where the administrators and organisers attempt to prevent ambush marketing through the use of player image. This paper examines the use of player image in the context of the 2003 Rugby World Cup, and, in particular, the terms of the contentious 'participation agreement' that each player had to sign before being able to compete. The provision of some background information about the Rugby World Cup, leads to discussion of ambush marketing in sport is discussed, and examines the legal rights of players to make economic use of their own persona, or image, as they choose, a feature known as 'character merchandising'. A discussion of the effect of 'restraint of trade' clauses in employment contracts leads to a series*

*of recommendations. Discuss some recommended strategies that aim to satisfy all parties and prevent the use of player image as a method of ambush marketing.*

## **Introduction**

The Olympic Games, World Cup Soccer, World Cup Cricket and the Rugby Union World Cup are all sporting events that are closely followed the world over. They present an international showcase both for particular sports and for individual participants. For the organisers and host nations, these events, if managed and marketed efficiently, represent an unparalleled opportunity to secure a significant financial windfall. For each sport there is the ability to develop and enhance its product for years to come. An issue, however, that administrators and organisers often manage poorly is that of the intellectual property rights of players.

The particular aspect of intellectual property causing much discord relates to the right to market the persona (or 'famousness') of individual well-known players. In other words, who should have the right to utilise 'player image' – should it be the individual player or the sporting administrators and organisers? Organisers of big sporting events are concerned that if they do not hold the exclusive right to market the player image of participants, official sponsors would lose their marketing advantage if a famous participant were to be used in a competitor's advertising campaign, a situation known as 'ambush marketing'. History shows that the apparent paranoia exhibited by the organisers of the 2003 Rugby World Cup towards possible ambush marketing is not unfounded, but their confrontational approach to the problem alienates the players, who, after all, make the spectacle possible.

The focus of this paper is on the use of 'player image' in the context of the 2003 Rugby World Cup and the negotiations surrounding the terms of the contentious 'participation agreement' that each player had to sign before being able to compete. The nub of the dispute between the organisers and the players was the issue of who should own the 'player image' of the participants. Following some background information about the Rugby World Cup, this paper discusses 'ambush marketing' in sport, and examines the legal rights of players to make economic use of their own persona, or image, as they choose, known as 'character merchandising'. There is a discussion of the effect of 'restraint of trade' clauses in employment

contracts, then finally the paper will recommend strategies that should be satisfactory to all parties to prevent the use of player image as a method of ambush marketing.

### **Background to the Rugby World Cup 2003**

The International Rugby Board (IRB), based in Ireland, governs rugby union internationally and controls the Rugby World Cup Ltd (RWC). According to the IRB, the Rugby World Cup is the world's third most significant sporting event, preceded only by the Olympics and the FIFA (soccer) World Cup. Again according to the IRB, more than three billion people followed the televised broadcast of the last Rugby World Cup in 1999 ([www.irb.com](http://www.irb.com)).

The governing body for rugby union in Australia is the Australian Rugby Union (ARU), and the players' association is the Rugby Union Players Association of Australia (RUPA). The Wallabies are now recognised as Australia's national winter team, and official sponsorship brings in more than \$12m a year to the ARU. The 2001 Bledisloe Cup match in Sydney was seen on TV across Australia by more than three million viewers (Bray, 2002). The familiar, and humorous, Qantas and Bundaberg Rum advertisements on TV featuring the Wallabies add to the profile of the team and the individual players.

The first controversy with regard to intellectual property and the 2003 Rugby World Cup occurred almost a year before the start of the tournament when Australia and New Zealand were preparing to sign an agreement with the IRB to co-host the event. Unfortunately for New Zealand one of the conditions in the contract was that 'clean stadiums' (stadiums free of sponsors' advertising) must be provided, and this the New Zealand Rugby Football Union could not do. With Australia able to give such a guarantee, sole hosting rights were granted to the ARU. The ARU has stated that it is expecting to make \$45 million from the world Cup (Eakins, 2003).

The most recent controversy emerged in April 2003. This related to the 'participation agreement' to be signed by the organising union of each competing country, thereby agreeing to abide by the rules and regulations of the RWC. Within that agreement there was a further 'participation agreement' to be signed individually by each player, on a 'take it or leave it' basis. From the outset the RWC refused to deal directly with the

International Rugby Players Association (IRPA), or any other players' associations. Any amendments to the players' participation agreement had to be proposed by the respective players' association, RUPA for example, in consultation with the governing union in each competing country. It then became the responsibility of the governing union to negotiate with IRB for the changes to be brought into effect. A side issue was the fact that although competing teams would share a participation fee of \$11 million, no prize money was offered. Players' associations were forced to negotiate with their governing unions for a winners' bonus. The deadline for signing the participation agreements was 31 July 2003, the last to sign up before the deadline being New Zealand (Australian Associated Press, 2003; Australian Rugby Union, 2003; Rugby Heaven, 2003; Planet Rugby, 2003).

From the players' perspective there were a number of contentious issues in the original players' participation agreement, an agreement described by RUPA as being 'draconian and unfair', and inconsistent with the collective bargaining agreement in force between RUPA and the various professional rugby union governing bodies in Australia (RUPAA, 2003). One of the issues that caused great controversy related to the use of player image.

*Clause 1(e) of the original player participation agreement reads*

**I ... agree not to wear any item of clothing or kit bearing any name, logo or design of any commercial entity, or to have tattooed, branded, shaved, cut, pierced, applied or fixed to, into or on to my body (including but not limited to, onto or into my hair and/or nails or onto my spectacles or contact lenses) any name, logo or design of any commercial or other entity, save as permitted under the Terms of Participation (RWC, 2003: 106).**

*Clause 1(g) reads*

**I ... agree, save as provided in the Terms of Participation, not to, directly or indirectly, allow my name, nickname, image, likeness, photograph, identifying characteristic, signature or performance to be used in advertising or endorsement of for any commercial purpose which involves a direct or**

**indirect association with the Tournament and/or which seeks to exploit (whether implicitly or explicitly) any connection therewith. For the avoidance of doubt this clause shall cover (without limitation) my appearance (and/or the use of my name, nickname, image, likeness photograph, identifying characteristics or performance) in such advertisements, endorsements or for such commercial purposes in the shirt and/or kit of my Union (and/or kit likely to cause confusion with the same) (RWC, 2003: 107).**

*Clause 11 reads*

**I ... acknowledge that this agreement restricts certain of my abilities to exploit for my own benefit and/or in my capacity, my name, image, likeness, photograph, signature, or performance at or in connection with the Tournament and I expressly acknowledge and agree that such restrictions are necessary, proportionate and reasonable for the purpose of protecting the Company's legitimate commercial, Tournament and developmental interests (RWC, 2003: 109).**

These provisions may directly conflict with individual sponsorship contracts already in existence, and represent a not inconsiderable legal obstacle to overcome. A player has a contract with a sponsor, and the sponsor requires fidelity to the contract and to the promotion of the sponsor's brand. If the player promotes a competitor's product, the player is in breach of contract. The IRB sponsors, who pay significant amounts for the privilege, also expect fidelity to the contract and to their brands. If a star player were to promote a competitor's product by means of a recognisable mark shaved into his hair (the Nike 'swoosh', for example), this action would undermine the effectiveness of the IRB sponsor's campaign, and would be a breach of the sponsor's contract with the IRB.<sup>1</sup> It would also be a clear example of ambush marketing. After some high pressure negotiation, including RUPA issuing a writ against the ARU in an effort to provoke a

resolution, the terms of the 'participation agreement' were eventually revised to the satisfaction of RUPA (RUPAB, 2003).

The participation agreement does not clearly set out, either before or after amendment, the period for which these clauses are effective. It could be construed from the wording of the agreement that they are to be effective for the duration of the tournament, but there is no formal definition of that time frame either. Clause 1 was not subsequently amended, so remained intact in the final player participation agreement. Therefore it would seem that Clause 1(e) suspended a player's ability to carry on with any individual contract to commercialise their persona for some indeterminate time, which may not have been the duration of the tournament. Clause 11 was amended in favour of players by the addition of various guarantees relating to the use by the RWC of individual player images.

Under Clause 8, the agreement is governed by English law and any dispute relating to it is to be heard in the British court system. The ramifications are that any Australian signatory would have to bear the expense of taking their evidence, witnesses, and, presumably, lawyers to the UK for a case to be heard. With an international tournament such as the 2003 RWC a clause determining the jurisdictional forum is standard, but it behoves those signing the agreement to ensure the terms are satisfactory in the first place, and to be aware of the ramifications if a dispute arises.

### **Ambush marketing in sport**

A definition of ambush marketing, or parasitic marketing, is:

**A company's intentional efforts to weaken – or ambush – its competitor's 'official' sponsorship by engaging in promotions and advertisements that trade off the event or property's goodwill while seeking to confuse the buying public as to which company really holds official sponsorship rights (McKelvey, 1994:20).**

For its own purposes, the IRB defines ambush marketing as follows:

**It is an attempt by companies/individuals to create an association with an event without investing in it. The practice, which in a number of cases has reached a high level of sophistication, is extremely harmful and**

**damaging to the bona fide commercial partners and – if it left unchecked – to the revenue generating potential of the Tournament. This, in turn, could have significant impact on the sums of money available for the development of the game ([www.rugbyworldcup.com/home/brand.htm](http://www.rugbyworldcup.com/home/brand.htm)).**

Examples of ambush marketing include (Bouvier, 2000:2):

1. unauthorised merchandising ...;
2. promotions (e.g. ... through running ‘congratulatory’ advertising ...);
3. sponsorship of individuals in a team sponsored by a competitor, or sponsorship of a team in a competition or event sponsored by a competitor;
4. corporate hospitality packages; and
5. using billboards outside the event stadium;

Major events, including the Olympic Games are not immune to ambush marketing. It is now a requirement that the host city for the Olympic Games provides legislation to guard against possible ambush marketing. The *Sydney 2000 Games (Indicia & Images) Protection Act 1996* (Cth), *Sydney 2000 Games (Indicia & Images) Protection Amendment Act 1997* (Cth) and the *Homebush Bay Operations Act 1999* (NSW) attempted to do so with reasonable success. Even so there is strong evidence to suggest that Qantas’s advertisement campaign before and during the games led people to believe that Qantas was the official airline sponsor, when in fact it was Ansett. The pre-Olympic swimming meets competition and selection trials for the Australian swimming squad, which took place at the Olympic Games pool, were sponsored by Qantas, and the Qantas brand was clearly identifiable during the television broadcasts of these events. Qantas, a major sponsor of Australian rugby union also took advantage of the opportunity offered by a Bledisloe Cup game between Australia and New Zealand just prior to the Olympics at Stadium Australia, one of the first events of any sort to be staged at this venue. A Qantas advertisement featured an aerial view of the clearly recognisable stadium with the Qantas choir singing ‘I still call Australia home’ in the middle of the pitch in the formation of the ‘flying kangaroo’ logo. Ansett was so concerned about these, and other ambush marketing tactics of Qantas, that Ansett sought an

injunction in the Federal Court. The case was settled without any orders being handed down to the effect that Qantas had engaged in any infringing conduct (Curthoys *et al.*, 2001).

The absence of a judgement in the Qantas-Ansett dispute presents very real difficulties for sponsors of major sporting events. If Ansett was seemingly outwitted so effectively and without any legal means to protect its interests, in spite of legislation being enacted to prevent the very behaviour being complained of, what other legal remedies are available? In Australia the common law action of passing off, discussed below, is a possibility, as are the provisions of the *Trade Practices Act 1974* (Cth) (*TPA 1974*), also discussed below. These potential legal remedies, however, are generally sought after the injurious behaviour has occurred, when the damage has already been done. Meenaghan (1996:103) warns that the practice of ‘simultaneously reduces effectiveness of the sponsor’s message while undermining the quality and value of the sponsorship opportunity that the event owner is selling. As such it may seriously inhibit the further growth of corporate sponsorship’. Strategies to prevent ambush marketing from occurring in the first place would be more satisfactory to the injured party, and cheaper, and the best way to effect these may be through non-legal means, such as negotiation and conciliation.

### **The players’ intellectual property rights**

There are four main aspects of intellectual property that are relevant to sport: copyright, design, trademarks and passing off a misleading conduct. Some of these may overlap, however all can offer protection to a variety of sporting initiatives. With respect to Australian law, the legal areas of most relevance to this paper are the common law action of passing off, and the statutory protection against misleading and deceptive conduct provided by s 52 of the *TPA 1974*. A player may also consider registering himself or herself as a trade mark, but the procedure is complex and costly, and not yet commonplace for participants in sport, and is not be examined here.

The law has come to recognise that the ‘persona’, or image, of a well-known person, for example a famous sportsperson, is a marketable commodity in its own right, and has an economic value. One way in which money can be earned is by the association of the name or the image of the sportsperson with a product or service, the aim being that the connection will enhance the reputation and the sales of the product or service. The well-

known person should be able to capitalise on this status however he or she may choose, and should also be able to prevent others from using image to promote their interests without permission and without payment. The marketing of name or image for monetary gain in this manner is known as 'character merchandising', and is worth millions of dollars (Sadler, 2001).

American basketball star Kobe Bryant reportedly receives some \$30 million a year from his sponsors Nike shoes, McDonalds, Sprite and others (The Telegraph Group, 2003). Australian swimmer Ian Thorpe earned an estimated \$3,675,000 from sponsorships and endorsements during 2002, compared with his \$25,000 prize money from swimming. Thorpe is sponsored by twelve companies, Adidas the major cash sponsorship with \$AUD 1,000,000 in 2002 and Aquarius and Telstra equal second \$AUD 500,000 (Thomson, 2002).

In late 2002 a cover story in the *BRW* was the topic of the top fifty Australian sports earners for that year. The top fifty included those sportspeople who were based overseas, and an estimated 2002 gross earnings included sponsorships. Golfer Greg Norman was at the top of the list with an estimated \$24,600,000; the largest category was soccer players, with twenty on the list, followed by golfers with seventeen. Surprisingly there were no rugby players, either rugby league or rugby union in the top fifty, as was also the case in 2001. George Gregan was the highest paid rugby union player with estimated earnings in 2002 of \$700,000 (Shoebriidge, 2002:54-56). The lack of rugby union players on the *BRW* list is curious, given the promotional material published by the IRB about the popularity of the game. If the IRB is correct, logic would suggest that individual sponsorship deals for some of the better known Australian players would place their earnings on a similar footing to those eight on the *BRW* list ranked equal 47th with \$1,000,000.<sup>2</sup>

### ***Passing off***

*Passing off* is used where the plaintiff has an established reputation and the defendant takes advantage of this reputation to promote the defendant's own interests. This can be done by adopting a similar, or even the same name, by copying the designs of the plaintiff, or by identifying the defendant's product in a similar manner to the plaintiff's. This can be achieved for example, by explaining the get-up of a competition product, a term used to describe a situation. For example 'get up' packaging, such as

copying the distinctive dimpled bottle of Haig whisky. In a character merchandising case, the defendant's unauthorised use of the plaintiff's image is passing off that the plaintiff has agreed to the connection. To be successful in a passing off action the plaintiff has to prove three things. First that the plaintiff's goods/business, or, in a character merchandising case, the plaintiff himself or herself, has an established reputation. Next, the plaintiff must prove that the defendant's actions will cause purchasers to believe the defendant's goods or business are of those of the plaintiff. Finally the plaintiff must show, has suffered, or is likely to suffer, damage. The remedies for an action in passing off are compensatory damages or an account of profits, and, perhaps of more use to the plaintiff, an injunction to prevent the continuation of the defendant's conduct (Sadler, 2001).

A character merchandising case involving the unauthorised use of a sportsperson's image was *Honey v Australian Airlines Limited* (Honey, 1989). This was a case in which the plaintiff was unsuccessful. The plaintiff was Gary Honey, an amateur athlete,<sup>3</sup> who claimed damages and an injunction following the use of his photograph on posters, book cover and a magazine cover. Because there was insufficient evidence to show that a reasonable number of people would think that the use of his photograph in those particular circumstances meant he had given his endorsement to Australian Airlines, he lost the case (Sadler, 2001). Indeed, passing off by itself is the subject of infrequent litigation as it is easier to use the provisions of the *TPA 1974*, although claims under the Act are often accompanied by a claim in passing off.

### **The Trade Practices Act 1974**

The most useful section of the Trade Practices Act of 1974 in the context of 'character merchandising' is s 52 which is headed 'Misleading or deceptive conduct' and comprises two key sections:

52(1) [Prohibited conduct] A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

52(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of sub-section (1).

The wording of the legislation suggests that the operation of s52 requires the existence of three factors. First, the defendant must be a

corporation, although s 6(3) of the Act extends Part V Division 1, in which s 52 is located, to include a person, that is an individual 'not being a corporation' engaging in conduct involving the use of postal, telegraphic or telephonic services or which takes place in a radio or television broadcast.

Second is the defendant's engagement in misleading or deceptive conduct. There is no need to prove that there was any intention to deceive, or that anyone has actually been misled or that actual loss or damage has occurred. It is, however, necessary to prove that there exists a real possibility of someone being deceived. The courts will identify the class of persons likely to be deceived or misled, which may be the general public or a section of the public, described as the target group. Then the courts determine the likely effect of the conduct on the relevant class and will find a breach of s 52 if the conduct would deceive or mislead members of the target group. Finally there must be a link between the conduct of the respondent and the misconception arising in the target group (Sadler, 2001).

Third is the requirement that the activity took place in trade or commerce. The courts have interpreted this broadly to include, for example, the activities of newspapers, rodeo associations and Australian Rules football clubs. Contravention of s 52 gives rise to the granting of an injunction to prevent continuation of the infringing behaviour and statutory damages (Sadler, 2001).

Olympic swimmer Kieran Perkins, an Australian, was successful in a s 52 action against Telstra (then known as Telecom) for using his name and photo, without his authorisation, in a colour supplement inserted into the Brisbane *Courier Mail* newspaper. In *Talmax Pty Ltd v Telstra Corp. Ltd* (*Talmax*, 1997), the Queensland Court of Appeal reversed the decision of Byrne J of the Queensland Trial Division. Byrne J held that 'the publication did not misrepresent that Perkins had consented to the respondent's association of his name, image and reputation with its advertising' (*Talmax*, 1997:448). The test used by Byrne J was what a 'careful reader' would make of the material in question. The Court of Appeal said this was an incorrect approach because the newspaper had a wide circulation and Perkins was granted an injunction, costs and damages of \$15,000 for the diminution of the opportunity to commercially exploit his name, image and reputation. The judgement concluded (*Talmax*, 1997:446):

**[T]he 'target' readership accordingly included 'the astute and the gullible, the intelligent and the not so**

**intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations', and the appellants could rely on any meaning which was reasonably open to a significant number of the newspaper readership (*Taco Co. of Australia Inc. v Taco Bell Pty Ltd*, 1982)**

This examination of “passing off” and the operation of s 52 of the *TPA 1974* has been in the context of the rights of players to protect their image. It is equally applicable to the practice of ambush marketing. In the latter case an aggrieved plaintiff may be a sponsor who has paid a large sum of money to be seen as officially associated with an event, or the aggrieved plaintiff may be the organisers who has seen the exclusive marketability of the event eroded by advertising interlopers. Either can claim that the activity of the defendant amounted to a passing off that the defendant was, in fact, an official sponsor (and had paid handsomely for that privilege), or, alternatively, that the defendant was engaging in misleading and deceptive conduct. However, redress in this situation is also affected by the operation of the notion of restraint of trade.

### **Restraint of trade**

A contract in restraint of trade has been defined judicially as (*Petrofina*, 1966: per Lord Diplock,138):

**... one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in future to carry on trade with other persons not parties to the contract in such manner as he chooses**

The most likely types of contract to be affected are employment contracts, contracts for the sale of a business and contracts to regulate trade relations. As well as being affected by the common law, there are provisions in the *TPA 1974* that proscribe anti-competitive behaviour of a similar nature. At common law a contract will be rendered void, that is unenforceable, by the courts if it is found to be in restraint of trade. If the contract as a whole is satisfactory, yet certain clauses are in restraint of trade, those clauses will be rendered void while the rest of the contract will stand (CCHA, 1991-2003). Originally, the courts would find the whole contract, or specific clause, to be void without more. Gradually the courts

have come to allow certain such contracts and clauses to remain effective, providing ‘the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public’ (*Nordenfelt*, 1894: per Lord Mcnaghten 565). Important issues that are considered in determining whether or not the restraint is reasonable are the geographical area and the duration of its intended operation.

Contracts of employment are of most relevance to this paper. The main issue is whether a player could argue that all or part of the RWC player participation agreement is a restraint of trade. As noted earlier, any case arising from a dispute over the 2003 RWC player participation agreement would have to be heard in the English courts although the broad legal principles governing restraint of trade in employment contracts are similar in both jurisdictions. For a discussion of the relevant law in the UK, see Beale (1999-2002), 17-075 to 17-113. The following discussion of the law as it operates in Australia, is designed to illustrate the principles that judges in both Australia and the UK would apply in these cases.

There have been a number of cases involving employment contracts in sport in Australia. In 1971 the High Court of Australia found the transfer rules then in place for rugby league players a restraint of trade (*Buckley v Tutty*, 1971). Kim Hughes, former Australian cricket test captain and Sheffield Shield player for Western Australia, was barred from playing in Western Australia after he participated in the rebel tours of South Africa in 1985/1986 and 1986/1987. He challenged the validity of the Cricket Council of the Western Australian Cricket Association (Inc) rules giving effect to his exclusion. Although he failed on a number of separate legal grounds, including under the *TPA 1974*, Hughes succeeded in proving the exclusionary clauses to be an unreasonable restraint of trade at common law, even though he was not in any contract with the Association. (*Hughes*, 1986). Similarly a challenge to the New South Wales Rugby League’s ‘internal draft’ rules by affected players was unsuccessful under the *TPA 1974*, but successful as a restraint of trade at common law (*Adamson*, 1991).

Rugby players signing the original ‘participation agreement’ in order to take part in the 2003 Rugby World Cup would find some comfort in the above decisions, as the restrictions therein are far too widely drawn to be reasonable in terms of the interests of the parties or of the public. They would be in a strong position to argue, successfully, that the clauses relating

to image were a restraint of trade. A case that might hinder their cause, however, is a British case in which singer George Michael failed to be released from his contract with Sony Music. Michael was required to deliver eight albums, and was legally tied to Sony until this occurred, up to a limit of fifteen years, facts that he argued were in restraint of trade. On the evidence, both the British High Court and Court of Appeal found Michael had been perfectly competent to negotiate the deal that best suited him, and, as he was in complete creative control, he was in a position to regulate the length of the contract himself (*Georgios Panayiotou*, 1994). The counter argument for prospective players in the 2003 Rugby World Cup was that the ‘participation contract’ was a generic one for all players, not negotiated on an individual one to one basis, and the tournament was a unique event held only once every four years.

***Who should own the player’s image?***

What should be the obvious starting point when negotiating the intellectual property rights inherent in major sporting events is the issue: who should own the player’s image? This question was raised by an internet poll in May 2003 on the Sport Business website (*Sportsbusiness.com*, 2003). Judging by the legal and administrative nature of the material posted on this site, it must be assumed that sports lawyers and sports administrators, rather than athletes, would be the main users. With this in mind, the following statistics were provided in answer to the question (*Sportsbusiness.com*, 2003):

**Table 1: Which of the following should own a sports professional’s image rights?**

<b>Proposed owner</b>	<b>Percentage of respondents</b>
The player/athlete	50%
Held jointly by all	25.3%
Club played for	16.7%
League played in	3.4%
National governing body	4.6%

Source: *Sportsbusiness.com* (2003)

The results clearly indicate recognition of the fact that the player contributes more to his or her image than any other party involved.

However as Lipton (2000:1) suggests: ‘Those who can establish a proprietary interest in a particular item will be able to exploit it commercially more readily than those who cannot clearly establish a right’. This would tend to be supported by the second most popular option which proposes that rights to image should be jointly held by all. There is certainly some limited support for intellectual property rights to be held solely by the league or the national governing body, although the remaining statistics indicate that the complaints voiced by rugby players about the original RWC ‘participation agreement’ were fair and reasonable.

***Protection strategies for sporting event organisers***

The following is a brief checklist for the organiser of a sporting event or competition to consider when limit the chances of ambush marketing in general, and the use (or misuse) of player image in particular: (Not that this does not represent a legal opinion and should not be used by readers in place of appropriate legal advice).

**Table 2: Protection strategies for sporting event organisers**

<b>Prepare an inventory</b>
The event organiser organisation should compile a comprehensive list of all items of intellectual property that they have or that need to be protected.
<b>Review current strategies</b>
If policies are in place already to protect against ambush marketing or other issues, these should be constantly updated.
<b>Contract restrictions</b>
These need to be negotiated with the broadcaster, venue owner, caterers local councils, and, most importantly, participants.
<b>Government intervention</b>
If an international competition the organisers should lobby with their government to seek protection similar to that afforded to the Olympics and Formula 1 racing.
<b>Educate the participants</b>
If players are clearly educated about the value of intellectual property and the potential windfall by protecting the sponsors of the event from ambush marketing, the rights could be negotiated fairly. However, it is only reasonable that in return the players should be able to reap some of that windfall on a personal level.

<b>Securing prominent space</b>
If the event is out of stadium or even if the event is conducted inside the stadium, signage in and around the city in question must be secured by the organisers for use by the sponsors.
<b>Name and shame</b>
An alternative strategy is to 'name and shame' the offenders, an approach already used by the International Olympics Committee. The disadvantage of this is that, while it may be a disincentive to offend in the future, it occurs after the ambush marketing has taken place, and the damage is already done. In addition it would have to be carefully managed to avoid litigation (defamation for example).
<b>Secure the participants</b>
As well as negotiating the intellectual property rights with the athletes, the organisers should also attempt to secure sponsorship funds for the high profile athletes and then use them in marketing campaigns to promote the event (CCHB, 1999-2002).

This is not an exhaustive list and there is no doubt that the imagination and ingenuity of ambush marketers will keep them one step ahead of the organisers and legislators.

From the perspective of this paper, educating the participants and securing their intellectual property rights in advance is the best way to prevent ambush marketing by way of use of player image. This can be best achieved by genuine negotiation between participants and organisers, so that the participants feel their interests have been fully considered. If it requires money to be paid to participants to bring about their full co-operation, this must be factored into any preliminary economic assessment of the viability of a major sporting event. As Smith (2003) points out, FIFA, the international governing body for soccer, has worked collaboratively with the soccer players' international association since the 1960s. Smith (2003: 70) says tennis and golf now embrace player power:

**to such an extent that professional athletes just about run the two sports these days, while staid old cricket will come to the party next month when the ICC meets to consider a recommendation of its own**

**cricketing department to formally recognise the  
Federation of International Cricketers Associations.**

## **Conclusion**

In Australia sport is a substantial business. Sports organisers and administrators enjoy a symbiotic relationship with corporate sponsors, the latter optimising their marketing dollar by bathing in reflected glory. This is particularly so where large sporting fixtures are involved. Securing all the respective rights beforehand is important in maximising the economic advantage for the sponsor. Legal battles are undesirable regardless of the outcome, but often the effective securing of rights by negotiation rather than by litigation depends on the strategic acuity of the sporting administrators and organisers.

The economic windfall that results from major sporting events such as the 2000 Olympic Games in Sydney and the 2003 Rugby World Cup is huge, as is the immeasurable benefit of the goodwill engendered by such occurrences. As a result the Australian government has an interest in facilitating the smooth transition of these events from the earliest stages to the final moment. With respect to the negotiations between organisers and participants, it may not be appropriate for the government to intervene directly, but it could ensure that suitable legislation is in place to secure the rights of all parties.

The economic value of player image makes ownership of the marketing rights a matter of great importance when a big sporting event takes place. It was unfortunate that the RWC took such an insensitive approach to the issue of player image and the associated intellectual property rights generated by the 2003 tournament. Recognising from the outset that the players have rights and negotiating on these rights with the IRPA rather than forcing the players' unions in each country to wrest some more satisfactory arrangement for their players, would have been a far better tactic than the confrontational approach initially employed by the RWC. It may, in fact, have led to a better and more co-operative deal for both parties, with less stress, delay and expense all round.

Ambush marketing will undoubtedly continue to be a factor in major sporting events. While recognising this, and while acknowledging that event organisers and games administrators are entitled to put in place strategies to

prevent it happening, more effort should be put into developing imaginative and innovative techniques to protect intellectual property rights, particularly those relating to player image. The RWC approach is one that simply antagonises the competitors, on whose participation and co-operation the success of the event ultimately depends. Without the wholeheartedly enthusiastic performance of the players, the event would be devalued to a far greater extent than any ambush marketing campaign.

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<sup>1</sup> It is a matter of note that, in comparison with high profile participants in other sports such as swimming and tennis, the current stars of rugby union do not feature more extensively in individual sponsorship deals. However, it is beyond the scope of this paper to examine the reasons for this in more detail.

<sup>2</sup> See above, endnote 3.

<sup>3</sup> Honey was a champion long jumper who won the gold medal for the long jump at the Brisbane Commonwealth Games in 1982, the silver at the Los Angeles Olympics in 1984, and the gold at the Edinburgh Commonwealth Games in 1986.