

**The Legal Protection and Regulation of Sponsorship Rights in
English Football**

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Abstract

Sponsorship is a form of promotional communication with the basic goal to persuade. Researchers have offered a series of benefits for the sponsor that can be achieved through selecting the ideal property, including, obtaining brand exposure, achieving brand recall, enhancing brand image, and communicating a brand theme in the hope of obtaining sales. However, differentiating the brand from competitors is a distinctive tactic essential for realising a competitive advantage. To assist with brand differentiating, corporate sponsors negotiate for exclusivity within a product or service category. Product category exclusivity acts to eliminate corporations within a sponsor's product or service category from the sponsored subject. Therefore, sponsors pay a premium price to achieve such a restricted promotional position.

However, instances of competing sponsorship interests within a football event or league have become common as broadcasters, footballers and stadiums owners all pursue corporate support. Where these separate actors in the same sports marketplace have not collaborate effectively to limit sponsor category conflicts, a sponsoring brand may find it difficult to establish unique image association within the football domain apart from category competitors. This questions the level of exclusivity football associations and related enterprises grant to their official sponsors.

The purpose of the research is to raise the issue and debate the practice of selling multiple sponsorship rights within a particular product or service category in football competitions. Ambush marketing has emerged as an effective weapon in the arsenal of marketing department seeking to associate their brands with sporting events. The research analyses the most effective and common strategies of ambush marketing in English football, and examines the legal mechanisms available in the United Kingdom to prevent the likelihood of suffering damage to official sponsors by third party ambush tactics. The research concludes with the extent to which the legal system in the United Kingdom could help to protect the exclusive rights of the sponsor in English Football.

Copyright Declaration

The copyright of this thesis rests with the author. No quotation from it should be published without their prior written consent. Information derived from this thesis must be acknowledged appropriately.

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Introduction

Since the 1970s, sport has assumed an ever-increasing role within the globalisation of business and public events with sports participants, capital, and labour moving around the world.¹ With the increasing professionalization and commercialisation of sports, the global sports industry has become a very big business.² The means in which sport is traded has undergone a fast transformation in recent years. It is estimated that global operational and infrastructure budgets for one-off sports events will be worth over £220 billion by 2022.³ Figures from a recent Statista study of sports teams, leagues and federations, show that the global sports market has increased from \$46.5 billion in 2005 to \$90.9 billion in 2017.⁴ According to a study commissioned by the European Commission, the sports market contributes 2.98 percent of overall gross value added in the European Union, and is responsible for 2.42 percent of the European Union employment (nearly five million people).⁵

Branding has played a fundamental part in the so-called commodification of sport.⁶ Sports events, leagues, clubs and athletes are now treated as commodities to be commercialised and traded,⁷ in particular with football the world's favourite game and most lucrative sport. According to Sepp Blatter, the former president of FIFA, the world governing body of

¹ Zhang, Kim, Marstromartino and Qian, *The sport industry in growing economies: critical issues and challenges*, (2018) 19(2) International Journal of Sports Marketing and Sponsorship 110.

² Ibid.

³ See, Global Sports Projects exports, Guidance for the UK companies on global sports projects opportunities and the help the Department for International Trade (DIT) can provide, www.gov.uk, 20 May 2015 <<https://www.gov.uk/government/collections/global-sports-projects-exports>> accessed on 16 July 2018.

⁴ Statista 2018, *Global Sport Market – total revenue from 2005 to 2017 (in billion U.S. dollars)*, <<https://www.statista.com/statistics/370560/worldwide-sports-market-revenue/>>’ accessed on 14 May 2018.

⁵ Sports Econ Australia, *Study on the contribution of sport to Economic Growth and Employment in the EU, Final Report*, November 2012, para 13 at 77-78, ‘<<http://ec.europa.eu/assets/eac/sport/library/studies/study-contribution-sports-economic-growth-final-rpt.pdf>>’ accessed on 22 May 2015.

⁶ On the phenomenon of commodification in sport, see Gardner, Felix, Leary, James and Welch, *Sports law*, 2nd edn (Cavendish Publishing Limited, 2001) 57 et seq.

⁷ Ibid.

football, ‘football is now a product in its own right, and there is much to play for not only on but also off the field of play.’⁸ This fact is further illustrated by the 26th Annual Review of Football Finance from sports business group Deloitte, reporting that the total European football market revenues reached 24.6 billion euro in 2015/16 accounting for approximately one third of the global sports market.⁹ The ‘Big Five’ European leagues¹⁰ are amongst the most profitable leagues representing 59% of the European football market (13,416 million euro),¹¹ and the English Premier League has commenced its place as Europe’s favourite league.¹² According to Deloitte, the combined revenues of the English Premier League clubs were 4.865 billion euro in 2016/17.¹³ A major part of these revenues flows from the sale of sponsorship, merchandising and broadcasting¹⁴ which involve exploitation of the various intellectual property rights of football associations and related enterprises.

Football bodies have become increasingly alert to the fact that they are operating in a commercial world, in which money is necessary to success. Therefore, they have started exploring areas outside their mainstream sporting activities in order to maintain and increase their financial resources. The sale of intellectual property rights now makes up a very significant portion of the income of football bodies and organisations. It would be difficult to market football events, leagues, clubs and athletes without intellectual property rights, because they would have limited things to commercialise or sell. Raising substantial revenue from intellectual property rights is a major source of funding for football clubs, federations

⁸ Blackshaw, *Sport marketing agreements; legal, fiscal and practical aspects*, (Springer Science and Business Media, 2011) 9.

⁹ Deloitte, *Ahead of the Curve, Annual Revenue of Football Finance*. Sports Business Group, July 2017 at 8.

¹⁰ The big five European professional football leagues are: England’s Premier League, Spain’s La Liga, Germany’s Bundesliga, Italy’s Serie A and France’s Ligue 1. Ibid.

¹¹ Ibid at 9. See also Statista 2018, *Revenue of the biggest (Big Five*) European soccer leagues from 1996/97 to 2017/18 (in million euros)* 2018, <<https://www.statista.com/statistics/261218/big-five-european-soccer-leagues-revenue/>> accessed on 15 July 2018.

¹² According to Deloitte, the English Premier League is the highest revenue generating league across all revenue streams. Deloitte, *ibid*.

¹³ With expectation that the English Premier League will break the five billion euro revenue barrier in 2017/18. Ibid, at 9. See also, Statista 2018, *ibid*, (n 11).

¹⁴ Deloitte, *ibid*.

and governing bodies who are responsible for developing national facilities and the future of football.¹⁵

Sponsorship, which gains its value by reason of intellectual property rights,¹⁶ is now a big business both for football associations and related enterprises and corporate sponsors. Despite the worldwide economic recession in 2009, figures from Statista show a dramatic growth in the worldwide sponsorship expenditure in the last decade, from \$37.9 billion in 2007 to expected \$65.8 billion in 2018.¹⁷ Subsequently, sponsorship represents one of the fastest growing sectors of marketing communications activities, and it seems to be logical to forecast a larger increase on sponsorships expenditure in the future.¹⁸

1) Differentiation through sponsorship category exclusivity

Scholars have identified numerous commercial objectives for corporate sponsors including: creating promotional opportunities, improving community relations, fostering favourable brand, creating entertainment opportunities and gaining publicity.¹⁹ However, differentiating the brand from rival companies is a distinctive strategy essential for realising a competitive advantage.²⁰ According to the resource-based view of the company, resources are considered

¹⁵ The exploitation of such rights is also crucial to events' rights owners in order to generate considerable profits to cover the cost of holding their events. See Hewitt, *Commercialisation of major sports events: does the law help or hinder the event organiser*, (2005) 13(1) Sport Law Journal 32.

¹⁶ Louw, *Ambush Marketing and The Mega Event Monopoly: How Law are Abuse to Protect Commercial Rights to Major Sporting Events* (Permalink, 2012) 38-39; Griffith-Jones and Barr-Smith (consulting editor), *Law and the Business of Sport*, (Butterworths, London, 1997) 194.

¹⁷ Statista, *Global Sponsorship Spending from 2007 to 2018 (in billion U.S. dollars)*, 2018, <<https://www.statista.com/statistics/196864/global-sponsorship-spending-since-2007/>>, accessed on 12 April 2018. The expenditure on sponsorship in the United States of America increased from \$16.5 billion in 2009 to \$24.2 billion in 2018, accounting for approximately one-third of the total worldwide sponsorship expenditure. In Europe, \$17.6 billion was invested on sponsorships in 2018. International Events Group (IEG), *What Sponsors Want and Where Dollars Will Go in 2018*, ESP Properties, at 2.

¹⁸ IEG expects that this grow in worldwide sponsorship expenditure will continue. However, it warns that sponsorship growth might slow because of client spending more on digital media. For more details. IEG, *ibid* at 4.

¹⁹ Meenaghan, *Measuring Sponsorship Performance: Challenge and Direction*, (2013) 30(5) Psychology and Marketing 389; Jobber, *Principles and Practice of Marketing*, 5th ed, (McGraw-Hill, 2007) 652 et seq; Mullin, Stephen and Sutton, *Sport Marketing*, 3rd edn, (Human Kinetics, 2007) 324 et seq.

²⁰ Cornwell, Roy and Steinard, *Exploring Managers' Perceptions of the Impact of Sponsorship on Brand Equity*, (2001) 30(2) Journal of Advertising 48.

strategic only when they contribute to a competitive advantage.²¹ Without such a competitive advantage, resources become bases of parity between competing companies.²² The effectiveness of sponsorship as a strategic tool for achieving a competitive advantage is based largely on its ability to grant exclusive rights to the sponsoring brand within its particular product or service category.²³

Football associations and related enterprises usually sell exclusive rights in a variety of product or service categories such as cars, financial services, wireless communication, beer, soft drinks and airlines.²⁴ Such category exclusive sponsorships contain an agreement by the sponsored organisation to forgo any potential promotional affiliation with a corporate sponsor's rivals in a defined product or service category for the duration of the sponsorship contract.²⁵ In other words, the football organisation agrees to refrain from affiliating with any of the official sponsor's competitors within the same product or service category. Therefore, product category exclusivity characterise sponsorship as a scarce resource that provides the capacity to differentiate affiliating sponsors' brands from their rivals in the consumers' minds.²⁶ With football attracting millions of spectators and visual media viewers around the world, category exclusive sponsorships are certainly a valuable commodity for corporate sponsors.

²¹ For further details see Barney, *Firm Resources and Sustained Competitive Advantage*, (1991) 17(1) *Journal of Management* 105.

²² Ibid; see also Cobbs, *Legal battles for sponsorship exclusivity: The cases of the World Cup and NASCAR* (2011) 14(3) *Sport Management Review* 288; Gwinner, *A model of image creation and image creation and image transfer in event sponsorship* (1997) 14(3) *International Marketing Review* 148.

²³ Cobbs, *ibid*.

²⁴ Selling exclusive sponsorship rights in a variety of product or service categories allows sponsored enterprises to generate more sponsorship income. Cornwell, Roy and Steinard, *ibid* (n 20) at 50.

²⁵ Cobbs, *ibid*, (n 22) at 288.

²⁶ Ibid. See also Fahy, Ferrelly and Quester, *Competitive advantage through sponsorship: A conceptual model and research propositions*, (2004) 38(8) *European Journal of Marketing* 1013-1030. 1019; Copeland, Frisby and McCarville, *Understanding the sport sponsorship process from a corporate perspective* (1996) 10(1) *Journal of Sport Management* 35.

2) The issue of sponsorship category exclusivity

The main implication of product category exclusivity in sport sponsorship is that competitors of official sponsors turn to ambushing as a mean of maintaining some association with the sponsored property. Ambush marketing is defined as ‘a planned effort (campaign) by organizations to associate themselves indirectly with a particular sponsored subject in order to gain at least some of the recognition and benefits that are associated with being an official sponsor’.²⁷ The term ‘ambush’ is commonly used in literatures because the main actors are often competitors of official sponsors.²⁸ Competing companies, usually with the same product or service category, attempt to gain benefits available only to official sponsors.²⁹ Competitors resort to ambush marketing because the designation of product category exclusivity acts to exclude them from the controlled sports environment.³⁰

Researchers have identified some frequently employed ambush marketing tactics including sponsoring media coverage or engaging in advertising that coincides with a sponsored event, engaging a sub-category sponsorship with individual players and accessing a venue to promote competing brands.³¹ Many individual actors including broadcasters, athletes and stadium owners pursue financial support from corporate sponsors to generate revenue. Thus, competitor companies attempt to associate their brands indirectly with a specific sponsored subject of an event or entity by offering financial support to those active actors. Those competitors simply chose to exploit an ancillary promotional opportunity that is legitimately available for purchase.

²⁷ Sandler and Shani, *Olympic Sponsorship vs Ambush Marketing: Who gets the gold?* (1989) 29(4) *Journal of Advertising Research* 11.

²⁸ *Ibid.* see also Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para I1.21.

²⁹ See Bean, *Ambush Marketing: Sport Sponsorship Confusion and Lanham Act* (1995) *Boston University Law Review* 1100; Meenaghan, *Ambush marketing: A threat to corporate sponsorship* (1996) 38(1) *Sloan Management Review* 106.

³⁰ Bean, *ibid*; Meenaghan, *ibid*.

³¹ See Meenaghan, *ibid* at 106-107; Sandler and Shani, *ibid* (n 27) 11; Crow and Hoek, *Ambush marketing: A critical review and some practical advice* (2003) 14(1) *Marketing Bulletin* 3-9; Tripodi and Sutherland, *Ambush marketing – An Olympic event* (2000) 7(6) *Journal of Brand Management* 416-7; Scassa, *Ambush marketing and the right of association: Clamping down on references to that big event with all the athletes in a couple of years* (2011) 25(4) *Journal of Sport Management* 355-6.

Instances of competing sponsorship interests within the same sporting entity or event have become common in football. Football competitions and leagues allow those individual actors (broadcasters, footballers and stadium owners) to sell sponsorship rights to different companies within the same product or service category as those have entered into a sponsorship contract with the event organisers and participated clubs. Each individual body provides rise to the greatest potential for conflicts. For example, although Barclays Bank is the official financial service sponsor of the Premier League,³² Standard Charter has a sponsorship agreement with Liverpool Football Club,³³ displaying its brand on the club's shirt worn by the club's players. One or more of those players themselves may enter into endorsement agreements with Bank of Scotland to promote the brand. Furthermore, one can assume that TSB Bank may purchase the stadium naming right of Chelsea Football Club. As part of the deal, Chelsea's home will be known as TSB stadium. Meanwhile, Lloyds Bank routinely purchases sponsorships and commercial time on Sky Sports during Premier League matches.

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³² See the Premier League's official sponsors on: www.premierleague.com

³³ www.liverpoolfc.com

³⁴ See the Premier League's official sponsors on: www.premierleague.com

sponsorship agreement with Liverpool Football Club,³⁵ displaying its brand on the club's shirt worn by the club's players. One or more of those players themselves may enter into endorsement agreements with Bank of Scotland to promote the brand. Furthermore, one can assume that TSB Bank may purchase the stadium naming right of Chelsea Football Club. As part of the deal, Chelsea's home will be known as TSB stadium. Meanwhile, Lloyds Bank routinely purchases sponsorships and commercial time on Sky Sports during Premier League matches.

As mentioned above,³⁶ the designation of product category exclusivity in the context of commercial sponsorship acts to exclude competitors within a same product or service category from the sporting event. Excluding competitors from the sponsored subject is the most important component that makes sponsorship an attractive strategy for corporate sponsors. Where football associations and related enterprises are unable to limit sponsor category conflict, it might be difficult for their official sponsors to establish a unique image association through sponsorship. The existence of multiple exclusive sponsorship contracts within the same product or service category in the same sponsored subject questions the level of exclusivity that football entities can offer corporate sponsors and may require a reconsideration of the advantages that exclusive sponsorship can actually deliver.

3) Research aim and objectives.

Using football as its main focus, the purpose of this research is to raise the issue and debate the practice of selling multiple exclusive sponsorship rights within the same product or service category. As selling exclusive sponsorship rights provide the football entities with a profitable income source, to what extent does the law in the United Kingdom protect these valuable rights? This concern is the core of the research.

³⁵ www.liverpoolfc.com

³⁶ See Section (1-4) of the Introduction.

To demonstrate this conflict, sponsorship arrangements in the English Premier League, the top of the hierarchy of English leagues, will be examined. The English Premier League is of particular interest because most of the legal mechanisms that traditionally regulate exclusive rights in sports events in the United Kingdom were formulated before sponsorship incomes became fundamental to the English Premier League. Moreover, the contemporary orientation of the English Premier League allows the above mentioned separate actors to sell exclusive sponsorship rights to different branding sponsors within the same product or service category. The Premier League with the huge amount of concentrated global exposure,³⁷ as well as the massive amount of collective sponsorship contracts, provides a suitable place to examine this increasingly developed promotional strategy.

This study is concerned with the deterrents of commitment in the relationship between football associations and their official sponsors and is based upon the following overall aim: to identify and examine the nature of the determinants of commitment in the relationship between football entities and their official sponsors in the United Kingdom. To achieve this aim, the following objectives have been developed.

3-1) Literature Review

The literature review aims to achieve several objectives. Firstly, to examine the key concepts of sports sponsorships and evaluate their relevance to professional football organisations. Secondly, to identify the aim and the function of exclusivity in sports sponsorship programme and, finally, to explore the evolution of sponsorship within football industry and identify the

³⁷ The appeal of Premier league football to both domestic and global audiences has helped to increase the inward economic impact of the competition by attracting international tourism, broadcasting revenues, foreign investment and sponsorships. Worldwide, the Premier League is available in 185 countries and broadcast to an estimated 730 million homes. George, Arnold and Mullen, *The economic impact of the Premier League*, Ernst and Young LLP, 2015 at 3. The full EY Economic impact Analysis of the Premier League is available to download at: <www.ey.com/PremierLeagueEconomicImpact>, accessed on 12 September 2016.

possible reasons for the apparent conflict of interest between corporate sponsors within the same product or service category in the industry.

3-2) Primary Research

The primary research investigation seeks to analyse the most common form of ambush marketing in English football and assess their implications on exclusive sponsorship programme. Such common forms include the exploitation of commercial broadcasters, footballers' image rights and football stadiums. Therefore, the analysis is based on a fundamental matrix of (i) Applicable common law principles that protect exclusive rights in the United Kingdom and the confluence with sponsorship theory and contemporary practice in British football; (ii) Applicable statutory law that provide legislative rights in favour of promoters of football competitions as follows:

A) the Ofcom Broadcast Code.

Broadcasters spend a considerable amount of money to secure live coverage of football competitions.³⁸ Therefore, they attempt to recoup some of that expense by selling broadcast sponsorship and advertising agreements. Buying such rights by competitors within a football telecast is considered the most effective form of ambushing strategies.³⁹ The appearance of competitors' brands on the television during a football competition could confuse the public and, therefore, decrease the value of the exclusive rights of the official sponsor.

³⁸ Wide coverage through broadcasters can also result in significant exposure for football competitions. Such exposure could deliver a private benefit to football competitions and the participated clubs in terms of increased income from sponsorship. For more information on the impact of television on commercial brands, see Allan and Roy, *Does Television Crowd out Spectators? New Evidence from the Scottish Premier League* (2008) *Journal of Sport Economics* 592-605.

³⁹ See Meenaghan, *Ambush marketing: A threat to corporate sponsorship*, *ibid* (n 29) 106; Crow and Hoek, *ibid* (n 31) 4-5; McKelvey, *NHL v. Pepsi-Cola Canada, Uh-Huh-Legal Parameters of Sports Ambush Marketing* (1992) 10(3) *Entertainment and Sports Law* 5; McKelvey and Grady, *Sponsorship program protection strategies for special sport events: Are event organizers outmanoeuvring ambush marketers* (2008) 22 *Journal of Sport Management* 555-6.

In the United Kingdom, commercial broadcasting is regulated by Ofcom, which was established under the provisions of The Office of Communications Act 2002.⁴⁰ Section 9 of the Broadcasting Code regulates the commercial references that display within television programming.⁴¹ The Code provides regulations relating to prohibited sponsors and content of sponsor's credit. The Code also regulates the appearance of branded products during sports coverage.⁴² Section 12 of the Code 'Scheduling of Television Advertising' also sets out some rules with which broadcasters licensed by Ofcom must comply when carrying advertising programme. It covers the maximum amount of advertising airtime and maximum number of advertising breaks. As broadcast coverage of football competitions is critical to sponsorship value, the research will critically analyse the impact of Ofcom Broadcasting Code on the value of exclusive sponsorship rights in English football.

B) Clause 4 of the FA Premier League Contract

Football players may receive sponsorship income in many different circumstances. He may be sponsored by a clothing or equipment manufacture, in which case he will be required to wear his sponsor's clothing or use his sponsor's equipment during competition. Sponsorship contract (aka individual endorsement) with several football players at or around the time of a football match or competition is a good opportunity for competitor companies to create an indirect association with the sponsored subject of football entities or events.⁴³ This will contribute significantly to maximise the rival companies' ability to create an association with the sport environment. Official sponsors of the football associations and related enterprises may see that the appearance of their competitors' brands with individual football players is

⁴⁰ The most recent version of the Ofcom Broadcasting Code took effect on 1st July 2015. See www.ofcom.org.uk

⁴¹ See generally section 9 and of Ofcom Broadcasting Code and its Guidance Notes.

⁴² See rule 9.6 (c) of Ofcom Broadcasting Code; see also para 1.32 of the Guidance Notes issued by Ofcom in relation to Rule 9.5 of the Broadcasting Code. This will be discussed with further details in Chapter Three of this research.

⁴³ McKelvey and Grady, *ibid*, (n 37) 554; Meenaghan, *Ambush marketing: A threat to corporate sponsorship* (1996) 38(1) Sloan Management Review 107. Lewis and Taylor, *ibid*, (n 28) para I4.13

likely to create confusion to the public. Obviously, this confusion will decrease the value of their exclusive sponsorship rights which cost them a significant amount of money. Therefore, football organisations should seek to limit what individual players and their sponsors can do during an event in order to protect their own official sponsors.

In the United Kingdom, the relationship between the football player and various sport entities is regulated by the standard form of the Federation Association Premier League Contract (The FAPL contract), which was established at the start of the 2003/2004 season.⁴⁴ Clause 4 of the FAPL contract includes a number of provisions which governs the use football entities may make of the player's image and the level of promotional support demanded of the players. The provisions indicate the footballers' rights and obligations regarding the commercial exploitation of their image rights. Those rights and obligations are based on a standard FAPL contract on which the player's employment agreement with his club will be based.⁴⁵ Thus, the research will analyse the extent to which the FAPL provisions assist to maintain the value of exclusivity in sponsorship arrangements of football clubs.

C) Section K of the FA Premier League Regulations

The venue for sporting events will always be at the heart of any sporting commercial operation. The revenue generated from sponsorship rights is inextricably linked to the operation and commercial exploitation of the venue. Therefore, the stadium must be controlled and managed to ensure that no competing brands will be displayed in the stadium during a football match.

⁴⁴ See the Premier League Handbook, *ibid* (n 38) at 273 et seq.

⁴⁵ For further details on the employment agreement between the player and his club, see generally Goulding, Mulcahy and Eastwood, *Player Contract and Player Liability*. In: Lewis and Taylor, (*ibid*, n28) para H1.1 et seq.

Competitors of official sponsors usually use the stadium to associate their brands with the sponsored subject through the exploitation of access tickets.⁴⁶ The exploitation of access tickets in consumer giveaways, sweepstakes, or contests comprises a common indirect ambush marketing technique.⁴⁷ Such exploitation is often designed to capitalise to the popularity of the sponsored subject. Therefore, it is viewed by sports organisation as an ‘antagonising’ form of ambush marketing.⁴⁸

In addition, competitors of official sponsors could associate their brands with the stadium through ground sharing arrangements. Some football stadiums are shared by several sporting organisations. Where a stadium is shared by one or more clubs or sporting events, the rights granted under any sponsorship agreement may infringe rights granted to sporting tenants in their staging agreements and vice versa. Section K of the English Premier Handbook ‘Stadium Criteria and Broadcasters’ Requirements’ sets out the rules relating to stadiums. It contains specific criteria relating to sharing stadiums. Football clubs must comply with the regulations whether they own the stadium or share it with other sporting organisations. Therefore, the research will consider both the ownership and the commercial exploitation of football stadiums in the English Premier League and assess the implication of such regulations on exclusive sponsorship rights.

3-3) Thesis Structure

To achieve the aims of the study, the research first sets out to review the literature in order to understand the function of exclusivity in sports sponsorships. Chapter One provides a review of the literature on the nature of exclusivity in sports sponsorships. The chapter is divided into two main sections; the first section explains the nature of sports sponsorship, by examining the concept of sport sponsorship. The section focuses on sport sponsorship issues

⁴⁶ McKelvey, *ibid* (n 37) at 5.

⁴⁷ *Ibid*; see also Scassa, *ibid* (n 31) 364; Bean, *ibid* (n 29) 1105.

⁴⁸ McKelvey, *ibid* (n 37) at 7.

by discussing the growth of sport sponsorship and introducing the characteristics of sports sponsorship with a special reference to football sponsorship. The second section of the chapter discusses the value of exclusivity in sport sponsorship. The applicable legal principles for protecting exclusivity in sports events are analysed providing the primary question of the extent to which sports associations and related enterprises have the legal rights to control their proprietary rights and how this impact on the value of sport sponsorship.

In parallel with the growth in sponsorship expenditure, a practice coined ambush marketing has arisen. Ambush marketing refers to a variety of activities undertaken by competitors of official sponsors that could confuse the public as to the real sponsor and, simultaneously decrease the value of exclusivity in sponsorship contracts. This practice poses significant legal challenges for rights owners seeking to protect both the financial investment of their official sponsors and the integrity of their sponsorship programs. Chapter Two examines the legal aspects of the evolution of ambush marketing and assesses the prevalent strategies employed by ambush marketers. Then, the chapter analyses the existing legal resources and their ability to address ambush marketing in order to identify its legal implications on exclusive sport sponsorship.

Chapter Three focuses on the extent to which the competitors of official sponsors can associate their brands with a sporting event through licensed broadcasters. This process is examined in the context of the rapid and the dramatic changes in the media coverage of the English football. Broadcasting sports events has become a form of advertising whereby competitors of official sponsors are able to benefit from the reputation of the sporting event. Consequently, decreasing the value of the exclusive sponsorship programme of football event. First, the chapter examines the relationship between the mass media and football sponsorship by explaining the impact of broadcast coverage of football competitions in the

United Kingdom on the value of sponsorship programme. Then, it examines the development in the regulations of broadcast advertising in the United Kingdom and analysis the extent to which these regulations protect the value of exclusivity in sponsorship programmes. Particularly, with the introduction of Ofcom as a reaction to the dramatic change in communication delivery and media coverage of sports events in the United Kingdom.

Chapter Four focuses on the legal and the practical issues that arise from the commercial exploitation of the football player's image rights. Football players are increasingly aware of their powerful position and also seek to sell specific sponsorship rights. The commercial exploitation of the player's image rights will provide a great opportunity to competitors of official sponsors to associate themselves with the sporting events. This chapter first investigates the ownership of football player's image rights in different capacities to explore the extent to which football players can exploit their image rights commercially. This will be followed by examining the practice of collective exploitation of the player's image rights by various football entities and sponsors. Thereafter, it analysis the legal implications of the commercial exploitation of the football player's image rights on the value of exclusive sponsorship. To illustrate these issues, the provisions of Clause 4 of the English Premier League will be examined.

Chapter Five focuses on the exploitation of football stadiums and assesses its implications on the exclusive sponsorship program. It investigates the possibilities of promoting brands of competitors of the official sponsors within football stadiums. An effective exclusive sponsorship programme depends significantly on whether the football entity own an exclusive possession on the stadium. Such exclusive possession enables the football entity to control access to the stadium. The exclusive possession is also significant when the stadium is shared by two clubs. That exclusive possession will indicate who has the rights to promote commercial brands within the stadium. The chapter starts with explaining the importance of

football stadiums for an effective sponsorship programme. Then, it investigates the commercial exploitation of football stadiums, with special reference to the practice of selling football stadium's naming rights to corporate stadiums. When the football stadium is shared by a number of clubs or owned by a separate commercial organisation. Then, it assesses the implications of multiple sponsorship contracts in football stadiums on the value of exclusivity in sponsorship contracts.

Chapter One: The Nature of Exclusivity in Sports Sponsorship under English Law

1-1) Introduction

The concept of sport has transcended the context of mere entertainment and leisure to become an important source of income and a major contributor to economies all over the world. Sports practitioners have been able to generate enormous revenues from the exploitation of aspects of intellectual property rights via broadcasting, merchandising, and sponsorship. According to a report from Deloitte's Sports Business Group, the English Premier League reported record revenue of £4.5 billion during the 2016-17 season,¹ generating a combined operating profit of £1 billion.² The vast majority (approximately 85%) of this revenue comes from the sale of intellectual property rights, namely broadcasting rights, sponsorship rights.³

Sponsorship is a species of endorsement that gains its value by reason of intellectual property rights. Many sponsorships contain exclusivity agreements for a particular corporate brand, eliminating any competition within its product category at that location.⁴ The cost of these sponsorship agreements restricts this strategy to only certain larger corporations. While there are clear benefits to the sponsor and the sponsored property, questions of how these agreements comply with competition rules remain. The sale of exclusive sponsorship rights may be viewed as a means to reduce competition from competition law point of view. Exclusive rights give the right owner a right to hinder others from offering the protected product to the market in competition with the intellectual property right

¹ That is a 25% increase from the previous year. Deloitte, *Ahead of the curve, Annual Revenue of Football Finance*. Sports Business Group, July 2017, at 16, <<https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/sports-business-group/deloitte-uk-annual-review-of-football-finance-2017.pdf>> access on 22 January 2018.

² This was primarily due to the Premier League's three year broadcasting rights arrangements coming into effect, helping drive revenue to record levels. Both Sky Sport and BT Sport paid £5.3 billion for rights to broadcast the English Premier League from 2016 to 2019, making it the most significant sources of income for sports organisations and clubs. *Ibid.*

³ *Ibid.*

⁴ Cobbs, *Legal battles for sponsorship exclusivity: The cases of the World Cup and NASCAR* [2011] Sport Management Review, 14(3), at 288.

holder. These exclusive sponsorship arrangements seem to contradict the basic principles of competition laws which are designed to foster competition and eliminate monopolistic practice.

This chapter of the research deals with the legal aspects of the commercialisation of sports properties, with a specific reference to football sponsorship. This chapter lays the foundation for that discussion by describing how, under English law, commercial rights are created and exploited in football competitions. The chapter first discusses the theory of intellectual property rights in sports. It examines the popularity of sports as a main component of the exploitation of intellectual property rights in sporting events. Second, the significance of football, the most popular sport in the United Kingdom, for corporate sponsors will be examined. This will be followed by explaining the importance of exclusivity in football sponsorship. Then, the chapter analyses the creation and the exploitation of such rights under English law. Finally, the chapter examines the practice of sponsorship in comparison to the philosophical intent of competition policy. It introduces some essential elements of competition policy, followed by an investigation of how those particular principles juxtapose and align with sponsorship practice.

1-2) A primer on property rights theory in professional sports

All human effort has its origin in an idea. Whatever the nature of that effort, it necessarily starts its existence as an idea in the mind of its original creator. The original creator then refines the idea until it ultimately reaches a workable condition.⁵ In order to refine the idea, the original creator will certainly need to describe the idea by using a physical manifestation of that idea, such as the writing of a prose description or the drawing of sketches.⁶ The owner of the idea may also wish to discuss it with specific firms who are interested in further

⁵ See Griffith-Jones and Barr-Smith (consulting editor), *Law and the Business of Sport*, (Butterworths, London 1997) 191.

⁶ *Ibid.*

developing of the idea.⁷ Such an original idea can provide its owner a range of rights known as intellectual property rights.⁸ These rights can be used to protect the idea from any unauthorised usage.

Intellectual property thus refers to the intangible creation of human mind.⁹ An intellectual property right is ‘a right that can be treated as property to control particular uses of a specified type of intangible assets.’¹⁰ Unlike physical property, knowledge, ideas and creations are partial public goods.¹¹ From society’s point of view the most efficient use of knowledge is to spread it to the public at a price that cover the distribution cost.¹² The fundamental problem with knowledge is that it is hard to exclude others from the knowledge since one person’s access to that knowledge does not detract from the knowledge of others,¹³ whilst in physical property, one person’s consumption prevents simultaneous consumption by another.¹⁴ However, privatising property provides rights over it to a legal individual, creating a legal barrier which prevents others from accessing it.¹⁵ The owner of the idea invests time, effort and money in research and development activity aiming to gain a monetary return from his effort and investment. This investment can be embodied in technical machinery and processes, in familiar things such as art, music, books, and in all other sources of information.

⁷ See Cimoli, et al, *Intellectual Property rights: Legal and Economic Challenges for Development*, (Oxford Sponsorship online, 2014) at 7.

⁸ For further details on the theory of innovation and the role of intellectual property rights see generally Cimoli, et al, *ibid*, at 6 et seq; Colston and Middleton, *Modern Intellectual Property Law*, 8th Edn (Cavendish Publishing 2005) at 7 et seq.

⁹ Nevertheless, some argue that it is not accurate to think of intellectual property rights as rights of property in the intangibles themselves, because the statutory intellectual property rights exclude others from of the relevant asset, but not from the enjoyment of the relevant asset. For more details on rights that can be treated as property, see Spence, *intellectual Property* (Oxford University Press 2007) at 13.

¹⁰ *Ibid*, at 12-13. Others defines intellectual property rights as ‘the application of ideas and information that are of commercial value’. Cornish et al, *Intellectual Property; Copyrights, patent, Trademark and Allied rights* (Sweet and Maxwell, 2013) at 65.

¹¹ Cimoli et al, *ibid* (n 7) at 8; Drexl J, *Research Handbook on Intellectual Property and Competition Law*, (Edward Elgar Publishing Limited 2008) at 7.

¹² Cimoli, *ibid*; Drexl, *ibid*.

¹³ Cimoli et al, *ibid*, at 8.

¹⁴ For further discussion on the difference between the production of knowledge and ordinary goods, see, *ibid*, at 8-9.

¹⁵ *Ibid*.

Intellectual property rights make it possible to rationally invest in such activities by preventing others from reaping the rewards from intellectual or marketing effort.¹⁶

Intellectual property law is that area of law which deals with intellectual property rights. According to the United Kingdom Intellectual Property Act 2014,¹⁷ copyrights, patents, designs and trademarks are the main types of intellectual property protection.¹⁸ The principle objective of the Act is to grant a limited monopoly to the owner of the intellectual property rights.¹⁹ The rationale for granting this monopoly is to support businesses in driving economic growth and encouraging innovation.²⁰ Intellectual property law gives the entrepreneurs and investors a sufficient incentive to take the risk to invest their money in developing new ideas. Granting a form of protection against unauthorised use of original ideas is the best practical way to incentive creativity.

Intellectual property rights also provide benefit to society and consumers.²¹ Without legal protections of new ideas, there will be limited economic growth and technology progress.²² This protection provides consumers with an opportunity to benefit from more efficient production and greater product differentiation. For example, pharmaceutical companies must be able to restrict others from selling generic drugs,²³ because these generic drugs are manufactured without taking the relevant risks and conducting the necessary research. Otherwise, this would curtail the research effort and prevent new medicines to reach the

¹⁶ Ibid.

¹⁷ Which enters into force on October 2014. See www.legislation.gov.uk

¹⁸ Ibid.

¹⁹ Colston, and Middleton, *Modern Intellectual Property Law*, 8th Edn (Cavendish Publishing 2005) at 32.

²⁰ According to the UK Intellectual Property Office, the objective of enacting the Intellectual Property Act is to modernising intellectual property law to help UK businesses better protect their intellectual property rights in the UK and abroad. See The Intellectual Property Act 2014 Explanatory Notes, para 3.

²¹ See Drexler, *ibid* (n 11) 7.

²² Ibid; see also Cornish et al, *Intellectual Property; Copyrights, patent, Trademark and Allied rights* (Sweet and Maxwell, 2013) at 78.

²³ According to the World Health Organisation (WHO), Generic drugs are ‘a pharmaceutical product, usually intended to be interchangeable with an innovator product, that is manufactured without a license from the innovator company and marketed after the expiry date of the patent or other exclusive rights’. See Alfonso-Cristancho et al, *Definition and Classification of Generic Drugs across the World*, 2015 (13)1 Cross Mark at 6.

market place. Thus, granting a restricted protection against unauthorised use of original ideas is necessary to improve those ideas to the benefit of both the public and the creator of the idea.

The popularity of sport has increasingly been recognised as an asset that can be commercially exploited because of the ability of sports to attract the public. Sports are so ingrained in humans' social culture that they have become an essential part of their lives. According to the White Paper on Sport, the majority of the public are taking part in sporting activities on a regular basis.²⁴ The larger part of the public love sports and spend a significant amount of its leisure time watching and following sport in one form or another.²⁵ For many people, sport generates significant value such as solidarity, tolerance, team spirit, contributing to personal development and fulfilment.²⁶ This phenomenon was summarised by one author when he said:

'People take pleasure in watching sport because, it presents a spectacle of conflict, drama, excitement and eventual resolution. They achieved social cohesion by belonging to a community of fans and by participating in the rituals of supporting a team through its wins and losses. For many supporters, their teams lend them an identity, almost tribal in its more extreme manifestations, which is an existential commitment to their football team and which sustains them through vicissitudes of their lives and work.'²⁷

Within sports, football has always been a popular sector across the world bringing together entertainment, competition, culture and to an extent monetary business.²⁸ Football

²⁴ See, Commission of the European Communities, *White Paper on Sport*, (COM, 2007) 391 final at 2.

²⁵ According to Pierre de Coubertin, the founder of the modern Olympic Games, 'Sport is part of every man and women's heritage and its absence can never be compensated for'. Ibid.

²⁶ Ibid.

²⁷ Wall, *Sports marketing and the Law: protecting proprietary interests in sports entertainment events* (1996) 7(77) *Marquette Sport Law Journal* 83.

²⁸ Buraimo, Simmons and Szymanski, *English Football* (2006) 7(1) *Journal of Sports and Economics* 29.

competitions that established as a hobby or a physical activity are now no longer confined to the bounds of entertainment but have gained commercial importance.

In the past, selling tickets represented the major revenue source for professional football clubs. For example, the combined revenue of the then English First Division were £170 million in 1991/92.²⁹ Almost 67% of that revenue were from matchday tickets.³⁰ Although football clubs still earn money from selling tickets, there is a limit to the income which can be generated purely from selling tickets. In 2017/18, matchday revenue is at its lowest level (15%) as a proportion of total revenue in the history of the Premier League.³¹

Contemporary incomes primarily are derived from sources that require the sporting bodies to sell intellectual property rights. Intangible assets such as football club's name, logo and emblem hold high commercial value and are important components of branding and merchandising activities. In addition, football associations and related enterprises can greatly enhance earning by the sale of broadcasting rights, sponsorship and other important revenue streams. Selling such intellectual property rights has led to an influx of income to football bodies. In the above mentioned example, the total revenue for the English Premier League clubs is expected to reach exceeded £4.6 billion in 2017/2018 season.³² The majority of this income is generated from three main sources comprising broadcasting, merchandising and sponsorship.³³

²⁹ Deloitte, *Ahead of the curve, Annual Revenue of Football Finance*. Sports Business Group, July 2017, <<https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/sports-business-group/deloitte-uk-annual-review-of-football-finance-2017.pdf>> access on 22 January 2018.

³⁰ Ibid.

³¹ Ibid. however, it has been expected further growth in matchday revenue given the continuing work by Premier League clubs to expand capacities and hence supply to meet demand amid consistently full or near full stadiums. Ibid.

³² Deloitte, Ibid, at 16. The average revenue of each Premier League club was £182 million in 2014/2015, which is more than all 22 top division clubs generated in total in 1991/90, the last year of the old Division One. Ibid.

³³ Ibid.

What the football club is doing in each source is seeking to draw on a particular feature of its existence to generate income. That feature has been described as an ‘identity’.³⁴ The popularity and attractiveness of football give marketability to that identity.³⁵ In other words, the popularity of the identity of a particular football entity, such as a football governing body, a league, a club, a stadium, a high profile footballer, gives it a power to generate income. Lord Macnaghten ³⁶ described the commercial pulling power of such identity as goodwill. He said goodwill is:

‘... the benefit and advantage of the good name, reputation, and connection of a business. It is *the attractive force which brings in custom*. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates.’³⁷

Of course, football has sufficient power of attraction.³⁸ In order to make it bring in custom, football associations and related enterprises aim to put that goodwill to commercial use. Such commercial usage requires them to grant licenses to third parties such as broadcasters, merchandiser and sponsors to use or exploit that goodwill.³⁹ A third party in such circumstances usually pays substantial amount of money in order to gain access to such valuable goodwill. The aim of such access is to use the goodwill of the particular football

³⁴ Griffith-Jones and Barr-Smith, *ibid* (n 5) 229.

³⁵ *Ibid*.

³⁶ In the case of *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217.

³⁷ *Ibid* at 223-4.

³⁸ Bill Shankly, a former Scottish footballer and Liverpool FC manager, said: ‘some people think football is a matter of life and death. I assure you, it’s much more serious than that’. See, *Last of the Shankly-lads*, bbc.co.uk on 12 November 1998,

<http://news.bbc.co.uk/1/hi/sport/football/fa_carling_premiership/213230.stm> accessed on 12 April 2015.

³⁹ The commercial value of sporting goodwill could be exploited through many other activities and not only through a third party activity. For example, most of the football clubs nowadays operate their own merchandising activities directly rather than through licensed third parties.

identity in order to enhance the commercial prospects of the associated third party.⁴⁰ The football entity, in return, gains substantial amount of money through the sale of its goodwill.

Merchandising⁴¹, for example, is a huge resource of revenue for football entities. It gives them an opportunity to exploit their own brand.⁴² The licensed merchandiser seeks to use the goodwill of the sporting body, by establishing a market in which the attraction of the products sold derives directly from that goodwill.⁴³ According to Tim Heberden, the Managing Director of Brand Finance, such goodwill have ‘the power to influence consumer demand, trade distribution, staff loyalty, supplier terms, and investor sentiments, transforming business performance and financial returns’.⁴⁴

Likewise, the commercial exploitation of collective broadcasting rights is another source of growing profit. The English Premier League has sold its broadcasting rights for the 2016-2019 seasons for a new record sum of £5.136 billion for the UK rights alone.⁴⁵ This means that each premier League match broadcast live in the United Kingdom will be worth £10.2 million in domestic broadcast revenue.⁴⁶ Licensed broadcasters seek to exploit that very goodwill to increase their viewing figures. Increasing the viewing figures helps the licensed broadcaster to better exploit the commercial opportunities available to him through advertising, broadcast sponsorship and other commercial programmes.⁴⁷

In the case of sponsorship, the subject of this research, official sponsors seek to associate their brands with a sponsored subject so as to feed off the goodwill of that subject. The

⁴⁰ Griffith-Jones and Barr-Smith, *ibid* (n 5) 230.

⁴¹ Merchandising are ‘generic names given to agreements that provide for the use of the identity, name, logo, trade marks, livery colours and other properties of and relating to a sport person, club or organisation to brand or publicise goods and services that are not directly connected with the core business of that person, club or organisation.’ Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para 15.1.

⁴² *Ibid*.

⁴³ *Ibid*.

⁴⁴ Blackshaw and Siekmann, *Sport Image Rights in Europe* (ASSER international Sport Law, 2005) 2.

⁴⁵ Deloitte, *Revolution: Annual Revenue of Football Finance – Highlights*, Sports Business Group, June 2015 at 11. Available online on: <https://www2.deloitte.com/uk/en/pages/sports-business-group/articles/annual-review-of-football-finance.html>, accessed on 15 July 2016.

⁴⁶ *Ibid*.

⁴⁷ This will be discussed in more details in Chapter Three of this research.

sponsorship contract works to transfer some of the sponsored subject's goodwill to the sponsor's brand in order to enhance the goodwill of his own brand.⁴⁸

These sources of revenue have made the ownership of intellectual property rights a growing part of the business of most of the major football entities. The potential licensor of these rights includes governing bodies, organisers of events and tournaments, clubs and sports associations, individual players, teams and others. Depending upon the strength of the power or attractive force these licensors own, third parties, whether merchandisers, broadcasters or sponsors, are increasingly recognising the extent of the potential benefits available to them through the commercial exploitation of goodwill connected with the football.

Most importantly, the value of such goodwill increasingly depends upon what the parties agreed with each other when the licence was granted. Accordingly, the relationship of the parties is governed by the law of contract. Granting a licence to use intellectual property rights is possible contractually in three main ways:

A) Non-exclusive license: in this kind of licence, the licensor retains the power to use the relevant rights himself and to grant licences to other people for that relevant right. This means unlimited number of people may use the relevant right.

B) A sole licence: this is where the licensor retains the power to use the relevant right himself, but agrees to not to grant licences to any other people. In this case only the licensor and licensee can use the relevant right.

C) An exclusive licence: where the licensor agrees not to use the relevant right himself, and not to grant licences to other people. ie only the licensee can use the relevant right.⁴⁹

⁴⁸ For further details, see Section Four of this chapter.

⁴⁹ See Intellectual Property Office on: www.ipo.gov.uk published on 12 December 2012.

One of the crucial considerations which will be required to be addressed is the extent to which the licensee is accorded exclusive access to the intellectual property rights granted by the licensor. Manifestly exclusive licences require a careful scrutiny, in particular a degree of exclusivity will usually be an essential feature of sponsorship contracts.

1-3) The concept of sponsorship as a promotional tool

The concept of sponsorship originated in the Greek and Roman period.⁵⁰ During the early days of the classic Antiquity, the first celebration of the Olympic Games took place as a celebration of the achievements of the human body.⁵¹ It was during this and subsequent events that the first sport sponsorships were seen.⁵² The idea was established by the local government and prominent Greek citizens as a patronage of social activities, providing entertainments for the public.⁵³ The purpose of providing such support was to enhance their community standing and to ensure continued public support.⁵⁴ This charitable concept has replaced by a market driven type of sponsorship and it has been accepted as a business-related behaviour.⁵⁵

The 1984 Olympic Games in Los Angeles was an interesting time in the world for sport because it changed the way sport sponsorship would be conducted forever. Many countries announced that they will boycott the Games in the United States because of the Cold War.⁵⁶ There were concerns that a number of events would be of lesser quality, and hence that

⁵⁰ Carrigan and Carrigan, *UK sports sponsorship: fair play or foul?* (1997) 6(2), Blackwell Publishers Ltd 59.

⁵¹ Ibid; See also Schwarz and Hunter, *Advanced Theory and Practice in Sport Marketing*, 1st edn, (Routledge, 2008) 243.

⁵² Schwarz and Hunter, Ibid; See also Furlong, *Tobacco advertising legislation and the sponsorship of sport* (1994) 22(3), Australian Business Law Review 160-61.

⁵³ Furlong, *ibid*, at 161.

⁵⁴ Ibid; Carrigan and Carrigan, *ibid*, (n 50)59.

⁵⁵ See Meenaghan, *Current developments and future directions in sponsorship*, (1998) 17(1) International Journal of Advertising 4-6; Klinecicz, *Ethical aspects of sponsorship*, (1998) 17 Journal of Business Ethic 1103.

⁵⁶ Schwarz and Hunter, *ibid* (n 51) 243.

people might not come.⁵⁷ There were also significant concerns that this would create a situation where the Olympic Games would be losing business venture, as no Olympics has turned a profit.⁵⁸ However, Peter Ueberroth, who was appointed head of the Los Angeles Olympic Committee in 1979, accepted and supported a verdict delivered by the local population on the withholding of public money.⁵⁹ He committed himself to delivering an event that could pay for itself.⁶⁰ He allowed corporations to use the Olympic symbols in their advertisements in exchange for financial support. As a result, many major sponsors stepped forward for the opportunity to be the official Olympic sponsor. This first effort into commercial sponsorship was successful, with the Olympic Games making a profit of \$225 million.⁶¹

Subsequently, the modern concept of sponsorship is a commercial arrangement in which there is an exchange of benefits. Corporate sponsors suppose a return for their money and get the relationships created by their sponsorship as business relationship. Most definitions of sponsorship emphasise this commercial orientation of sponsorship and the marketing communication strategy. A commonly accepted definition of sponsorship was constructed by Meenaghan as “the provision of assistance either financial or in kind to an activity by a commercial organisation for the purpose of achieving commercial objectives.”⁶² Sponsorship is a kind of investment in a certain specific activity in the form of money or materials. In

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Wenn, *Peter Ueberroth's Legacy: How the 1984 Los Angeles Olympics Changed the Trajectory of the Olympic Movement*, (2015) 32(1) the International Journal of the History of Sport 158

⁶⁰ Ibid. see also, Rocco, *Rings of Power: Peter Ueberroth and the 1984 Los Angeles Olympic Games*, (2004) Financial History 12.

⁶¹ Wenn, Ibid. Subsequently, the International Olympic Committee created the Olympic Partner (TOP) Programme. As the only sponsorship vehicle that provides exclusive worldwide marketing rights to the Olympic Games, TOP also offers technical and product support for the International Olympic Committee. This in turn trickles down to provide benefits to athletes and spectators. As the most successful brand name in worldwide sport, the Olympics and the TOP Programme provides most exclusive sport marketing platform in the world. Schwarz and Hunter, *ibid* (n 51) 243.

⁶² Meenaghan, *Commercial sponsorship*, (1983) 7(17) European Journal of Marketing 9.

other words, sponsorships are based on the provision of resources by the sponsor to an entity or cause in exchange for a direct association to their activities.

1-4) The importance of sports for corporate sponsors

Branding has emerged as a top management priority for corporations because of the growing realisation that brands are one of the most valuable intangible assets that companies have. A strong and successful brand will add value to the company's business beyond physical assets. According to Forbes, the brand value of companies such as Nike, Visa, Coca-Cola, Pepsi and Budweiser worth much more than their revenues.⁶³ These companies spend a considerable amount of money every year on sponsorship to promote their brands. For example, the brand value of Coca-Cola worth 56.4 billion dollars accounting for more than 55% of the company's stock market value.⁶⁴ In 2017, the company spent \$4 billion on sponsorship activities to promote its brand.⁶⁵ According to the style guru Peter York:

‘For these companies their brand is their central asset – physical products are secondary- and most of their quality time is spent making and renewing the brand- its meaning, attitude and social role, its values- because it is the brand that people buy, not the product. Products, so the thinking goes, are generic, copyable, discountable, vulnerable, but brands are unique magic.’⁶⁶

Sponsorship has a central role to play in developing brand image. Commercial sponsorship represents substantial and valuable marketing opportunity for corporate sponsors to increase the value of their brands. It provides the sponsor a direct benefit simply by means of the

⁶³ Forbes, *the World's Most Valuable Brands, 2017 ranking*, available online on, <<https://www.forbes.com/powerful-brands/list/#tab:rank>>, accessed on 14 December 2007.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Article entitled ‘*Branded*’, The Times, 10 February 2001, in Blackshaw and Siekmann, *Sport Image Rights in Europe* (ASSER international Sport Law, 2005) 1.

association and indirect benefits via media exposure and through exploiting intellectual property rights connected with the sponsored properties.⁶⁷

There are a range of activities that could be sponsored by corporations, including: arts, education, exhibitions, local events and publications. However, the most widely and often used sponsorship is sport sponsorship. According to a report by the International Event Group (IEG),⁶⁸ sport sponsorship is the dominant sponsorship medium in both value and volume terms accounting 70% of the global sponsorship expenditure.⁶⁹ In the same vein as worldwide spending, the UK marketing also provides a clear indication of the scope of increased investment in sport sponsorship. Figures from Key Note⁷⁰ show that sport sponsorship is the most lucrative area of the overall sponsorship market in the United Kingdom. These figures suggest that delivering a brand message through sports continues to be a substantial marketing tactic for corporate sponsors. Sponsoring sports properties, according to those figures, is a valuable tool in the marketing communication for corporations.

According to Fortunato and Richards, the different varieties of sponsored subjects in sports provides an opportunity to corporate sponsors to negotiate the conditions for which their brand receives exposure.⁷¹ Many options can arise to the corporate to display its brand in sports such as venue naming rights, signage, endorsing sports superstars, broadcast sponsorship and the possibility of selling brand products at the stadium. The variety of sponsored properties in sports activities contributes significantly to dominate the domain of sponsorship.

⁶⁷ See Roberts, *The Scope of Exclusive right to Control dissemination of Real-Time Sports Event Information*, (2004) 15(1) *Stanford Law and Policy Review* 167-8; Meenaghan, *The Role of Sponsorship in Marketing Communications Mix*, (1991) 10(1) *International Journal of advertising* 40.

⁶⁸ International Events Group (IEG), *What Sponsors Want and Where Dollars Will Go in 2018*, ESP Properties.

⁶⁹ *Ibid* at 4.

⁷⁰ For more details on the market size of sport sponsorship in the UK, see Key Note, *Sports Sponsorship*, 9th edn, January 2013 at 11. Although some decline accrued in the UK's sponsorship market in 2010 and 2011 because of the economic recession in 2009, sponsorship has increased as the London 2012 Olympic and Paralympic games contributed to attract significant sponsorship deals. *Ibid* at 5.

⁷¹ Fortunato and Richards, *Reconciling sports sponsorship exclusivity with antitrust law* (2007) 8 *Texas Review of Entertainment and Sports Law* 34.

Meenaghan in his seminal paper on the impact of sponsorship on consumer's behaviour, identifies creating brand awareness as a primary marketing objective of sponsorship.⁷² Sponsoring sport properties provides the corporate sponsor a great opportunity to create such brand awareness through communicating its brand to millions of audiences during the context of actual sport competition. Fortunato and Melzer support this view suggesting that sponsoring sport properties has become an effective strategy for many companies to gain brand exposure, because the public is increasingly being presented with a wide media coverage of sports activities.⁷³ They argue that this provides new commercial opportunities for sport and those involved in it.⁷⁴ Such exposure can deliver private benefits to sport in term of increase revenue from sponsorship and the attraction of new supporters.

Stipp and Schiavone point out that sponsoring sports property will transfer the loyalty of specific audience from the sport property to the corporate sponsor, thereby enhancing brand awareness, reputation and the image of the sponsor.⁷⁵ Madrigal agreed with this view, stating that fan identification did extend from supporting a sport property to the support of a brand that associates itself with that property.⁷⁶ He said "...loyalty toward a preferred team may beneficial consequences for corporate sponsors. Consistent with the idea of in-group favouritism, higher levels of team identification among attendees of sporting event appear to be positively related to intentions to purchase a sponsor's products".⁷⁷ Thus, the popularity of sport properties serves an appropriate venue to create an association in the consumer's mind between the sponsoring brand and the sport property. This association can lead to the increased consumer purchase of the sponsoring brand's products.

⁷² Meenaghan, *Understanding Sponsorship Effects*, (2001) 18(2) *Psychology and Marketing* 104.

⁷³ Fortunato and Melzer, *the Conflict of Selling Multiple Sponsorships: The NFL Beer Market* (2008) 2(1) *Journal of Sponsorship* 50.

⁷⁴ *Ibid.*

⁷⁵ Stipp and Schiavone, *Modelling the Impact of Olympic Sponsorship on Corporate Image*, (1996) 36(4) *Journal of Advertising Research* 27.

⁷⁶ Madrigal, *The influence of social alliances with sports teams on intentions to purchase corporate sponsors' products*, (2000) 29(4) *Journal of Advertising* 21.

⁷⁷ *Ibid.*

1-5) Sponsorships and football

As mentioned earlier,⁷⁸ corporate sponsors spend considerable amount of money on sport sponsorships every year. Within sport, football has been the major recipient of the total sponsorship.⁷⁹ This is likely to be down to the high number of competing clubs coupled with the increasing popularity of this particular sport. In addition, the growth in popularity of English football has been based on the ability of the Premier League and the clubs to realise the value of the football competition. English football is widely considered to be an established and distinct business and is considered to be the world's most lucrative sport competition. According to figures from Statista,⁸⁰ the combined revenues of the English Premier League increased from £650 million in 1996/97,⁸¹ to £4.865 billion in 2016/17⁸² making it the richest league in the world.⁸³ Over 30% of these revenues flow from the sale of sponsorship rights.⁸⁴

The sponsorship structure of professional football clubs in the United Kingdom has changed over the years. In the past, it was mostly a local company which backed a single football club.⁸⁵ Football, however, attracted more and more companies as a consequence of the increasing popularity of the Premier League and clubs soon became marketing tools for international companies. The popularity of the Premier League abroad is seen as a major factor behind the corporate sponsor's desire to associate their brand with the league. This

⁷⁸ See Section (1-4) of this research.

⁷⁹ See Key Note, *Sports Sponsorship*, 9th edn, January 2013 at 13 et seq.

⁸⁰ Statista, *Revenue of the biggest (Big Five*) European soccer leagues from 1996/97 to 2017/18 (in million euros)*, available online on: <<https://www.statista.com/statistics/261218/big-five-european-soccer-leagues-revenue/>>, accessed on 16 March 2018.

⁸¹ Ibid.

⁸² With expectation that the English Premier League will break the five billion euro revenue barrier in 2017/18. Ibid.

⁸³ Deloitte, *Ahead of the curve, Annual Revenue of Football Finance*, Sports Business Group, July 2017 at 9, <<https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/sports-business-group/deloitte-uk-annual-review-of-football-finance-2017.pdf>>, accessed on 12 January 2018.

⁸⁴ Ibid.

⁸⁵ See Noll, R. *The Economics of Promotion and Relegation in Sports Leagues: The Case of English Football*, (2002) 3(2) *Journal of Sports Economics* 179.

popularity contributes significantly to increase the value of sponsorship market in the United Kingdom.⁸⁶

It is commonly suggested that the commercialisation of football started in the mid-1980s with the sale of broadcasting rights.⁸⁷ Football attracts the attention of millions of people around the world and, thus, has become a main topic for the media. Allan and Roy contend that the intensification of football as a commodity began with the era of television broadcasting.⁸⁸ Football has experienced significant spurts of commercial activities and sport organisations have started to exploit various commercial rights since that time.⁸⁹ The dramatic growth of worldwide media coverage was accompanied by an increase in corporate sponsorship within football industry.⁹⁰ Russell agrees suggesting that the acceleration in the process of commercialisation within football in the United Kingdom was started when the league granted permission to the football clubs to take shirt sponsorship during the early attempts to televise league matches live.⁹¹ As the audience is increasingly being presented with various media coverage, sponsorship has developed into a viable strategy for sponsors to secure a measurable brand awareness. Wide Television coverage results in a significant exposure for football leagues. Such exposure provides considerable advantages to the league and its clubs in term of attracting new supporters, and thereby raises more sponsorship income.

⁸⁶ For example, when the Japanese company 'Epson' announced its partnership with Manchester United as an Official Office Equipment partner, the value of the sponsorship deal was well explained by Epson's Global President, Minoru Usui. He said "the partnership with Manchester United aligns Epson with an exciting and globally recognised brand, bringing us closer to our customers worldwide. Leading the way through constant creativity and innovation both brands share a commitment to achieving the highest standards. Our vision to excite and inspire customers is represented by Manchester United's success on the pitch and the unique printer and project technologies for which Epson is renowned". See Epson website on: http://global.epson.com/newsroom/2010/news_20101126.html, accessed on 18 July 2015.

⁸⁷ See Gratton, *The peculiar economics of English professional football*, (2000) 1(1) Soccer and Society 24; Haynes, *Footballers' image rights in the new media age*, (2007) 7(4) European Sport Management Quarterly 363; Roberts, *The Scope of Exclusive right to Control dissemination of Real-Time Sports Event Information*, (2004) 15(1) Stanford Law and Policy Review 168.

⁸⁸ Allan and Roy, *Does Television Crowd out Spectators? New Evidence from the Scottish Premier League*, (2008) 9(6) Journal of sport Economics 592-605 at 592-93; see also Townley, S *Sports Sponsorship and Television*, (1984) International Legal Practice 27-28.

⁸⁹ Gratton, *The peculiar economics of English professional football*, (2000) 1(1) Soccer and Society 24-27.

⁹⁰ Ibid; Allan and Roy, *ibid*, (n 133) at 593.

⁹¹ Russell, *Football and the English: A social history of association football in England* (Carnegie Publishing Ltd, 1997) 1863.

In 2015, the FA Premier League secured its place as the world's richest football competitions after signing a £5.136 billion three season deal for domestic television rights share between BskyB and British Telecom (BT).⁹² The Premier League also has a large number of overseas broadcast partners. With matches broadcast into millions of homes around the world, the cost of sponsorship rights also rise considerably as corporations must compete aggressively to promote their brands throughout the world. Additionally, the revenue generated from the sale of such rights enables the football clubs to bring some of the best coaches and football superstars from around the world to the league. This will further increase the attraction of the league and, consequently, invite many corporate sponsors to compete aggressively to be involved in the league. Thus, it can be said that the popularity of the Premier League among viewers and fans, as well as its worldwide coverage, contribute significantly to attract sponsors' interests in the commercial opportunities that such popularity and coverage can provide.

Sponsorship in football can take shape in several ways including: football governing bodies, clubs or their stadiums, individual footballers and broadcasters

1-5-1) Football governing body sponsorship

Football governing bodies are organisations that are responsible for developing the rule structure for football activities as well as organise competitions at level from local to international.⁹³ They range from international governing bodies such as the Federation Internationale de Football Association (FIFA) to national governing bodies such as the

⁹² Deloitte, *Revolution: Annual Revenue of Football Finance – Highlights*, Sports Business Group, June 2015 at 11. Available online on: <https://www2.deloitte.com/uk/en/pages/sports-business-group/articles/annual-review-of-football-finance.html>, accessed on 15 July 2016.

⁹³ See Schwarz and Hunter, *ibid* (n 51) 243.

English Football Association (the FA).⁹⁴ The FA is the national governing body for football in England and is responsible for sanctioning competition Rule Book, including the Premier League's,⁹⁵ and regulating on-field matters.⁹⁶ It also organises The FA Cup competition, in which the 20 Member clubs compete.⁹⁷

From sponsorship standpoint, the association between corporate sponsors and football governing bodies tend to result in receiving "official sponsor" status.⁹⁸ Official sponsor status refers to the football organisation's public acknowledgement of the association between the sponsor and the organisation.⁹⁹ Official sponsors often receive additional benefits as a result of the sponsorship, including inclusion in all sport organisation marketing efforts, the ability to use the football organisation's logo in their own marketing efforts, and hospitality opportunities to entertain subsidiaries, clients and customers.¹⁰⁰

The corporation that tends to enter into sponsorship with governing bodies tend to be large companies mainly because of the large financial investment required with these sponsorships. An example of a national governing body sponsorship would be Nike's sponsorship agreement with the FA.¹⁰¹ The latter have had a contract with the sportswear manufacturer for

⁹⁴ Ibid.

⁹⁵ The main role of the FA in the Premier League is to organise the football competition between the 20 clubs that make up the league. The competition consists of 380 matches played over a nine month season and sees each club play each other home and away. It is run on a commercial basis and generate a range of revenues including: ticketing, broadcasting and sponsorship. These revenues have enabled clubs to invest in all aspects of the game - including their squad, stadiums and training facilities – which in turn has generated greater interest in the competition from football fans in the United Kingdom and overseas. George, Arnold and Mullen, *The economic impact of the Premier League*, Ernst and Young LLP, 2015 at 3. The full EY Economic impact Analysis of the Premier League is available to download at: <www.ey.com/PremierLeagueEconomicImpact>, accessed on 12 September 2016.

⁹⁶ www.thefa.com.

⁹⁷ Ibid.

⁹⁸ Schwarz and Hunter, *ibid* (n 51) 244.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ See the FA Website on: <<http://www.thefa.com/about-football-association/st-georges-park/discover/discover/news/fa-announce-new-nike-deal>>, accessed on 15 April 2017.

three years and has now signed a 12-year contract extension, effective from August 2018.¹⁰²
The deal is reportedly worth in the region of £400 million.¹⁰³

1-5-2) Football Club Sponsorship

Since the foundation of the Premier League, most of the British football clubs have created special marketing departments to investigate their fans and other spectators as potential consumers to establish merchandising strategy that was built around their brand names.¹⁰⁴ Successful and popular football clubs with their large number of fans attract many corporate sponsors. Such sponsors may be contradictory to the sponsorship of the governing body. For example, Adidas is the official kit supplier of Manchester United,¹⁰⁵ but the FA is sponsored by Nike.

The goal of most club sponsorships is to create long term and mutually beneficial relationships between the club and the sponsor. For example, Liverpool FC's long-standing partnership with Carlsberg will continue in its role as the club's official beer sponsor until the end of the 2018-19 season.¹⁰⁶ This marked a very important milestone in the relationship between Liverpool FC and Carlsberg – its 25th anniversary.¹⁰⁷ The sponsorship opportunities range from signage on the stadium in association with special competition such as the Premier League, the UEFA Champions League and Europe League. The resulting objectives of such sponsorship agreement include building awareness of the company's products and services, enhancing opportunities for new customer relationships and brand association with

¹⁰² *England will wear Nike kit until 2030 after Football Association signs £400 Million deal*, bbc.co.uk, 13 December 2016, <<https://www.bbc.co.uk/sport/football/38306474>>, accessed on 15 April 2017.

¹⁰³ Ibid.

¹⁰⁴ Gratton, *The peculiar economics of English professional football*, (2000) 1(1) Soccer and Society 24.

¹⁰⁵ See, www.manutd.com.

¹⁰⁶ See, www.liverpoolfc.com.

¹⁰⁷ Ibid.

the club.¹⁰⁸ These two first types of sponsorships are referred to herein generally as ‘sponsored subject’.

1-5-3) Football players’ endorsements

Recently, football players have developed the use of their image rights. Image right is ‘the commercial appropriation of someone’s personality, including indices of their image, voice, name and signature’.¹⁰⁹ The image rights of football players are increasingly being used to promote the sale of corporate products.¹¹⁰ One of the best uses of professional player’s right of publicity is products endorsements.¹¹¹ Endorsement occurs where a professional athlete states his consent of a specific good or service, or is publicised using that good or service.¹¹² It can also occur where the sport star’s name or image are used in association with that good or service.¹¹³ The fame and positive publicity of the athlete’s image can increase consumer brand awareness, enhance brand image and stimulate sales volume.¹¹⁴ Many companies seek to adopt this new advertising and promotional strategy in order to transfer the positive image of star athletes to the products they produce.¹¹⁵ The connection of a good performance and fitness of the athlete’s name or image with a certain brand is a good method for attracting consumers toward that brand.

¹⁰⁸ Russell, *Football and the English: A social history of association football in England* (Carnegie Publishing Ltd, 1997) 1866.

¹⁰⁹ Haynes, *Footballers’ image rights in the new media age*, (2007) 7(4), *European Sport Management Quarterly* 361.

¹¹⁰ *Ibid.*

¹¹¹ For more details on the player’s endorsement contracts, see Wall, *Sports marketing and the Law: protecting proprietary interests in sports entertainment events* (1996) 7(77) *Marquette Sport Law Journal* 154.

¹¹² Boyd, *Does English Law Recognise the Concept of an Image or Personality Right?* (2002) *Entertainment Law Review* at 1.

¹¹³ *Ibid.*

¹¹⁴ Arai et al, *Athletes brand Image: scale development and model test, 2013* (2013) 13(4) *European Sport Management Quarterly* 13(4) 383-403 at 384; Haynes, *Footballers’ image rights in the new media age*, (2007) 7(4), *European Sport Management Quarterly* 364-5.

¹¹⁵ Blackshaw, *Protecting Sports Image Rights in Europe*, (2005) 6(2) *Business Law International* at 270.

It is worth mentioning in this respect that corporate sponsors tend to concentrate on athletes who compete in individual events, such as tennis, golf and boxing, because such sports are more oriented towards the individual than others.¹¹⁶ However, individual endorsement contracts are also entered into by star players in team sports such as football, rugby and basketball. According to Forbes, more than one third of the top 100 world's highest-paid personalities are in the world of sport.¹¹⁷ The large majority of them are professional footballers.¹¹⁸ Much of the commercial value of modern football clubs resides in the massive popular appeal of these leader football players. Therefore, those leading footballers have realised the great earnings potential of using their image to sell marketing articles.

1-5-4) Broadcast and media sponsorship

Broadcast sponsorship involves corporations that buy an association with particular football competition through television.¹¹⁹ Before broadcast sponsorship can even be considered, there must be an association between a football organisation and the media outlet. This usually involves a broadcasting rights contract. These broadcasting rights contracts are the single largest revenue source for football organisations. At the time of writing, the Premier League

¹¹⁶ Thus, the income which athletes make from endorsements in such sports usually exceeds their salaries from the sport itself. For example, the Swiss tennis player Roger Federer earns many more millions more off the field of play than on it through the commercialisation of his image which is well known around the world. According to Forbes, Roger Federer earned approximately \$68 million in 2016. Almost \$60 million of this amount came from endorsement deals with companies including Nike, Rolex, Mercedes-Benz and Credit Suisse. <<https://www.forbes.com/profile/roger-federer/?list=celebrities>>, accessed on 21 May 2018. Similarly, according to a report published by The Sun, the Britain's most successful Formula One driver Lewis Hamilton has a staggering £112 million worth of sponsors. These include Monster Energy, Puma, Bose, Union Bank of Switzerland, Epson and Tommy Hilfiger, which all pay the sports star millions for their logo to be shown on his white polo top. Toby Gannon, *F1 Star Lewis Hamilton is advertiser's dream with 112 million sponsorship on race suit – from Tommy Hilfiger to Monster Energy*, The Sun, 19 March 2018. <<https://www.thesun.co.uk/sport/5848044/f1-lewis-hamilton-sponsorship/>> accessed on 25 May 2018.

¹¹⁷ See Forbes, The World's Highest-Paid Celebrities, <<https://www.forbes.com/celebrities/list/>>, accessed on 20 May 2018.

¹¹⁸ Ibid.

¹¹⁹ It is commonly known that the sponsor in broadcast sponsorship is the official sponsor of the broadcaster of the event rather than the sponsor of sports entities. See Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) I3.102.

has announced that five packages for the 2019-2022 domestic broadcast rights have been sold for £4.464 billion.¹²⁰ Sky Sports and BT Sports have renewed the broadcast agreement with the FA to show live Premier League matches after buying five of the seven packages on offer.¹²¹ Once the broadcast agreements have been signed, then the licenced broadcaster looks at different ways to obtain a return on their investments such as the sale of sponsorships and traditional advertising in commercial breaks. In the above mentioned example, the French car manufacture Renault secured sponsorship of Premier League football coverage on Sky Sports.¹²² The deal includes live Saturday lunch time fixtures, Renault Super Sunday and Bank Holiday games and links with Renault's 'Passion for Life' brand pillar.¹²³

1-5-5) Football stadiums sponsorship

Facility sponsorship in football is naming rights agreements for stadiums. Naming rights has been defined as “a transaction in which money or consideration changes hands in order to secure the right to name a sport facility.”¹²⁴ Recently, the sale of stadium naming rights has become a growing area of sponsorship in the English Premier League. A new study by Duff and Phelps, has estimated the value of every Premier League Club's stadium naming rights.¹²⁵

¹²⁰ *Premier League UK live broadcasting rights update*, premierleague.com, 13 February 2018, <<https://www.premierleague.com/news/623304>>, accessed on 5 March 2018.

¹²¹ Premier League executive chairman Richard Scudamore said: “To have achieved this investment with two packages of live rights remaining to sell is an outcome that is testament to the excellent football competition delivered by the club. It provides them with certainty and will underpin their continued efforts to put on the most compelling football, invest sustainably in all areas, and use their popularity and reach to have a positive impact on the sport and beyond.” Ibid.

¹²² See Renault's website on: <<https://life.renault.co.uk/partnerships/sky/>>, accessed on 5 March 2018.

¹²³ *ibid*

¹²⁴ Miller, B, *Look before you leap: the Effects of stadium and arena lease agreements on corporate naming rights deals*, (2003) Sports Law Journal, in , Thornburg, R, *Stadium Naming Rights: An Assessment of the Contract and Trademark Issues inherent to both Professional and Collegiate Stadiums*, (2003) 2(2) Sport and Entertainment Law Journal 330

¹²⁵ Trevor Birch, Managing Director and Head of UK Sports at Duff and Phelps, said: “... Although the UK hasn't embraced stadium naming rights as enthusiastically as the United States, its potential to become an important revenue stream is highlighted by these figures. Clubs are continually looking at ways to generate extra value, and given the gift-edged international demand for the Premier League TV rights, we may be entering a period where we start to see clubs monetizing their stadium rights. This is potentially a huge opportunity for clubs, with 40% of Premier League clubs, including Arsenal, Manchester City, Leicester, Stock City, Brighton and Hove Albion all granting stadium naming rights to their grounds in recent years.” Trevor Birch and Michael Weaver, *Market Rates of Premier League Stadium naming Rights increase by over 80% over the last four years*,

The corporate finance advisor suggest the value of naming rights market in the Premier League has risen 80 per cent from £74.6 million in 2013 to £135.6 million in 2017.¹²⁶

These agreements are often long term and significant in value. Also, the value of the naming rights sponsorship will vary with the size of the market, the level of the competition playing, and the assorted of events scheduled by the facility.¹²⁷ For example, Emirates Airline first signed its sponsorship agreement with Arsenal in 2001, providing the airline with naming rights to the stadium until 2021.¹²⁸ Recently, the club have agreed a new naming rights sponsorship with Emirates Airline that will run until 2028.¹²⁹ The size of the deal is reportedly believed to be in excess of £200 million.¹³⁰

As it can be seen, there are many separate actors in the field of football who pursue financial support from corporate sponsors. The increase of sponsorships in the football market place poses a challenge to sponsors attempting to establish a unique brand position apart from the clutter. This bring us to examine the advantage of exclusive rights in football sponsorship.

1-6) The value of exclusive rights in football sponsorship

As discussed earlier,¹³¹ the characteristics of brand exposure, image association and the potential of influencing purchasing behaviour that have been demonstrated by scholars are of

Duff and Phelps on 13 February 2018, <<https://www.duffandphelps.com/about-us/news/market-rates-of-premier-league-stadium-naming-rights-increase>>, access on 22 March 2018.

¹²⁶ Ibid. The study indicates that the top six clubs who regularly play in European Competitions account for over 77 per cent of the staggering £135.6 million sum. Ibid.

¹²⁷ See Schwarz and Hunter, *ibid* (n 51) 250.

¹²⁸ Bill Wilson, *Arsenal and Emirates in £200m shirt sponsorship extension*, *bbc.co.uk*, 19 February 2018, <<https://www.bbc.co.uk/news/business-43113951>>, accessed on 22 March 2018.

¹²⁹ Ibid.

¹³⁰ Ibid. Arsenal FC's Chief Executive Ivan Gazidis said: "Our sponsorship is the longer running in the Premier League and one of the longest relationship in world sport. This mutual commitment is testimony to the strength and depth of our unique relationship. Emirates are again demonstrating their great belief in our approach and ambition and their significantly increased investment will help us continue to compete for trophies and bring more success to the club and our fans around the world." Ibid.

¹³¹ See section (1-4) of this research.

a great value for sponsors when sponsoring such a popular football entity or event.¹³² Yet, many authors contend that the characteristic of exclusivity within the sponsor's particular product or service category makes sponsorship an attractive strategy for many corporations.¹³³

In the past, sports enterprises had no formal structure to their sponsorship programme. However, the 1984 Olympics Games in Los Angeles saw the emergence of the concept of product or service category exclusivity when Fuji purchased exclusive sponsorship rights from the international Olympic Committee (IOC).¹³⁴ Subsequently, sports entities have started to sell exclusive sponsorships for various product categories. For example, amongst multiple sponsors, there might be one wireless communication, one bank, one soft drink, one airline, one manufacture and so on. The characteristic of obtaining exclusivity for the sponsoring brand within a particular product category allows sports associations and related enterprises to sell fewer but higher value exclusive package.

The characteristic of products category exclusivity has been described as the most valued rights afforded official sponsors.¹³⁵ Through category exclusive sponsorship businesses are given a highly advantageous monopoly position to associate themselves with the sponsored subject. The sponsor pay a considerable amount of money on that sponsored subject in order to be the only sponsor in his product and service category. The designation of product category exclusivity acts to exclude competitors within sponsor's product category from a

¹³² For an exhaustive list of potential sponsorship objectives, see; Gwinner, *A model of image creation and image creation and image transfer in event sponsorship* (1997) 14(3) International Marketing Review 145; O'Reilly and Madill, *The Development of a process for Evaluating Marketing Sponsorships* (2011) 29(1) Canadian Journal Administrative Science 50.

¹³³ See Fortunato and Richards, *Reconciling sports sponsorship exclusivity with antitrust law* (2007) 8 Texas Review of Entertainment and Sports Law 34; Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para 14.51; Fortunato and Melzer, *The Conflict of Selling Multiple Sponsorships: The NFL Beer Market* (2008) 2(1) Journal of Sponsorship 51; Cobbs, *ibid* (n 4) 288; Fortunato and Martin, *American Needle v NFL: Legal and Sponsorship Implication* (2010) 9(73) University of Denver Sport and Entertainment Law Journal 74.

¹³⁴ Schwarz and Hunter, *ibid* (n 51) 243. Sandler and Shani, *Olympic Sponsorship vs Ambush Marketing: Who gets the gold?* (1989) 29(4) Journal of Advertising Research 10-11; Crow and Hoek, *Ambush marketing: A critical review and some practical advice* (2003) 14(1) Marketing Bulletin 3-4.

¹³⁵ See Fortunato and Richards, *ibid*, (n 133) at 34; Fortunato and Melzer, *ibid*, (n 133) at 51.

controlled sports environment.¹³⁶ This provides the corporate sponsor an opportunity to avoid competitive interference that could be encountered in other advertising context. Eliminating competitors from the sponsored subject will enable corporate sponsors to differentiate their brands from competitors and, thus, enhancing the value of sponsoring brand.¹³⁷

For example, Heineken is the official sponsor of the UEFA Champions League. The company reportedly pays £43.6 million every year to be the only official beer sponsor of the UEFA Champions League.¹³⁸ Certainly, Heineken pays this massive amount of money not only to associate its brand with the Champions League, but also to lock out its rivals from the sporting event. With such football activities attracting billions of people around the world each year, either in stadiums or through visual media, these exclusive rights are undoubtedly a valuable communication tool for corporate sponsors.

For some industries such as fast food, beer and soda exclusive sponsorship is of even greater value due to the additional advantage of creating a competition free area at a stadium for sales of their brands.¹³⁹ Such exclusive right usually denies the consumers who attend the stadium the choice of any other different brands. Millions of audience attend football stadiums every year. The audience are limited to the exposure of brands that have exclusive sponsorship rights at the stadiums and in many cases they are also limited in their brands purchase choice. In the previous example, Heineken have exclusive ‘pouring rights’ to sell its products inside the stadiums during the competition. The deal excludes Heineken’s competitors from selling beer to the thousands of audience who attend the competition.

¹³⁶ Cobbs, *ibid* (n 4); Griffith-Jones and Barr-Smith (consulting editor), *Law and the Business of Sport*, (Butterworths, London 1997) 271-2; Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para I4.51.

¹³⁷ See, Cornwell et al, *Exploring Managers’ Perceptions of the Impact of Sponsorship on Brand Equity*, (2001) 30(2) *Journal of Advertising* 48-49.

¹³⁸ See Ashley Armstrong, *Heineken extends Champions League sponsorship*, telegraph.co.com, 31 October 2013, <<https://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/leisure/10418255/Heineken-extends-Champions-League-sponsorship.html>>, accessed on 11 February 2015.

¹³⁹ Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para I4.53

As exclusive rights very valuable for both events owners and corporate sponsors, such rights must be legally protected from any unauthorised exploitation by third parties. The commercial value of such rights could lead such third parties to put plans to benefit from real or apparent loopholes in the legal protection available to right owners and their official sponsors to associate themselves with the sponsored subject. If football entities are unable to exclude third parties from their events' environments, or if the law simply does not allow them to do so, then their official sponsors may eventually decide that they should simply join such third parties to exploit the sponsored goodwill without paying the expensive sponsorship fee. Therefore, the next section will explain the building of exclusivity in sporting events under English law.

1-7) The commercial exploitation of exclusive rights under English law.

As rights owners have started to develop ways to reap the financial benefits of product category exclusivity in sponsorship contracts, the potential for the exploitation of such valuable rights hinge to a large degree on their legal ability to control those rights. Controlling such rights by the owners is crucial for creating a profitable sponsorship programme. When such valuable rights exist, then one must assume that they are infringed by others. Therefore, identifying the extent to which English law enables rights owners to exploit exclusive rights in sporting events is crucial for structuring an effective sports sponsorship programme.

The first fundamental question presented when rights owners seek to sell exclusive sponsorship relates to the extent to which they have intellectual property rights in the sporting event itself. The issue at the root of this question is the extent to which the English law recognises exclusive rights in sporting events.

1-7-1) No general exclusive rights in sporting events per se.

The most crucial legal fact in this regard is that English law simply does not recognise the existence of proprietary rights in sports events per se. In other words, there are no protectable interests in sporting events per se that the court will recognise in the United Kingdom. Likewise, there is no *sui generis* right that can protect the event. The earliest direct authority on this point is the decision of the Court of Appeal in the case of *Sport and General Press Agency Ltd v Our Dogs Publishing Co Ltd (Our Dogs)*¹⁴⁰. The right owner of a dog show organised by the Ladies Kennel Association purported in good faith to sell the ‘exclusive’ rights of taking photographs at the show to a professional photographer who in turn purported to assign the claimant. An independent photographer took photographs and sold them to the defendant, who published them. The claimant in this case was purported to be the only photographer that has the right to take photos at the show.¹⁴¹ The claimant sought an injunction to prevent publication by the defendants, particularly both the defendant’s agent when he took the photographs and the defendant when he received them previously informed that the claimant had granted the exclusive right to take photographs.¹⁴² The defendant pointed out that there was no prohibition on photographing an event per se. It was also argued that the claimant had not imposed such prohibition when granting admission tickets to the dog show event.¹⁴³

The court thus was called to decide whether an exclusive right existed in sports events as a property. In the first instance, Horridge J expressly denied the existence of any exclusive rights which the promoter of the event could assign as property.¹⁴⁴ He said:

‘no one possesses a right of preventing another person photographing him any more than he has a right of preventing another person giving a description of him,

¹⁴⁰ [1917] 2 KB 125 (CA).

¹⁴¹ Ibid at 126.

¹⁴² Ibid.

¹⁴³ Ibid 127.

¹⁴⁴ [1916] 2 K. B. 880.

provided the description is not libellous or otherwise wrongful. Those rights do not exist. As, therefore, the Ladies' Kennel Association had *no exclusive right* to take photographs as distinguished from their means of obtaining the right by virtue of their possession of the land'.¹⁴⁵

According to Horridge J, the mere creation of an event of general interest does not give the promoter of the event an exclusive right to the news value unless he is able to control the sources of that news. The issue was also seen by the Court of Appeal as raising the limits of the control-powers incident to an ownership interest in land. According to Lord Justice Swinfen Eady:

'It is said that the association had been put to trouble and expense in organising the show, which was their property and which included the right to take photographs themselves and to grant the same right to others, and that they in fact granted it to [the claimant]. In my opinion, it is not right to speak of the right of taking photographs as property. No doubt the ladies Kennel Association had the ground for the day, and also the right of allowing those persons to enter of whom they approved and excluding those of whom they did not, and that right carried with it the right of laying down conditions binding on the parties admitted; it might be a condition that they should not use cameras or should not take photographs or make sketches. But they did not lay down any such conditions... the answer to the plaintiffs' argument is that they could have acquired by contract such a right as they claim, and that they failed to do.'¹⁴⁶

¹⁴⁵ Ibid at 884.

¹⁴⁶ [1917] 2 KB 125 (CA) 127-28.

The Court of Appeal thus upheld the dismissal of the action by Horridge J on the bases that the promoter of the event and the claimant failed to lay down, in contract, conditions of entry to restrain the use of unauthorised cameras. Accordingly, the court intimated the ability of the promoter to create such rights by incorporating a prohibition in the contract of admission.¹⁴⁷ The 'Our Dogs' judgement was cited in a 1937 Australian High Court case,¹⁴⁸ *Victoria Park Racing v Taylor (Victoria Park Racing)*,¹⁴⁹ which remains the leading authority on the point to this day. The claimant in this case attempted to assert property rights over a spectacle they created in the form of a racing event, where the defendant had been broadcasting the event without permission.

The racecourse was operated by the claimant in Sydney. It was fenced entirely by the claimant in a way that, under normal circumstances, was only visible by viewers inside the venue.¹⁵⁰ The claimant did not allow any description or information concerning the races to be broadcast by radio.¹⁵¹ So, the right owner was purported to prevent others from exploiting intangible interests of the event. One of the defendants owned a residential property near the boundaries of the racecourse. He gave a permission to a Class B commercial radio station to erect a tower on his front garden.¹⁵² From the top of the tower, a reporter (one of the defendants) was able to see inside the racecourse. Equipped with field glasses, the sports caster could see the information posted on notice boards inside the racecourse before and after the races. The boards provided the place of the horses on the course at the outset of the

¹⁴⁷ Lush LJ felt the need to add the more general qualifying proposition that 'if those who promote shows and exhibitions wish to prevent the taking of photographs, they must make it a matter of contract'. Ibid at 128.

¹⁴⁸ The law regarding proprietary rights in sports events is similar in Canada, Australia and New Zealand. English law, in particular, is persuasive authority in these countries, where courts frequently cite British cases. Canadian, Australian and New Zealand courts also cite each other's decisions and decisions of other common law jurisdictions, such as the United States. English courts also cite Australian cases, in particular those by the Australian High Court. *Victoria Park Racing* is of persuasive authority in the United Kingdom and other common law countries. For further information on the similarity between those jurisdictions regarding sports events, see Wise and Meyer, *International sports Law and Business*, (Kluwer Law International, 1997) 1760.

¹⁴⁹ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 509.

¹⁵⁰ Ibid at 480.

¹⁵¹ Ibid, at 480.

¹⁵² Ibid, at 481.

race and their final position. This information was of interest and value to the audience and to those who wished to bet on the races. The unauthorised reporter began to produce a live commentary of the race from the tower reporting on the horse races taking place within the racecourse.¹⁵³

While the case focused on unauthorised radio broadcasters, the holding is considered applicable to other intellectual property rights, including exclusive sponsorship, in sporting events as well. The case raises a question of whether the law helps sports rights owners to protect the exclusive interests in their sporting events. This is particularly important because the claimant had suffered a loss in exclusivity as a direct result of the actions of the defendants.¹⁵⁴

The plaintiff sued to grant an injunction to prevent such a live commentary, confirming that the live broadcasting on the radio had led to decrease the number of tickets sold at the gate and it had a quasi-property right in its investment which unjustly interfered by the defendants.¹⁵⁵ As preventing competitors from the event is the main component of exclusive sponsorship, the case explains the extent to which rights owners are able to exclude competitors from exploiting the goodwill of the event.

The court refused to stop the radio station from broadcasting the result of the horse races on the basis that the defendants had not infringed any *recognisable right* belonging to the claimant.¹⁵⁶ In his leading judgement, Latham C.J. stated:

“It has been argued that by the expenditure of money the plaintiff has created a spectacle and that it therefore has what is described as a quasi-property in the spectacle which the law will protect. The vagueness of this proposition is apparent on its face. What it really means is that there is some principle (apart from contract

¹⁵³ Ibid.

¹⁵⁴ Ibid, at 482.

¹⁵⁵ Ibid, at 481-2.

¹⁵⁶ Ibid, at 496-8.

or confidential relationship) which prevent people in some circumstances from opening their eyes and seeing something and describing what they see. The court has not been referred to any authority in English law which support the general contention that if a person chooses to organise an entertainment or to do anything else which other persons are able to see he has a right to obtain from a court an order that they shall not describe to anybody what they see... [T]he mere fact that damage results of the plaintiff from such a description cannot be relied upon as a cause of action... A spectacle cannot be owned in any ordinary sense of the world”.¹⁵⁷

This view is consistent with the traditional position that an exclusive right in sport contests is not a form of property known to the common law. Latham C.J. adopted the same approach of *Our Dogs* refusing any argument that law should recognise proprietary rights in sports contests per se. He confirmed that commercial practices in sports events conform to the existing legal framework rather than other way around. Dixon C.J. agrees stating that the right claimed by the claimant was not an interest falling within any category protected by law or equity:

“If English law had followed the development that has recently taken place in the United States,¹⁵⁸ the broadcast right in respect of the races might have been protected as part of the quasi-property created by the enterprise, organisation and labour of the plaintiff in equipping a racecourse and doing all that is necessary to conduct meeting. But courts of equity have not in British jurisdiction thrown the

¹⁵⁷ Ibid, at 496-7.

¹⁵⁸ Dixon CJ was referring to the legal development adopted by the United States Supreme Court in the case of *International News Service v Associated Press* which prevented the International News Services from exploiting the Associated Press’s labour on the grounds of ‘unfair competition’. In this case both the plaintiff and the claimant are involved in the news collection business. The defendant used the information in its own business by purchasing early edition of published newspapers of his competitor (the claimant). The latter argued that this copyright of the news constitutes unfair competition. The defendant argued that since the news is published by the plaintiff to the public, anyone can use it and for any purpose. See *International News Service v Associated Press*, 248 US 215, 63 L Ed 211, 39 S Ct 68 (1918).

¹⁵⁸ *Victoria Park Racing v Taylor*, ibid (n 149) at 519.

protection of an injunction around all the intangible elements of value... which may flow from the exercise by an individual of his powers or resources whether in the organisation of a business or undertaking or the use of ingenuity, knowledge, skill or labour. This is sufficiently evidenced by the history of the law of copyright and by the fact that *the exclusive right to invention, trademarks, designs, trade names and reputation are dealt with in English law as special heads of protected interests and not under a wide generalisation*".¹⁵⁹

The majority of the court did not consider the unfair conduct taking by the defendants due to the absence of a clearly identifiable proprietary right. In his dissenting opinion, Evatt J suggested the necessity to show remedial flexibility beyond the identifiable categories of protected legal interests in order to find an objective remedy. He said:

“the fact that there is no previous English decision which is comparable to the present does not tell against the plaintiff because not only is simultaneous or television quite new, but, so far as I know, no one has as yet, constructed high grandstands outside recognised sport grounds for the purpose of viewing the sports and of enriching themselves at the expense of the occupier”.¹⁶⁰

This view conforms to the recent exploitation of intellectual property rights in sports activities. As mentioned earlier,¹⁶¹ sports organisations started to exploit various revenue sources that hinged on their control of exclusive rights. This is particularly the case with the emergence of product category exclusivity in the context of sports sponsorship in the mid-1980s.¹⁶² The competition between corporate competitors to secure product category exclusivity in popular sporting events has started to spill into the courtroom since that time.

¹⁵⁹ Ibid, at 508-9.

¹⁶⁰ Ibid at 519.

¹⁶¹ See Section (1-2) of this research.

¹⁶² Ibid.

The most famous example in this regard is the conflict between *Fuji v Kodak* in the 1984 Los Angeles Olympics, when Kodak failed to secure sponsorship rights for the event to his competitor Fuji.¹⁶³ Instead, Kodak became the sponsor of ABC television's broadcasts of the games and the official film supplier to the United States track team.¹⁶⁴

Rich J expects this development in the field of sport business taking into account the technological growth of the 1930s, when said "the prospects of television make our decision a very important one".¹⁶⁵ Nowadays, the high technology offers the potential to be the next new great source of revenue generated from exclusive sponsorship. Certainly, this will increase the potential of conflicts between the competing brands in the context of sponsorship.¹⁶⁶

1-7-2) Unauthorised exploitation of proprietary rights in modern days

The same formalistic approach that the plaintiff in *Our Dogs* and *Victoria Park Racing* had suffered repeated in a modern demonstration in the case of *British Broadcasting Corporation (BBC) v Talksport Ltd.*¹⁶⁷ The claimant in this case was the sole holder of live radio broadcasting rights in the United Kingdom for the European Championship football tournament (Euro 2000). The defendant (Talksport), although a licensed UK broadcaster, was not a member of the European Broadcasting Union (EBU) and, thus, unable to broadcast a radio live coverage within stadiums. Instead, Talksport broadcasts commentary of the matches from a close hotel room 'off-tube', i.e. by producing a commentary based on live TV picture viewed in stadiums and by adding stadiums sound effect.¹⁶⁸ Off-tube technique creates the impression that the broadcast was live within the stadium when it was not. Talksport used

¹⁶³ See Sandler and Shani, *Olympic Sponsorship vs Ambush Marketing: Who gets the gold?* (1989) 29(4) Journal of Advertising Research 10-11. This will be discussed in details in section (2) of Chapter Two.

¹⁶⁴ Ibid.

¹⁶⁵ *Victoria Park Racing v Taylor* (n 149) at 505.

¹⁶⁶ For further details on the impact of virtual advertising on exclusive sponsorship rights, see Section (5) of Chapter Three of this research.

¹⁶⁷ [2001] FSR 6.

¹⁶⁸ Talksport had not used the actual sound from the matches directly but was using pre-recording crowd noises taken from another matches because that would have been a breach of the copyright in the claimant's recording of the noise. Ibid, at 56-7.

the word 'live' during its coverage. However, Talksport had given certain undertakings to its listeners that its coverage was off-tube and unofficial.¹⁶⁹

At a resumed hearing, the BBC, having paid a considerable amount of money to buy the exclusive radio rights, sought an injunction for passing off. The injunction was based on an alleged misrepresentation to the public that the commentary broadcast by Talksport was live within stadiums. The BBC sued for an injunction not to stop the commentary but to stop Talksport from representing by the use of sound effects that its commentary came from within stadium, i.e. prevent Talksport that its radio coverage of the matches was live.

It is commonly known that the tort of passing off is made out where the claimant can show goodwill, misrepresentation and damage.¹⁷⁰ Although the High Court accepted that Talksport's claim was deceptive and therefore wrong, it rejected the claim because the BBC failed to link that misrepresentation to any protectable goodwill in live coverage of the event.¹⁷¹ The missing element in this case was damage to goodwill and therefore the plaintiff failed to prove that Talksport's conduct contained the all elements of passing off.¹⁷² According to the court, the 'exclusive right' of broadcasting the event exclusively by the BBC could not be described as 'product' but it was an activity and the word live was no more than descriptions of that activity. Words which merely describe the services offered, such as the live sports broadcasting, were incapable to constitute goodwill.¹⁷³

Accordingly, under English law, there are no proprietary rights, including exclusive sponsorship rights, in sports events. This is not to say, of course, that such rights do not exist as a matter of fact; the millions of pounds in sponsorship rights fees that change hands in the sector each year attest that they do. Instead it means that from a legal perspective those rights

¹⁶⁹ Talksport was regularly using of the following disclaimer: "this is Talksport not the BBC, with unofficial full match commentary on Talksport courtesy of our TV monitor at the Talksport Amsterdam Studio". Ibid, at 54.

¹⁷⁰ Griffith-Jones and Barr-Smith (consulting editor), *Law and the Business of Sport*, (Butterworths, London 1997) 200 et seq.

¹⁷¹ [2001] FSR 6 at 53.

¹⁷² Ibid.

¹⁷³ Ibid at 55.

are created, exploited and protected not as *sui generis* rights, by virtue of application in combination of principles of real property law, intellectual property law and contract law. Therefore, the traditional model of programmes in English football can be based on an essential matrix of: (i) the creation of various intellectual property rights in elements of the event that can be protected from unauthorised exploitation by third parties; (ii) exclusive rights of access to football stadiums, enabling right owners to control the audience by admission only on specified terms and conditions; and (iii) contractual control in addition over the conduct of the competition participants and commercial partners, such as footballers and licenced broadcasters. This matrix provides the foundation for the exclusive creation and exploitation of commercial rights to football competitions under English law. It is also this matrix that forms the basis for protection of the event from so-called ‘ambush marketing’.

1-8) The application of competition laws in football competitions.

As we have seen above,¹⁷⁴ the legal system could provide the foundation of the exclusive creation and exploitation of sponsorship rights to sports properties under English law. We have seen also¹⁷⁵ that such rights provide a clear benefit for the corporate sponsor and the sport property. However, exclusive rights with premier sport properties are difficult to acquire. Since such rights are extremely expensive, this privilege is available only to wealthy companies. It is difficult for small companies to compete a handful of large corporations. Thus, from competition law point of view, exclusive rights may be viewed as means to reduce competition.

The designation of exclusivity appear to create precisely the opposite effect on the main principle of the EU competition rules. As mentioned earlier,¹⁷⁶ exclusive rights are a legally enforceable power to exclude others from using a resource. One of the major purposes of the Treaty on the Functioning of the European Union (TFEU) is to promote and protect the economic competitiveness of a

¹⁷⁴ See generally section 1-7 above.

¹⁷⁵ See section 1-6.

¹⁷⁶ See section 1-7.

marketplace. Articles 101 and 102 (formerly 81 and 82 EC) of the TFEU provide the chief means by which that purpose is promoted.¹⁷⁷ They constitute together the foundations of the European community's policy in the area. The economic purpose of articles 101 and 102 is the protection and promotion of effective competition leading to effective market performance. It is in the interest of the consumer that competition forces suppliers to share the surplus resulting from efficient performance with consumers in the form of lower prices. Competition also forces suppliers to invest in research and development to promote innovations.¹⁷⁸

Alleged breaches of either article will be investigated and dealt by the European Commission (the Commission).¹⁷⁹ The Commission can investigate potentially anti-competitive practice either on their own motion or following a complaint. The Commission has the power to order interim measures, restrain breaches and impose fines on offending undertakings.¹⁸⁰

Article 101 attacks decisions and concerted practices generally which inhibit competition if they may affect trade between Member States. Article 101(1) prohibits:

‘All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market...’

Therefore, for article 101(1) to apply, the following factors must be present: (i) there must be an agreement, decision or concerted practice between undertakings, (ii) it must affect competition within the common market, (iii) there must be an effect on inter-state trade.¹⁸¹ However, even if these

¹⁷⁷ The Competition Act 1998 contains domestic equivalence of these rules, referred to as Chapter I and Chapter II prohibitions.

¹⁷⁸ This is illustrated by the Commission's discretion of the objective of article 101 in its guidance on the application of article 101: 'The aim of Article 101 of the Treaty as a whole is to protect competition on the market with a view to promoting consumer welfare and an allocation of resources'. Communication From the Commission – Notice- Guidance on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements. (2014/C 89/03) para 5.

¹⁷⁹ Beloff, et al, *Sports Law*, 2nd edn, Hart Publishing 2012 at 164

¹⁸⁰ Ibid.

¹⁸¹ Similar principles apply under the Agreement on a European Economic Area to Iceland, Liechtenstein and Norway. Ibid.

features are all present, the agreement may benefit from exemption pursuant to Article 101(3).¹⁸² If an agreement falls within Article 101(1) and is not exempt under Article 101(3), then Article 101(2) renders it automatically void.¹⁸³

Article 102 addresses any abuse of a dominant position in the common market or in a substantial part of it.¹⁸⁴ An undertaking acts in contravention of Article 102 if (i) it occupies a dominant position in the marketplace, and (ii) it abuses that dominant position by acting anti-competitively. The term dominance has been defined by the ECJ as ‘a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers’.¹⁸⁵ The question to consider is whether the exclusive sponsorship agreements restrict competition within the meaning of Article 101(1) of the TFEU or constitutes an abuse of a dominant position contrary to Article 102 of the TFEU.

Although sponsorship is a very valuable factor of a sport’s commercial programme, competition law issues comparatively few. This is because there are enormous range of alternative platforms for corporations to promote their products or services, including television advertising, sponsorship of art or cultural event, billboard advertising and so on. This makes the market a very broad one. The more widely a market is defined, the less likely the conclusion that a specific undertaking is dominant in it.¹⁸⁶ Therefore, there is less concern regarding foreclosure of markets in the context of sponsorships.

In case if a company insists on a football-related platform, the range of alternative possibilities are still massive. For example, there are endorsement agreements with individual footballers, sponsoring

¹⁸² Article 101(3) of the TFEU states: ‘the provisions of paragraph 1 may, however, be declared inapplicable in the case of: (i) any agreement or category of agreements between undertakings; (ii) any decision or category of decisions by associations of undertakings; and (iii) any concerned practice or category of concerned practice; which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit...’.

¹⁸³ Article 101(2) of the TFEU states ‘Any agreements or decisions prohibited pursuant to this Article shall be automatically void.’

¹⁸⁴ The European Commission has issued the Art 102 Enforcement Guidance to abusive exclusionary conduct by dominant undertakings.

¹⁸⁵ Case 27/76 *United Brands Company v Commission of the European Communities* [1978] ECR 207 para 65 at 277.

¹⁸⁶ Beloff et al, *ibid*, (n 179) at 164. Conversely, the same undertaking is more likely to be found dominant in a narrowly construed market. *Ibid*. See also Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para F2.331.

a club, stadium naming rights match programme advertising and so on. As a result of this wide range of methods for promoting a particular brand, an exclusive sponsorship agreement is not likely to raise many competition law concerns.

However, if a market is defined narrowly enough, it is possible that an exclusive sponsorship arrangement is likely to restrict competition. For example, the central sponsorship arrangement between the French National League and Adidas in 1995 was based on a very narrow definition of the relevant market and, therefore, was struck down on competition grounds.¹⁸⁷ The French National League granted Adidas an exclusive rights to provide kits to all of the clubs in the first and second divisions of the French football league championship.¹⁸⁸ The league then adopted a rule demanding the clubs to use Adidas' kits as designed by the League. Thus, 30 out of 42 football clubs entered into sponsorship agreement with Adidas. However, the Court of Appeal in Paris held that the central arrangement between Adidas and the French National League had infringed competition law.¹⁸⁹

Therefore, a sponsorship agreement between an event organiser on behalf of all participating teams to use only a specific equipment could restrict competition law. For example, in *the Danish Tennis Federation* (the DTF) case,¹⁹⁰ the DTF granted an exclusive rights to Slazenger, Tretorn and Penn to supply tennis balls for use in all official tennis competitions in Denmark. The DTF required the tournaments to obtain their balls only from the above manufacturers. The sponsorship agreement also granted sponsors the rights to use the DTF logo and the denomination 'DTF official balls'. The sponsors also granted the rights to say the ball is approved by the DTF in their advertisements. This gave the suppliers a competitive advantage over other manufacturers. Therefore, these sponsorship arrangements were investigated by the Commission for their compatibility with competition rules. The Commission's view caused the DTF to modify its arrangements under which manufacturers obtained a right to supply balls for its tournaments in return for financial support. Under the amended rules, the DTF was required to award the sponsorship contract only after an objective tender procedure open to all suppliers. The successful company was appointed for a maximum of two years

¹⁸⁷ *National Football League v Adidas*, Court of Appeal of Paris, 29 February 2000, [2000] 10ECLR.

¹⁸⁸ *Ibid* at N.118/9

¹⁸⁹ *Ibid*.

¹⁹⁰ European Commission Press Release, case no IP/98/355 (15 April 1998) Brussels.

sponsorship contract. According to the European Commission, DTF's sponsorship arrangement with tennis ball suppliers no longer raise competition problems, provided that certain criteria for openness and transparency are met.¹⁹¹ Moreover, these arrangements were amended to require the DTF to cease describing the nominated balls as 'official' DTF balls. According to the Commission, such designation implied that the balls were of superior quality in circumstances where no technical criteria had been applied such as to mark them out as being better than others.¹⁹²

Of course, this is not to say that event organisers are not allowed to sell exclusive sponsorships rights. For example, event organisers do not infringe competition law when enter into title sponsorship agreements, such as Barclays Premier League, because such deals are not properly analysed as central arrangement.¹⁹³ In such a case, event organisers grant the right to associate the name of the sponsor with the event as a whole, not with individual clubs within the event.¹⁹⁴ Therefore, event organisers only are able to grant title sponsorship rights to a corporate sponsor and not any individual club.

1-9) Conclusion

Football activities are some of the most influential promotional and marketing vehicles available to commercial companies in the modern world. A considerable amount of money is spent every year in the football sponsorship market in order to obtain rights and to leverage such rights with a view to pursuing profit maximisation. Product category exclusivity has been recognised as among the most valued rights afforded corporate sponsors because it acts to exclude competitors within a sponsor's product or service category from the sponsored subject.

Questions regarding the nature and extent of sponsorship rights in football and other sports as such have never served before the English courts. However, it is usually indicated that, as a

¹⁹¹ 'The Commission conditionally approves sponsorship contracts between the Danish Tennis Federation and its tennis ball suppliers'. Ibid.

¹⁹² Ibid.

¹⁹³ See also Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para F2.338.

¹⁹⁴ Ibid.

result of the judgements in *Our Dogs* and *Victoria Park Racing*, English law does not recognise the existence of proprietary rights in sports per se and that exclusive sponsorship rights in sport as such therefore cannot exist. English courts assert that the exclusive sponsorship rights arise from sport activities conform to the existing legal framework, rather than the other way around. In accordance with this approach, organisers of football competitions held in the United Kingdom cannot rely on general proprietary right in the event itself to prevent unauthorised exploitation of that competition. Instead, the event organiser must organise the event in such a way that it cannot be commercially exploited by others without infringing rights of the event organiser that are recognised under English law.

This approach, with its solid root of earlier economic period, raise a question of whether the existing common law is able to provide a required support and protection for structuring an effective sponsorship programme in modern football events in the United Kingdom. If the right owner is unable to control access to the stadium of the event, and therefore cannot stop an unauthorised person attending and promoting competitor brands, the right owner cannot stop that person by invoking any proprietary right in the event per se.¹⁹⁵ This is of course a matter of great concern to rights owners. According to Blais, ‘legal uncertainty as to what subject matter is being sold and purchased, and to what extent, if at all, third parties may be prevented from engaging in practical activities, is both detrimental and a disincentive to commercial and sporting activity’.¹⁹⁶ This bring us to a discussion of such piratical activity, aka ‘ambush marketing.

¹⁹⁵ The same holds true of so-called image rights. See Laddie J in *Elvis Presley Trade Marks* [1997] RPC 543 at 548. ‘[personalities] can only complain if the reproduction or use of the of the likeness results in the infringement of some recognised legal right which [he/she] does own.’ See generally Chapter Four of this research.

¹⁹⁶ Blais, *the Protection of Exclusive Television Rights to Sporting Events Held in Public Venues: An Overview of the Law in Australia and Canada* (1992) 18 Melbourne University Law Review 508.

Chapter Two: The Implication of Ambush Marketing on Exclusive Sponsorship Rights.

2-1) Introduction.

We have seen in the previous chapter that exclusivity is the key requirement for corporate sponsors. Corporate sponsors devote their marketing resources to a particular sponsored subject to prevent their rival companies from undertaking a similar promotional programme. Football associations and related enterprises are contractually obliged to protect the interest of their commercial sponsors by excluding competitors within a sponsor's product or service category from a controlled sports environment.

We have also seen that English law does not recognise the existence of exclusive sponsorship rights in sporting events per se. Likewise there is no sui generis right that protects the event. This could decrease the value of the exclusive sponsorship programmes. Official sponsors pay considerable amount of money for exclusive sponsorship rights. This investment may be seriously undermined when unauthorised companies benefit from associating their brands with the sponsored subject. The extent of the damage will often be unquantifiable, but will however clearly influence the way marketing departments perceive sponsorship value for the future. In addition, there could be other adverse repercussions, including diminution in the ability to assert legal proprietorship of such rights and loss of income to sports bodies. It is important, therefore, to consider the position of official sponsors' competitors who pose the single largest threat to the commercialisation of sporting events. This threat is known as ambush marketing.¹

Despite the fact that English law does not recognise exclusive sponsorship rights in football and other sporting events per se, it is possible to create a coherent packages of rights around

¹ The former IOC marketing director Michael Payne states 'ambush marketing is not a game. It is a deadly serious business and has the potential to destroy sponsorship. If ambush, or 'parasitic' marketing is left unchecked, then the fundamental revenue base of sports will be undermined'. For more details see Louw, *Ambush Marketing and The Mega Event Monopoly: How Law is Abused to Protect Commercial Rights to Major Sporting Events* (Permalink, 2012) at 115.

the event that is capable of protection from third parties. Therefore, the sponsorship rights are capable of being granted exclusively to an official sponsor. Such rights are created and protected by a virtue of the application combination of principles of contract law and intellectual property law.

This chapter analyses the protection of exclusive sponsorship rights through the use of intellectual property law. This analysis is based on the creation of various intellectual property rights in elements of the event that can be protected from unauthorised exploitation by third parties. Such third parties are not seeking to exploit relationships with participants in the football event, but are truly unrelated third parties. Therefore, the ability to take effective action against such third parties will depend on the extent to which they are making use of elements of the football event – such as mascots, logos, emblems, photographs – in which the football entities own such intellectual property rights.

The chapter first examines what is understood by the term ambush marketing in the context of sponsorship. Then, it explains the evolution of ambush marketing, details the strategies pursued by both those harmed and those engaged in ambush marketing activities. Using recent examples from sporting events, the chapter examines common ambush marketing techniques that ambush marketers use to avoid legal consequences.² Then, it analysis the legal claims that football associations and related enterprises and sponsors may have against ambush marketers. Accordingly, it discusses common law claims, such as trademark, copyright and passing off law as a legal bases of protection against ambush marketing.

² However, this section will be introduced with a limited of resources. Chadwick and Burton provided examples of the most common forms of ambush marketing, classifying it into three district categories. They highlighted the deferent strategies used by ambush marketers to develop an attachment with the sponsored subject. Other resources refer to strategies of ambush marketing, but they are not relevant to the developing strategies of ambush marketing. Therefore, section (3) of this chapter will refer basically to the strategies provided by Chadwick and Burton. Chadwick and Burton, *The Evolving Sophistication of Ambush Marketing: A Typology of Strategies*, (2011) 53(6) Thunderbird international Business Review.

2-2) What is Ambush Marketing?

Much of the benefit to a sponsor of his sponsorship arrangement derives from his exclusive association with the sponsored enterprise and the opportunities to which this exclusivity exposes him.³ Thus, the sponsor usually include provisions in his sponsorship contract to prevent any inappropriate or incompatible activities by its competitors from reducing the benefit of that association. However, official sponsors usually find it difficult to achieve satisfactory protection, in particular with the existence of some practical activities which irritate the official sponsor to secure exclusive sponsorship.

Football competitions are likely to involve a large number of bodies comprising individual players, clubs, leagues, national and/or continental organisations and international federations. These bodies are looking to increase their financial return from their participation, each with its own particular interests. For example, different clubs, footballers, stadium owners, within the premier league may secure sponsorship deals from competing companies or from companies in competition with the official sponsor of competitions organised by the FA, UEFA or FIFA.

Instances of competing sponsorship interests within the same sporting event may also arise through third parties outside the structure of the sporting organisation. The potential of such conflict through broadcasters, for example, provides a significant opening for third party interests to access the goodwill of a sporting competition.⁴ Most broadcasters are themselves in a position to introduce conflicting interests such as the sale of sponsorship and advertising space during the broadcast coverage itself.⁵ Such an opportunity offers the potential to compete with an official sponsoring competitor for public attention around the sporting competition.

³ See Section (7) of Chapter One

⁴ Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) I3.103.

⁵ *Ibid*, para I3.104.

Indeed, as sport sponsorship has grown over the last three decades, so too have the efforts made by competitors of official sponsors to capitalise on the financial benefits and media value provided by sport.⁶ Competitors of official sponsors do this by targeting their audience and suggesting some associations within the sponsored subject which in fact they do not enjoy. Ambush marketing is a term coined in business circles to describe such kind of dilution of official sponsor's exclusive rights.

Sandler and Shani were among the first to discuss ambush marketing, which they suggest occurs when competitors attempt to pass itself off as official sponsors.⁷ They place the inception of ambush marketing in the 1984 Olympic Games in Los Angeles, when the International Olympic Committee (IOC) started to sell category exclusive sponsorship to maximise its sponsorship programme income.⁸ The commercial sponsors of the Olympic Games were separated, for the first time, into three categories: official sponsors, suppliers, and licensees.⁹ Following the restructuring in the IOC's sponsorship programme by organisers of the 1984 Los Angeles Olympics, ambush marketing emerged as a big threat to sport sponsorship, providing competitors with means of associating with sponsored subjects.¹⁰ This new strategy of reducing the number of official sponsors and giving the exclusivity in product category forced major rivals of an exclusive sponsor to resort to other strategies to be associated with sporting properties.¹¹

⁶ Chadwick and Burton, *The Evolving Sophistication of Ambush Marketing: A Typology of Strategies*, (2011) 53(6) *Thunderbird international Business Review* 710; Hoek and Gendall, *Ambush marketing: More Than Just Commercial Irritant?* (2002) 1(2) *Entertainment Law* 73.

⁷ Sandler and Shani, *Olympic Sponsorship vs Ambush Marketing: Who gets the gold?* (1989) 29(4) *Journal of Advertising Research* 11.

⁸ *Ibid.* see also Crompton, *Sport ambushing in sport*, (2004) 9 *Managing Leisure* 1.

⁹ Shani and Sandler, *Ambush Marketing: is Confusion to Blame for the Flickering of the Flame?* (1998) 15(4) *Psychology and Marketing* 369-70.

¹⁰ *Ibid.*

¹¹ *Ibid.*, see also Chadwick and Burton, *The Evolving Sophistication of Ambush Marketing: A Typology of Strategies*, (2011) 53(6) *Thunderbird international Business Review* 710

Sandler and Shani put forward the dispute between Fuji and Kodak as an example of such practice.¹² Fuji secured the exclusive sponsorship rights in the photography and imaging product category of the Olympic Games. However, its competitor, Kodak, refused to sit back and watch Fuji receiving such exposure. Kodak, then, successfully associated its brand with the event by becoming the ‘proud sponsor’ of the ABC’s broadcast of the event, and also the ‘official film’ of the U.S track team.¹³ They define ambush marketing as ‘a planned effort (campaign) by organization to associate themselves indirectly with an event in order to gain at least some of the recognition and benefits that are associated with being an official sponsor’.¹⁴ The term ambush has been applied because the main actors are usually major competitors of official sponsors of event organisers, who pounce during sporting events to maximise commercial impact.¹⁵ Accordingly, ambush marketing involves a situation where an official sponsor finds that its association with the sponsored subject has been diluted by some actions of major competitors.

Meenaghan describes the type of conduct involved in ambush marketing, stating that ‘ambush marketing involves a company seeking to associate with an event without making payment to the event owner and often in direct conflict with a competitor who is a legitimate and paying sponsor’.¹⁶ This definition refers to competitors’ attempts to benefit from the goodwill, popularity and reputation of the sponsored subject by creating an association without authorisation of the rights owners. Townley et al also emphasise the unauthorised association of the competitors stating that ‘Ambush marketing, or parasitic¹⁷ marketing, consists, in the sports context, of the unauthorised association by businesses of their names,

¹² Sandler and Shani, *ibid* (n 7) at 10-11.

¹³ *Ibid*.

¹⁴ *Ibid*.

¹⁵ Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para 11.21.

¹⁶ Meenaghan, *Ambush Marketing: Corporate Strategy and Consumer Reaction* (1998) 15(4) *Psychology and Marketing* 314.

¹⁷ Ambush marketing has been termed parasitic marketing ‘because detractors argue that ambushers are obtaining nourishment from the host event without giving anything in return’. Crompton, *Sport ambushing in sport*, *Managing Leisure*, 9, 2004, 1-12 at 1.

brands, products, or services with a sports event or competition through any one or more of a wide range of marketing activities'.¹⁸ The term unauthorised association means that the right owners have neither, directly or indirectly, sanctioned nor licenced such conduct.

However, the common understanding of ambush marketing appears to be based on definitions which are outdated in light of the practice of ambush marketers. The previous definitions on ambush marketing has provided an initial understanding of ambush marketing, however, the term ambush marketing remains an amorphous one and there is still uncertainty of what specifically constitute ambush marketing. Therefore, Chadwick and Burton propose a more comprehensive description of the type of conduct involved in ambush marketing. They defined ambush marketing as 'a form of associative marketing which is designed by an organisation or capitalise on the awareness, attention, goodwill, and other benefits, generated by having an association with an event or property, without the organisation having an official or direct connection to that event or property.'¹⁹ According to Chadwick and Burton, ambush marketers seem to be constantly developing their strategies in order to ensure the success of their campaigns, such as targeted promotions and the creation of rival tournament properties.²⁰

2-3) Ambush Marketing Strategies

Most ambush marketing research identify the commonly employed ambush marketing strategies. These strategies revolve around five typically used marketing opportunities by ambush marketers including sponsoring media coverage of a sporting events; sponsoring subcategories and leveraging this sponsorship aggressively to overshadow competitor

¹⁸ Townley, Harrington and Couchman, *The Legal and Practical Prevention of Ambush Marketing in Sports*, (1998) 15(4) *Psychology and Marketing* 333.

¹⁹ Chadwick and Burton, *The Evolving Sophistication of Ambush Marketing: A Typology of Strategies*, (2011) 53(6) *Thunderbird international Business Review* 714.

²⁰ *Ibid.*

sponsors; buying advertising time surrounding event broadcasts, before and after official telecast; aligning major promotions with a sporting event and actively creatively leveraging those promotions; and the use of alternative creative means, highlighting the innovation of ambushers deflecting attention away from the sporting event.²¹ Usually some combination of all of these strategies will be used in ambush campaign.

The Canadian²² case of *National Hockey League v Pepsi-Cola Canada Ltd (National Hockey League)*,²³ for example, provides a classic illustration of ambush marketing strategies. In 1990, the NHL granted Coca-Cola the exclusive rights to be its official soft drink sponsor of the Stanley Cup hockey play-offs. However, Pepsi-Cola utilised numerous ambush marketing technique to associate itself with the NHL, such as the use of a contest called ‘Diet Pepsi’s \$4,000,000 Pro Hockey Playoff Pool’ which featured Don Cherry, a famous hockey figure throughout Canada.²⁴ In the contest, Pepsi-Cola asked the contestants to submit a bottle capliner correctly identifying the Stanley Cup Play-off winner and the number of matches played by it to win the Stanley Cup.²⁵ For example, if New Jersey Devils won in three games, or New York Rangers won in eight games, and someone had that bottle cap, he was a winner. Furthermore, Pepsi-Cola supported the contest by sponsoring the broadcasts of the NHL play-off games throughout Canada using its commercial spots to advertise the promotion.²⁶ However, at the beginning of the commercial, Pepsi-Cola displayed across the bottom of the television screen a disclaimer that its contest is not sponsored by the claimant.²⁷

²¹ Meenaghan, *Point of View: Ambush Marketing: Immoral or Imaginative Practice*. *Journal of Advertising Research* 43(5), 1994, pp. 77-88 at 80-83; Meenaghan 1996, *ibid*, (n 21) at 106-8; Bean, *Ambush Marketing: Sport Sponsorship Confusion and Lanham Act*, *BUL Rev*, 75, 1995, at 1103-6.

²² English law, in particular, is persuasive authority in Canada, Australia and New Zealand where courts frequently cite British cases. See Wise and Mayer (n 193).

²³ *National Hockey League v Pepsi-Cola Canada Ltd* (2d) 27 (1992), affirmed 59 CPR (3d) 216 (1995).

²⁴ *Ibid*, para 3 and 19.

²⁵ *Ibid*, para 3 at 2.

²⁶ *Ibid*, para 19.

²⁷ *Ibid*, para 4.

The NHL sued Pepsi in an effort to protect the rights it had sold to Coca-Cola as the exclusive sponsor of the event. The NHL claimed that the television advertisements and the contest were likely to convey to the public a false impression that the NHL authorised Pepsi's products. The cause of action at trial were a passing off, trademark infringement and interference with contractual relations.²⁸ In dismissing the action, the trial judge stated his conclusion that:

'[T]he contest did not constitute the tort of passing off, it did not infringe any of the plaintiff's registered marks and did not interfere with the plaintiff's business relations.the television advertisements is being nothing more than amusing but obvious spoofs which no reasonable viewer would interpret as suggesting that the contest was in any way authorised, sponsored, endorsed or approved by the plaintiffs.'²⁹

The Supreme Court of British Columbia rejected the claim of trademark infringement because none of the NHL's actual registered marks were used by Pepsi.³⁰ The passing off claim also were dismissed because the NHL was unable to prove that Pepsi's promotional activities had created a false impression in consumer's mind that the product or activity was authorised by the NHL.³¹ According to the court, Pepsi's had used appropriate disclaimers in its promotional announcements to make consumers aware that it was not officially associated with the NHL.³²

²⁸ Ibid para 3.

²⁹ Ibid para 4.

³⁰ Ibid para 18.

³¹ Ibid para 13.

³² Ibid para 20. The court cited the case of *NFL v Governor of Delaware*. In this case, the *NFL* sought to prevent the defendant from producing football-themed lottery games based on trademark law. Although *Delaware* did not use *NFL*'s mark, the latter argued that there is a close relationship to its own games which create an impression that the *NFL* endorse gambling. The court found that *Delaware's* advertising did not create false impression because he used a *disclaimer* on the tickets indicating that it did not affiliate itself with the *NFL*. *The National Football League (NFL) v Governor of Delaware* 435 F.Supp. 1372, (D. Del. 1977).

The case shows how ambush marketers protect themselves from legal battles. They often accurately plan to benefit from real or apparent loopholes in the legal protection available to right owners and their official sponsors to associate themselves with the sponsored subject. Ambush marketing is, therefore, a real threat to the ability of the sporting bodies to realise the full commercial value of their sporting goodwill. If sports associations and related enterprises are unable to exclude ambushers from the sponsored subject, or if the law simply does not allow them to do so, then their official sponsors may eventually decide that they should simply join the ambush marketer to exploit the sporting goodwill without paying the expensive sponsorship fee.

However, contemporary ambush marketers employ various strategies and methods to associate themselves with the sponsored subject. According to Scassa, these strategies are generally distinguished as taking one of two forms, association and intrusion.³³ Ambush marketing by association occurs where the official sponsor's competitor attempts to create an illusion in the consumer's mind that its brand is officially associated with the sponsored subject.³⁴ This type of ambush marketing would often constitute passing off in the traditional sense. During April and May 2006 for example, LG Electronic SA (Pty) Ltd, which was not the official sponsor of the FIFA World Cup 2006 in Germany, advertised a competition in which the winners could win a trip to the final of the FIFA World Cup.³⁵ The advertisements appeared on the television, print media and LG's website involved images and phrases that alluded to the FIFA World Cup.³⁶ FIFA subsequently lodged complaints to the Advertising Standards Authority (ASA), whose Sponsorship Code prohibited parties other than the official sponsors from launching any event-related sales promotions that create the

³³ Scassa, *Ambush marketing and the right of association: Clamping down on references to that big event with all the athletes in a couple of years* (2011) 25 *Journal of Sport Management* 355.

³⁴ *Ibid.*

³⁵ See Louw, *Ambush Marketing and The Mega Event Monopoly: How Law are Abuse to Protect Commercial Rights to Major Sporting Events* (Permalink, 2012). 101.

³⁶ *Ibid.*

impression they are sponsoring such event.³⁷ However, LG withdraw the allegedly offending promotional by deleting all references to the FIFA World Cup.³⁸

Ambush marketing by intrusion occurs when ambush marketers place trademarks or other indicia in the sporting event spaces where they will captured by media, or seen by the audience.³⁹ Example of this form is the usual unauthorised exploitation of airspaces at sporting events by for instance using branded hot air balloons to intrude in such airspace and advertise competitors' brands. Both practices (association and intrusion) can prevent delivery of category exclusivity and harm the brand awareness and image building objectives they have by introducing increased promotional clutter surrounding the sponsored subject.

Chadwick and Burton suggest that there are no fixed categories of conduct that constitute ambush marketing.⁴⁰ However, they provide examples of situations that might fall within the description of ambush marketing.⁴¹ They classify ambush marketing into three distinct categories, highlighting the different strategies used by ambush marketers to develop an attachment with the sponsored subject. Each category includes specific type of ambushing activities.

2-3-1) Direct Ambush Marketing: this include any intended association of a brand with a sport property, through a clear reference or an intended connection to the sponsored subject.⁴²

This category includes the following type:

2-3-1-A) Predatory ambushing: this type of ambush occurs when a brand attempts to attack the official sponsor intentionally in order to gain market share and confuse consumers as to

³⁷ Ibid.

³⁸ Ibid.

³⁹ See Scassa, *Ambush marketing and the right of association: Clamping down on references to that big event with all the athletes in a couple of years* (2011) 25(4) *Journal of Sport Management* 355.

⁴⁰ See Chadwick and Burton, *ibid*, (n 19) at 714.

⁴¹ Ibid at 715-17.

⁴² Ibid at 717.

who is the official sponsor.⁴³ For example, in 2008, Carlsberg was the official sponsor of the UEFA European Championships.⁴⁴ However, Heineken, who sponsor the UEFA Champions League, set up near the football stadiums and distributed hats branded with the Heineken name and logo to the fans.⁴⁵ Such activities will confuse the public and, consequently, weaken the advantage of the exclusive access that Carlsberg has paid to establish.

2-3-1-B) Coattail ambushing: a direct attempt by a competitor company to associate its brand with a sport event by using a legitimate link with the event, such as sponsoring individual teams or athletes competing within a specific event.⁴⁶ An example of this form of ambushing include Adidas sponsorship of the Australian Olympic swimmer Ian Thorpe when Nike was the official clothing sponsor for the Australian Olympic team.⁴⁷ Thorpe was photographed with his Adidas towel dropped over Nike's logo at a medal presentation ceremony.⁴⁸ The purpose of this association was obviously to attack Nike and to capitalise on the public interest generated by the sponsored subject.

2-3-1-C) Property infringement: this form includes any intentional unauthorised use of protected intellectual property, including copyright and trade mark property such as logos, words and names, or knowingly infringing the rules and regulations of an event, in a brand's marketing as means of creating association with a particular sponsored subject. Example of this form is the case of *Arsenal Football Club Plc v Mathew Reed*,⁴⁹ when the claimant sued

⁴³ Ibid at 715; see also Louw, *Ambush Marketing and The Mega Event Monopoly: How Law are Abuse to Protect Commercial Rights to Major Sporting Events* (Permalink, 2012) 98.

⁴⁴ UEFA and Carlsberg have announced an extension of their long-term sponsorship agreement for the UEFA national team competitions – a partnership which began at the 1988 UEFA European Championship in the former West Germany. See for more details www.uefa.com.

⁴⁵ See Pearson, *Dirty Trix at Euro 2008: Brand Protection, Ambush Marketing and Intellectual Property Theft at the European Football Championships* (2012) 10(1) the Entertainment and Sports Law Journal 5.

⁴⁶ Chadwick and Burton, *ibid*, (n 19) at 715.

⁴⁷ For more details see Crow and Hoek, *Ambush marketing: A critical review and some practical advice*, (2003) 14(1) Marketing Bulletin 5.

⁴⁸ Ibid.

⁴⁹ [2003] 1 All ER 137.

for trademark infringement and passing off against *Mr. Reed* who had been selling football memorabilia depicting the Arsenal marks from stalls near Arsenal's stadium.⁵⁰

2-3-2) Indirect Ambushes: this category of ambush marketing activity is defined as 'an association of a brand with a sporting property through suggestion or indirect reference, drawing on the awareness and attention of consumers surrounding a sporting property without express reference or attachment to the property'.⁵¹ Competitor companies may use this category of ambush marketing to publicise their products, with no motives concerning their competitor's sponsorship activities. This category include the following types:

2-3-2-A) Associative ambushing: this occurs when an unauthorised company uses terminology or imagery to create an allusion that its brand has links to a sport property, without making any specific references or implying an official association with the property.⁵² For example, during the lead up to the 2008 Beijing Summer Olympics, Nike made considerable use of the number '8', a symbol of luck and fortune in China and incorporated the design pattern on its products.⁵³

2-3-2-B) Distractive ambushing: This type of ambushing occur when an unauthorised brand makes a presence or disruption at or around a sporting event, without making a reference to the sponsored subject.⁵⁴ The aim of this campaign is to gain awareness from the attendance. In the 2008 Open Championship, for example, Bentley set up a row of its cars prominently displayed outside Hillside Golf Club, directly adjacent to Royal Birkdale, the host course of The Open, a means of attracting interest and deterring from Lexus' official sponsorship of the event.⁵⁵

⁵⁰ The case will be discussed in detail in section (4) of this chapter.

⁵¹ Chadwick and Burton, *ibid*, (n 19) at 716.

⁵² *Ibid*.

⁵³ *Ibid*.

⁵⁴ *Ibid*.

⁵⁵ *Ibid*.

2-3-2-C) Values ambushing: This type of ambushing aims to use the central value of the sponsored subject in order to imply an association with a sporting property in the consumer's mind.⁵⁶ For example, the European Football Championship tournaments took place in Austria and Switzerland from 7 to 29 June 2008. The tournament's main marketing emphasised themes of unity and anti-racism. Puma, who was not a sponsor, led an advertising campaign during the spring and summer of 2008 including the slogan 'June 2008: Together Everywhere'.⁵⁷ The goals of the campaign were to create awareness, communicate the Puma's brand value and build a positive image of Puma in the consumer's mind.⁵⁸

2-3-2-D) insurgent ambushing: sometimes competitors resort to use surprise street-style at or near the sponsored subject. They do so in order to imply an association with the sporting event, and to distract consumer's attention away from official sponsors.⁵⁹ During the 2008 ATP/WTA French Open at Roland Garros, for example, the clothing company K-Swiss Inc ambushed the competition by staging a promotion on the limits of the event's protected property, parked a crashed car setting up a giant purple K-Swiss branded tennis ball on the top on the major route to Roland Garros.⁶⁰

2-3-2-E) Parallel Property Ambushing: this type of indirect ambushing occurs when a non-sponsor company creates or supports a rival event or property that is somehow related to the ambush target. The main aim of the ambusher is to associate its brand with the sporting property at the time of the event, capitalising on the main sport property's goodwill⁶¹. For

⁵⁶ Ibid.

⁵⁷ A Puma spokesman says its campaign was part of the company's seasonal football advertising campaign and was meant to be 'a reflection of bringing football fans from all over the world together during a football tournament. Being a leading sport brand, Puma would be remiss if it did not recognise such event.' Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ ibid

example, Nike launched a one day global running event held in many countries across the world, seven days after the Beijing Olympic Games had ended in 2008.⁶²

2-3-3) Incidental ambushing: Chadwick and Burton describe this category of ambush activities as instances when consumers think that a non-sponsor brand is associated with a sporting event without any attempt of that brand to establish such a connection.⁶³ Although the intentional element does not exist, this association can be harmful to the official sponsor because it may clutter the marketing environment. This category includes the following types:

2-3-3-A) Unintentional ambushing: this type of ambushing occurs when the incorrect consumer identification of a non-sponsoring brand as an official sponsor, inexplicitly or unknowingly, based on a previous or expected association with a sporting property, such as the media highlighting of a specific equipment used by athletes, which may confuse consumers about the real official sponsor of the event. For instance, during the Beijing 2008 Olympic Games, Speedo earned a considerable media attention as a result of the incredible performances of the swimmers in their LZR Racer swimsuits.⁶⁴ The repeated mentioning of Speedo's equipment by the media caused consumers to think, wrongly, that Speedo is the official sponsor of the event.⁶⁵

2-3-3-B) Saturation ambushing: Competitors of official sponsors usually increase their advertising and marketing campaign during sporting events. They do so by avoiding any associative imagery and without any reference to the sporting event. Such campaigns aim to benefit from the increased broadcast media attention around the event.⁶⁶ For example, during Beijing Olympic Games in 2008, Lucozade aggressively prompted its brand through print

⁶² Ibid.

⁶³ Ibid at 218.

⁶⁴ See Clare Matheson, *Speedo makes waves at Olympics*, [bbc.co.uk](http://news.bbc.co.uk/1/hi/business/7558622.stm), 19 August 2008. <<http://news.bbc.co.uk/1/hi/business/7558622.stm>> accessed on 14 march 2015

⁶⁵ Ibid.

⁶⁶ Chadwick and Burton (n 19) 218.

and television advertisement, above and behind their standard marketing, featuring a variety of sports and athletes in line with the Olympics.⁶⁷

Although these ambush marketing tactics are unethical and unfair marketing practice, they do not include activities that clearly constitute infringements of recognised proprietary rights. These strategies are continuum of situations with marketers employing various means of associating with the sponsored subject. The evolution of these strategies is, therefore, reflected in the protecting mechanisms used by the rights owners and official sponsors. Such ambush marketers engage in clever campaigns suggesting that they are somehow connected to the sponsored subject without breaching any law. Ambushes which do not break any law are difficult to combat.

Obviously, owners of the sponsored subject are struggling to protect the integrity of goodwill they sell to prospective companies and have become increasingly frustrated with ambush marketing. Such ambush marketing could seriously risk the financial viability of sporting properties by diluting the value of their sponsored subject. Official sponsors will be less willing to invest their money in ultimately worthless exclusive rights unless there are legal mechanisms available to control ambush marketing activities. The result could lead to shrink the sponsorship market.

Although Chadwick and Burton provided so many examples of ambush marketing strategies, the fact is there are only two type of ambushers. The first type of ambushers are seeking to exploit relationship with active actors in the sporting event, while the second type are truly unrelated third party. The next section will examine the legal weapons available for event organisers in the UK to protect the exclusive rights of their official sponsors against the second type of ambushers (unrelated third parties).

⁶⁷ Ibid.

2-4) The traditional legal bases for protection against unauthorised use of exclusive rights

As we have seen,⁶⁸ the practice of ambush marketing is not limited to the unauthorised exploitation of the sponsored subject by third parties, but also to ambushers who are seeking to exploit relationships with participants in sporting events. The strategies above show that ambushers usually exploit contractual arrangements with active actors in the event to associate their brands with the event. In the context of football, such actors are commercial broadcasters, football players and stadium owners.

Contractual provisions can give football entities strong protection against ambush by or via such actors,⁶⁹ however, only limited and indirect protection against unauthorised exploitation of the event by third parties with whom the event organiser does not have a contractual relationship. The event organiser's main weapon against such parties is intellectual property law.

While English law does not recognise the existence of proprietary rights in sports events per se, intellectual property rights may enable the right owner to prevent ambush activities by third parties. As discussed earlier,⁷⁰ intellectual property rights provide the creator of distinctive works a degree of exclusive rights in respect to the use of his creation. It will be possible to secure copyright protection of words, logos, emblems, etc. as original artistic works. Trademark infringement proceeding is another and is often a more efficient way of protection against ambush marketing by third parties. In some instances, both copyright and trademark protection will be available for the same word, emblem, design, etc. Ambush

⁶⁸ See generally Section (2-3) of this chapter.

⁶⁹ However, each contractual party raise a potential of conflict regarding the exploitation of the sponsored subject. Therefore, the contractual relationship with each party will be analysed separately in Chapters Three, Four and Five.

⁷⁰ Section (1-2) of this research.

marketing may also be prevented by the action for passing off by the use of a false representation in connection with goods and services.

2-4-1) Copyright

Copyright seeks to protect the skill and the hard work of creation and authorship of copyrightable works, and it is used to restrain other people from copying the work. The Copyright Design and Patent Act 1988 (CDPA 1988) identifies copyrightable works as ‘original literary, dramatic, musical and artistic works; sound recordings, films, broadcasts, and cable programmes; and the typographical arrangements of published editions’.⁷¹ The CDPA 1988 also confers upon the owner of copyright in a work the exclusive right to perform.⁷² Copyright arise automatically and does not have to be registered to be enforceable.⁷³

The copyright is owned by its creator and can be sold and bought like any other form of property.⁷⁴ In the context of sport, many commercial agreements are based on an assignment of copyright. This can be a complete assignment by authorising all of the acts during the entire copyright period,⁷⁵ or can be limited so as to apply to some but not all the acts restricted and/or to part but not the whole of the copyright period.⁷⁶ Thus, a copyright work can be the subject of various assignment for various periods of time, and many people can be involved in the exploitation of copyright work.

In the context of sporting events, section 180(2) of the CDPA 1988 defines performance as ‘dramatic performance, a musical performance, a reading or recitation of a literary work or a performance of a variety act or any similar presentation given by one or more individuals.’

⁷¹ See section 1 of the CDPA 1988.

⁷² See section 2(1) of the CDPA 1988.

⁷³ See section 3(2) of the CDPA 1988.

⁷⁴ See section 90 of the CDPA 1988.

⁷⁵ Section 92/1 of CDPA 1988 state ‘exclusive licence means a licence in writing signed by or on behalf of the copyright owner authorising the licensee to the exclusion of all other persons, including the person granting the licence to exercise the right which would otherwise be exercisable exclusively by the copyright owner.’

⁷⁶ See Section 90/2 of CDPA 1988.

However, sporting events do not fall into any of the categories defined by the CDPA 1988. English copyright law simply does not recognise a sporting event as a dramatic work in which copyright may protect.⁷⁷ Creation of a special intellectual property right in a sporting event was particularly rejected by the Copyright Committee in the 1952. In its report to the Parliament, the Committee wrote: ‘... Under the present law there is no copyright in a spectacle such as sporting event and, if access thereto can be obtained, neither those taking part nor the organiser can prevent the spectacle being recorded upon records or films, or being directly or indirectly reproduced to the public simultaneously or subsequently.’⁷⁸

This view clearly illustrated in the cases of *Federation Association Premier League Ltd v QC Leisure*:⁷⁹ Pups in the United Kingdom had shown live Premier League games broadcasts through decoder cards provided by the defendants. The decoder cards obtained in outside the United Kingdom and intended for private domestic use. These cards enabled the unauthorised reception of non-Sky satellite channels. The FAPL claimed that these actions infringed their rights under sections 297 and 298 of the CDPA 1988 and their copyrights in the footage. The defendant claimed that the cross-border trade in decoder cards was lawful even within Premier League’s consent under the CDPA 1988 and certain provisions of European Court law⁸⁰ and sought a reference to the European Court of Justice. The latter contended that sports events do not qualify as protected subject matter under EU copyright law stating ‘FA Premier League cannot claim copyright in the Premier League matches themselves, as they cannot be classified as works.’⁸¹ The court explained that in order to be classified as a work of authorship the subject matter would have to be original in the sense of the author’s own

⁷⁷ A dramatic work is one that is capable of being performed, such as acting and dancing. See section 3 of the CDPA 1988.

⁷⁸ Copyright Committee report, 1952 para 160.

⁷⁹ See joint cases C 403/08 and 429/08 *Football association Premier League Ltd and others v QC Leisure and others and Karen Murphy v Media Protection Services Ltd* (2011) ECR-I-9083.

⁸⁰ Including in particular Directive 98/84/EC (the Conditional Access Directive).

⁸¹ See *Football association Premier League Ltd and others v QC Leisure*, *ibid* (no 300) para 96.

intellectual creation.⁸² However, according to the court, sporting events cannot be regarded as intellectual creations classifiable as work within the meaning of the Copyright Directive.⁸³ This applies on sports events as such notably football games, which are subject to the rules of the game which leave no room for creative expressive freedom for the purposes of copyright.⁸⁴ The court went even further stating that sporting events are not protected by European Union law on any other basis in the field of intellectual property, excluding thus related rights to copyright as well.⁸⁵

However, there are other aspects of a sporting events that could be qualify for copyright protection. For example, according to section 3 of the CDPA 1988 ‘literary work means any work, other than a dramatic or musical work, which is written, spoken or sung’. This certainly will cover any original written material generated about sport such as match reports, regulations, rules, publications, tickets and other business and formal documents. Therefore, such original written materials are capable for copyright protection as literary works.

Copyright in artistic works can also be of relevance in sport. Artistic works include photographs and graphic works, sculptures or collage, irrespective of artistic quality.⁸⁶ Copyright subsists in photographic images which are used in printed materials relating to sport. Copyright also subsist in the artwork relating to sport, such as logos, designs, trophies, posters and flags, that forms the basis for sports sponsorship. As a result, threats of proceedings for copyright infringement may be used to prevent ambushers from the unauthorised use of such artwork.

⁸² Ibid para 97.

⁸³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

⁸⁴ See *Football association Premier League Ltd and others v QC Leisure*, *ibid* (no 300) para 98.

⁸⁵ Ibid para 99.

⁸⁶ Section 4(1) of the CDPA 1988.

2-4-2) Trade mark

Section 1 of the Trade Mark Act 1994 ('TMA 1994) defines trade mark as 'any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals, or the shape of goods or their packaging.'⁸⁷ Despite the fact that the law provide some protection for unregistered trademarks, a trademark is far easier if it has been registered. Registered trade mark confers certain exclusive rights on its owner in respect to its use in relation to the particular classes of products in which it has been registered.⁸⁸ It is designed to protect the registered trademark from firms who include a similar mark on their products and then offer those products to the public.

Similar to copyright, registered trade mark can be bought, sold, licenced and assigned.⁸⁹ For example, the main driver of values in a sporting event sponsorship agreement is the ability to associate itself with the event by granting a licence to reproduce the event trade mark on its products or services. In similar way for shirt sponsors, a main driver of values is the grant to the shirt supplier of a trade mark licence to reproduce the club's logo on replica shirts. Such mark therefore may potentially be protected by trademark registration under TMA 1994.

Securing registration of a sponsored subject as a trade mark can be helpful to stopping the ambushing of that mark where the unauthorised association with the sponsored subject is achieved by the reproduction of such registered marks. However, there are certain absolute grounds of refusal of registration under TMA 1994. For instance, a mark will not be registered if it is devoid of distinctive character.⁹⁰ The mark also will not be registered if it 'consist exclusively of signs or indications which may serve, in trade, to designate the kind,

⁸⁷ See Section 1 of the TMA 1994.

⁸⁸ See section 2 of the TMA 1994

⁸⁹ See section 29 of the TMA 1994.

⁹⁰ See section 3 (1) (b) of the TMA 1994.

quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services.’⁹¹

In 1997, for example, Tottenham Hotspur FC applied to register the word ‘Tottenham’ as a trademark to protect its range of merchandise sold officially through the club.⁹² However, the registration had been challenged by local traders who claimed that Tottenham should not be allowed to claim rights to a specific area of London.⁹³ The ground of opposition pursued by the opponent were under sections 3(1), (b) and (c) of the TMA 1994.⁹⁴ The objection was rejected by the Hearing Officer and Tottenham’s application for registration was granted on the ground that despite the fact that Tottenham is a geographical area of London, ‘there is no evidence that Tottenham has a reputation for anything, other than the football team.’⁹⁵ ... [T]he evidence indicates that [the word Tottenham] is much more likely to be associated with the football club. The evidence suggests to me that the football fame is likely to subsume any geographical association.’⁹⁶

Moreover, certain ‘specially protected marks’, such as royal arms or national flags also cannot be registered as a trademark.⁹⁷ For instance, the TMA 1994 will not allow The Football Association to register the England national flag as a trade mark. This may provide an opportunity for ambushers to use images of that flag to associate themselves with the England football team.

In addition, section 5 of the TMA 1994 provides further ‘relative grounds for refusal of registration’. For example, a trademark shall not be registered if it is identical to a mark registered by a third party, or if it is identical to a registered mark and in the either case its

⁹¹ Section 3 (1) (c) of the TMA 1994.

⁹² Application no 2130740 By Tottenham Hotspur plc to register the trade mark ‘Tottenham’, 8 April 2002.

⁹³ Ibid, para 23.

⁹⁴ Ibid.

⁹⁵ Ibid, para 28.

⁹⁶ Ibid para 31.

⁹⁷ See Section 4 of TMA 1994.

registration would create confusion with the earlier mark.⁹⁸ The mark also will not be registered if use would infringe copyright or would amount to passing off.⁹⁹ The only exception to this refusal is if the applicant for registration of the later mark can show ‘honest concurrent use’ of that mark.¹⁰⁰

It can be said then that, if validly registered, a trade mark confers certain exclusive rights on its owner. Securing registration of the sponsored subject as a trade mark can be very helpful for rights holders in preventing the ambushing to that sponsored subject. However, even where the sponsored subject is registered as a trade mark, rights holders need to bear in mind that not every unauthorised exploitation of that mark infringes the owner’s trade mark.

Section 10 of the TMA 1994 states that registered trade mark will be infringed if a sign is used in course of trade which is: i) identical to the trade mark and used in relation to goods or services which are identical to those for which the trade mark was registered¹⁰¹; ii) identical or similar to the trade mark and used in relation to goods or services which are identical or similar to those for which the trademark was registered, where there exists a likelihood of confusion on the part of relevant public¹⁰²; iii) identical or similar to a trade mark with a reputation in the United Kingdom and where the use of the sign without due cause takes unfair advantage of or is detrimental to the distinctive character or repute of the trade mark.¹⁰³

Thus, although securing registration of the sponsored subject as a trade mark puts the sponsor into a strong position, the battle with ambushers may not be over. In order to establish infringement, the proprietor of the registered mark needs to show that the defendant has made unauthorised use of the mark. Section 10(4) of the TMA 1994 sets out a list of ways in which

⁹⁸ See Section 5(3) of the TMA 1994.

⁹⁹ See Section 5(4) of the TMA 1994.

¹⁰⁰ See section 7(3) of the TMA 1994.

¹⁰¹ Section 10(1) of the TMA 1994.

¹⁰² Section 10(2) of the TMA 1994.

¹⁰³ Section 10(3) of the TMA 1994.

a person may use a sign for the purposes of infringement.¹⁰⁴ Nevertheless, it is important to note that the list in subsection 10(4) is neither exhaustive nor definitive.¹⁰⁵ Purely incidental use of the mark may not amount to use of it under subsection 10(4) of the TMA 1994.

Example of legitimate use of a mark is the case of *Trebor Bassett Ltd v The Football Association*.¹⁰⁶ The defendant placed cards featuring photographs of England footballers in its packet of candy sticks. The England ‘Three Loins’ logo, in respect of which the Football Association owned a registered trade mark, appeared on the England football shirts worn by the players in the photographs.

The Football Association alleged that Trebor Bassett had infringed its trade mark, by including these cards with the pictures in which the logo was apparent. The court ruled that the defendant was not reproducing the Three Lions logo in an effort to indicate a trade association between the cards and The Football Association. According to Rattee J. ‘Trebor Bassett is not even arguably using the logo ... in any real sense of the word ‘uses’ and is certainly not, in my judgement, using it as a sign in respect of its cards.’¹⁰⁷

Similarly, the case of *Rugby Football Union (RFU) and Nike v Cotton Traders Ltd*¹⁰⁸ was primarily concern with whether a registered trade mark can be infringed by unauthorised third parties. The defendant had produced and sold rugby shirts with a red rose motif prior to 1991. Between 1991 and 1997, the defendant was an official licensee of the RFU. In 1998, the RFL had registered an updated version of the England rugby rose as a Community trade mark. Although the license between the RFU and the defendant had ended, the latter commenced the manufacture and sale its original rugby shirt.

¹⁰⁴ According to section 10(4) of the TMA 1994, ‘a person uses a sign if he affixes it to goods or the packaging, offers or exposes goods for sale, puts them on the market or stocks them for those purposes under the sign, or offers or supplies services under the sign, imports or exports goods under the sign, uses the sign on business paper or in advertising.’

¹⁰⁵ *Trebor Bassett Ltd v The Football Association*, [1997] FSR 211, Ch D at 216.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid* at 217.

¹⁰⁸ [2002] All ER (D) 417 (Mar).

The RFL and its sponsor Nike sued the defendant on the base of trade mark infringement for selling classic England rugby jerseys bearing the England rugby rose. Lloyd J. ruled out that the classic English rugby rose was associated in the minds of the audience with England as a country or its national team, and was not understood to indicate the RFU or the trade origin of the goods on which it featured.¹⁰⁹ He content that the registration date the rose was a generic national symbol, not associated with the RFU, and was not distinctive of goods produced by the RFU, and nor did it acquire such distinctiveness after registration.¹¹⁰ The trademark infringement claim, thus, failed. Consequently, the sports rights owner was unable to stop an ambusher using the England rugby rose to create an association between his goods and services and England rugby.

However, the outcome of the case *Arsenal Football Club plc v Reed (Reed)*¹¹¹ was more helpful to rights holders. Arsenal FC owned a number of trademarks, including the word ARSENAL and the club's 'gunners' logo. The defendant, Matthew Reed, sold unofficial scarves and hats bearing these marks from serval stalls outside the Arsenal stadium.

Arsenal's lawyers claimed (among others¹¹²) for use of the identical mark on identical products under section 10(1) of the TMA 1994. However, Laddie J rejected the claim on the base that the defendant was not using the devices featured on his products to indicate the original of those products, but as badges of allegiance to the club. He states '[T]he Arsenal signs on Mr Reed's products would be perceived as a badge of support, loyalty or affiliation

¹⁰⁹ Ibid at para 48-50.

¹¹⁰ Ibid para 53.

¹¹¹ *Arsenal Football club plc v Mathew Reed* [2001] RPC 922, on referral to the EJC, Case C- 206-01 judgement date 12 November 2002, back to Chancery Division, [2002] EWHC 2695 (Ch), appeal upheld [2003] EWCA Civ 96.

¹¹² Arsenal FC lawyers brought claims for registered trade mark infringement, passing off and copyright infringement, although the latter claim was abandoned prior to the start of the trial. Ibid.

to those to whom they are directed. They would not be perceived as indicating trade origin'.¹¹³

Arsenal FC's lawyers challenged the ruling and the case was referred to the European Court of Justice for guidance and clarification on trademark law.¹¹⁴ The European Court of Justice noted that 'the essential function of a trade mark was to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which had another origin. [In order to do so, the mark must] offer a guarantee that all the goods or services bearing [the mark] have been manufactured or supplied under the control of a single undertaking which was responsible for their quality.'¹¹⁵ The European Court of Justice point out that Mr. Reed was using a sign in the course of trade which was identical with the trademark registered by Arsenal FC.¹¹⁶ Therefore, the court ruled that Mr. Reed's use of Arsenal FC's trademarks was liable to affect the original function of the mark, and so was indeed trademark infringement.

The case then went back to Laddie J in the High Court, who felt that the European Court of Justice had exceeded its jurisdiction.¹¹⁷ According to Laddie, the court had already found that there was no likelihood of consumer confusion in this particular case, and that the European Court of Justice had interfered with the High Court's finding of fact on this point.¹¹⁸ Therefore, Laddie J considered himself free not accept the European Court of Justice's conclusion.¹¹⁹ Instead, Laddie J decided that it must apply the European Court of Justice's

¹¹³ Ibid para 31.

¹¹⁴ Arsenal Football Club plc v Matthew Reed (C-206/01), ECJ judgement dated 12 November 2002, [2003] Ch 454, [2003] 3 WLR 450.

¹¹⁵ Ibid at 3.

¹¹⁶ Ibid.

¹¹⁷ [2002] EWHC 2695(Ch).

¹¹⁸ Ibid para 27.

¹¹⁹ Ibid.

principles to its own first findings of fact, and conclude that no infringement of the trademarks had taken place.¹²⁰

The Court of Appeal upheld Arsenal FC's appeal against Laddie J's ruling, confirming that Mr. Reed's trading activities did infringe Arsenal FC's trademark registration.¹²¹ The Court of Appeal stated that the European Court of Justice was not particularly concerned with the issue of trade mark use. Instead, it considered the essential function of a trademark, and then went on to rule that Mr. Reed's activities were likely to impair this function.¹²² The Court of Appeal held that if Mr. Reed were allowed to continue, it would not be possible for consumers to guarantee that goods bearing the Arsenal mark came from Arsenal FC.¹²³ As a result Mr. Reed was ordered to stop selling unofficial products.

Therefore, the essential issue is not to ask whether the particular use made by an ambusher of the mark fits within a precise definition under section 10(4) of the TMA 1994. Rather, the test is whether that use is such as to prejudice the ability of the trade mark. This will obviously provide rights holders the opportunity to protect the sponsored subject from unauthorised uses. However, the badge of allegiance argument may still be a serious threat to the validity of the registration of the sponsored subject as a trade mark. This will make it very difficult for sport organisations to challenge ambush marketing practices using trademark infringement theory.

It can be said therefore that nothing in TMA 1994 affects to protect registered logos, names, emblems, etc., from firms who include a similar mark on their products to the buying public. However, it does not easily adapt itself to protect a registrant from firms that do not include any mark or logo on their product, but just use a similar mark or reference in a commercial

¹²⁰ Ibid para 30

¹²¹ [2003] EWCA Civ 696.

¹²² Ibid para 48.

¹²³ Ibid.

advertising. Therefore, for most ambush marketing strategies, the TMA 1994 is not a serious threat.

2-4-3) Passing off

As we have seen,¹²⁴ the TMA 1994 regulates the registration of trade marks at the United Kingdom Intellectual Property Office and the enforcement and commercial exploitation of registered marks. However, nothing in TMA 1994 affects the law relating to passing off.¹²⁵ In the UK, the theory of passing off may be available where a firm's goodwill has been injured or appropriate by the use of false representation in connection with goods or services.¹²⁶ Such passing off is achieved by the use of the unregistered marks indicative of the plaintiff.¹²⁷ Passing off acts to restrain a trader from wrongfully exploiting the goodwill built up by another by passing off his products as the products of that other.¹²⁸ Therefore, the tort of passing off could constitute an obvious weapon for sports rights owners to use against ambush marketers.

The tort of passing off generally requires the claimant to show that: i) it owns goodwill in the trade mark at issue; ii) there has been misrepresentation likely to lead to confusion; iii) and damage has resulted to the plaintiff's goodwill.¹²⁹

¹²⁴ See Section (2-4-1).

¹²⁵ Section 2(2) of TMA 1994 states: 'No proceeding lie to prevent or recover damages for the infringement of an unregistered trade mark as such; but nothing in this Act affects the law to passing off'.

¹²⁶ See generally Drysdale and Silverleaf, *Passing off: Law and Practice*, 2nd Edn (Butterworths, London 1995)

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ The tort of passing off conveniently summarised in the report of the judgement of Lord Oliver in the case of *Reckitt and Colman Products Ltd v Borden Inc* [1990] RPC 341 at 406 '[passing off] may be expressed in terms of the elements which the plaintiff ... has to prove in order to succeed ... First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying get up ... under which his particular goods or services are offered ... such that the get up is recognised by the public as distinctive of the plaintiff's goods or services. Secondly he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff ... Thirdly he must demonstrate that he suffers ... damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.'

Proving a misrepresentation by the defendant is usually the most difficult element to identify. In the case of *Arsenal v Reed*,¹³⁰ Laddie J summarised the requirements for the passing off action as ‘a misrepresentation to members of the public which has caused or is likely to cause a not insignificant part of that public to believe that [the defendant]’s goods are goods of [the claimant] or are licensed by or commercially associated with it.’ The key question then is whether there is any likelihood of any confusion on the part of members of the public.

Arsenal FC’s lawyers claimed that the defendant misrepresented his products as official merchandise.¹³¹ They claimed that many consumers would believe that Mr Reed’s products were either produced by Arsenal or licenced by the club. Therefore, they sought to restrain Mr. Reed from selling products bearing the Arsenal crest on the ground of passing off infringement. In response, Mr Reed argued that the function of Arsenal FC’s trademarks did not appear to be compromised because he had a disclaimer sign in front of his stalls telling consumers that his products were not licenced by Arsenal FC. This disclaimer was held to prevent any consumer confusion, which precluded claims based on passing off infringement.

Laddie J concluded that evidence of confusion, if it exist, would be easily found since the defendant had retailed his goods for several years. He noted that ‘absence of evidence of confusion become more telling and more demanding of explanation by the claimant the longer, more open and more extensive the defendant’s activities are. The purchasing public may be more or less observant and less or more easily misled than might be thought when the issue are being ventilated in the rather clinical atmosphere in court’.¹³²

For passing off to be established in the context of sponsorship, therefore, right owners must show that the ambusher’s aim is to associate the goods or services with the sponsored subject’s. Ambush marketers could avoid passing off infringement claims by using

¹³⁰ Ibid (n 332).

¹³¹ Ibid at 881

¹³² *Arsenal Football club plc v Mathew Reed* [2001] RPC 922 para 24.

disclaimers in their advertising. According to the court, an adequate remedy for passing off infringement is for the ambushers to include a prominent disclaimer that their goods or services are not associated with or authorised by the sporting event.

Common field of activity is another difficulty of using the tort of passing off to prevent unauthorised association by third parties with a sponsored subject. The court in the UK requires the right owner to operate in the same field of activities as the defendant. The difficulties with the common field of activity hurdle started in the case of *McCulloch v Lewis A May Ltd*.¹³³ The claimant was a famous children's radio broadcaster under the name of 'Uncle Mac'. The defendant began selling buffed wheat under the name of 'Uncle Mac's Buffed Wheat' without permission of the BBC, Uncle Mac's employer at the time. The defendant designed its product in such a way to associate itself with the celebrity. It was argued that harmful inferences regarding the claimant would be drawn by the public. Therefore, the claimant sued for passing off. However, the court rejected the claim stating that there was no common field of activity between the plaintiff and the defendant.¹³⁴ The plaintiff was a presenter and not a cereal manufacturer, and as such the public would not be confused.¹³⁵ Therefore, the court held that the plaintiff did not have any relevant goodwill in respect of the manufacture of cereal.¹³⁶ This decision ignored the fact that it was highly likely that the public buying the cereal would simply assume that the claimant had consented for his image to be used.

¹³³ [1947] 2 All ER 845.

¹³⁴ *Ibid* at 551.

¹³⁵ *Ibid*.

¹³⁶ This approach was subsequently confirmed in the case of *Lyngstad v Anabas Products Ltd*, when the plaintiff sued to prevent the sale of T-shirt featuring pictures of pop group, ABBA. The court rejected the claim on the basis that there was no common field of activity between the group and the producer of the T-shirts. [1977] FSR 62 (Ch D),

This approach severely restricted the usefulness of the tort of passing off particularly in sports sector. However, the case of *Irvine v Talksport Ltd (Irvine)*¹³⁷ breathed a new life into the tort of passing off as a useful protection for sports rights owners. The defendant used a distorted image of the claimant, a famous racing driver, to endorse its product. The right to use the photograph had been legally obtained, but the defendant had doctored the photograph, removing the mobile phone that the claimant was holding and replacing it with a portable radio with the word ‘Talk Sport’.

The claimant contended that the distribution of brochure bearing that manipulated photograph of him falsely implied that he endorsed Talksport, and was an actionable passing off. The defendant rely on the lack of a common field of activity. The court, however, held in favour of the claimant in this passing off action and rejected the common field of activity requirement. During the case the presiding judge (Laddie J) suggested that established law in this field did not adequately reflect the changing nature of market practice and that the law of passing off should be seen to be responding to these changing social and economic circumstances. Laddie J referred to the Australian passing off case *Henderson v Radio Corporation Pty Ltd*,¹³⁸ and the English case of *Harrods v Harrodain School Ltd*,¹³⁹ (both of which rejected the common field of activity), stating:

‘[The] Law of passing off now is of greater width than as applied ... in *McCulloch v May*. If someone acquires a valuable reputation or goodwill, the law of passing off will protect it from unlicensed use by other parties. Such use will frequently be damaging in the direct sense that it will involve selling inferior goods or services under the guise that they are from the claimant. But the action is not restricted to protecting against that sort of damage. The law will vindicate the

¹³⁷ *Edmond Irvine Tidewell v Talksport Ltd* [2002] EWHC 367(Ch), [2002] 2 All ER 414.

¹³⁸ [1969] RPC 218.

¹³⁹ [1996] RPC 697.

claimant's exclusive right to the reputation or goodwill. It will not allow others to so use goodwill as to reduce, blur or diminish its exclusivity. It follows that it is not necessary to show that the claimant and the defendant share a common field of activity or that sales of products or services will be diminished either substantially or directly at least in the short term.'¹⁴⁰

The ruling of Irvine, then, was clearly proffering a change to existing legal practice where reputation and goodwill were threatened via false endorsement. Laddie J noted that this rule enables the law to respond with the constant state flux of the commercial market, stating that 'the law of passing off responds to changes in the nature of trade' and that the old cases may not reflect recent development.¹⁴¹

There was even more good news for rights owners with a 2007 High Court decision in the case of *Jules Rimet Cup Ltd v The Football Association Ltd*.¹⁴² In that case, the claimant sought to register the words 'WORLD CUP WILLIE', England's 1966 World Cup mascot, as trademarks. The defendant, the Football Association, sought to block the registration as a trade mark on the ground (among others¹⁴³) that use of that mark amounted to passing off.¹⁴⁴ The court noted that despite the fact that character had not been used by since 1970, the Football Association had not abandoned the goodwill in it.¹⁴⁵ Instead, the Football Association had reasonably decided to put World Cup Willie 'on the shelf' until it could be

¹⁴⁰ *Irvine v Talksport Ltd*, *ibid*, para 38.

¹⁴¹ *Ibid*, para 14. Similar cases have added weight to Laddie J's approach such as that involving the cricketer Ian Botham who took legal action against the company that owns Guinness for alleged breach of his image rights in advertisements in the national press. The advertisements, which appeared during the World Cup in 2002 in various national newspapers, tried to link the Guinness drink with Botham's most captivating cricket – the 1981 series against Australia. However, the case settled out of court in relation to a complaint against Guinness. See Mihir Bose, *Botham in test match with Guinness over his image*, *The Telegraph*, 13 August 2002.

¹⁴² [2007] EWHC 2376 (Ch)

¹⁴³ The Football Association sought to rely on copyright in drawings of 'World Cup Willie' to prevent registration of a similar drawing as a trade mark. However, the claim was rejected by the court on the ground that the copy was held not to reproduce a substantial part of the original. *Ibid* para 93.

¹⁴⁴ *Ibid* para 5.

¹⁴⁵ *Ibid* para 54.

used again in conjunction with a World Cup in the UK.¹⁴⁶ The court found that there remained sufficient goodwill in the World Cup Willie logo as a basis for an action in passing off.

It can be said that courts in the UK are generally reluctant to extend claims based upon intellectual property law to combat ambush marketing. The court's opinion confirmed that most common law remedies simply do not encompass common ambush marketing strategies. Common law recovery seems to be as an open invitation for companies to engage ambush marketing. Therefore, sports organisations should identify additional legal remedies to combat ambush marketing activities.

The limited protection that the court affords to the investment made by sports rights owners and corporate sponsors, and the consequent difficulties in protecting the sponsored subject against ambush marketers constitute a serious concern for sports rights owners and official sponsors in the UK. It is difficult, if not impossible, to guarantee delivery of absolute exclusive rights of association with a specific sponsored subject to an official sponsor through intellectual property rights. Therefore, sponsorship contracts must be nuanced around potential gaps and risks.

2-5) Conclusion

The fact that English law does not recognise exclusive sponsorship rights in the sporting events, does not mean that such rights are not legally protected. Instead, it means that such rights are protected by virtue of application in combination, including intellectual property law. This chapter analysed the ability of intellectual property law to protect exclusive rights against unauthorised third parties of ambush marketers.

¹⁴⁶ Ibid.

The chapter first examined the meaning of ambush marketing. The purpose of that examination is to indicate who are ambush marketers and how can they create a threat on the exclusive rights of official sponsors. Ambush marketing involves a situation where official sponsors of an event explore that their exclusive position with the sponsored subject of the event has been diminished by an action of a rival company. Such rival companies are either ambushers who are seeking to exploit relationships with participants in the event, or truly unrelated third parties. This was approved when the strategies ambush marketing have been explained. There are many situations that might fall within the description of ambush marketing. This includes the situations when the competitors of official sponsors exploit a relationship with participants or commercial partners of the event.

Therefore, the traditional model of sports sponsorship programme is based on the contractual control over the conduct of event participants and commercial partners, and the creation of various intellectual property rights in element of the event that can be protected from unauthorised exploitation by third parties. The contractual control of football associations and related enterprises over the conduct of their event participants and commercial partners will be analysed separately in three chapter.

This chapter however analysed the ability of intellectual property law to protect proprietary rights against truly unauthorised third parties. In fact intellectual property law provides a sufficient protection against such ambushers, in particular the tort of passing off. It can be seen that there have been decisions which provide sufficient support for a claimant who complains of unauthorised use of proprietary rights. However, the claimant in such decisions were able to provide evidence that the unauthorised use of the rights is related to his established field of activity. In the context of football, it is difficult for the owner of an exclusive rights to prove a common field of activity. Obviously, the ambushers' products are

unrelated to that of the football entity, and therefore can easily rely on the lack of a common field of activity.

However, the law of intellectual property is not designed to protect the sponsorship rights of the event. The development of ambush marketing strategies by unauthorised third parties requires regulations to recognise ambush marketing activities and discourage it. Although such ambush marketing attracted the attention of regulators to recognise ambush marketing activities,¹⁴⁷ the wide range of areas where ambush marketing can occur highlights the need for a comprehensive strategy by sports entities in order to counter ambush marketing activities.

¹⁴⁷ For example, the UK parliament had already passed one statute creating *sui generis* rights of association with the Olympic Games. It prevents the registration of a mark that incorporates the word 'Olympic' and the Olympic five rings as a trade mark unless the application is made by the consent of the British Olympic Association. See section 4(5) of Trade Mark Act 1994.

Chapter Three: The Regulation of Broadcasting Advertising and Its Implication on Sport Sponsorship in the United Kingdom

3-1) Introduction

The liberalisation of the European broadcasting markets in the late of 1980-90s combined with the development of technology (the emergence of digital and mobile television, media services in the internet, etc.) has led to a new demand for ‘killer content’ that is able to attract a massive number of viewers.¹ Football content unmistakably has the ability to meet this crowd. A majority of the public in the European Union are passionate about football and who spend a substantial amount of leisure time watching and following football matches.² Because of the development of media, football and other sports competitions can be brought to the public at home. Hence, the sport and the media have developed a mutually beneficial relationship over the years, where both industries are benefiting from each other. Media acts as a promotional and revenue medium for sport, which provides valuable content and audiences for media.³

At the time of writing, the English Premier League has announced that five of the seven packages for the 2019-2022 television broadcast rights have been sold to Sky Sport and BT Sport for £4.464 billion,⁴ making it the most significant sources of income for the Premier League clubs. For media operators, winning the right to broadcast such a popular league is a decisive source of content, because it will enable them to attract the attention of a large proportion of viewers and gives them credibility and profile in the marketplace.⁵

¹ Lefever and Rompuy, *Ensuring Access to Sports Content: 10 Years of EU Intervention; Time to Celebrate?* (2009) 2 *Journal of Media Law* at 243

² Commission of the European Communities, *White Paper on Sport*, (COM, 2007) 391 final at 2.

³ Lefever, *New Media and Sport: International Legal Aspects* (T.M.C Asser Press, 2012) at 7.

⁴ For further details, see www.premierleague.com.

⁵ For the same meaning, see Boyle and Haynes, *Power Play: Sport, the Media and Popular Culture*, 2nd ed, (Edenborough University Press, 2009) at 70.

Most importantly, extra media coverage of such a league via television can result in a significant exposure for the league and its clubs. Such exposure will provide the league and its clubs with a private advantage in the form of increased income from sponsorships.

Indeed, sponsorship fees have escalated dramatically with the ever increasing coverage of sporting events on television. According to Meenaghan, because of the evolution of the broadcasting market in the 1980s, the sponsorship market in the United Kingdom increased from £35 million in 1978 to £281 million in 1990.⁶ The sale of broadcasting rights is very important to sponsors, because it puts them in contact with a potentially massive group of customers. The greater the media coverage of the event, the better it is for official sponsors. Wide coverage of major sporting events offers multiple opportunities for lucrative sponsorship deals to market brands and develop business.

The sale of broadcasting rights, however, has created opportunities for brands to associate themselves with football associations and related enterprises. Purchasing broadcast sponsorship and advertising spots by competitors of official sponsors of the event are the most effective forms of ambush marketing.⁷ Licensed broadcasters of football competitions may themselves be sponsored, as there are companies who are interested in sponsoring programme sponsorship where the programme involves sporting coverage.⁸ Licensed broadcasters may also participate in a less direct form of ambush by selling advertising spots during event programming to the competitors of official sponsors.⁹

This chapter analysis the contractual relationship between rights owners and sports broadcasters in order to indicate the extent to which the competitors of official sponsors of

⁶ Meenaghan, *Current Development and Future Direction in Sponsorship*, (1998), *ibid* at 5.

⁷ Crompton, *Sponsorship Ambushing in Sports*, (2004) 9 *Manging Leisure* 2-3; McKelvey, and Grady, *Sponsorship program protection strategies for special sport events: Are event organizers outmanoeuvring ambush marketers*, (2008) 22 *Journal of Sport Management* 555; Meenaghan, *Ambush marketing: A threat to corporate sponsorship* (1996) 38(1) *Sloan Management Review* 106.

⁸ Broadcast sponsorship is regulated in the United Kingdom in Section 9 of Ofcom Broadcasting Act which will be discussed in details later in this chapter.

⁹ Commercial advertising is regulated by Ofcom's Code on the Scheduling of Television Advertising.

football associations and related enterprises are able to associate their brands with the sponsored subject through licenced broadcasters. This process is examined in the context of the rapid and dramatic changes in the media coverage of sporting events in the United Kingdom and considers its impact on exclusive sponsorship.

First, the chapter examines the meaning of sports broadcasting rights to indicate the ownership of such rights. Then it examines the relationship between the media and sports sponsorship by indicating the impact of broadcasting coverage on sponsorship programme value. Thereafter, it analysis the regulations relating to sponsorship and advertising on commercial broadcasting in the United Kingdom. The purpose of this analysis is to indicate the extent to which these regulations are able to protect the value of exclusive sponsorship rights, particularly with the introduction of the Ofcom Broadcasting Code as a regulation of media coverage of sporting events in the United Kingdom. The chapter, therefore, focuses on those rules which are most relevant to the commercial references in television programming. Finally, the chapter examines the issue of virtual advertising. This is the latest technological development in television and stadium advertising which refers to real-time video insertion into television broadcasts. There are legal ramifications associated with this technology. Therefore, it considers implications of such technology on the exclusive sponsorship rights.

3-2) What are Sports Broadcasting Rights?

In the case of *BBC v Talksport*¹⁰, Laddie J. described a sports broadcasting right as ‘the right to broadcast on television, live coverage of the matches from within the stadia where they are taking place’.¹¹ Clearly, the essence of the broadcasting right, particularly from the point of view of the broadcaster, is exclusivity for coverage of the sporting event. Accordingly, the event organiser will grant the broadcaster the right to publish the event to the exclusion of all

¹⁰ *British Broadcasting Corporation (BBC) v Talksport Ltd*, [2001] FSR 6.

¹¹ *Ibid* para 5.

other networks. As discussed earlier,¹² although English law recognises no stand-alone broadcasting or other proprietary rights in a sporting event per se, the laws of real property, contract and intellectual property can effectively be used to establish exclusive broadcasting rights. This is accomplished through:

3-2-1) Control over access to the Stadium

When the event organiser is able to control the stadiums at which football matches take place, it will be possible to control people who are permitted to access the stadiums. Controlling admission to the stadiums will allow the event organiser to grant a permission to a camera crew from its television licensee to access the stadium. This means that licenced broadcasters are the only ones who can create live visual signals of the match, forbidding access to other broadcasting teams.¹³

Controlling the stadium can be secured either by ownership of the freehold or leasehold interest in the land on which the stadium is situated. The stadium can also be controlled through a contract with the stadium owner who give the event organiser the exclusive right to occupy the stadium and to determine who has the right to access and on what condition.¹⁴

In the English Premier League, football clubs occupy their stadiums on which the league will take place and thus control access to the grounds. However, football clubs do not control the broadcasting rights to the Premier League. English Premier League clubs are required to provide the necessary rights, services and facilities at their stadia in order to enable the Premier League to fulfil its broadcasting contracts.¹⁵ English Premier League Clubs are

¹² See Section (1-7) of this research.

¹³ Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para I3.18.

¹⁴ For the ownership of football stadiums, see Section Six of Chapter Five of this research.

¹⁵ Rule D.3 of the Premier League Handbook 2018/19 states: ‘... Clubs shall provide such rights, facilities and services as are required to enable the League to fulfil its Commercial Contracts, UK Broadcasting Contracts, Overseas Broadcasting Contracts and Radio Contracts and shall not by any act or Omission infringe any exclusive rights granted thereunder or otherwise cause any breach thereof to occur.’ The Premier League Handbook 2018/19, published by the Football Association Premier League Limited. The last version of the Premier League Handbook is available online on: <https://www.premierleague.com/publications> accessed on 20 August 2018.

themselves prevented from granting any broadcasting rights to Premier League matches.¹⁶ The aim of such a restriction is to create a package of the broadcasting rights to all of the matches in the Premier League. The English Premier League sell its broadcasting rights on a central or collective basis and distribute the revenue to the member clubs in accordance with predetermined criteria.¹⁷

Broadcasting rights, under English law, consist of a licence to enter the stadium, film the proceedings, and transmit the resulting footage to the viewers.¹⁸ However, ticket holders nowadays are able to bring into the stadium their smart phones, tablets, cameras, etc. to send moving pictures and statistics to recipients outside the stadium. Thus, in order to ensure that its licenced broadcaster are the only ones producing footage of the match, the event organiser must make sure that ticket holders are not allowed to enter the stadium with recording equipment.¹⁹ This could be done through conditioning the admission ticket on acceptance of such restrictions.

In the case of *Victoria Park Racing*,²⁰ McTiernan. J. noted that an event organiser was entitled ‘to impose on the right it granted to any patron to enter the [stadium] that he would not communicate to anyone outside the [stadium] the knowledge about the racing which he got inside.’²¹ Therefore, the failure to observe that condition would be a breach of contract. A ticket is a licence from the event organiser to enter the stadium. When a spectator acts outside the terms and conditions of that licence, he/she will be trespassing at the stadium and could be ejected from the stadium.²²

¹⁶ Rule D.13 of the Premier League Handbook 2018/19, *ibid*.

¹⁷ Rule D.15 and D.16 of the Premier League Handbook 2018/19. *Ibid*.

¹⁸ Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para I1.34.

¹⁹ Care need to be taken to bring such terms and conditions to the attention of the ticket holder prior to the sale. This will be discussed with further details in Chapter Six of this research.

²⁰ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

²¹ *Ibid* 526.

²² Such terms and conditions will be discussed in more details in Chapter Six of this research.

3-2-2) Ownership of the Copyright in the Content Created.

Under English law, copyright subsist automatically in the sound recording, films, broadcast or cable programme created by the broadcast partner.²³ According to the CDPA 1988, the author, which is here the producer and the principle director, is the first owner of the copyright in an Audio-visual recording of a sporting event.²⁴ As a result, it would be the broadcaster and not the event organiser that has the right to authorise broadcasting of footage of the event across the range of territories. However, the CDPA 1988 specifically permits a present assignment of a future copyright.²⁵ Future copyright means ‘copyright which will or may come into existence in respect of a future work or class of works or on the occurrence of a future event’.²⁶ Such an assignment then takes effect as soon as the footage is created.²⁷ This copyright assignment is often included in the broadcast rights contract between the event organiser and the host broadcaster. In return for the assignment of copyright, the event organiser will grant the broadcaster a limited license to broadcast the match in its licensed territory.

For example, when Sky and BT Sport record and broadcast coverage of the English Premier League, the owner of the copyright in the footage created would be Sky and BT Sport (as the originator).²⁸ However, in the host broadcast contract that gives Sky and BT Sport the right to enter the stadiums to create the footage, the event organiser (the Premier League) takes an assignment of copyright in the footage from Sky and BT Sport. According to the contract, the Premier League licenses back to Sky and BT Sport the right to incorporate the footage into Sky and BT programming for broadcast during the term of the agreement.²⁹ Therefore, the

²³ CDPA 1988, s 5.

²⁴ CDPA 1988 s 9.

²⁵ CDPA 1988 s 91.

²⁶ CDPA 1988 s 91(2).

²⁷ Ibid.

²⁸ Where a copyright work is created by an employee during the course of his employment, his employer will be the first owner of the copyright: CDPA 1988, s 11(2).

²⁹ CDPA 1988 s 9.

Premier League is the first owner of the copyright. Copyright in the resulting broadcasts belongs to Sky and BT Sports as the party making the broadcast.

Accordingly, event organisers are the owners of any pictures or footage recorded by the broadcaster during the events. They can use such photographs and footages to promote their events. They can also authorise other parties to use such photographs and footages for promotional purposes. Licenced broadcasters also have the rights to use such photographs and footages to promote their programmes.

3-3) The Evolution of Football Broadcasting Rights in the United Kingdom

The relationship between sports and media goes back to first half of the 18th century, when printed media started reporting results of sporting events.³⁰ This provided sports organisations with extra publicity and made their events more popular. At the same time, it enabled the newspapers and magazines to secure new readers interested in the sports.³¹ This was followed by the emergence of radio broadcasting, with its new ability to attract higher number of audiences.³² Live radio coverage of sporting events and commentary combined to give something of its atmosphere to distant and dispersed audience.³³ The introduction of television, however, provided simultaneous sound, vision and motion that enabled audiences to watch sporting events from their home.³⁴ This helped to develop a stronger relationship between sport and media, as sports organisations started to earn additional income from the sale of broadcasting rights to media organisations.³⁵

³⁰ Rowe, *The Global Love-Match: Sport and Television*, (1996) 18 Media Culture and Society 568.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Baimbridge, Cameron and Dawson, *Satellite Television and the Demand for Football: A whole New Ball Game?* (1996) 43(3) Scottish Journal of Political Economy 318.

³⁵ Allan and Roy, *Does Television Crowd out Spectators? New Evidence from the Scottish Premier League*, (2008) 9(6) Journal of Sport Economics 593.

The United Kingdom market for sport broadcasting through television has developed considerably since the early 1980s.³⁶ The first live coverage of football league eventually started in 1983, when both the BBC and ITV agreed with the English football league to broadcast 20 matches in two seasons at cost of £5.2 million.³⁷ The number of live coverage matches has been restricted because football bodies took the view that televising football matches would significantly reduce personal attendance.³⁸ The general thought was that live coverage of football matches through television will make negative impacts on a club's traditional fan base.³⁹ However, live coverage of the English Premier League proved to be a fan builder, allowing millions of fans around the world to view sports competitions from their homes.⁴⁰

The ever increasing popularity of football made major football events receive extensive television coverage. The sale of broadcasting rights of the English Premier League, for example, has undergone important changes in the following years and continued to evolve at great pace. The English Football Association (FA) and the BSkyB satellite sports channel⁴¹ completed a contract in 1992 that brought them exclusive rights for live matches of the newly established FA Premier League.⁴² The access to the exclusive broadcasting rights was a key factor for the sports broadcasting market. This fact is further illustrated by the incredible rise in the value of the FA Premier League broadcasting rights. The broadcasting rights for the

³⁶ Baimbridge, Cameron and Dawson, (ibid) 318. Buraimo, Simmons and Szymanski, *English Football* (2006) 7(1) Journal of Sports and Economics 31 et seq.

³⁷ Buraimo, *the Demand for Sport Broadcasting* (2005) Handbook on the Economics of sports 103.

³⁸ Therefore, selling tickets represented the major revenue source for sports organisations in the past. Buraimo, *ibid* (n18) at 102-3.

³⁹ For example, using data from the 1993/94 English Premier League, Baimbridge, Cameron and Dawson, found that weekday attendances are reduced by approximately 15% when a game is shown on television. Baimbridge, Cameron and Dawson, *Satellite Television and the Demand for Football: A whole New Ball Game?* (1996) 43(3) Scottish Journal of Political Economy 318.

⁴⁰ Rowe, *The Global Love-Match: Sport and Television*, (1996) 18 Media Culture and Society 573.

⁴¹ In 1992, British satellite Broadcasting emerged with Sky to become BSkyB. For further details see Geey and James, *The Premier League- European commission Broadcasting Negotiations* (2006) 4(1) Entertainment and Sport Law Journal 2.

⁴² The FA Premier League was formed comprising 22 teams from the top division of the football league. The new form enabled the FA Premier League to attract greater broadcasting fees and the revenue was shared among the 22 teams instead of the former 92 teams. Buraimo, *the Demand for Sport Broadcasting* (2005) Handbook on the Economics of sports 104.

first English Premier League were acquired by BSkyB for £38 million per season for five seasons from 1992.⁴³ In 2007, the broadcasting rights price had risen to £569 million per season for just three years deal (involving Sky Sports and Setanta).⁴⁴ The total revenues generated by the Premier League in the latest round of tenders (2016-19) further increased to £1,712 billion per season for the domestic live broadcast rights (involving Sky Sport and BT).⁴⁵ In total, the Premier League is set to achieve revenues of nearly £8 billion for the sale of the domestic and international media rights.⁴⁶

There is no doubt that technological advances have increased the range of televised sports coverage. The rise in televised sports coverage further continued with the move towards digital broadcasting systems.⁴⁷ In the past, sports contents could only be delivered to the audiences by analogue terrestrial broadcasters.⁴⁸ The limited number of analogue terrestrial broadcasters meant that rights owners had to compete for limited broadcasting space. Consequently, the United Kingdom market for the league broadcasting rights was effectively limited to the BBC and ITV,⁴⁹ who dominated the market and audience choice.⁵⁰ The emergence of digital broadcasting technology, however, has opened up the broadcast market to a proliferation of new domestic and international entrants. The new broadcasting system allowed sports broadcasters to deliver the sporting content by terrestrial channels as well as cable, digital satellite, the internet, and mobile technology. This resulted in the removal of the

⁴³ Buraimo, Simmons and Szymanski, *English Football* (2006) 7(1) *Journal of Sports and Economics* 32.

⁴⁴ Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para I3.2.

⁴⁵ Both Sky Sport and BT will pay an average of more than £10 million per match, an increase of 70% on the last broadcasting deal (£6.5 million). Deloitte, *Revolution: Annual Revenue of Football Finance – Highlights*, Sports Business Group, June 2015 at 11. Available online on: <https://www2.deloitte.com/uk/en/pages/sports-business-group/articles/annual-review-of-football-finance.html>, accessed on 15 July 2016.

⁴⁶ *Ibid.*

⁴⁷ Griffith-Jones and Barr-Smith (consulting editor), *Law and the Business of Sport*, (Butterworths, London 1997) 190.

⁴⁸ Baimbridge, Cameron and Dawson, *Satellite Television and the Demand for Football: A whole New Ball Game?* (1996) 43(3) *Scottish Journal of Political Economy* 319.

⁴⁹ Both the BBC and ITV were the only broadcasters of the English Premier League from 1983 to 1992. *Ibid.*

⁵⁰ Although Channel Four became interested in sports broadcasting in the early 1990s, budgetary constraints and platform space mean that it could not compete for major sports like English football contests. Buraimo, *the Demand for Sport Broadcasting* (2005) *Handbook on the Economics of sports* 101.

terrestrial broadcaster's monopoly and increased competition within the market.⁵¹ Thus, English football clubs threatened to accept a more lucrative deal with the British Satellite Broadcasting (BSB).⁵² The dramatic changes in the delivery of sporting contents to the audience at home meant that the extent of sporting coverage has been the subject of a corresponding increase. Digital broadcasting technology resulted in the distribution of significantly increased and widened amount of live coverage of sporting contests.

The technological innovations in sports broadcasting have also impacted on consumer demand. The rise in televised sports coverage is constantly improving and the technology allows for increasingly effective interaction with the public. The quality and speed of content delivery are key factors in attracting a large number of viewers.⁵³ The technological advances in sports broadcasting give an impression to the viewers that they are live spectators in the stadium. In addition, broadcasters use additional features, such as different camera positions, freeze frames, replays with slow motion, close ups, etc. make viewers feel part of the event. The viewers might even get a better view of the game as such features help the viewers to see things that stadium audience usually miss.

Furthermore, the technological progress in the televised coverage of sporting events has a cultural effect on the way audience accesses and views information. The audiences are able now to watch sports contests at the time that they prefer. For instance, most broadcasters are now providing online platforms that allow audiences to benefit from contents at any time they prefer such as BBC iPlayer and Sky Go.⁵⁴ In addition, consumers can not only watch live sporting events on their television, but also via internet on personal computers and mobile devices such as tablets and smartphones. This is starkly demonstrated by the recent BBC and

⁵¹ Ibid at 103;

⁵² Geey and James, *The Premier League- European commission Broadcasting Negotiations* (2006) 4(1) Entertainment and Sport Law Journal 5.

⁵³ Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para I4.80.

⁵⁴ For more details on the growth of online platforms and its impact on consumer behaviour, see Kate Bulkley, *iPlayer came, we watched, it conquered*. The Guardian 30 Jun 2008 <http://www.katebulkley.com/page4-5-2.pdf> accessed on 15 May 2017.

ITV coverage of the World Cup 2018 in Russia. Such multiplatform coverage allows audience to watch sports content whenever they wish and wherever they are.

Additionally, the new technology in televised sports coverage has increased the distribution of sports programming. For instance, some football leagues, such as English Football League One or Two, were unavailable for television viewers in the past. Such vents were not available to the audiences in the past because they were not sufficiently attractive to broadcasters from an advertising income viewpoint.⁵⁵ However, such events are now available online on pay-per-view basis to potential viewers.

Equally, the proliferation of new platforms for the viewing of sports content provide greater flexibility in scheduling. Broadcasters are able now to cover football events on its primary linear broadcast channels, as well as online through applications or through their websites. For example, The FA Cup provides a large volume of action each season. Only eight matches per round are sufficiently attractive for licenced broadcasters to show in the early rounds.⁵⁶ Therefore, the FA has shown additional matches on its website and via its YouTube channel.⁵⁷ Such multiplatform coverage provides viewers with the opportunity to watch what they like and access coverage at any time they want.

The advances of technology in televised sports coverage are likely to continue to provide new opportunities for the distribution of sports programming. As sports broadcasters compete to find new ways to engage their audience, technology continues to provide further options in the way in which sports content is delivered. This is likely to result in the delivery of a greatly increased supply of both live and delayed coverage of sporting action.

⁵⁵ Buraimo, Simmons and Szymanski, *English Football* (2006) 7(1) *Journal of Sports and Economics* 38.

⁵⁶ FA Cup will be broadcast in the United Kingdom on BBC and BT Sport. See www.thefa.com.

⁵⁷ These matches are available on The FA' website www.thefa.com.

3-4) The importance of football broadcasting agreements for sponsorship arrangements.

A principal broadcasting contract will usually be between the owner of the event and the broadcaster. However, this contractual relationship also has a significant effect on the marketing activity which surrounds the event, principally sponsorship arrangements. We have already seen the importance of the commercial pulling power of major football events to the official sponsors.⁵⁸ Wide media coverage of such events is one of the most effective ways of exploiting such commercial pulling power, because it helps the sponsor to deliver its branding message to as many people as possible.⁵⁹ Therefore, the success of any sponsorship agreement depends extremely upon the extent of television coverage.

For example, the UEFA Champions League is the most watched annual sporting competition in the world, with a cumulative television audience of 3.7 billion per season.⁶⁰ The 2018 UEFA Champions League final in Kyiv between Liverpool FC and Real Madrid FC aired to over 200 countries and was watched by 350 million television viewers around the world.⁶¹ More than one billion fans tuned in to watch the final of the 2018 FIFA World Cup in Russia, with the competition reaching a global in-home television audience of 3.2 billion people around the world.⁶² An expected 300 million people around the world watched matches online on mobile devices,⁶³ in a sign that more and more fans are embracing new technology for sports content.

These viewing statistics have led to such football events becoming a major focus of corporate interest, reflecting increased opportunities for sponsorship. As companies seek to communicate their messages to multiple audiences, mass media has become the primary

⁵⁸ See Chapter Two of this research.

⁵⁹ Griffith-Jones and Barr-Smith (consulting editor), *Law and the Business of Sport*, (Butterworths, London 1997) 290

⁶⁰ See, *Adidas extends UEFA Champions League partnership*, [uefa.com](https://www.uefa.com/insideuefa/about-uefa/administration/marketing/news/newsid=2560120.html), on 22 May 2018 <https://www.uefa.com/insideuefa/about-uefa/administration/marketing/news/newsid=2560120.html> Accessed on 27 May 2018.

⁶¹ *Ibid.*

⁶² See www.fifa.com

⁶³ *Ibid.*

source to deliver their messages. The telecast of such major football events provide corporate sponsors with larger viewing numbers, ensuring that their message is seen by greater number of the public. The high media exposure given to the event title, advertising signs in stadiums and even clothing and equipment used by the football clubs has contributed to attract corporate sponsors.

In addition, the owners of a football event may look to require its licenced broadcaster to provide exposure to its official sponsors by showing the sponsor's logo or name onto the feed prior to broadcast. The broadcaster may also be required to refer to the name of the event by its full sponsored name, such as 'The Emirates FA Cup'. Where appropriate, commentators and others may also be required to make oral mention of the event by its sponsored title. Therefore, the sale of sports broadcasting rights has become significant revenue streams for football clubs and event organisers, not only for the high fees of broadcasting rights, but also for the additional income from corporate sponsors. This remarkable number of revenue streams has put the commercial partners (licenced broadcasters and sponsors) even in a powerful position to change essential aspects of the sport for their interests. Some rules even have been reformed and playing conditions revised so as to enhance broadcast coverage and attract sponsors fees. For example, to get the chance to broadcast as many football matches as possible, most English Premier League and FA Cup matches are held at a time of the day that would not appear to be in the best interests of the clubs. These matches are held early in the day so that they could be broadcast in overseas countries at prime time.⁶⁴ In addition, as part of the new broadcasting deal, Sky Sport has broadcast broadcast 10 Premier League

⁶⁴ See Cristopher Harris, *How the TV War between La Liga and FPL may impact you*. worldsoccertalk.com published on 28 September 2009, <<http://worldsoccertalk.com/2009/09/28/how-the-tv-war-between-la-liga-and-epl-may-impact-you/>> Accessed on 15 April 2016.

matches per season on Friday evening from the start of the 2017-18 season.⁶⁵ That fits viewers' habits and thus the sponsors' and broadcasters' performances.

The high public exposure given to the sponsored subject through such media coverage has opened up new commercial opportunities for commercial sponsors. Commercial logos, design and other material associated with the event will be featured in such a coverage. This media coverage puts the commercial sponsor in contact with the largest viewing numbers. Therefore, corporate sponsors may require the rights owner to secure its broadcasting arrangements prior to buying sponsorship to the event. The broadcasting arrangement may include an obligation upon the licensed broadcaster to deliver detailed audience viewing figures for its broadcasts. The event organiser will use these figures to attract corporate sponsors to the event.

The question of broadcast coverage thus is likely to be the key ingredient when negotiating sponsorship contracts. In general, the sponsor will want to ensure the owner of the event imposed obligations on the broadcaster, designed to achieve a particular level and quality of coverage. The sponsor will want to ensure that the event is transmitted to the public in a structured way, at popular times and for sensible periods of time. Therefore, the sponsor should consider the type of the coverage. In the United Kingdom, there are three different types of channels⁶⁶: i) free to air channels, such as the BBC, which allow people to view the content without requiring a subscription; ii) Free to air commercial channels, such as ITV, which have advertising breaks, that gives the sponsor the opportunity to break bumpers (i.e. five seconds going into and out of advertising breaks) and billboards (i.e. the 15 seconds at the start and end of the programming)⁶⁷ around the programming and; iii) Subscription channels, such as Sky Sport and BT Sport, which tend to have several hours to fill, and

⁶⁵ For more information see, *Premier League TV Rights: Sky and BT Pay £5.1 billion for Life Games*, bbc.co.uk published on 10 February 2011, <<http://www.bbc.co.uk/sport/football/31357409>> accessed on 15 April 2016.

⁶⁶ Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para I4.82

⁶⁷ See Rule 9.20 of Ofcom Broadcasting Code (s 154 of its Guidance notes). This rule will be discussed in more details below in this chapter.

therefore may be willing to commit broadcasting more hours of coverage of the event than other broadcasters. Generally, channels like BBC and ITV have higher viewing figures than pay channels like Sky and BT Sport and the sponsor's branding is therefore likely to be seen by more people. For example, the viewing figures of the UEFA Champions League decreased dramatically in 2015-16 season because the broadcasting rights moved from ITV to BT Sport, attracting an average peak audience of less than 200,000 compared to the average peak of 4.4 million who watched the event free-to-air on ITV.⁶⁸ Accordingly, it is customary for corporate sponsors to consider the identity of the television broadcaster when entering into sponsorship agreements with the owner of the event. Identifying the broadcaster will enable the corporate sponsor to determine whether the proposed sponsorship is satisfactory.

In addition to the quality of the televised coverage of the competition, the sponsor should consider the extent and the length of that coverage. This is well illustrated in the case of *Northern and Shell v Champion Children (Northern and Shell)*,⁶⁹ when a dispute occurred over a warranty made to a sponsor about the timing of a broadcast of the sponsored event.⁷⁰ The claimant, the publisher of OK! Magazine, agreed to pay £160,000 to be the official sponsor of the Champion Children Awards.⁷¹ The awards were initially intended to be presented by HRH Diana, Princess of Wales, and the event was to be broadcast on the BBC on a Sunday afternoon with anticipated audience of six million viewers.⁷² The Princess of Wales turned out to be unavailable and was replaced by HRH the Duchess of Kent.⁷³ It was

⁶⁸ For more details, see Ben Rumsby, *UEFA Concerned by BT Sport's dismal Champions League viewing figures*, thetelegraph.co.uk published on 10 February 2016, <<http://www.telegraph.co.uk/football/2016/02/12/uefa-concerned-by-bt-sports-dismal-champions-league-viewing-figu/>>, Accessed on 22 April 2016.

⁶⁹ *Northern and Shell plc v Champion Children of the year awards Ltd* [2001] All ER 407.

⁷⁰ Although the case is not related to football or any sporting activity, it illustrates the importance of the timing and the length of the coverage for corporate sponsors.

⁷¹ [2001] All ER 407, *ibid*, para 3.

⁷² *Ibid* para 10.

⁷³ *Ibid* para 4.

acknowledged that there might be less public interest and a new sponsorship contract was negotiated under which OK! agreed to pay a reduced contribution of £90,000.⁷⁴

In the new sponsorship contract, there was no reference to estimated television viewing figures. Instead, clause 6 of the new sponsorship contract stated:

‘In the event that the Event does not proceed for any reason or that it is not broadcast by the BBC at a time and date acceptable to the Sponsor in its reasonable discretion, all monies paid under this Agreement by the Sponsor shall be repaid upon demand by the Sponsor, and no further sums shall be due’.⁷⁵

The programme was broadcast on Monday with disappointing figures of only 710,000 viewers.⁷⁶ OK! was not satisfied with the viewing figures and started proceedings against Champion for the return of the first £45,000 sponsorship instalment.⁷⁷ OK!’s grounds for action included that the scheduling for the broadcast did not live up to the defendant’s pre-contractual proposal that the show would be broadcast at peak time and attract audience of at least six million viewers. The Court of Appeal held that clause six of the new sponsorship contract did not mention audience figures and that OK! had got significant benefits from its sponsorship agreement.⁷⁸ OK! received free publicity from the BBC on the back of an event viewed by a large number of audiences.

Accordingly, a consideration should be given as to whether or not the broadcasting contract should include amongst its parties certain other participants, such as corporate sponsors. The case of *Northern and Shell* shows that viewing figures of major events through television is fundamental to sponsorship value. It illustrates the importance of the timing, frequency and

⁷⁴ Ibid para 25

⁷⁵ Ibid para 7.

⁷⁶ Ibid para 16.

⁷⁷ Ibid para 11.

⁷⁸ Ibid para 26 and 27.

length of television coverage to the official sponsors. The sponsor should ensure that the event organiser has secured a minimum commitment from the broadcaster in relation to the channel on which the event will be broadcast, the time of broadcast, and for how long and how often, in order to maximise the value of sponsorship programme. Therefore, if the sponsorship agreement is being given on the basis that the event will be broadcast on a particular channel and at a particular time, the sponsor should ensure that this is specified in the sponsorship contract.

3-5) Conflicting Sponsorship Rights in Broadcasting Arrangements

We have seen that broadcasting rights have contributed significantly to increase the popularity of football competitions. The success of most broadcasting programme is highly dependent on sufficient audience size to produce adequate financial resources. Therefore, viewing figures are a key indicator for the popularity of any broadcaster. Buying broadcasting rights of a major football event is fundamental for many broadcasters for increasing the viewing figures.⁷⁹ Where these figures are high, it is likely to attract more commercial brands. Indeed, the rise in viewing figures enables the broadcaster to attract lucrative commercial brands through the sale of commercial references that feature within television programming. Commercial references is defined as ‘any visual or audio reference within programming to a product, service or trade mark (whether related to commercial or non-commercial organisation)’.⁸⁰ Licensed broadcasters, in order to boost their own advertising revenue, will have the rights to sell broadcast sponsorship rights for their programmes covering the event, and the rights to sell advertising slots during breaks. Purchasing such commercial references

⁷⁹ For example, the viewing figures of BT Sport channels boosted because of its broadcasting agreement with the UEFA. The channel announced that more than 12 million viewers watched its coverage of the Champions League and Europe League finals in 2016. Ben Rumsby, *UEFA Concerned by BT Sport's dismal Champions League viewing figures*, [thetelegraph.co.uk](http://www.telegraph.co.uk) published on 10 February 2016, <<http://www.telegraph.co.uk/football/2016/02/12/uefa-concerned-by-bt-sports-dismal-champions-league-viewing-figu/>>, accessed on 25 April 2016.

⁸⁰ See section Nine of Ofcom Broadcasting Code (the Broadcasting Code).

during a major football competition is a key for distributing companies' branding messages to the largest viewing number of people.

However, such commercial references may determine the value of the exclusive rights of the official sponsor of the event. Licensed broadcasters may sell such commercial references to a different (potentially even a rival) sponsor or advertiser to that of the event organiser. This will allow competitor brands of official sponsors to associate their brands with not only the licensed broadcaster, but also the sponsored subject of the event. This is particularly true when the broadcaster has the right to use the name and logo of the event in its transmissions of programming. The broadcaster may also have the right to use the names and logos of the clubs and players who participated in the competition in its promotional materials. This means the broadcaster can pass such rights to its commercial partners as well. This will certainly decrease the value of any exclusive sponsorship programme of the event. The impact of broadcasters' commercial references on the exclusive sponsorship programme of football competitions will be considered in more detail below.

3-5-1) Broadcast Sponsorship

Broadcast sponsorship has grown recently as commercial broadcasters look at different ways to gain a return on their investment. Broadcast sponsorship occurs when the broadcaster offers to third parties the right to be a sponsor of its programme.⁸¹ This does not involve sponsorship of the sporting event itself, but rather of the licensed broadcaster of the event.⁸² The sponsor in broadcast sponsorship will enter into a separate arrangement with the licenced broadcaster and may therefore be different from the official sponsor of the event. For instance, Nissan is the official sponsor of Sky Sports' transmissions of the FA Premier League.⁸³ In effect such a sponsorship is a form of advertising that enables companies to

⁸¹ See Rule 9.14 of the Broadcasting Code.

⁸² Ibid.

⁸³ www.skysports.com

associate their brands with sports programming more closely than by merely purchasing airtime in scheduled advertising spots. It is characterised by access to brake bumpers (ie the five seconds coming in and out of advertising breaks) and billboards (ie the 15 seconds at the start and end of the programme).⁸⁴ This means that Nissan's brand and advertising will appear for 15 seconds at the start and end of the FA Premier League Programme on Sky, and five seconds going in and out of each advertising break during the programme.⁸⁵

The potential of conflict here is obvious. For example, Hyundai was the official sponsor in the car industry category for the recent FIFA World Cup in Russia.⁸⁶ Television coverage in the United Kingdom was split between the BBC and ITV. The BBC is not permitted to carry advertising or sponsorship on its programmes because it is financed by television licence fee paid by households.⁸⁷ However, ITV entered into a sponsorship agreement with Volkswagen, allowing the car company to sponsor the channel's transmission of the tournament.⁸⁸ Volkswagen, then is not paying the rights fee to the FIFA, but to ITV channel which may cost much less than sponsoring the tournament itself. As a result, Hyundai may find a competitor within the same product category has achieved broadcasting rights and, in some cases, greater profile than Hyundai itself achieved, despite its official status with the FIFA World Cup. From Hyundai's point of view, these arrangements encroach on its exclusive rights with the FIFA, and as a result may diminish the overall value of their exclusive sponsorship rights. The general public probably does not recognise the distinction between the event sponsor (Hyundai) and the broadcast sponsor (Volkswagen). With millions of

⁸⁴ See Rule 9.20 of Ofcom Broadcasting Code (para 154 of the Guidance notes).

⁸⁵ Ibid.

⁸⁶ See www.fifa.com.

⁸⁷ The BBC is prevented from selling broadcast sponsorship rights to its programmes because the public should not reason to suspect that the BBC's integrity has been compromised by the influence of a sponsor. However, the BBC is allowed to broadcast coverage of sponsored events under some editorial principles including: The BBC aims to credit fairly the enabling role of sponsors; it must not promote a sponsor in its coverage; its coverage should not include a sponsor in the title of a BBC programme; it must not accept any money from sponsors or organisers towards the cost of any element of its broadcast coverage of an event; and sponsored event should be genuinely free standing and not created simply to attract broadcast coverage. See s4.56 of BBC's Fair Trading Guidelines and s16.4.44 of BBC's Editorial Guidelines.

⁸⁸ See www.itvmedia.co.uk.

audiences watching the football World Cup on television, it is unlikely many will notice who the official sponsor of the event is and who is not.

As discussed earlier,⁸⁹ one purpose of a broadcasting contract is to maximise the goodwill of the event and of those with whom the event is legitimately associated, principally the event sponsors. However, this promotional obligation may be undermined when the licensed broadcaster allows a competitor of the official sponsor of the event to associate its brand with the event. It is the event organiser's obligation to prevent such rival companies ambushing the event. Thus, the broadcasting contract should be astute to include appropriate provisions to eliminate such opportunities. Specific terms and conditions could be designed to prevent avoidable conflicts of interest.⁹⁰ Event organisers sometimes try to obtain broadcast sponsorship rights through their broadcast agreements so that they are then able to reserve these rights into their own official sponsors. For example, UEFA retains all broadcast sponsorship rights for the UEFA Champions League, controlling all advertising time during matches and allotting the time to its sponsors.⁹¹ As a result, official sponsors of the event are not only protected from potential ambush campaigns, but are also getting further exposure for their brands.

Where event organisers are unable to pass broadcast sponsorship rights onto their own sponsors, they may look to protect their own sponsors from being ambushed by the broadcast sponsor by including requirements that their sponsors are given the first option to negotiate for the broadcast sponsorship rights. Accordingly, the licensed broadcaster must offer the official sponsor of the event an exclusive right of first negotiation to acquire the broadcast sponsorship rights during a specified period. However, the high cost of securing sponsorship

⁸⁹ See Section (4) of this chapter.

⁹⁰ The IOC, in negotiating television broadcast rights with media partners, restricts the use of the term broadcast sponsor within their broadcast deal. See Chadwick and Burton, *The Evolving Sophistication of Ambush Marketing: A Typology of Strategies*, (2011) 53(6) *Thunderbird International Business Review* 713.

⁹¹ See Rule F.1.6 of 'Regulations of the UEFA Champions League 2015-18 Cycle'. The Regulations are available online on www.uefa.com.

rights may leave the official sponsor of the event with few funds to promote their status with the broadcaster. With effect from the end of the period, the licensed broadcaster will be able to sell the broadcast sponsorship rights to third parties. This means that if official sponsors of the event fail to secure broadcast sponsorship rights, they would not be able to prevent rival brands from winning them.

However, the broadcasting contract could be used to further such ends. The broadcast contract may include another provision stating that no broadcast sponsorship opportunities should be offered or awarded to particular product or service categories. If the official sponsors of the event do not take up the offer to sponsor the broadcast, the broadcast sponsor appointed by the broadcaster may not be a rival company of any of the event sponsors. In the above mentioned example, ITV should offer Hyundai (and any other official sponsor of the World Cup in Russia) an exclusive right of first negotiation to acquire the broadcast sponsorship rights during specific period. With effect from the end of the period referred to above, ITV should be entitled to sell any remaining broadcast sponsorship rights to third parties provided that the broadcaster undertakes that it will not sell any such remaining broadcast sponsorship rights to a rival company (e.g. Volkswagen). In all cases, ITV should ensure that the third party is clearly associated with its transmissions of programmes and not with the FIFA, the World Cup or any team or player participating in the World Cup.⁹²

3-5-2) Simultaneous advertising in commercial breaks

Commercial television generally incorporates advertising spots during sporting coverage. In general, the income generated for broadcasters through traditional advertising have been at

⁹² See Rule 9.19 of the Broadcasting Code. This condition is explained in detail in Section Six of this chapter.

risk because of the emergence of Digital Video Recorder technology such as Sky+.⁹³ Such a technology enables television viewers to easily skip past television advertisements.⁹⁴ Thus, advertising during live sports programming becomes even more attractive to advertisers on the basis that not only the programming can still attract mass audiences but also it actually requires transmission and viewing on a scheduled linear basis. The risk of viewers avoiding advertising is also mitigated online by the inclusion of advertising that is shown prior to the display of the relevant requested clip or programme (commonly known as ‘pre-roll’) which cannot be skipped.⁹⁵

Despite the fact that companies prefer to spend their communication money on the sponsorship, purchasing advertising spots in commercial breaks prior to and during football event broadcasts is essential for official sponsors to promote their status. Most importantly, purchasing such advertising spots by official sponsors of the event is crucial to prevent their competitors from associating their brands with the sponsored subject. Extensive televised advertising by a competitor throughout the period of the event could harm the official sponsor’s exclusive rights because viewers may associate the event with advertisers rather than with official sponsors. For example, in the 2012 Summer Olympic Games in London, Nike launched a global television advertising campaign featuring athletes competing in places around the world.⁹⁶ It was assumed that Nike achieved a slightly higher awareness rating for the Olympic Games than its competitor Adidas, the official sponsor of the event.⁹⁷

⁹³ Digital Video Recorder, also known as a Personal Video Recorder (PVR). For further details of the impact of this technology on television advertising see Wilbur, *How the digital video recorder (DVR) changes traditional television advertising* (2008) 37(1) *Journal of Advertising* 143.

⁹⁴ *Ibid.*

⁹⁵ Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) I3.104.

⁹⁶ See Mark Sweney, *Olympics 2012: Nike Plots Ambush ad campaign*, the Guardian, 25 July 2012, <https://www.theguardian.com/media/2012/jul/25/olympics-2012-nike-ambush-ad>, Access on 22 Jun 2016.

⁹⁷ In his attempt to create a clear association between Nike and the event, Nike brand chief Greg Hoffman said ‘the idea is to simply inspire and energise everyday athletes everywhere and to celebrate their achievements, participate and enjoy the thrill of achieving in sport at their own level’. *Ibid.*

Despite the fact that competitor's action may diminish the value of the sponsor's exclusive rights, exploitation of broadcasting advertising spots does not breach any legislation. Purchasing simultaneous advertising slots by competitors of official sponsors is a routine commercial behaviour. Yet, the mere existence of these advertising spots is likely to impact on the level of exclusivity provided in sponsorship contracts. Such interruptions can sometimes become intrusive and objectionable. For example, although Heineken was one of the official sponsors of the World Cup in Russia,⁹⁸ Budweiser run an extensive advertising campaign on ITV during the event.⁹⁹ The broadcasting contract ought to make express provision for such advertising, for example, a specific timetable might be agreed. Alternatively, rules may be laid down both as to the length of any commercial breaks and as to the occasions when such breaks may be taken.¹⁰⁰

Again, it might be appropriate to afford official sponsors of the event some kind of priority in bidding for such advertising spots. The broadcasting agreement may include provisions binding the broadcaster to sell the advertising breaks to the official sponsor. This will prevent rival companies from purchasing such spots. However, official sponsors, who have already paid a big sponsorship fee, could be unable to purchase the total advertising time inventory. Licensed broadcasters usually sell the advertising spots during football programmes for a higher rate than during other programmes. For example, a 30 second advertisement during the half time break of the semi-final match between England and Croatia costed a brand between £400,000 and £500,000.¹⁰¹ It is often the case that competitors of official sponsors have the economic ability to purchase more broadcast advertising spots because they already

⁹⁸ See www.fifa.com

⁹⁹ One advert by Budweiser for the FIFA World Cup in Russia, for example, featured a load of drones searching the globe to give football fans a bud to drink as they cheer on their teams. The advertisement is available online on: <https://www.youtube.com/watch?v=HNz0D3PR0yM>

¹⁰⁰ The rules that regulate advertising spots in the United Kingdom is considered more fully in Section Six below.

¹⁰¹ John McCarthy, *why brands will spend £500k a spot during England's historical World Cup Semi on ITV*, 10 July 2018, <<https://www.thedrum.com/news/2018/07/10/why-brands-will-spend-500k-spot-during-englands-historic-world-cup-semi-itv>>, accessed on 15 July 2018.

have not spent their budget on sponsorship.¹⁰² So even if the official sponsors of the event, for example, purchase 15%-25% of the total advertising spot inventory, it would leave between 75% and 85% of the credits available for its competitors.

3-6) The Regulation of Sports Broadcasting in the United Kingdom

European Union Law has an impact on broadcasting in the United Kingdom as a member of the European Union. Under European Union Law, Member States laws on television broadcasting must comply with the previous Television without Frontiers Directive (TWF Directive¹⁰³). The Directive, which was enacted in 1989, aimed to harmonise television broadcasting laws throughout the European Union, including requirements relating to the protection of children, the encouragement of production of European works and, importantly, rules on advertising and sponsorship.¹⁰⁴

The TWF Directive dealt only with traditional television services. However, the vast advance in technology since the first implementation of the TWF Directive made it clear that it needs to be updated in order to provide harmonised regulations as to all forms of audio-visual services. Therefore, a new directive Audiovisual Media Services Directive (AVMS Directive¹⁰⁵) came into force on 19 December 2007 with a requirement for Member States to implement it within two years.¹⁰⁶ The codified version of the AVMS Directive came into force on 5 May 2010, replacing the TWF Directive and its amendments.¹⁰⁷

¹⁰² One experienced sponsor commented ‘presumably, since your competitors have not already spent many millions of dollars to be the official sponsor, they will have the cash to buy in. And the truth is, the average people on his or her couch lazily watching these competing commercials is unlikely to notice who is official and who is not’. Crompton, *Sponsorship Ambushing in Sports*, (2004) 9 *Manging Leisure* 3.

¹⁰³ Directive 89/552 EEC amended by Directive 97/36/EC and 2007/65/EC.

¹⁰⁴ Ibid.

¹⁰⁵ Directive 2010/13/EU.

¹⁰⁶ Ibid. the AVMS Directive aims to lay down common standards in television broadcasting and applies across all Member States so as to create a true single market in television broadcasting. Ibid.

¹⁰⁷ Ibid.

In the United Kingdom, Commercial broadcasting is regulated by Ofcom, which was established under the provisions of the Office of Communication Act 2002. Ofcom's powers were formally vested in December 2003.¹⁰⁸ The current Ofcom Broadcasting Code came into effect on the 3rd of April 2017.¹⁰⁹ Ofcom's formation was part of a major reform of communications regulation in the United Kingdom, encompassed in the Communication Act 2003.¹¹⁰ It replaced a large number of regulatory bodies which had responsibility broadcasting regulation.¹¹¹ Ofcom's responsibilities come under the Department of Trade and Industry and the Department of Culture, Media and Sport, which is most relevant to broadcasting. Ofcom operates under a number of Acts of Parliament and other legislation, and the most relevant legislation for broadcasting is the Communication Act 2003, the Broadcasting Acts 1990 and the Broadcasting Act 1996.¹¹² Ofcom is also responsible for some broadcasting activities of the BBC.

All broadcasters in the United Kingdom¹¹³ must have an appropriate licence by Ofcom in order to operate broadcasting services. They are all required to comply with the Ofcom Broadcasting Code (the Broadcasting Code) drawn by Ofcom.¹¹⁴ The Broadcasting Code sets the required standards for television and radio programmes and covers issues relating to sponsorship and advertising including any programme sponsored for promoting purposes. The Broadcasting Code with the most relevance to sports broadcasting is section Nine

¹⁰⁸ Ibid.

¹⁰⁹ The last version of Ofcom Broadcasting Code is available on Ofcom's website (www.ofcom.org.uk).

¹¹⁰ Directive 2010/13/EU.

¹¹¹ Ofcom replaced the previous various regulators, namely the Broadcasting Standards Commissions (BSC), the Independent Television Commission (ITC) and the Radio Authority (RA), which regulated the exploitation of media rights. For further details, see The Consultation on the Proposed Ofcom Broadcasting Code, published on 14 July 2004 section 1 para 2.

¹¹² See Ofcom's Statutory Duties and Regulatory Principles, www.ofcom.org.uk

¹¹³ Except the BBC and S4C who are funded by the licence fee or grant in aid as they do not carry advertising. The legal basis for the BBC's existence are its Royal Charter and the Agreement with Parliament, which are renewed every ten years. The Agreement specifies that the BBC must do all it can to ensure that controversial subjects are treated with due accuracy and due impartiality in all relevant output. These aspects of its output are regulated by the BBC Trust, the BBC governing body. See www.bbc.co.uk

¹¹⁴ Full-length versions of the Code can be found on Ofcom's website: www.ofcom.com

(Commercial References in Television Programming) of the Broadcasting Code.¹¹⁵ As with the other sections of the Broadcasting Code, it begins with an over-arching principle, and then sets out a series of specific rules that are intended to implement the principle. The rules are further supplemented by Guidance intended to assist broadcasters in interpreting and applying the Broadcasting Code.¹¹⁶

Section Nine of the Broadcasting Code sets out the rules for sponsorship and other commercial references that feature within television programming in the UK.¹¹⁷ The section provides regulations relating to forbidden advertisers and the content of the sponsor's credit (break bumpers and billboards). The purpose of the section is to prevent unsuitable broadcast sponsorship with particular reference to three principles:

- Editorial independence: to ensure that the broadcasters maintain editorial control over sponsored content and that programmes are not distorted for commercial purposes.
- Transparency: to ensure sponsorship arrangements are apparent;
- Distinction: to ensure that there is a clear division between editorial content and advertising.¹¹⁸

Generally, the section grants licensed broadcasters the right to sell broadcast sponsorships for their programmes when covering sporting events. The section defines sponsored programming as any 'programming that has had some or all of its costs met by a sponsor.'¹¹⁹

¹¹⁵ The BBC, S4C and S4C Digital are not Ofcom licensees and, therefore, not subject to Section Nine of the Broadcasting Code. However, they are subject to legislation on listed events including the FIFA World Cup Final Tournament, The FA Cup Final, The Scottish FA Cup Final (in Scotland) and the European Football Champions Final Tournament. For more details on the Ofcom's listed events, see Rule 1.3 of 'Code on Sports and Other Listed and Designated Events' published by the Independent Television Commission (ITC) and now adapted by Ofcom.

¹¹⁶ See the Guidance Notes (Issue Three 20 May 2016) issued by Ofcom in relation to Section Nine, *Commercial References in Television Programming*, of the Broadcasting Code. (the Guidance Notes).

¹¹⁷ The BBC, S4C and S4C Digital are not Ofcom licensees and therefore not subject to Section Nine of the Broadcasting Code. However, they are subject to the legislation on listed sporting events and, thus, the regulations on listed events as set out in the relevant provisions of the Broadcasting Code. For more details on the Ofcom's listed sporting events see 'Code on Sports and Other Listed and Designated Events'. available online on ofcom.org.uk.

¹¹⁸ See para 1.7 'The Principles Underpinning Section Nine' of the Guidance Notes.

¹¹⁹ See the Broadcasting Code, p 58.

This includes any sporting programme¹²⁰ funded by a corporate sponsor with a view to promoting its own name, image, activities or any other direct or indirect interest. However, the Broadcasting Code imposes certain constraints consistent with the need to comply with the principles above.¹²¹ Rule 9.16 provides a regulation relating to prohibited sponsors, such as political brands, tobacco brands¹²², prescription only medicines, guns and obscene materials.¹²³ This provision has run in parallel to growing criticism to sports bodies and clubs associating themselves with products that are said to be contrary to the ethos of sport. Obviously such a rule does not provide a clear benefit to the official sponsor of sporting events because they will be also prohibited from sponsoring sporting events if they produce such product or service categories.¹²⁴

The Broadcasting Code also prohibits news and affair programmes from being sponsored by corporate sponsors.¹²⁵ A news programme is a programme (or a news flash) that includes local, national or international news.¹²⁶ This, however, does not include sports reports that accompany news programmes, because such content does not comprise material that constitutes news or current affairs.¹²⁷ This means that corporate sponsors are able to associate their brand with such short specialist reports. Although such short specialised reports display after the matches, sponsoring such sport reports by competitors of official sponsors may provide them an opportunity to associate their brands with the sporting event. For example, the broadcaster through such short reports will mention the event and may display highlights

¹²⁰ Sports programmes may include coverage of sporting events and programmes involving discussion and analysis of sports. See para 1.65 of the Guidance Notes.

¹²¹ In all cases broadcasters are responsible for the programmes they transmit. para 1.11 of the Guidance Notes.

¹²² The Tobacco Advertising and Promotion Act 2002 also bans tobacco sponsorship and advertising throughout the United Kingdom.

¹²³ See para 1.139 of the Guidance Notes.

¹²⁴ For more details on prohibited advertisers in the United Kingdom, see generally the Broadcast Committee of Advertising Practice Code, the UK Code of Broadcast Advertising.

¹²⁵ Rule 9.15 of the Broadcasting Code states that ‘News and current affairs programmes must not be sponsored’. This prohibition on the sponsorship of news and current affairs is a direct requirement of Article 10(4) of the AVMS Directive.

¹²⁶ See para 1.72 of the Guidance Notes.

¹²⁷ See para 1.138 of the Guidance Notes.

and goals of the matches. The existence of a competitor's brand with such reports would be liable to confuse the public perception of who has a legitimate association with the event in question.

The Broadcasting Code also puts restrictions on the format and content of the sponsor's credit (breakbumpers and billboards). According to the Broadcasting Code, the purpose of such credits should be to notify viewers that the relevant programme is sponsored and to identify the sponsor.¹²⁸ In order to ensure that sponsorship arrangements are transparent, sponsorship must be clearly identified as such by reference to the name or logo of the sponsor.¹²⁹ Different creative messages can be used by licenced broadcasters to identify their sponsorship arrangements, such as 'this programme is sponsored by...', or 'brought to you by...'. To help ensure transparency, such credits must be broadcast at the beginning and/or end of the programme.¹³⁰ Nevertheless, care should be taken to avoid any ambiguous statement that may lead to confuse viewers over the nature and purpose of the sponsorship credits.¹³¹ Therefore, viewers should be able to distinguish between programme content and sponsorship credits.¹³² In the programme, there must be no promotional reference to the sponsor, its name, trademark, image activity or product or to any of its other direct or indirect interests. Licenced broadcasters must also maintain a distinction between advertising and sponsorship credits.¹³³ Sponsorship credits must not contain advertising messages or calls of action to viewers, such as messages that directly encourage the audience to buy products or that directly invite the viewers to contact the broadcaster's sponsor.¹³⁴ In other words, sponsorship

¹²⁸ See Rule 9.19 of the Broadcasting Code.

¹²⁹ See Rule 9.19(a) of the Broadcasting Code.

¹³⁰ Rule 9.20 Of the Broadcasting Code.

¹³¹ Para 1.151 of the Guidance Notes.

¹³² Rule 9.21 of the Broadcasting Code.

¹³³ Rule 9.4 of the Broadcasting Code

¹³⁴ Article 10 (1)(b) of the AVMS Directive states that sponsored programmes 'must not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services.' para 1.162 of the Guidance Notes.

credits should fulfil the role of identifying the sponsorship arrangement and not be capable of being confused with advertising by concentrating on the goods or services of the sponsor.

It can be said that this rule provides official sponsors of sporting events appropriate protection against ambush marketers, in particular when the latter are not able to promote their products or services through licenced broadcasters. Such a rule is also essential because it is supposed to help the viewer to understand that the sponsorship credits do not involve the sponsorship of the event itself but rather of the broadcaster of the event. However, the appearance of a competitor's name or logo during live football coverage through such sponsorship credits is enough to decrease the commercial value of exclusive sponsorship rights.

Furthermore, although the Broadcasting Code does not specify limits as to the permitted number of sponsorship credits, it is likely to take into account the size, frequency and duration of those credits when applying the rule.¹³⁵ Therefore, no undue prominence should be given to sponsorship credits.¹³⁶ Sponsorship credits will not be unduly prominent when they are brief and static.¹³⁷ In addition the Broadcasting Code states that broadcasters of sporting events should ideally schedule on-screen commercial credits to be shown alongside match statistics in a graphic overlay, rather than during play.¹³⁸

Obviously, such rules do not apply on the official sponsors of the event whose their brands appear frequently during the coverage. According to the Broadcasting Code, references to branded products that appear within sporting coverage are less likely to constitute undue prominence and thereby infringe the Broadcasting Code.¹³⁹ The broadcasting code states that sports coverage is 'likely to reflect the higher level of branding that is present at venues'.¹⁴⁰

¹³⁵ See para 1.169 of the Guidance Notes.

¹³⁶ See Rule 9.22(b) of the Broadcasting Code.

¹³⁷ See Rule 9.22(b) of the Broadcasting Code.

¹³⁸ See para 1.170 of the Guidance Notes.

¹³⁹ See Rule 9.6 of the Broadcasting Code.

¹⁴⁰ See Para 1.32 of the Guidance Notes.

Therefore, references to branded products on, for example, perimeter boards around football stadia are acceptable by the Broadcasting Code. This means more exposure to the official sponsors of the event who put their names and/or brands on the perimeter boards. Therefore, such rules are essential for exclusive sponsorship arrangements of the event because they help the television viewers to recognise the official sponsors of the event from other third parties. However, official sponsors of sporting events should ensure that the cameras would not linger on unauthorised sign or other manifestation designed to publicise the products or services of the licenced broadcaster's sponsors or those who seek free publicity for their businesses.

The Broadcasting Code also puts regulatory restrictions on television advertising breaks during sporting programmes. Ofcom's Code on the Scheduling of Television Advertising (CSTA) defines television advertising as 'any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods and services, including immovable property, rights and obligations, in return for payment'. It sets out regulations governing the maximum amount of airtime that can be used for advertising generally.¹⁴¹ It also indicates the maximum number of advertising breaks.¹⁴² The rules stipulate that 'where television advertising is inserted during programmes, television broadcasters must ensure that the integrity of the programme is not prejudiced, having regard to the nature and duration of the programme, and where natural breaks occur.'¹⁴³ An advertiser must not influence the content and scheduling of a programme in such way as to impair the responsibility and editorial independence of the broadcaster.¹⁴⁴ It seeks to ensure that viewers are easily able to

¹⁴¹ See Rules 4 and 5 of CSTA.

¹⁴² See Rule 16 of CSTA.

¹⁴³ Rule 8 of CSTA.

¹⁴⁴ Rule 9.1 and 9.18 of the Broadcasting Code.

differentiate the editorial material from advertising.¹⁴⁵ This limit on the amount of advertising that licensed broadcasters can transmit is based on Article 23 of the AVMS Directive.¹⁴⁶

It can be said that such rules provide detailed regulations on what might be required to ensure that advertising spots during sporting programmes are distinguishable. In other words, these rules are applied to impose an obligation on licenced broadcasters to ensure that viewers can easily distinguish the advertising spots from the editorial content. However, the distinction between advertng spots and programme content does not provide the required protection against ambush marketing activities. Obviously, the purpose of such rules is not to protect the official sponsors of sporting event. Rather the rules aim to prevent editorial content being distorted for commercial purposes.¹⁴⁷

In general, the Broadcasting Code impose regulatory restrictions on the commercial references of licenced broadcasters. Such restrictions are important to ensure that the viewer has an appropriate information to assess the matter being broadcast. Therefore, the principles of transparency, separation and editorial independence are apparent in the rules which ensure that advertisements and other commercial references are appropriately identified and distinguished from other programme content.

The principles of transparency involve information being provided to viewers which ensures that they understand the nature of the content being broadcast and a clear separation between commercial references content and other programming content. The Broadcasting Code also emphasis on the editorial independence of programming, and prohibits advertisers and

¹⁴⁵ See para 1.16 of the Guidance Notes. The Broadcasting Code also protect the viewers from surreptitious advertising. 'Surreptitious advertising involves a reference to a product, service or trade mark within a programme, where such a reference is intended by the broadcaster to serve as advertising and this is not made clear to the audience. Such advertising is likely to be considered intentional if it occurs in return for payment or other valuable consideration to the broadcaster or producer'. See rule 9.3 of Ofcom broadcasting code.

¹⁴⁶ 'The promotion of television advertising spots and television shopping spots within a given clock hour shall not exceed 20%.' Article 23(1) of the AVMS Directive. The article however exempt announcement made by the broadcaster in in connection with its own programme from this limit. Article 23(2) of the AVMS Directive.

¹⁴⁷ As required in Rule 9.2 of Ofcom Broadcasting Code: 'Broadcasters must ensure the editorial content is distinct from advertising'.

sponsors having any influence on television programming. The Broadcasting Code rules are essential for official sponsors of sporting events because they reduce the potential of ambush marketing activities through licenced broadcasters. However, we have seen examples of ambush marketing practices through licenced broadcasters during the recent 2018 World Cup in Russia. This proved that the Broadcasting Code alone cannot provide an appropriate protection against ambush marketing activities without astute broadcasting contract.

3-7) The use of virtual advertising

As discussed earlier in this chapter, the appearance of the official sponsor's logo and name on the stadium electronic advertising signage is essential to achieve successful communication outcomes.¹⁴⁸ This signage plays a significant role in the dissemination of the sponsor's messages to spectators and viewers. Official sponsors therefore require the signage to be seen by a significant number of people. This can be done when the cameras would linger on the perimeter signage and other advertising mechanism at the stadia.

Technological advances now lead to other opportunities for official sponsors to incorporate their messages into major events through what is called virtual advertising. Virtual advertising is 'the name given to electronic imaging systems used to insert advertising or other commercial messages on the broadcast footage of the event.'¹⁴⁹ This technology will allow broadcasters to place a virtual sign on the perimeter boards or anywhere they want.¹⁵⁰ The signs can be animated and can also be continually changed during the telecast. The signs will not be seen by the spectators at the stadium, but will be prominently displayed for television viewers.¹⁵¹

¹⁴⁸ We have seen in the previous section that references to branded products or services on perimeter boards through broadcasters are acceptable and do not infringe the Broadcasting Code.

¹⁴⁹ Lewis, A, and J Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) I3.127

¹⁵⁰ Ibid

¹⁵¹ Griffith-Jones and Barr-Smith (consulting editor), *Law and the Business of Sport*, (Butterworths, London 1997) 310.

The use of virtual signage can extend to many facets of the stadium. For example, it can be placed in prime locations on or around the stadium, and not only over existing signs around the stadium.¹⁵² Virtual advertising allows for these key areas inside the stadium to be allotted to the sponsor during the telecast without interfering with the action at the stadium.¹⁵³ For example, it is possible to use this technology to insert an advert for Budweiser within the centre-circle of a football stadium. For television viewers, it will appear as if Budweiser is actually present on the pitch during the match.

The technology of virtual advertising provides numerous advantages to official sponsors. It offers them the opportunity to better target desired market. The signs can be varied so that television audiences in different geographical regions see different advertisements. For instance, a regional brand may wish to target only its local community rather spending too much money on a sign that will receive international exposure. This will provide official sponsors an opportunity to pay for signage to be displayed only in selected markets. This will also allow event organisers and licensed broadcasters to sell the same advertising space several times over to different sponsors and advertisers in each receiving territory.

The impact that this may have can be extended to presenting the signs in different languages in different countries. For example, during the football match between England and Holland in 2012, virtual advertising boards implemented to display different advertising depending on the territory in which viewers watched the match on the television.¹⁵⁴ Viewers either in the stadium or on the United Kingdom or Dutch television watched advertisements for ING, Price Water House Coopers, Dutch State Lottery, etc.¹⁵⁵ But those who watched the match on

¹⁵² Turner and Cusumano, *Virtual advertising: Legal implications for sport* (2000) 3 Sport Management Review 52.

¹⁵³ Ibid.

¹⁵⁴ See Christopher Harris, *England-Holland TV Broadcast Implement Virtual Advertising Technology for Overseas Viewers*, woldsoccertalk.com, 29 February 2012, <<http://woldsoccertalk.com/2012/02/29/England-holland-tv-broadcast--implements-virtual-advertising-technology-for-overseas-viewers/>>, accessed on 15 April 2018

¹⁵⁵ Ibid.

television outside of the United Kingdom and Netherlands would have seen several different Asian companies on the perimeter boards, such as Indovision (Indonesian pay TV service), Garuda Indonesia (Indonesian airline), ANA (Japanese airline) Astro (Malaysian pay TV service), and Now TV (Hong Kong IPTV service).¹⁵⁶

Again, during the match between England and Costa Rica at Elland Road Stadium in Leeds, the perimeter signage at the stadium were UK brands specifically. However, during the broadcast, the FA and ITV have tested virtual advertising which delivered new augmented regional advertising on a feed going to America and on another being fed to Asia, Australia and part of Europe.¹⁵⁷ This allowed them to sell more advertising inventory on the on the same spot, offering an opportunity for greater income, while making the advertising more relevant to viewer audiences.¹⁵⁸

The potential that virtual advertising creates for the broadcaster is obvious. It provides the broadcaster with the capacity to generate significant additional revenue streams with global ramifications. Presenting a different signage message to every market at premium price has enormous revenue earning potential.¹⁵⁹ However, it is appropriate to define the issues with which the technology of virtual advertising is associated. Event organisers enter into an agreement with a specific sponsor selling signage space at prominent positions in or around the stadium. They also enter into a broadcasting agreement with a broadcaster granting it an exclusive right to broadcast the event. In order to increase its own advertising revenue, the licenced broadcaster enters into an additional agreement with a different sponsor or advertiser

¹⁵⁶ Ibid.

¹⁵⁷ Ken Kerschbaumer, *FA Deploys Supponor Virtual-Replacement Technology for World Cup Warm-Up Match*, <https://www.sportsvideo.org/2018/06/13/fa-deploys-supponor-virtual-replacement-technology-for-world-cup-warm-up-match/>, accessed on 16 June 2018.

¹⁵⁸ Tom Gracey, senior broadcast manager of The FA, said: 'The potential for virtual [advertising] is substantial. Perimeter LED displays have become a fundamental platform for activating brand partnerships in sport, so the ability to change that message to make it relevant for different fans around the world is hugely appealing for us and our partners. We were delighted to be able to collaborate with various stakeholders in order to deploy it on this occasion'. Ibid.

¹⁵⁹ Turner and Cusumano, *Virtual advertising: Legal implications for sport* (2000) 3 Sport Management Review 54.

to that of the event organiser in order to promote its goods or services through the medium of virtual advertising. This advertising is either superimposed on the advertising signs of the official sponsor of the event or might appear next to or side by side with the first sponsor's sign. Whichever way, the official sponsor of the event may complain that its signage is not receiving the exclusive coverage to which it thought was entitled under the sponsorship contract. Its signage rights have been diluted by the innovation of virtual advertising. These issues will have an impact on the way event organisers conduct their operations and will require the parties to have a clear understanding of their legal obligations. These obligations will vary depending upon exclusivity clauses between event organisers and official sponsors. In fact, FIFA has set out its own regulation regarding the use of virtual advertising during the broadcast coverage of football matches. According to FIFA's Laws of the Games, approved by the International Football Association Board, virtual advertising is forbidden on the field of play and its appurtenances, including the goal nets, technical areas, and also on the area immediately surrounding the field of play.¹⁶⁰ This restriction applies from the moment the teams enter the field of play before each half of the match, and until the moment they leave it after each half.¹⁶¹ In other words, the use of virtual advertising on the pitch, such as the centre-circle and the penalty-areas, is allowed at any time before and after a match and at half-time but never during the play itself. However, the use of virtual advertising is allowed on areas in the stadium that are already used for advertising or other flat areas that could potentially be used for advertising.¹⁶² Such advertising must be at least one meter away from the boundary lines of the field of play.¹⁶³

However, the rule above does not indicate the party who has the right to use virtual advertising. This raises a question of whether the licenced broadcaster has the right to replace

¹⁶⁰ Law 1, Decision 12 of the FIFA's Laws of the Game.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

signs in the stadium with one of its own. For example, what if the broadcaster replaces the advertising signage in overseas markets without the permission of the event organiser? In such cases, the event organiser, the broadcaster and the official sponsor will require clearly defined terms in their contractual arrangements. Both the event organiser and the broadcaster enter into an arrangement with each other for rights to the event. They both also enter into arrangements and agreements with sponsors. Location of the event sponsor's signage will be generally agreed and clarified prior to the event. The use of virtual advertising, however, will put barrier between each party and their respective sponsors. The sponsorship agreements between each party and their respective sponsors are the aspects which is most affected by virtual advertising.

3-8) The contractual arrangements between the parties

Identifying the legal relationships between the parties to the sale of signage rights inside the stadium concentrate on the terms and conditions which should be included in any contractual arrangements between the parties. Such terms and conditions are essential to prevent virtual advertising from infringing the exclusive rights of official sponsors of sporting associations or event organisers. The contractual relationship between the parties will be discussed in more details below:

3-8-1) The relationship between the event organiser and the broadcaster

As discussed above,¹⁶⁴ the FIFA's Laws of the Game does not indicate whether or not licensed broadcasters are allowed to add advertising signage for their own sponsors without the permission of the event organiser. Therefore, in order to maintain control over the signage, the event organiser should insist in the broadcasting contract that the broadcaster is not allowed to use virtual advertising in his coverage of the event. The event organiser is

¹⁶⁴ Section (3-7) of this chapter.

required to add a provision to the broadcasting contract to prevent the licensed broadcaster from altering the signal. For example, the term should include that ‘the event organiser has the exclusive right to negotiate with any third party with respect to the sale television coverage of the event and advertising space within all parts of the stadium.’ Likewise, the broadcasting contract may also include a provision to protect any on screen identification of sponsors sold by the event organiser.

However, if the event organiser permits the use of virtual advertising, the issue of income sharing from such advertising would need to be addressed in the broadcasting contract. Most importantly, care would need to be taken by the event organiser to ensure that the exclusive rights of its official sponsors under sponsorship arrangements would not be infringed or put into risk. In considering whether the event organiser should provide its approval to allow virtual advertising, terms regarding control or prohibition of the television signal should be treated as essence of the broadcasting contract.

3-8-2) The relationship between the sponsor and the event organiser

The sponsorship contract between the event organiser and the sponsor usually include signage rights. That rights allow the sponsor to display advertising of its products or services at various vantage points in the stadium. Such rights are very important for the sponsor to maximise both spectator and television viewing audiences. Signage rights will have the maximum effect on the viewing audience both in terms of sales and consumer awareness of its products or services. Therefore, it is essential that the sponsorship contract sets out the rights and obligations of each party. The sponsor will be most concerned to ensure that its goods or services are exclusively advertised on the signage. The crucial issue is in relation to placement of the event organiser’s signage and type against that of the broadcaster.

Therefore, the sponsor should be keen to ensure that none of its rivals have signage at the event that will detract from the value of its sponsorship. With the advent of virtual

advertising, the sponsorship contract should include terms to ensure that the event organiser will take all reasonable steps to prevent virtual advertising or at least controls it. A widely compromised is for the contract with the licenced broadcaster to require that: i) the event organiser will ensure that no signage of its sponsor's competitors or their products at the stadia; and ii) the event organiser will use its best endeavours to ensure that any television coverage of the event where possible direct the television cameras onto the sponsor's signage.'

It seems that virtual advertising will significantly boost advertising income for event organisers and licenced broadcasters. All parties to a broadcast or sponsorship contract have to take virtual advertising into account in the negotiation of such contacts. If they fail to do so for some reasons, this will jeopardise the relationships of all concerned. More importantly from the sponsor's point of view, virtual advertising could be exploited by its competitors to dilute its exclusive rights with the event. If virtual advertising is to be permitted, the sponsor should ensure that no virtual signage of its competitors is displayed at the stadium.

3-9) Conclusion

This chapter has examined the meaning of sports broadcasting rights to indicate the ownership of such rights. Then it has also examined the relationship between the media and sports sponsorship in order to indicate the impact of broadcasting coverage on sponsorship programme value. The study has found several conflicts regarding the commercial activities of the broadcaster. Such conflicts are regulated by Ofcom Broadcasting Code. The conclusion of the chapter will be as follow:

The sponsorship programme of football associations and related enterprises in the United Kingdom has developed dramatically with the evolution of the broadcasting market in the 1980s. Live coverage of football competitions is very important for corporate sponsors

because it puts them in contact with an enormous numbers of consumers. The sale of broadcasting rights however provides a great opportunity for competitors of official sponsors to infringe the exclusive rights of the official sponsor. Licensed broadcasters sell commercial references (namely broadcast sponsorship and commercial advertising) during football programming. Such commercial references could be purchased by a competitor of the official sponsor. This will decrease the commercial value of the sponsorship programme of football competitions, and thus infringes the exclusive rights of the official sponsor.

In the United Kingdom, such commercial references are regulated by the Ofcom Broadcasting Code. The Broadcasting Code includes rules that could be applied to limit the impact of such commercial references on the exclusive rights of the event sponsors. However, such limitations are not enough to prevent competitors of official sponsors to associate their brands with the sponsored subject of the event. Obviously, the competitors' behaviour does not breach the sponsorship contract that official sponsors hold with the football entity. However, the appearance of multiple brands within the same product or service category on television questions the level of exclusivity provided by football entities. Indeed, it is the football entities' responsibility to protect their official sponsors' exclusive rights. Football associations and related enterprises cannot provide a full exclusive sponsorship rights without a concrete broadcast agreement with the broadcaster. Some football entities, such as the UEFA Champions League, look to protect their official sponsors from the possibility of ambush by limiting the rights of the licensed broadcaster to sell commercial references during event programming to third parties. However, instances of competing sponsorship interests within the English football suggests that such football entities focus on maximising the revenue generated from the sale of broadcasting rights, with little concern for the consequences regarding the delivery of exclusive sponsorship package to their official sponsors.

Chapter Four: The Impact of the Commercial Exploitation of Footballer's Image Rights on Exclusive Sponsorship Rights.

4-1) Introduction

As we have seen in the previous chapter, advertising and means for its promotion has developed tremendously over the past few decades as a result of the rapid development of technology and the possibility of dissemination of information through television and other modern media.¹ In general, media, most notably the press, are interested in sports news and events and, in particular, in those related to high profile athletes. According to Rojek, 'celebrities [including famous footballers] replaced the monarchy as the new symbols of recognition and belonging, and as the belief in God waned, celebrities became immortal.'² Indeed, a report by *the economist*, indicates that the public are very interested in celebrities' lifestyles in the United Kingdom:

'The country has a profusion of titles devoted to chronicling even the smallest doing of celebrities. Britons buy almost half as many celebrity magazine as Americans do, despite having a population that is only one-fifth the size. Celebrity news often makes the front page of British tabloid newspaper, providing a formidable distribution channel for stories about celebrity sex, drugs and parenthood.'³

New figures from the Audit Bureau of Circulation show that the ten bestselling celebrity publications and ten most popular tabloids have a combined circulation of £23 million.⁴ In the context of football, high profile stars may fill as many headlines on the front cover of

¹ Blackshaw and Siekmann, *Sports Image Rights in Europe* (T.M.C. Asser Press 2005) at 145.

² Rojek, *Celebrity*, (Reaktion Books Ltd, 2001) at 14.

³ The Economist, *Making and Marketing Celebrities: The Fame Machine, Britain's celebrity industry is more prolific-and more benign-than ever before*, published on 1 September 2015, <<http://www.economist.com/node/4344144>> accessed on 22 April 2017.

⁴ <<https://www.abc.org.uk/>>, access on 28 April 2018.

newspapers and magazines as they do on the backspaces. The swiftness with which information on high profile footballers circulates in the digital environment comes to dominate the agenda of news. With this effective campaign of media visibility, an increasing number of professional footballers have increased their profiles and turned a profit as the result of their achievements.⁵ Therefore, high profile footballers' features, such as their images, names, words, initials, voice or signature, has recently considered popular cultural and economic products, and draw attention from corporate sponsors.⁶

According to Wall:

'one of the best uses of sports celebrities' rights of publicity is product endorsements. Athletes can be ambassadors for the products and services they use. Their endorsement and positive publicity can lift consumer brand awareness, enhance brand image and stimulate sales volume. Upon introduction, licensed products that carry a celebrity's name can establish instant credibility for the brand in the marketplace.'⁷

For a striking example of this marketing phenomenon, take the case of Manchester United FC's former midfielder, David Beckham. The British football icon earned many more million more off the field of play than on it through the commercialisation of his name, image and other identifying characteristics of which are instantly recognisable, well known and marketable throughout the world.⁸ By endorsing products, David Beckham, with his high profile and positive publicity, has the potential to increase a consumer's brand awareness, enhance a brand image and, as a result, increase consumer sales.

⁵ For the same meaning, see Blackshaw and Siekmann, *Sport Image Rights in Europe* (ASSER international Sport Law, 2005) 145.

⁶ Haynes, *The Fame Game: The Peculiarities of Sports Image Rights in the United Kingdom* (2004) 12(2) Trends in Communication Journal 102.

⁷ Wall, *Sports Marketing and the Law: Protecting Proprietary Interests in Sports Entertainment Events* (1996) 7(77) Marquette Sports Law Journal 154.

⁸ <<http://www.forbes.com/profile/david-beckham/>>, accessed on 15 April 2016.

However, individual endorsement contracts with a number of football players at or around the time of a football event may create an indirect association with the event and the participating clubs or teams. For official sponsors of the event and participating clubs, the appearance of their competitors' brands with individual football players is likely to confuse the public and, as a result, dilute the sponsors' exclusive rights.

On the other hand, the exclusive sponsor of the football player has an interest in the player's image right and seeks to prevent other companies from exploiting this exclusive right. The value of the football player's image right can be decreased with the practice of collective image rights exploitation.⁹ For example, indirect image rights licenses may be given by a number of entities including clubs, leagues, broadcasters, federations, event organisers and national teams. The Collective exploitation allows all of them to exploit the image right of the player for commercial purposes.¹⁰ This exploitation is not limited to the sport entities only, but also to their official sponsors.¹¹ Therefore, it is important to identify the owner of the footballer's image rights when he acts in his own capacity and when he participates in an organised football competition as a member of a team.

To appreciate the variety of sponsorship agreements available in the market, one only needs to consider the various ways in which sponsors can become associated with a high profile footballer. This chapter looks at the manner in which a professional football player can become associated either directly or indirectly with a range of different brands. This is to indicate the impact of such association on exclusive sponsorship programmes of football associations and related enterprises.

⁹ See Blackshaw and Siekmann, *Sport Image Rights in Europe* (ASSER international Sport Law, 2005) 337.

¹⁰ *Ibid*, at 339.

¹¹ This will be discussed with more details later in this chapter.

This chapter will examine the legal and practical issues that may arise from the commercial exploitation of footballers' image, name and other identifying characteristics. The chapter will examine the extent to which English law recognises and protects the rights of individuals to control the commercial exploitation of his name, image and/or other identifying characteristics. It will be demonstrated that the law in the United Kingdom does not recognise an individual's property interest in his image per se, but rather forces him to cobble together a limited protection through the inventive use of various legal doctrines. Afterward, the nature of clause 4 of the Football Association Premier League (FAPL) standard contract, its importance, and its content will be thoroughly examined because it details the contractual rights and duties of players and clubs. The chapter concludes with the implications of such standard contract on the exclusive rights of the official sponsors.

4-2) The legal status of professional footballers' image rights in the United Kingdom

The concept of image right as understood today stems from the so-called 'right of publicity' which was established in the United States of America in the case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc (Haelan)*.¹² This right is historically linked to the right of privacy but was extended in *Healan* to also protect against commercial misappropriation.¹³

In the United Kingdom, a useful example of the breadth of image rights is the definition provided in the standard contract under which professional football players in the Football Association Premier League are required to be employed: 'player's image shall mean the player's name nickname fame image signature voice and film and photographic portrayal virtual and/or electronic representation replica and other characteristics of the player

¹² 202 F.2d 866 (2d Cir. 1953), cert denied, 346 U.S. 816 (1953).

¹³ Ibid.

including his shirt number.’¹⁴ Clearly, according to this definition, the concept of image is not limited to the production of the footballer’s physical appearance through names or pictures or other visual representation, but also extends to other aspects of use of personal characteristics.

This broad scope of image right was recognised in the case of *Proactive Sports Management Limited v Rooney (Rooney)*,¹⁵ where the Court defined image rights to mean: ‘the right for any commercial or promotional purpose to use the player’s name, nickname, slogan and signature developed from time to time, image likeness, voice, logos, get-ups, initials, team or squad number (as may be allocated to the player from time to time), reputation, video or film portrayal, biographical information, graphic representation, electronic, animated or computer-generated representation and/or any other right or quasi-right anywhere in the world of the player in relation to his name, reputation, image, promotional services, and/or his performances together with the right to apply for registration of any such rights.’ Such exhaustive definitions underline the significance of players’ image rights. Such rights are significant because the potential they have for public relations and marketing especially as we now live in a highly consumer-driven world.

Obviously, the importance of image is further enhanced by the fact that technology and social media have greatly influenced the public’s appetite for football. These two factors invariably increased the commercial value of footballers as firms usually spot the opportunity to attach themselves to such popular image in order to boost their products and services. For example, according to a report from Apple Tree Communications, which measures the social and digital media value for brands, the reigning Ballon d’or winner Cristiano Ronaldo is the second most followed on social media with 238 million followers between Facebook,

¹⁴ See clause 1.1 of English Premier League Contract. Available in Form 19 of the Premier League Handbook season (2018/2019).

¹⁵ *Proactive Sports Management Limited V Rooney and Other* [2011] EWCA Civ 1444.

Instagram and twitter accounts.¹⁶ In 2016, the Portuguese striker published 347 posts that included a Nike logo, one of Ronaldo's individual sponsors, and this, in return, generated 474 million interactions in terms of likes, shares or comments.¹⁷ This generated £410 million in value for Nike in 2016 alone.¹⁸ The advancement of multi-media where advertising and promotion extent beyond national borders has rendered the use of such high profile footballers.

As can be seen, such players have increasingly engaged in the exploitation of image for commercial purposes. As the value of such images is increasing, there will be unauthorised attempts to derive benefit from the development of an athlete's image.¹⁹ The commercial value of the image can be diluted when the athlete is unable to prevent others from using their images.²⁰ Most importantly, commercial actors may use the footballer's image without his consent to associate their brands with football associations and related enterprises and, as a result, dilute the exclusive rights of their official sponsors. This has made it necessary to examine the extent to which professional football players are able to control their image rights.

In fact, image rights are comprised of two types of rights: first, the right to publicity 'to keep one's image and likeness from being commercially exploited without permission or contractual compensation.'²¹ In pursuing commercial activities, the player will need the support of the law as a means of maintaining exclusivity. Maintaining such exclusivity is crucial for the value of the player's image. Secondly, the right of privacy or, 'the right to be

¹⁶ www.appletreecomunications.com

¹⁷ For more details see Alan Dawson, *Cristiano Ronaldo's Social media channels are worth £410 million a year to Nike*. Published by Business Insider UK on 7 March 2017, <http://uk.businessinsider.com/cristiano-ronaldo-social-media-2017-3>, accessed on 24 April 2018

¹⁸ *Ibid.*

¹⁹ Boyes, *Legal protection of athletes' image rights in the United Kingdom* (2015) 15 *International Sports Law Journal* at 72.

²⁰ *Ibid.*

²¹ Bains, *personality rights: should the UK grant celebrities a proprietary right in their personality?* (2007) 18(6) Part 1. *Entertainment Law Review* 164.

left alone and not represent one's personality publicly without permission.²² The capacity of football players to exercise control over the deployment of their image is not only in a commercial context, but also as it relates to private information, including image,²³ which they regard as private or wish to avoid becoming public knowledge. Therefore, the player will often make recourse to law as a means of restricting the dissemination of such private information in support of their interest in a private life.²⁴

In the case of *Proactive Sports Management Ltd v Rooney*,²⁵ the English Court reaffirmed the economic importance of image rights and the extent to which they form an important part of an athlete's commercial portfolio. In 2003, the former Manchester United player Wayne Rooney set up a company, Stoneygate Ltd, to exploit his image rights, when he was a seventeen year old player with Everton FC.²⁶ Stoneygate Ltd then entered into an image rights representation agreement with Proactive Ltd in relation to the exploitation of the player's image rights.²⁷ Proactive received 20% commission of all gross fees received for any promotion, endorsement or advertisement agreement for a duration of eight years.²⁸ The contract between Stoneygate and Proactive was silent on whether Proactive should continue to receive the commission after its expiry or termination.²⁹ The arrangement was exceptionally successful for all parties and positive relations continued until 2008 when Stoneygate decided to terminate the agreement and point another company in its place.³⁰

Proactive took proceedings, claiming that Stoneygate was in breach of the agreement, and

²² Ibid at 165.

²³ In the House of Lords decision in *Douglas v Hello!*, which is discussed below, Lord Nicholls of Birkenhead expressed the view that '[information communicated in other ways, in sketches of descriptive writing or by word of mouth, cannot be so complete and accurate' as a photograph. *OBG Ltd. V. Allan* [2007] UKHL 21, at 71.

²⁴ Boyes, *ibid* (n 549) at 70.

²⁵ *Proactive Sports Management Limited v Rooney and Other* [2011] EWCA Civ 1444

²⁶ Ibid at 476.

²⁷ Ibid.

²⁸ Clause 6.2 of the contract stated: '20% of the gross sum payable under any contract or arrangements for the promotion, endorsement or advertisement of [Stonetgate]... and/or the exploitation of the Intellectual Property and/or products, goods or services to which [Stoneygate]... is a party.' Ibid.

²⁹ Ibid 477.

³⁰ Ibid.

that Proactive was entitled to commission due under the agreement. Stoneygate argued that proactive was not entitled to commission and that the agreement was enforceable because it was an unreasonable restraint of trade.³¹

The Court of Appeal ruled that Proactive was not entitled to commission and upheld the High Court's decision that the agreement was unenforceable, as it was an unreasonable restraint of trade.³² The Court of Appeal argued that Mr Rooney had been primarily employed as a footballer, and his image rights were ancillary to this.³³ As the contract was held to be unenforceable, Proactive was unable to enforce its contractual right to commission due under the agreement before or after the date that Stoneygate terminated the arrangement.³⁴ This decision demonstrates that image rights are an extremely tradeable commodity and capable of forming the subject of an enforceable contractual arrangement. Arden LJ expressly highlighted the economic value of image rights: 'the endorsement of goods encourages the purchase and consumption of goods, and the court is entitled to assume that it is in the interests of the public that image rights should be fully realisable for this economic purpose.'³⁵ Therefore, it has been suggested that the measures adopted by the court in respect of Rooney's image rights 'were able to be classified as an unreasonable limitation on his capacity to trade is further evidence of a legal appreciation... of these image rights.'³⁶

However, despite the approach adopted in *Rooney*, English courts have consistently rejected the existence of free-standing image rights in English law. While certain jurisdictions, such as the United States of America, France and Germany offer a statutory protection against the

³¹ Ibid.

³² Ibid at 510.

³³ Ibid at 507.

³⁴ Ibid.

³⁵ Ibid at 500.

³⁶ Boyes, *ibid* (n 549) at 64.

exploitation of an individual's image,³⁷ English law provides no cause of action for the infringement of image rights as such. In other words, there is no legislation that recognises statutory right of athletes or other well-known persons to control the commercial use of their image in the United Kingdom.³⁸ Professor Cornish summarised the position under English law as follows:

‘English law has steadfastly refused to adopt any embracing principle that a person has a right to his or her name, or, for that matter, to identifying characteristics, such as voice or image. An entitlement simply to demand that such characteristics without more amount to property in personality is highly regarded as a *commodification too far*’.³⁹

This fact is clearly illustrated in the case of *Tolley v Fry*⁴⁰ where Greer LJ stated:

‘Some men and women voluntarily entered professions which by their nature invite publicity, and public approval or disapproval. It is not unreasonable in their case that they should submit without complaint to their names and occupations

³⁷ Image rights are recognised as an extension of privacy laws in such countries. For example, Section 43(a) of the Lanham Trademark Act prohibits use of any ‘word, term, name, symbol or device, or any combination thereof, or any false designation of origin, false or misleading description of fact or misleading representation’. Similarly, Articles 1 and 2 of the German Constitution provide, in statutes, for the protection of human dignity and the right to free development of personality. These rights allow an individual to prevent others from using individuals’ image without permission. Likewise, Article 9 of the French Civil Code formally incorporates a right to privacy into French law: ‘Everyone has the right to respect for his private life. Without prejudice to compensation for injury suffered, the court may prescribe any measures, such as questions, seizures and others, appropriate to prevent or put an end to an invasion of personal privacy; in case of emergency those measures may be provided for by interim order’. For further details, see generally Blackshaw and Siekmann, *Sport Image Rights in Europe* (ASSER international Sport Law, 2005); see also Keenan, *Image Rights and Privacy Law – A summary of the UK Position* (2009) *Business Law Review*, at 110.

³⁸ It is worth noting that Guernsey, a small British island in the English Channel, has taken the creation and recognition of image rights to a new level by introducing a registrable statutory image right under its Image rights (Bailiwick of Guernsey) Ordinance in 2012. Registration under the first time which is published in Guernsey’s Register of personalities and images. The proprietor of the registered personality obtains a legal property rights similar to a trade mark which can then be assigned and licenced. In addition, the proprietor of the registered image right has exclusive rights in the images registered against or associated with that registered personality. Coors, *Are sports image rights assets? A legal, economic and tax perspective* (2015) 15 *International Sports Law Journal* 65.

³⁹ See Cornish, Llewelyn and Aplin, *Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights*, 7th edn (Sweet and Maxwell, 2010), para 17-34.

⁴⁰ *Tolley v JS Fry and Sons Ltd* [1930] 1 KB 467, CA.

and reputations being treated as matters of public interest, and almost as public property'.⁴¹

Again, in the case of *Elvis v Yours*⁴², Simon Brown LJ explained the rejection of a property right to prevent unauthorised use of personal identity in advertising stating that:

'In addressing the critical issue of distinctiveness there should be no a priori assumption that only a celebrity or his successor may ever market (or licence the marketing of) his own character. Monopolies should not be so readily created.'⁴³

This approach may lead to practical difficulties in a football player's attempt to protect his images. The existence of the player's image or name on a specific product or service implies that he has endorsed that product or service. This unauthorised exploitation could seriously damage the value of his image rights. As Jones explained:

'the damage caused by unauthorised manipulation or appropriation of a person's image for commercial purposes comes in two forms, the first being the invasion of the subject's privacy and the related loss of control or autonomy over the use of his or her image and the second being the loss of control inherent in the defendant's reaping an economic benefit from another person's image and the reputation and goodwill associated with it'.⁴⁴

⁴¹ Ibid at 477.

⁴² *Elvis Presley Enterprises Inc v Sid Shaw Elvisly Yours* [1999] RPC 567.

⁴³ Ibid at 597-8. As is discussed below, in the case of *Fenty v Arcadia Group*, the court again rejected the idea of a proprietary right in personality. Birss J stated: 'Whatever may be the position elsewhere in the world, and however much various celebrities may wish there were, there is today in English no such thing as a free standing general right by a famous person (or anyone else) to control the reproduction of their image.' *Fenty and others v Arcadia Group Brands Ltd (t/a Topshop) and another* [2013] EWHC 2310 (Ch) para 2.

⁴⁴ Jones, *Manipulating the Law against Misleading Imagery: Photo-Montage and Appropriation of Well-known Personality* (1999) EIPR 28. According to Steele: 'The existence of goods and services bearing the individual's name or image (and therefore the possible implied suggestion that the individual has approved or endorsed the products) without authorisation can in some cases seriously damage the value of a sporting personality's licencing rights in his image. Not only does the individual suffer the loss of royalties he might have earned but also his image may depreciate in value by the affixing of his name and image of inferior goods or materials. It may also deprive him of another lucrative endorsement contract due to loss of exclusivity.' Steele, *Personality Merchandising, Licensing Rights and the March of the Turtles* (1997) 5(2) SATLJ 14.

Most importantly, the absence of a concrete protection of a person's right of publicity could allow unauthorised third parties to use footballers' images or names to associate their brands with football associations and related enterprises.

4-3) The protection of image rights in the United Kingdom

Despite the absence of a discrete right as indicated by the above discussion, it is still widely understood that there are certain rights that can be used to prevent the unauthorised appropriation of individuals' images or names. As Laddie J states, individuals can complain 'if the reproduction or use of [his/her] likeness results in the infringement of some recognised legal right which [he/she] does own.'⁴⁵ Individuals, therefore, could rely on a variety of statutory rights and common law principles in order to control the use and commercial value of their names and images. In other words, the law forces football players to cobble together a limited protection through the use of various analogues and neighbouring doctrines. The bulk of the historic case law in this respect relates to control of image through the deployment of commercially focussed rights under actions in passing off or through the lodging of a registered trade mark. A further grasp of related actions are concerned rights in property, defamation, and trade secrets. Quasi-legal protection relating to the commercial protection of image rights also exists in respect of advertising controls. Recently, a body of law has grown up around actions based on the tort of breach of confidence, particularly since the coming into force of the Human Rights Act 1998 (HRC 1998). These doctrines will be discussed in more details below in order to indicate how the law in the United Kingdom can prevent unauthorised third parties exploiting footballers' image rights. This is important to indicate whether or not unauthorised third parties are able to use footballers' image or names to associate their brands with football associations and related enterprises.

⁴⁵ *Elvis Presley Trademarks*, RE [1997] RPC 543 at 548.

4-3-1) Defamation

Defamation can be defined as ‘the publication of an untrue statement about a person that tends to lower his reputation in the opinion of right thinking members of the community’.⁴⁶

According to this definition, the tort of defamation could be used to protect football players’ interests in their reputation by preventing the unauthorised exploitation of their names or images. In other words, the law of defamation could protect the football player from having his image or name used in a way that tends to make the public think the worse of him.

The law of defamation has been used by the Court of Appeal as early as 1931 in the case of *Tolley v Fry*⁴⁷ to protect a celebrity’s reputation. The defendant published adverts showing the claimant, a champion amateur golf player, with a bar of the defendant’s chocolate protruding from his pocket in such a way as suggested that he was endorsing the defendant’s product.

The claimant had not given permission for his fame and publicity to be used in such advertisement. The claimant commenced proceedings on the basis that such advertising implied defamatory message that he had been endorsed or approved the defendant’s product.⁴⁸ The defamatory meaning of the advertisement was said to be that the claimant had ‘prostituted’ his status as an amateur golf player for advertising purposes, in particular there was a clear division between players and gentlemen at those days.⁴⁹ The court upheld the claim, finding that the advertisement inferred that the claimant was ‘a hypocrite’ when he presented himself as amateur golf player.⁵⁰ The court upheld that the unauthorised exploitation of the claimant’s likeness would not have been actionable without this defamatory inference. Greer LJ noted:

⁴⁶ Per Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237.

⁴⁷ [1930] 1 KB 467, CA.

⁴⁸ *Ibid*.

⁴⁹ Amateur status was required for competitions in the major championships in the 1920s. *Ibid* at 469.

⁵⁰ *Ibid* at 478.

I have no hesitation in saying that in my judgement the defendants in publishing the advertisement in question, without first obtaining Mr. Tolley's consent, acted in a manner inconsistent with the decencies of life, and in doing so they were guilty of an act for which there ought to be a legal remedy. But unless a man's photograph, caricature, or name be published in such a context that the publication can be said to be defamatory within the law of libel, it cannot be made the subject-matter of complaint by action at law.⁵¹

Clearly, this decision turned on the perceived public shame that would descend upon an amateur athlete found to be engaging in commercial activity. However, given that the great majority of football players with image rights worth exploiting are professionals these days, it seems unlikely to see once again defamation actions to prevent unauthorised exploitation of footballers' image. The most likely claim might be from the unauthorised exploitation of a football player image for news reports rather than for commercial purposes.⁵² Indeed, the law of defamation may sit more comfortably within privacy cases.

4-3-2) the protection of image rights through the registered trade mark

As the law of defamation offers a little protection for the footballers' identity, the latter have made innovative use of intellectual property rights as a means to protect their image from unauthorised commercial use, specifically the registered trade mark. In the United Kingdom,

⁵¹ Ibid at 479.

⁵² For example, Jason Donovan sued The Face Magazine for defamation after it ran an article falsely reporting that he was gay. His argument was based on the fact that he had always presented himself as being heterosexual, and that The Face Magazine was thus defaming him by suggesting he had deceived the public about his sexuality. See Vincent Graff, *Gay? Not gay? So what! Why should it be a matter for the libel lawyers?* Published by Independent on 11 December 2005, <https://www.independent.co.uk/news/media/gay-not-gay-so-what-why-should-it-be-a-matter-for-the-libel-lawyers-518915.html>, access on 15 may 2018.

the Trade Marks Act 1994 (TMA 1994) defines a trade mark as ‘any sign capable of being reproduced graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or the packaging’.⁵³ A registered trade mark then is a valuable asset, giving the proprietor an exclusive right to exploit the mark in relation to the products and services for which it is registered.⁵⁴ For this reason, some high profile footballers have personally registered their names as trademarks to take advantages of the licencing opportunities and ability to prevent unauthorised use, notable examples include Lionel Messi,⁵⁵ Joe Cole,⁵⁶ Fernando Torres⁵⁷ and Harry Kane.⁵⁸ another favourite method is through the development of a motif associated with the footballer. David Beckham, for example, has registered a trademark of his silhouettes in famous poses striking a free-kick.⁵⁹

Hence, such features may be instantly recognisable, but it will not qualify for registration as a trademark unless it is ‘capable of distinguishing goods or services of one undertaking from those of other undertakings’.⁶⁰ In order to be granted registration as a trademark, the indicia of the proprietor must be distinct from that of others. For example, Mark Hughes’s application to register his name was rejected on the ground of lack of distinctiveness. Beyond the traditional name trademarks, therefore, some players have been a little more creative with their registration. For example, Paul Gascoigne Promotions Ltd registered his nick name

⁵³ Section 1(1) of the TMA 1994.

⁵⁴ Section 9(1) of the TMA 1994.

⁵⁵ Trade Mark number EU006353131.

⁵⁶ Trade Mark number UK0002176765B.

⁵⁷ Trade Mark number UK00002575323 and UK00002575320.

⁵⁸ Trade Mark number UK00003475232.

⁵⁹ Trade Mark number [UK00002372235](#).

⁶⁰ Section 1(1) of the TMA 1994

‘Gazza’ as a trade mark, and Tottenham Hotspur FC’s previous player Gareth Bale has registered his ‘Eleven of Heart’ that he makes after scoring goals as a trade mark.⁶¹

However, the usefulness of registered trademark is limited in this respect as the trademark legislation is not designed to protect image rights per se. The legislation is rather designed to help the owner to distinguish his goods or services from those of other entities.⁶² One of the limitations of registered trademark is that the registration can only be used to prevent the use of similar or identical marks.⁶³ For example, the registration of the name Wayne Rooney as a trade mark can only be used to prevent the use of similar or identical mark. Accordingly, the player cannot effectively use the mark to prevent the unauthorised use of his image or nickname ‘The Golden Boy’.

In addition, trade mark law requires that marks actually be used in the field for which they are registered.⁶⁴ Therefore, football players cannot guarantee that the registration of the trade mark will protect their images if they do not make use of the mark in relation to the goods for which it is registered. There have been cases in which the exploitation of celebrities’ trademark by third parties without permission have not been viewed as an infringement by the English court. In the case of *Elvis Presley Enterprises v Sid Shaw Elvisly Yours, (Elvis)*⁶⁵ the court has pointed out that the unauthorised use of the name is unlikely to be an indication of trade origin, but merely descriptive of the character of the products to which the name is attached. In this case, the claimant, a company incorporated in the USA, claimed register

⁶¹ Trade mark number UK00002657917. However, the Welsh forward subsequently gave up his rights to this trademark in November 2013 for unbeknown reasons. Ibid.

⁶² Section 1 (1) of the TMA 1994.

⁶³ See section 10(1)-(3) of TMA 1994.

⁶⁴ S. 46(5) TMA 1994.

⁶⁵ 1997 RPC 543.

trademark of the name 'Elvis Presley', who was a famous rock and roll singer, to prevent the defendant using the same name on its products.⁶⁶

In his judgement, Laddie J highlighted that distinctiveness means that the trademark must enable the consumer to distinguish the products of one trader from the similar goods of another trader.⁶⁷ He stated that:

'... [The public] will purchase Elvis merchandise because it carries the name or likeness of Elvis and not because it comes from a particular source. ...there is no reason why [the defendant] or anyone else for that matter should not sell memorabilia mementoes of Elvis Presley, including products embellished with pictures of him and such traders are likely, in the ordinary course of their business and without any improper motive, to desire to use the name Elvis or Elvis Presley upon or in connection with their own such goods.'⁶⁸

This passage is probably main problems faced by footballers and other celebrities who try to use trademark law to prevent unauthorised use of their names or images. Laddie J emphasised that the use of the name 'Elvis' was the subject matter of the products and did not provide the consumer with an indication concerning the origin of the product.⁶⁹ In his point of view, the name Elvis was not deemed to be distinctive enough to function as a 'badge of origin'.⁷⁰ Laddie J commented that members of the public will buy Elvis merchandise not because it comes from a specific source, but simply because it bears Elvis's likeness or name.⁷¹ In other words, people purchase such products not because they believe that the product is endorsed

⁶⁶ It is clear from the emphasis on distinctiveness that the approach taken in this case will apply under the TMA 1994, even though that case was still decided under the 1938 Act. Ibid 549.

⁶⁷ The meaning of distinctive is dealt with by section 9(2) and (3) of the TMA 1938.

⁶⁸ 1997 RPC 543 at 552.

⁶⁹ Ibid.

⁷⁰ Ibid at 552-3.

⁷¹ Ibid.

by the celebrity, but simply because they see his name on that product. The defendant's unauthorised exploitation therefore is not an infringement of the trademark owner's rights.

This decision was upheld by the Court of Appeal on the base that the name *Elvis* did not carry sufficient distinction for the late signer's commercial partners to claim sole ownership of it.⁷²

Walter J stated that:

'[T]he judge was right to conclude that the Elvis mark has very little inherent distinctiveness. That conclusion was reached by a number of intermediary steps, one of which was the judge's finding that members of the public purchase Elvis Presley merchandise not because it comes from a particular source, but because it carries the name or image of Elvis Presley. Indeed the judge came close to finding that for goods of the sort advertised by Elvis Yours, the commemoration of the late Elvis Presley is the product and the article upon which his name appears. Whether a poster, a pennant.... a mark or piece of soap) is little more than a vehicle'.⁷³

For football players, the problem is that it is relatively straightforward for their image to be deployed on goods or supporting marketing, not as an indication of source of the goods, but simply as an adornment. For instance, the owner of the copyright of footage of, say, Harry Kane playing football could include his name in the packaging of a video of that footage, despite the fact Harry Kane's name is registered as a trade mark. The reason is that the trade mark is used not to indicate that Harry Kane himself had authorised the production of the video, but merely to describe what was inside the packaging. The player will be seen as the subject, rather than the source of the goods.

⁷² [1999] RPC 567, CA 597-598.

⁷³ Ibid.

A similar situation arose when the former Manchester United manager Alex Ferguson applied to register his name in 2005.⁷⁴ Whilst the Trade Mark Registry did not object most of the goods listed, it refused to allow registration for certain Class 16 goods including posters, photographs, transfers, stickers and other printed matter relating to football.⁷⁵ The basis for this decision was that the sign 'Alex Ferguson' lacked distinctive character, as the general public would not distinguish Sir Alex's image carrying goods from those sold by other traders.⁷⁶ Sir Alex was the victim of his own fame, as the widespread use of his name on such goods made it difficult to obtain trade mark protection.⁷⁷

There is a further problem for those who seek to use trade mark law to protect against the unauthorised exploitation of their images. Where a footballer is seeking to show a reputation in a mark which relates to his indicia, he must show a reputation in terms of trading under that mark. It is not enough for him to show that he is known or recognised by the indicia. It was for this reason that Andrew Cole, a former Manchester United striker, failed in his opposition of fellow football player Joe Cole's application for the mark 'King Cole' in 2001.⁷⁸ It was considered that Andrew Cole was unable to show any history of trading under the name 'King Cole', even though he provided evidence that he was known by that nickname.⁷⁹ This decision highlights the importance of the distinction between reputation in the general sense and in trademark sense.

Therefore, to make out a claim for infringement of a registered name or image, the footballer is required to show that the unauthorised use of that name or image is an indication of origin. He is also required to show a likelihood that the unauthorised use of his registered name or

⁷⁴ Application number: 2323092B on 23 September 2005.

⁷⁵ Ibid para 3.

⁷⁶ Ibid para 22.

⁷⁷ See also for similar case, *Diana, Princess of Wales* [2001] ETMR 25.

⁷⁸ In the Matter of Opposition No: 49995 by Andrew Cole Enterprise Limited.

⁷⁹ Ibid at para 29.

image will confuse the public. Neither will be possible if the case involves production of merchandise bearing the footballer's name and image and the public are purchasing the merchandise merely because it bears the likeness of the footballer, and not because they believe the reproduction of that likeness indicates that the footballer himself is associated with the production of the merchandise. It can be said then that securing registration of a name and image as a trade mark can be a significant assistance in stopping unauthorised exploitation of the footballer's name or image. However, not every unauthorised use of that registered name and image infringes the footballer's trade mark rights therein.

4-3-3) Protecting image rights through copyright

Copyright law can also be used by football stakeholders to protect their image. In the United Kingdom, the law of copyright is governed by the CDPA 1988. Obviously, copyright does not protect a general right of personality attaching the image, name or other identifying characteristics of professional footballers. For example, there is no copyright in a face.⁸⁰ It is likewise well established that there is no copyright in a name, no matter how intellectually creative that name may be or how carefully selected.⁸¹

However, copyright does protect certain works in relation to which unauthorised use of a footballer's image, name or other identifying characteristics may be embodied. The law confers a property right in original literary, films, musical and artistic works, broadcasts

⁸⁰ For example, in the case of *Merchandising Corp'n of America Inc v Harpbond Inc* [1983] FSR 32, the Court of Appeal held that facial make-up is not painting within the definition of artistic works in the copyright Act 1956 section 3.

⁸¹ See *Exxon Corp'n v Exxon Insurance Consultants International Ltd* [1982] Ch 119, [1981] 2 All ER 495. In this case it was argued that the word 'Exxon' should be granted copyright protection as an original literary work. Even though the term 'Exxon' may have satisfied the skill, labour and judgment test of originality under s.1 of the CDPA 1988, it was held to be devoid of copyright protection for the reason that a literary work had to convey information, instruction or pleasure. The court found that these characteristics could not be conveyed by a single word. In his leading judgement, Graham J stated: 'As I have already stated, the question that I have to decide is, shortly stated, whether [the name] Exxon is an 'original literary work' within s 2 of the 1956 Act? I do not think it is. What it is then, one may ask. It is a word which, through invented and therefore original, has no meaning and suggests nothing in itself.' At 504.

video recordings and sound recordings.⁸² Artistic works include photographs, sculptures and graphic works.⁸³ However, it is unlikely that copyright will form the basis of a useful cause of action unless the owner of the copyright in the medium in question is the player or an associated entity. For example, there is copyright in a photograph, but it belongs to the photographer not to the player, unless the latter owns the copyright in that photograph.⁸⁴ So, if a photograph of a footballer is used for commercial purposes without his consent, the player cannot claim on the base of copyright infringement unless he owns the copyright of that photograph.⁸⁵ Therefore, a football player may consider buying the rights of his well-known photographs. Securing such rights may help a football player to control unauthorised uses of such photographs.

In addition, a specially designed graphical or logo symbol, intended to represent a footballer, may also attract copyright protection as an artistic work. For instance, as part of his endorsement agreement with Nike, Barcelona FC's star Lionel Messi has his own logo. The logo contains typography as well as graphic illustration which is the first letter 'M' of his name imprinted on a simple black backdrop. Such logo will attract copyright protection against any unauthorised use.

In the case of *Football Association Premier League Ltd v Panini UK Ltd (Panini)*,⁸⁶ the Court of Appeal examined whether the use of logos in photographs of well-known football players on stickers and albums could be regarded as incidental inclusion under section 31 of the CDPA 1988. The Photographic image of the players showed them wearing their premier league club strips which bore, the individual club badge and in some cases, the Premier

⁸² Section 1(1) (a) of the CDPA 1988.

⁸³ Section 4(1) (a) of the CDPA 1988.

⁸⁴ Section 9(1) and 11(1) of the CDPA1988.

⁸⁵ For further details, see Chapter Four of the research p.

⁸⁶ *The Football Association Premier League Limited and Others v Panini UK Limited* [2002] EWCA Civ 995.

League emblem.⁸⁷ The first claimant, the Football Association Premier League, had licenced the production of an official sticker and album collection to Topps Europe Limited.⁸⁸

The Court of Appeal granted an injunction against the defendant from selling collectible stickers of well-known footballers wearing team shirts showing the Premier League logo or the logo of a Premier League clubs. According to the Court, the reasons why one work has been included in another should be examined, and in doing this, it said that the commercial reasons as well as the artistic reasons for such inclusion were relevant. Lord Justice Chadwick stated: ‘It is impossible to say that the inclusion of the individual badge and the FAPL emblem is ‘incidental’. The inclusion of the individual badge and the FAPL emblem is essential to the object for which the image of the player as it appears on the sticker or in the album was created’.⁸⁹ He found that the stickers and albums were created predominantly for a commercial purpose to produce something collectable for a particular market.⁹⁰ He concluded that the inclusion of such logos in the stickers and albums was not incidental and formed a central aspect of the stickers and the albums from marketing point of view.⁹¹ The absence of such official logos from the photographs would arguably detract from the collectability of such items.⁹²

Accordingly, the law of copyright could be used to prevent unauthorised exploitation of the footballer’s image only when that image includes logos of his club or the Football Association. However, such logos and emblems do not always help to prevent the unauthorised exploitation of the player’s image. For example, the Court of Appeal’s decision in *Panini* can be contrasted with the decision in the case of *Trebor Bassett Ltd v The Football*

⁸⁷ Ibid para 2.

⁸⁸ Ibid para 9.

⁸⁹ Ibid para 27.

⁹⁰ Ibid

⁹¹ Ibid.

⁹² Ibid.

Association (Trebor).⁹³ In this case, Trebor placed cards featuring photographs of England footballers in its packets of candy sticks. The England ‘Three Lions’ logo, in respect of which the Football Association owned a registered trade mark, appeared on the England football shirts worn by the players in the photographs.⁹⁴

The Football Association alleged that Trebor had infringed its trade mark by including these cards with the photographs in which the logo was apparent. According to the court, Trebor’s act of publishing and marketing these cards in conjunction with the sweets did not amount to using the logo in respect of the cards on which the photographs appeared. Rattee J Stated: “Trebor Basset is not even arguably using the logo, as such, in any real sense of the word ‘uses’ and is certainly not, in my judgement, using it as a sign in respect of its cards.”⁹⁵

It can be said that the deployment of copyright law in support of footballers’ image rights has a variable prospect of success. For those footballers who actively pursue the commercial use of their image, copyright is certainly a useful tool in supporting that enterprise. Nevertheless, as a more general means of image right protection this offers only piecemeal protections for a footballer’s image.

4-3-4) Data Protection Act 1998

Image-related claims could also be made in the Data Protection Act 1998 (DPA 1998).⁹⁶ The Act regulates the processing of information about individuals.⁹⁷ Arguably, it may provide a remedy for misappropriation of an image because it contains provisions that operate to protect personal data and impose certain requirements on those who process such data. A photograph of a football player will be known as “personal data” within the meaning of the

⁹³ *Trebor Bassett Ltd v The Football Association* [1997] F.S.R. 211.

⁹⁴ *Ibid* at 211.

⁹⁵ *Ibid* at 217.

⁹⁶ Which was introduced to implement the Data Protection Directive (95/46/EEC).

⁹⁷ Section 13 of the DPA 1998 defines ‘processing’ as ‘obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data.’

Act provided that the individual can be recognised from the photo. The DPA 1998 defines personal data as ‘data which relate to a living individual who can be identified: (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.’⁹⁸ According to this definition, footballers’ image, name and other identifying characteristics may all be personal data.

In general, processing such data by third parties requires the approval of the individual in which the data relates according to the Act. It might seem, however, that such approval can be implied when photographs are taken during a football match. In other words, it is debatable that football players would have implicitly accepted to the use of his image when he plays a football match on an open ground. Nonetheless, if the photo is taken which a player would naturally go against, then the publishing of these photographs would infringe the DPA 1998.

Furthermore, Section 32 of the DPA 1998 provides exceptions to the requirement of approval, including journalism, art and literature. In the case of *Durant v Financial Service Authority*,⁹⁹ the Court of Appeal considered the meaning of personal data:

The appellant had made a subject access request under the DPA 1998 to the Respondent for it to provide him with information they held about him. The Respondent refused to provide information held on manual files on the ground that such information did not fall within the definition of ‘personal data’ because it was not part of a structured filing system.

⁹⁸ Section 1 of the DPA 1998.

⁹⁹ [2003] EWCA Civ

The Court concluded that not every piece of data which has a connection with an individual can be said to 'relate to' him. Auld LJ, with whom Buxton and Mummery LLJ concurred, ruled that:

'not all information retrieved from a computer search against an individual's name or unique identifier is personal data within the Act. Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depend on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transaction or matters in which he may have been involved to a greater to lesser degree'.¹⁰⁰

Auld LJ went on to comment that to be personal data, the information had to be 'biographical in a significant sense' and be something that 'affects his privacy, whether in his personal or family life, business or professional capacity'.¹⁰¹ Clearly, the purpose of the Act was not to assist professional footballers obtain access to documents to assist them in litigation against a third party by claiming that such documents carry personal data about him.

It should be noted however that the law relating to data protection has started to have impact regarding the control of image and other private information. In the case of *Campbell v MGN Ltd*¹⁰² the claimant was awarded nominal sums in relation to the breach of their data protection rights. In this case, The Daily Mirror newspaper published a front-page story under the headline, 'Naomi: I am a drug addict'. The story, which continued inside the newspaper over several pages, was accompanied by a number of photographs of supermodel Naomi Campbell on a London street.¹⁰³ The claimant immediately commenced proceedings against

¹⁰⁰ Ibid para 28.

¹⁰¹ Ibid para 28.

¹⁰² [2002] 499 AC 487.

¹⁰³ Ibid.

the newspaper's publisher, MGN Ltd, for breach of confidence and compensation under the DPA 1998. On the DPA 1998, the court states that the information contained in the newspaper as to the nature of, and details of, the therapy that Campbell was receiving, including the photographs with captions, was clearly related to her physical or mental health or condition and was therefore 'sensitive personal data' as defined by the DPA 1998.¹⁰⁴ The court ruled the newspaper did not have one of the legitimising conditions in Schedule 3 of the Act to enable it to lawfully publish such material.¹⁰⁵

In *Murray v. Express Newspaper*,¹⁰⁶ the court suggested that a remedy for breach of data protection rights might extend to an account of profits and thus provide more meaningful outcomes for claimants. Therefore, it seems that actions under the DPA 1998 will become more prevalent as a means of protection of image.

4-3-5) Human Rights Act 1998

The capacity of famous football players to exercise control over the deployment of their image is also related to private information, including an image, which they wish to avoid being published. Such famous players' off-field indiscretions are now of great interest of the media who utilise stories as a means of generating interest and sales. Usually such stories will relate to aspects of athletes' private lives which they may prefer to keep it far from the public domain.¹⁰⁷ Such interest, however, raises the issue as to whether the media have the right to investigate and report on players off-field indiscretions, given the fact that the incidents occur in their own time. For example, in regard to the sexual affairs of Ashley Cole,¹⁰⁸ the former Chelsea FC and England national team player, it should be noted that no crimes were

¹⁰⁴ Ibid at para 92.

¹⁰⁵ Ibid.

¹⁰⁶ [2009] Ch 481.

¹⁰⁷ Boyes, *ibid*, (n 549) at 70.

¹⁰⁸ Richard Edwards, *Ashley Cole in privacy row after 'covering up', alleged affair*. The telegraph, 22 February 2010. Accessed on 10 Jun 2018. <https://www.telegraph.co.uk/news/uknews/law-and-order/7285676/Ashley-Cole-in-privacy-row-after-covering-up-alleged-affair.html> accessed on 23 May 2016.

committed, and the behaviour engaged in was consensual. This raises private questions for which the player paid a heavy price, given the fact that the affairs affected his family and ended his marriage.¹⁰⁹ Answering this question will indicate the extent to which the law of breach of confidence could protect the player's image against unauthorised exploitation.

In addition, the rise of social media has only expanded the scrutiny. Now almost everyone who owns a smartphone can be a journalist, photographer or publisher. Any off-field activity by a footballer could be easily posted online to the world at large. For example, in March 2018, a footage filmed by a football fan and obtained by the Daily Mirror showed Jamie Carragher, a well-known football pundit on Sky Sports and the former Liverpool FC and national team player, spitting towards the fan and his young daughter.¹¹⁰ Carragher was suspended by Sky Sports till the end of the 2017-18 Premier League season.¹¹¹

In fact, the lack of a UK law protecting privacy was considered in the case of *Kaye v Robertson*.¹¹² In this case, the claimant was a well-known television actor who had been involved in a car accident suffering head injuries. While recovering from surgery, two Sunday Sport journalists went into the hospital dressed as medical staff to take pictures of him. Kaye vainly sought an injunction to prevent publication of the story and images. In denying the injunction, the court acknowledged that Mr Kaye had experienced 'a monstrous invasion of his privacy.'¹¹³ Despite this, the court concluded that by itself, 'this invasion of his privacy which underlies the plaintiff's complaint... does not entitle him to relief in English law.'¹¹⁴ Eady. J. noted the lack of legal protection against publication for Mr Kaye,

¹⁰⁹ Ibid.

¹¹⁰ Aaron Flanagan, *Jamie Carragher breaks cover for first time since spit as he prepares for showdown talks with Sky Sports*. Published by the Mirror on 12 Mars 2018. <<https://www.mirror.co.uk/sport/football/news/jamie-carragher-pictured-first-time-12171055>> accessed on 14 April 2016.

¹¹¹ Ibid.

¹¹² *Kaye v. Robertson and others* [1991] F.S.R. 62.

¹¹³ Ibid at 70.

¹¹⁴ Ibid.

stating that there was ‘a serious gap in the jurisprudence of any civilised society, if such a gross intrusion could happen without redress’.¹¹⁵

However, the law has now developed substantially in this respect through the introduction of the HRA 1998. The HRA 1998 incorporates into English law the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. As a result of the passage of the HRA 1998, the courts of the UK are now obliged to take into account the rights provided by the Convention and not to act in a way which is incompatible with a convention rights.¹¹⁶

Article 8 of European Convention on Human Rights provides that ‘everyone has the right to respect for his private and family life, his home and his correspondence’. Private life includes ‘an individual’s physical and psychological integrity and the guarantee afforded by the right to privacy is intended to ensure the development of personality of individuals in their relations between themselves.’¹¹⁷ This broad concept of private life must be taken into account by the courts in the UK when applying private law rights between private parties.

In the case of *Douglas v Hello*¹¹⁸ the English court had a cause to consider the extent to which the HRA 1998 should assist those attempting to protect the commercial value of their confidential information, including image. The first two claimants (Douglases), well-known

¹¹⁵ Ibid. Eady J observed in his speech on privacy to intellectual property lawyers in 2009 that the statutory tort could be less restrictive of the media than the law of privacy as it subsequently developed. He said: we were, rather naively perhaps, attempting to achieve certainty and predictability. Anyway that was not adopted by the legislature. Instead, ministers were heard to say at the time, on more than one occasion, that it was best to trust an independent judiciary to develop the common law by reference to Articles 8 and 10 of the European Convention. That is not a view one hears much about these days, since in certain quarters the process is thought to have gone too far in the wrong direction. It has become it has become fashionable to label judges, not as independent, but rather as ‘unaccountable’. Following measured representations from the Daily Mail, the Justice Secretary has recently announced that something called a statutory ‘nudge’ may after all be required.’ Source: Sir David Eady’s Speech on Privacy to TIPLA (The Intellectual Property Lawyers’ Association), House of Lords, 18 February 2009.

<https://publications.parliament.uk/pa/cm200809/cmselect/cmcmds/memo/press/uc7502.htm>> accessed on 18 April 2016.

¹¹⁶ Section 3 of the HRA 1998.

¹¹⁷ *R (Country Alliance) v AG* [2007] UKHL, 52, [2008] 1 AC 719 at para 116.

¹¹⁸ [2003] 3 All ER 996.

film stars, sold exclusive rights to photograph their wedding to the third claimant (OK!). At the wedding, photography was prohibited. Despite the tight security, a paparazzi infiltrated and took unauthorised photographs of the wedding. Hello! bought the exclusive rights to publish the unauthorised photographs. An application by the claimants for an injunction to prevent publication by Hello! was rejected by the Court of Appeal and both OK! and Hello! published their wedding edition the following day.¹¹⁹ In the proceedings, the Douglasses and OK! claimed damages for breach of confidence.¹²⁰

At first instance, Lindsey J found that the Douglasses were entitled to damages and a perpetual injunction against Hello! on the ground that the publication of the unauthorised photographs constituted a breach of confidence.¹²¹ He found that OK! was entitled to damages from Hello! on considerably similar grounds, albeit that the breach of confidence was more in the nature of a trade secret.¹²²

The Court of Appeal upheld the judge's decision on the Douglasses' breach of confidence claim and on OK!'s claims based on economic torts.¹²³ The Court of Appeal concluded that the photographs of Douglasses' wedding were worthy of protection as private information in respect of the Douglasses. The Court stated that "... photographs of the wedding plainly portrayed aspects of the Douglasses' private life and fell within the protection of the law of confidentiality, as extended to cover private or personal information."¹²⁴ Therefore, the court concluded that where the information features the private life of the individual, it will be protected against invasion by unauthorised parties through the doctrine of privacy.¹²⁵

¹¹⁹ Ibid para 133 et seq.

¹²⁰ OK! Magazine also claimed for interference with its business by unlawful means. Ibid.

¹²¹ [2003] 3 All ER 996.

¹²² Ibid at para 196.

¹²³ [2005] 4 All ER 128.

¹²⁴ Ibid at para 95.

¹²⁵ Ibid paras 112-13.

OK! on the other hand, despite its initial success in the High Court, had the award of damages in its favour overturned in the Court of Appeal,¹²⁶ and chose to appeal against the decision that Hello! was not liable for breach of confidence.¹²⁷ The majority of the House of Lords decided that the wedding photographs were protected through confidentiality. They found that the publication of the unauthorised pictures by the defendant breached OK!'s right of privacy in the authorised photographs.¹²⁸ According to the majority of the Law Lords, the simultaneous publication by OK! of its authorised pictures had not put the unauthorised pictures in the public domain and out of the reach of this action.¹²⁹ Lord Hoffman pointed out that the breach of confidence claim by OK! did not depend on the inherent nature of the information, but rather on the fact that it was subject to control by the Douglasses. He said:

‘the fact that the information happens to have been about the personal life of the Douglasses is irrelevant. It could have been about anything that a newspaper was willing to pay for. What matters is that the Douglasses, by the way they arranged their wedding, were in a position to impose an obligation of confidence. They were in control of the information.’

Therefore, where an individual is in a position to control personal information, such as image of an event that can be kept secret from the outside world, he will be able to treat that information as a ‘conventional’ trade secret and protect it using the doctrine of breach of confidence. They can also transfer their interests in that information to another party. Depending on the fee paid, such information can be licensed to third parties, who will then obtain the benefit of the confidentiality.¹³⁰ Lord Brown concluded: “Having paid £1 million

¹²⁶ OK! was awarded £1,033,156 which was overturned by the Court of Appeal. Ibid 260.

¹²⁷ [2007] UKHL 21.

¹²⁸ Ibid, para 120-122 per Lord Hoffmann.

¹²⁹ Ibid, para 307 per Baroness Hale and para 329 per Lord Brown. The contrary view was taken by Lord Nicholl para 257.

¹³⁰ Ibid, para 117, per Lord Hoffmann.

for an exclusive right it seems to me that OK! ought to be in a position to protect that right and to look to the law for redress were a third party intentionally to destroy it.”¹³¹

As the House of Lords substantially made clear that its observations in *Douglas v Hello!* refer to a cause of action in breach of confidence of private information, and not to a free-standing image right.¹³² However, the development of the law in this regard could put the claimants in a powerful position to control certain aspects of their images. The ability to exercise legal control over image is eventually premised on the capacity of the claimants to exercise effective control over their image. The same approach can certainly be adopted in respect of football.

However, there are rare cases where the disclosure of the fact that a footballer is taking action could defeat the purpose of the injunction but these are exceptions to the rule. English courts took the view that not all private information is entitled to be viewed as confidential. It should be the responsibility of any privacy claimant seeking the benefit confidential to show that there is a clear necessity for such an order. In 2002, A (the footballer Garry Flitcroft, the previous captain of Blackburn Rovers FC) sought to prevent publication in B (*The People*) of kiss-and-tell stories from two young women C and D with whom he had had affairs at

¹³¹ Ibid, para 325.

¹³² The comparison between image rights and privacy in *Douglas v Hello!* were described by the Honourable Murry Gleeson AC, former Chief Justice of the High Court in Australia: ‘if two film stars , who live by publicity, sell, for a large sum of money, the exclusive rights to photograph their wedding, they are exploiting legitimately, and licensing some third party to exploit, their fame and their image. If a third party undermines that enterprise by unauthorised publication of photographs of the wedding, it seems incongruous to describe what is going on as an intrusion upon privacy. It is a diversion of the benefits of profitable publicity. The problem is not that the personal dignity of the film stars has been affronted; it is that their earning capacity has been unfairly compromised. Their complaint is essentially commercial; and the law should deal with it on a frankly commercial basis. On the other hand, in other circumstances, intrusive conduct by a photographer may damage interests associated with human dignity, whether or not the plaintiff is a celebrity. The interest protected in the case of a celebrity who sells the exclusive right to take and publish her photograph in a certain setting; or in a certain attire, is not easily recognised either as confidentiality or privacy. Yet it is not difficult to see why the law of commerce would seek to protect it. At the same time photographs of the same celebrity and her children taken in some family or recreational setting may involve clear disrespect for her private or family life. This seems to accord with the approval of the European Court of Human Rights. The conduct of a stalker, whether his motives are personal or commercial, may be damaging to any victim, and the law’s protection understandably may be based on the concept of human dignity. Confusing the two kinds of legal protection is unproductive, and may devalue the currency of important concept’.

different times.¹³³ Flitcroft did not want his wife and family to find out about the affairs. He sought the injunction to prevent publication on the grounds that there should be confidentiality between him and the young women. In the High Court, Jack J decided that this was an invasion of the footballer's privacy, that he should be able to count on confidentiality and that there was no public interest in publishing.¹³⁴ Jack J assumed that A was entitled to the same protection in respect of his 'transient' relationship with C and D as would be available if the information had concerned a marriage relationship.¹³⁵ *The People* appealed against the decision.¹³⁶ Lord Woolf CJ¹³⁷ overturned the decision. He held that Jack J had erred on a number of points in granting the injunction, stating relationships of the sort A had with C and D are 'not the categories of relationships which the court should be astute to protect when the other parties to the relationships do not want them to remain confidential'.¹³⁸ He concluded that the pre-trial injunction would be unjustified interference with press freedom.¹³⁹ Lord Woolf went on to make it clear that there was a public interest defence in publishing what was of interest to the public.¹⁴⁰ He explained that if newspapers do not publish information which the public is interested in, there would be fewer newspapers, and this would not itself be in the public interest.¹⁴¹

¹³³ [2003] QB 195.

¹³⁴ *A v B plc and another* [2001] 1 WLR 2341 at 2356-7.

¹³⁵ *Ibid.*

¹³⁶ [2003] QB 195.

¹³⁷ Sitting with Lord Justice Laws and Lord Justice Dyson.

¹³⁸ *Ibid* at para 45. Lord Woolf controversially asserted in his judgement: "Where an individual is a public figure he is entitled to have his privacy respected in the appropriate circumstances, A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure. The public figure may hold a position where higher standard of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position." *Ibid.*

¹³⁹ *Ibid* at para 47.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

Another former England football player, John Terry was similarly unsuccessful in an attempt to restrict publication of details and pictures relating to his alleged relationship with a woman.¹⁴² A newspaper was about to publish their scoop on John Terry's adulterous affair with a former team-mate's ex-partner. John Terry sought complete privacy, stating that any publication of any information, including images, evidencing the extramarital relationship could lead to harming his private family life. Tugendhat J noted that there was no evidence before the court and no personal representation from the applicant of proof to convince him to apply the right to privacy under Article 8 of the HRA 1998, nor was there any confidential or privacy information disclosed.¹⁴³ For this reason the court lifted the interim order granted initially a few days earlier, stating that privacy law was not there to protect someone's reputation, which in this case also included the footballer's *commercial activities*.¹⁴⁴

It can be said that while the law of breach of confidence does offer some opportunity to protect private or confidential information, including image, subject to that information possessing the necessary quality of confidence and being imparted in that manner; that is in circumstances in which there would be a reasonable expectation of privacy. However, often information will not cross this threshold, and even where it does so, publication may still be justified in the public interest where the information relates to a person of standing or one who has previously made contradictory claims.

From a commercial perspective, footballers are best advised to be as proactive as possible in taking steps to secure their rights. Ensuring that rights of image and brand are exploited to their full extent and supporting trademarks registered, will go some way to offering a degree of control. Nevertheless, even the most proactive footballers may find that there are gaps in their approach which they had not contemplated.

¹⁴² *Terry v Persons Unknown* [2010] EMLR 16

¹⁴³ *Ibid* at para 104.

¹⁴⁴ *Ibid* at para 131.

From the prospective of life, it is clear that genuinely private aspects of family life will benefit from protection, but footballers who seek to protect their image from being tarnished by preventing details of any misdemeanour from becoming public knowledge are likely to be much less successful in their approach.

4-3-6) Protecting image through the tort of passing off.

The tort of passing off was formulated to protect a trade's goodwill or reputation by preventing one trader from representing their goods or services as the goods or services of another.¹⁴⁵ Therefore, passing off may be established where a footballer's image is used on a defendant's goods or services so as to deceive consumers that there is a 'business connection' between the football player and the defendant. In the case of *Warnink v. Townend*,¹⁴⁶ the House of Lords set out five necessary elements to establish a cause of action in passing off: "(1) a misrepresentation (2) made by a trader in the course of trade (3) to prospective customers of his or ultimate consumers of goods or services supplied by him (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to the business or goodwill of the trader by whom the action is brought or will probably do so."¹⁴⁷ Accordingly, the tort of passing off protects the goodwill¹⁴⁸ of individuals and companies, which arises as a result of their business and activities. The tort of passing off, therefore, is a useful remedy against the unauthorised exploitation of footballers' images. The scene was set by the case of *McCulloch v Lewis A May Ltd*,¹⁴⁹ though this did not relate to the exploitation of a footballer's image. In this case, the claimant was a well-known children's broadcaster who used the name 'Uncle Mac'. The defendant sold cereal under the name 'Uncle Mac' alluding to some of the

¹⁴⁵ See *Reddaway v Banham* [1891] AC 199, 204 (Halsbury LC).

¹⁴⁶ [1979] AC 731.

¹⁴⁷ *Ibid* at 743.

¹⁴⁸ Goodwill 'is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom'. Per Lord Macnaghten in *IRC v Miller and Co's Margarine Ltd* [1901] AC 217.

¹⁴⁹ [1947] 2 All ER 845, Ch D.

claimant's characteristics, without his permission.¹⁵⁰ The claimant sued for passing off claiming that the defendant was effectively trading on the goodwill engendered by his fame. As mentioned above, such an action requires the claimant to demonstrate goodwill, misrepresentation as to the products or services offered by the defendant and actual damage. The court rejected the claim upholding that there was no common field of activity between the plaintiff and the defendant. The court held that the facts did not give rise to passing off because the claimant was a presenter and not a cereal manufacturer.¹⁵¹ Therefore, no goodwill existed which could sustain damage.¹⁵² This decision completely ignored the fact that it is highly likely that the public buying the defendant's product would simply assume that the claimant had consented for his name or image to be used. This use could tarnish his image. This approach severely restricted the usefulness of the tort of passing off particularly in the sports sector.

A significant development of the tort of passing off in this area was apparent in the case of *Mirage Studios v Counter Feat Clothing*¹⁵³ commonly known as the 'Ninja Turtles'. In this case the interim injunction was sought by the claimants to restrain the use of four cartoon characters on the defendant's T-shirts on the ground that their reproduction constituted a breach of passing off.¹⁵⁴ This time, the claimant produced evidence that there had been

¹⁵⁰ Not only did the cereal use the name 'Uncle Mac', it was also designed in such a way to associate the cereal with the celebrity. *Ibid*.

¹⁵¹ This approach was subsequently confirmed in *Sim v. H J Heinz Co Ltd* [1959] 1 All ER 547. An actor's voice was mimicked in television advertisement for the defendant's food products. It was held that passing off do not apply because the claimant was in the business of acting and not selling soups and baked beans. Similar reasoning can be found, in the case of *Lyngstad v Anabas Products Ltd*, [1977] FSR 62 (Ch D) by the High Court of Justice. The plaintiff sued to prevent the sale of T-shirt featuring pictures of pop group, ABBA. The court rejected the claim on the base that there was no common field of activity between the group and the producer of the T-shirts.

¹⁵² Wynn-Parry J was 'satisfied that there is discoverable in all those in which the court has intervened the factor that there was a common field of activity in which, however remotely, both the plaintiff and the defendant were engage and that it was the presence of that factor that grounded the jurisdiction of the court'. [1947] 2 All ER 845, Ch D at 851.

¹⁵³ [1991] F.S.R. 145.

¹⁵⁴ *Ibid* at 146.

confusion with defendant's products, which the public believed had been licenced by the claimant.¹⁵⁵

The court held that the public was sufficiently sophisticated to understand that the manufacture and sale of such goods would be licenced by the claimant.¹⁵⁶ Therefore, the claimant could be successful in a claim for passing off.¹⁵⁷ This development of the law in this area was very important in that it expanded the potential for the utilisation of passing off as a means by which to protect the image of footballers. However, subsequent similar cases have appeared to limit the extension of actions in passing off to support attempts to restrict exploitation through merchandising.

In *Halliwel v. Panini SpA*,¹⁵⁸ the singing group 'Spice Girls' applied for an injunction, under the claim of passing off, to prevent Panini from distributing an unauthorised sticker collection, called 'The Fab Five,' which featured their images. The group contended that the public would be misled into believing that it was an authorised collection, because the collection did not contain a disclaimer.¹⁵⁹ The court made it quite clear that the claimants were unlikely to succeed at trial.¹⁶⁰ In his judgement, Lightman J suggested that the absence of the word 'unofficial' on the defendant's product would not mislead the public.¹⁶¹ The court then questioned whether a designation of 'official' on a product is of any relevance to a purchaser.¹⁶²

In the high profile football case *Cantona v Cantona French Wines Limited*,¹⁶³ the claimant, a former football star Eric Cantona, launched proceedings against the defendants for

¹⁵⁵ Ibid at 151.

¹⁵⁶ Ibid 157.

¹⁵⁷ Ibid 159.

¹⁵⁸ [1997] 5 EMLR.

¹⁵⁹ ibid

¹⁶⁰ ibid

¹⁶¹ ibid

¹⁶² ibid

¹⁶³ ibid

associating themselves with Cantona and his football club, Manchester United FC. The defendants had registered companies under the names ‘Cantona French Wines Ltd’, Cantona French Brady Ltd’, and Cantona Pour Homme Ltd.’¹⁶⁴ Advertisements for their similarly named products had appeared in the newspapers accompanied by a phrase inextricably associated with Cantona, namely ‘Ooh Aah’.¹⁶⁵ The advertisement also depicted Cantona’s jersey number ‘7’ on the wine bottle.¹⁶⁶ The case was settled in the claimant’s favour before it got to trial when the defendants agreed to end any association between Cantona and their merchandise and to change the company name.¹⁶⁷

Whether this obvious association would have amounted to passing off is uncertain. Cantona may be able to establish that he had a reputation as an endorser, and that his legitimate endorsement was damaged by the unendorsed products.¹⁶⁸ However, Cantona would also have had the difficult task of proving that a significant portion of the public believed that he endorsed the product.

This requirement severely restricted the usefulness of the tort of passing off, in the sport sector as elsewhere. The case of *Irvine v Talksport Ltd*¹⁶⁹ (*Irvine*) however breathed a new life into the tort of passing off as a useful protection for celebrities. *Talk Sport*, who runs an eponymous radio station, used a distorted image of the claimant, a prominent driver in the FIA Formula One World Championship, to endorse its product. The original image showed the claimant holding a mobile telephone,¹⁷⁰ but the defendant had doctored the photograph, removing the mobile phone that the claimant was holding and replacing it with a portable radio with the word ‘*Talk Sport*’. The claimant contended that the distribution of brochure

¹⁶⁴ *ibid*

¹⁶⁵ *ibid*

¹⁶⁶ *ibid*

¹⁶⁷ *ibid*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Edmond Irvine Tidewell v Talksport Ltd* [2002] EWHC 367(Ch), [2002] 2 All ER 414.

¹⁷⁰ The right to use the photograph had been legally obtained from a photograph agency. So that copyright in the photograph was not an issue.

bearing that manipulated photograph of him falsely implied that he endorsed the defendant, and was an actionable passing off. The defendant relied on the lack of a common field of activity. In this case, Laddie J was careful to differentiate cases of false endorsement from merchandising more generally. He drew a distinction between merchandising and endorsement stating: “When someone endorse a product or service he tells the relevant public that he approves of the product or services or is happy to be associated with it. In effect he adds his name as an encouragement to members of the relevant public to buy or use the service or product. Merchandising is rather different. It involves exploiting image, themes or articles which have become famous.”¹⁷¹

Laddie J went on to make clear that for a passing off action to succeed in a false endorsement claim, the claimant must show more than a mere commercial exploitation of his name or image. He stated: “this case is concerned with endorsement, not merchandising rights. For that reason, Miss Lane [council for Irvine] does not argue that her client can succeed simply by showing that his image was used for commercial purposes on the defendant’s brochure. She accepts that she must go further and show that there was an implicit representation or endorsement or that members of the target audience would believe that to be the case.”¹⁷²

Laddie J noted that the old cases may not reflect the recent development and that ‘the law of passing off responds to changes in the nature of trade’¹⁷³. He, therefore, held in favour of the claimant in this passing off action rejecting the common field of activity requirement.¹⁷⁴ He held that it was the purpose of the law of passing off to vindicate the claimant’s exclusive

¹⁷¹ [2002] EWHC 367 (Ch) para 9.

¹⁷² [2002] EWHC 367 (Ch) para 58.

¹⁷³ Ibid para 14. Laddie J referred to the case of *Harrods v Harrodian School Ltd* [1996] RPC 697, CA, where Beldam LJ said: “there is no requirement that the defendant should be carrying on a business which competes with that of the plaintiff or which would compete with any natural extension of the plaintiff’s business. The expression “common field of activity” was coined by Wynn-Parry J in *McCulloch V May* ... when he dismissed the plaintiff’s claim for want of this factor. This was contrary to numerous previous authorities And is now discredited. Ibid para 28.

¹⁷⁴ Ibid para 38.

right to his goodwill.¹⁷⁵ The law, therefore, would not allow the unauthorised use of that goodwill.¹⁷⁶ The Court of Appeal affirmed Laddie J's decision emphasising that the actual image of the claimant listening to the radio gave an impression of endorsement.¹⁷⁷ Therefore, Laddie J ruling may enable the law to respond with the constant state flux of the commercial market. Laddie's ruling that 'Mr Irvine has a property right in his goodwill which he can protect from unlicensed appropriation consisting of a false claim or suggestion of endorsement of a third party's goods or services' is a very important step forward in the recognition of image rights under English law. It provides a proper cause of action that responds to modern marketing practice, and makes the inventive use of other causes of action less imperative.

The position established by *Irvine* has been affirmed by the court of appeal in *Fenty v Arcadia Group Brands Ltd.*¹⁷⁸ In this case, Topshop started selling a T-shirt bearing an image of the top star Rihanna taken by an independent photographer during a video shoot. Topshop had obtained a licence from the photographer to use the image on the merchandise but had no licence with Rihanna.¹⁷⁹ The latter issued court proceeding against Topshop for passing off, that is using her image in such a way as to deceive members of the public into buying the t-shirt because they would believe she had authorised the use of her image.¹⁸⁰ Topshop argued that this effectively amounted to a claim to an image right and should not be upheld by the court.

In the High Court, Birss J held that the unauthorised exploitation of Rihanna's image was passing off liable to confuse Rihanna's fans. He emphasised the importance of the particular

¹⁷⁵ Ibid.

¹⁷⁶ Ibid para 39.

¹⁷⁷ The Court of Appeal subsequently awarded Irvine £25000 as this would have been his minimum fee for making such an endorsement. [2003] EWCA Civ 423 para 116.

¹⁷⁸ [2013] EWHC 2310 (Ch).

¹⁷⁹ Ibid at 70.

¹⁸⁰ Ibid.

circumstances of the case stating: ‘The mere sale by a trader of a t-shirt bearing an image of a famous person is not, without more, an act of passing off. However the sale of this image of this person on this garment by this shop in these circumstances is a different matter.’¹⁸¹ The difference in this case was that the singer was able to show that she had created goodwill in her own brand, not just as a famous singer and celebrity, but that she had a certain fashion icon status among the relevant section of the public.¹⁸² Therefore, Rihanna had a protectable goodwill, and the court was of the view that the t-shirt were likely to mislead or induce consumers to purchase them in the false belief they had been authorised by Rihanna.¹⁸³ As Topshop had numerous endorsement arrangements with other celebrities, the court also reasoned that this would increase the public perception that it had entered a similar arrangement with Rihanna.¹⁸⁴ Birss J emphasised that the absence of a free-standing image right in English law did not mean that the exploitation of image could not be regarded as a relevant factor in an overall assessment of passing off.¹⁸⁵

The decision however is unlikely to open the door for claims to be brought every time the image of a celebrity is used without his permission. Birss J emphasised each case will depend upon the individual circumstance. The application of *Rihanna* to football players is likely to be relatively limited. The claim for passing off in *Rihanna* could not have succeeded without the combination of past association between the parties and the similarity of the image to Rihanna’s own marketing material. However, this development in the law of passing off in both *Irvine* and *Rihanna* are a significant step forward for the ability of high profile football players to protect their commercial rights associated with image.

¹⁸¹ Ibid at 90.

¹⁸² Ibid at 84.

¹⁸³ Ibid.

¹⁸⁴ Ibid at 85.

¹⁸⁵ Ibid at 75. The Court of Appeal upheld the High Court’s decision. [2015] EWCA Civ 3.

Indeed, many high profile footballers have started focusing on developing their images actively nowadays. According to Forbes' annual list of the world's wealthiest athletes, the former Manchester United player Cristiano Ronaldo was crowned the top earning athlete in the world with total earning of 108 million dollars.¹⁸⁶ Almost 47 million dollars of this revenue comes from his personal commercial activities.¹⁸⁷ These activities include endorsement agreements with Nike, Tag Heuer, Herbalife, Pokerstars, Clear Shampoo and Roc Headphones.¹⁸⁸ Cristiano Ronaldo has also started to develop very valuable rights in his image rights. For example, he has recently concentrated on growing his personal commercial brand 'CR7'.¹⁸⁹ Despite his endorsement agreements above, he also has his own line of shirts, boxers and fragrance.¹⁹⁰ Such commercial activities are a clear evidence that the player is enjoying a significant reputation or goodwill. Any unauthorised use of his image could create a false message which would be understood by a significant portion of the public that the player has approved or endorsed the product or services. It can be said then that the case of *Irvine* and *Rihanna* made it clear that high profile footballers, and other well-known celebrities, have property rights in their goodwill that they can protect from unlicensed appropriation consisting of a false claim or suggestion of endorsement of a third party's products or services. Nonetheless, this protection is likely to be relatively limited. In these cases, the British court alluded to the possibility that the time may be coming for the reassessment of merchandising cases, either by the reference to the HRA 1998 or by the development of the common law. Such reassessment may be encouraged by the development in the law of breach of private information outlined above. Until then, football players should

¹⁸⁶ [www.forbes.com. https://www.forbes.com/profile/cristiano-ronaldo/](https://www.forbes.com/profile/cristiano-ronaldo/)

¹⁸⁷ Ibid.

¹⁸⁸ In addition, Cristiano Ronaldo has his personal line of CR7 shirts, shoes, underwear, cologne and hotels. Ibid.

¹⁸⁹ See Olenski, Steve, *The Rising Branding Star That is Cristiano Ronaldo*, Forbes 14 April 2016 <https://www.forbes.com/sites/steveolenski/2016/04/14/the-rising-branding-star-that-is-cristiano-ronaldo/#621e349e21>, accessed on 15 May 2017.

¹⁹⁰ Ibid.

not expect a concrete legal protection against unauthorised use of their image. This will not only dilute the commercial value of the footballer's image, but also the commercial arrangements of football association and related enterprises. The absence of a free-standing image right in English law and the reluctance of the court to use the exist law to prevent unauthorised use of the image will provide ambush marketers an opportunity to associate their brands with football associations and related enterprises through footballers.

The exploitation of a footballer's image as a means of ambush marketing is not limited only to unauthorised use of that image, but also to the parties who own the contractual authorisation to use that image. In the next section of the chapter, there is a review of the main types of contracts and contractual provisions currently used to exploit the commercial value in a football player's image. The purpose of the section is to indicate the extent to which such contractual provisions could be used by the participating parties to infringe the exclusive rights of official sponsors.

4-4) Image rights and the contractual relationship between the footballer and his club, team and governing body.

Whatever the legal position, thr the fact is that there has developed a substantial industry dealing with the grant and exploitation of the right to make commercial use of the image of high profile football players. As a result, image rights clauses in a football player's contract and separate image rights contracts have both become commonplace. It is significant to know the legal position when addressing the grant of exclusivity that is usually sought in endorsement or licensing contracts. However, the absence of free-standing image rights in English law is no bar to their exploitation, as long as such image rights can be granted as a matter of contract. Such contracts will not only grant image rights but also protect them from

being exploited without consent. According to Rose, ‘the reality is that the best known players (and the ones with the most valuable images) are using their contractual bargaining power to ring fence (in contract) the ability of others to use their image.’¹⁹¹

Usually, the athlete assigns his image rights to a company which then negotiates and concludes agreements with third parties for the exploitation of those rights.¹⁹² One key third party is usually the football club, team or a governing body by which the footballer is employed. Football players usually enter into a single contract with such parties granting them both their playing services and their image rights in connection with those services. Such contracts may contain differing degrees of detail in relation to the ability of the club, team or governing body to exploit that image rights. In 2002, for example, David Beckham negotiated a contract extension with his club Manchester United FC. He succeeded in extracting payment for image right which constituted a fifth of his final £90,000 a week contract.¹⁹³ However, elite professional footballers may now prefer to manage their image rights separately from their employment contracts nowadays. In the above mentioned example, Beckham signed a 5 year contract with Los Angeles Galaxy FC worth 128\$ million.¹⁹⁴ The contract also granted Beckham the complete control of his image rights.¹⁹⁵ This shows a shifting of powers between football clubs and footballers.

This contractual matrix becomes more complicated when one considers the variety ways in which image rights can be contractually exploited. A football player can become associated, either directly or indirectly, with a range of different brands including his own personal sponsors, his club, his national team and governing bodies. All these parties are seeking to

¹⁹¹ Rose, *will sports stars stand up for their image rights?* (2000) 51 *Sports Business* 26, in Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para H2.90.

¹⁹² Boyes, *ibid* (n 549) at 70.

¹⁹³ *Beckham signs new contract*, *bbc sport* on 12 May 2002. Accessed on 25 February 2018.

¹⁹⁴ Kurt Badenhausen, *David Beckham Departs MLS after earning \$255 million*, *Forbes*, 30 November 2012, accessed on 25 February 2018.

¹⁹⁵ *Ibid*.

use the players' celebrity status to promote their sponsors and commercial partners. For example, Liverpool FC and England striker Daniel Sturridge has endorsement deals with companies such as Nike, Sainsbury, BT Sports and Subway.¹⁹⁶ Images of the player may be exploited as part of an overall club or team sponsorship.¹⁹⁷ Liverpool FC will want to include the right to exploit images of its players in their club context in its sponsorship agreements with commercial partners including Standard Chartered, NB, BET Victor, Carlsberg, etc.¹⁹⁸ The FA¹⁹⁹ also wants to enhance the sponsorship rights they can offer to their commercial partners (including Vauxhall, Adidas, M&S, Lidl, Mars, etc.)²⁰⁰ by granting them the right to exploit the images of the player in his England capacity. Organisers of football competitions and tournaments in which the players, as a member of the club or the national team, participate will also want to grant their commercial partners the right to use images of footballers competing in their event. Certainly, commercial partners will not only include official sponsors, but also broadcasters, who will also seek to use player imagery to promote their broadcast of the matches.

Clearly, with so many interwoven commercial programmes to deliver, there is plenty of scope for conflict in the exploitation of a player's image rights. This has made it necessary to critically review the contractual relationship between footballers and these parties. Otherwise, disputes become unavoidable. In 2005, for example, Initially Cable & Wireless were the official sponsors for West Indies cricket.²⁰¹ The company also had individual agreements with many West Indian Players.²⁰² Subsequently, the West Indies cricket sponsors changed to

¹⁹⁶ www.danielsturridge.net

¹⁹⁷ Regulatory restrictions are discussed in further detail later in this chapter.

¹⁹⁸ See liverpoolfc.com.

¹⁹⁹ The FA shall mean the Football Association Limited

²⁰⁰ www.thefa.com/england

²⁰¹ Scyld Berry, *Sponsors Finger West Indies*, the.telegraph.co.uk, on 27 February 2005, Accessed on 13 April 2017.

²⁰² *Ibid.*

Digicel.²⁰³ Since Digicel were rivals to Cable & Wireless, they insisted that the West Indies Cricket Board ask its players to drop their Cable & Wireless agreements.²⁰⁴ Some of the West Indies players refused to sever their deals with Cable & Wireless, and this resulted in them getting dropped for the first match in the Test series against Africa.²⁰⁵

In the context of football, clause 4 of the Football Association Premier League contract (the FAPL contract) ensures that each of these parties is only allowed the freedom to operate²⁰⁶ with regards to particular commercial transactions to the extent that their actions do not infringe the right of the other parties.²⁰⁷ In the words, it ensures that both the player and the other parties have the freedom to operate collaboratively to avoid infringing the right of the other.²⁰⁸ For this purpose, the FAPL contract recognises the distinction between the exploitation of a football player's image in a club context and in the player's capacity as an individual.²⁰⁹ This distinction provides a helpful approach to the general issue of the exploitation of players' image rights. The distinction adopts some core principles as a solution to the competing demands of the club and the player.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Freedom to operate is used in the context of determining whether a particular commercial action, such as licencing, testing or commercialising a product or process, can be done without infringing valid intellectual property rights of other. Jolly, Adam, *The handbook of European intellectual property management: developing, managing and protecting your company's intellectual property*. (London, 2007) at 198.

²⁰⁷ See Form 19 of *The Premier League Handbook Season 2016/17*. Available online on www.thefa.com

²⁰⁸ It is worth mentioning that in the past, clause 14 was the only clause relating to image rights issues in the old FAPL Contract. Under that clause, the most significant obligation on a player's part was to allow the club to photograph him. 'The player shall permit the Club to photograph him as a member of the squad of players and staff of the Club provided that such photographs are for use only the official photographs of the Club. The player may, save as otherwise mutually agreed and subject to the overriding obligation contained in the Rules to the public media in a reasonable manner. The player shall, whenever circumstances permit, give to the Club reasonable notice of his intention to make such contributions to the public media in order to allow representations to be made by him on behalf of the Club if it so desires.' The new FAPL contract however has developed significantly over recent years and now contains a number of detailed provisions relating to the commercial use of football players' image. It contains a number of provisions which govern the use the football clubs may make of the player's images and the level of promotional support demanded of the players.

²⁰⁹ 'Club context shall mean in relation to any representation of the Player and/or the Player's Image a representation in connection or combination with the name colour Strip trade mark logos or other identifying characteristics of the club (including trade mark and logos relating to the Club and its activities which trademarks and logos are registered in the name of and or/exploited by any Associated Company) or in any manner referring to or taking advantage of any of the same. See Clause 4 of the FAPL Standard Contract, *Community Public Relations and Marketing*, available in form 19 of the Premier League Handbook season (2016/2017).

4-5) The implications of clause 4 of the FAPL on exclusive sponsorship programme

As mentioned above,²¹⁰ the FAPL contract has been drafted to help in guiding the relationship between footballers and the parties who use his image for commercial purposes. It requires a high degree of collaboration between the parties in term of the use of the player's image in their promotional activities. In particular, the clause addresses issues regarding participating in events, prohibition on endorsing conflicting brands and photography. Such issues will be discussed in more details below.

The starting point in this regard is that football players in the English premier league are free to enter into whatever personal endorsements arrangements they wish.²¹¹ However, such freedom is restricted by the player's contractual obligations towards his club and national team. The FAPL contract provides that while a player performs his job within the duration of his contract (including travelling on club business), he should only wear the clothes that are provided and authorised by the club.²¹² Certainly, such clothes display names or logos of the official sponsors of the club. So, when he plays football for his club, the player is prohibited from display any name, logo or any other feature of his personal sponsor on any item of clothing without a writing consent by his club.²¹³ Certainly this includes any item of clothing that the players are wearing in training or under their uniform. For example, during the UEFA Euro 2012, a Danish player, Nicolas Bendtner, pulled up his shirt and dropped his shorts slightly to reveal a pair of green shorts with betting company Paddy Power written on them after scoring this second goal against Portugal.²¹⁴ The company sent a tweet within minutes of

²¹⁰ Section (4-4)

²¹¹ Clause 4.5 of the FAPL contract.

²¹² See Clause 4.2(1) of the FAPL pleyer contract.

²¹³ See Clause 4.2(2) of the FAPL pleyer contract.

²¹⁴ Stuart Roach, Guerrilla marketing: Bendtner's 'underpants' ambush UEFA at Euro 2012. CNN on 19 June 2012. Accessed on 3 March 2018.

Bendtner's goal with a picture of the player wearing his 'lucky underwear'.²¹⁵ Bendtner was fined £80,000 and banned from playing in Denmark's next competitive game.²¹⁶

According to the FALP contract however, such a restriction is limited to the use of *any item of clothing* only. This means that the use of temporary tattoos on footballers in club context is presenting another challenge to football clubs wishing to preserve the exclusivity of official sponsorship rights. While no Premier League player has yet worn a tattoo advertising, some players may consider it. This type of marketing ploy has already made a controversial appearance in sporting activities such as tennis, bodybuilders and marathon runners.²¹⁷

Most importantly, the FAPL contract balances the obligations between the player and the club in this regard by allowing the player to wear boots or goalkeeping gloves of their choosing. Clause 4.2.2 of the FAPL contract states '... nothing in this clause shall prevent the player wearing and/or promoting football boots and in the case of a goalkeeper gloves of his choice.' The clause allows the player to select boots at his own discretion because boots (and goalkeeping gloves) have always been treated as a special case, on the basis that they are 'tools of trade', which a player must be able to select at his own discretion.²¹⁸ So in the above mentioned example, Daniel Sturridge has an endorsement agreement with Nike, wearing Nike Hypervenom boots in club context and starring in various advertising campaigns.²¹⁹ This happens to conflict with BN and Adidas, the official kit supplier for Liverpool and England national team respectively. The player may even try to attract the public's attention to his boots while he is playing for his club. For example, Paris Saint-Germain superstar Neymar Da Silva created a stir by celebrating his goal in the France Coupe de la league

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Basketball players have expressed interest in offering skin-space for sponsorship as well. See generally Vukelj, *Post No Bills: Can the NBA Prohibit its Players from Wearing Tattoo Advertising?* (2005) 15(2) Media and Entertainment Law Journal 507.

²¹⁸ Ibid.

²¹⁹ Top Premier League strikers off to flying start in the Hypervenom. Nike, 23 September 2013. <http://news.nike.com/news/top-premier-league-strikers-get-off-to-flying-start-in-hypervenom>

balancing his Nike boot on his head.²²⁰ The player's celebration appeared to be an opportunist bit of self-promotion to ensure maximum exposure for own sponsor Nike.²²¹

The FAPL contract also provides restrictions on the player's freedom over their endorsements arrangements even when they are not performing the services set out in the contract. According to the FAPL contract, save for existing commitments or when on international duty, the footballer must not endorse or otherwise exploit or promote his image in relation to any brand that conflicts with the club's branded products.²²² He (the player) must also avoid such conflict with the products, brands or services of any of their club's two main promoters or the league's principle sponsor.²²³ The reason of such restriction is to prevent the companies from trying to create indirect association with the football clubs and the League.

In addition, the FAPL contract provides that the player shall not exploit his image in a *club context*.²²⁴ In the above mentioned example, Daniele Sturridge was also involved in a range of individual endorsement agreements. In promoting each of these individual corporate sponsors, Sturridge is not permitted to appear in connection or combination with the name, logo, trademark, strip, colour or any other identifying characteristics of Liverpool FC. Otherwise, the player is free to conclude endorsement deals outside the scope of the contract. Clause 4.5 of the FAPL contract allows the player to engage in promotional and public relation activities outside of the club: 'Except to the extent specifically herein provided or otherwise specifically agreed with the Player nothing in this contract shall prevent the player from undertaking promotional activities or from exploiting the player's Image...'

²²⁰ Anthony Chapman, *Neymar balances boot on his head to celebrate penalty as French giants cruise into cup semi-final*, thesun.co.uk, on 11 January 2018, <https://www.thesun.co.uk/sport/football/5314476/neymar-psg-boot-head-celebration-pictures/>, accessed on 15 March 2018.

²²¹ Ibid.

²²² Clause 4.3 of the FAPL contract.

²²³ Ibid.

²²⁴ Clause 4.4 of the FAPL contract states: 'the Player agrees that he will not either on his own behalf or with or through any third party undertake promotional activities in a Club Context nor exploit the Player's Image in a Club Context in any manner and/or in any Media nor grant the right to do so to any third party.'

In addition to the provisions highlighted above, the FAPL contract provides that the football club can ask its players to attend sponsored events for six hours per week at the club's reasonable notice.²²⁵ It also allowed the club to take photographs of its football players either alone or with other members of the team and use these photographs to promote the club and the Premier League.²²⁶ This means that the football player must allow himself to be available for interviews and photographic opportunities with official sponsors and commercial partners of the club.²²⁷

However, when a club or an international team offers use of player images as parts of its bundle of sponsorship rights, the sponsor must be required to use images that only feature groups of a certain number of players to indicate that this is a team (and not individual) sponsorship.²²⁸ The FAPL contract provides that the use of a player's image would be deemed not to imply an individual endorsement where such use was made in combination with the image of at least two other members of the playing squad, provided that such player's image is used with a substantially equal prominence.²²⁹ However, this may lead to disputes between the player and the club or national team about the meaning of equal prominence. For example, Liverpool FC star Mohammed Salah and the Egyptian Football Association were reportedly in dispute over the player's image rights ahead of the 2018 World Cup in Russia.²³⁰ According to Salah's lawyer, the player's image featured prominently on the outside of Egypt's national team's plane, which was provided by the official team sponsor 'WE'.²³¹ Salah has his own individual sponsorship agreement with rival

²²⁵ Three hours of which are for community and public relations activities. Clause 4.1 of the FAPL contract.

²²⁶ Ibid.

²²⁷ However, such appearance and photographs shall not be used to imply any brand or product endorsement by the player. Clause 4.1 of the FAPL Contract.

²²⁸ Clause 4.6.2 of the FAPL contract.

²²⁹ Clause 4.6.1 of the FAPL contract.

²³⁰ David Mercer, Liverpool star Mohammed Salah blasts Egyptian FA for 'ignoring' complaints over image rights, <https://news.sky.com/story/liverpool-star-mohamed-salah-blasts-egyptian-fa-for-ignoring-complaints-over-image-use-11483567>, accessed on 20 August 2018.

²³¹ Ibid.

telecommunication firm Vodafone.²³² The Egyptian Football association are adamant that they have the right to use the image of Salah in the national team capacity.²³³

3-6) Breach of contract in endorsement agreements

The revelations concerning the private life of Tiger Woods, and the sanctions imposed on John Terry for racial abuse discussed above,²³⁴ have brought to the fore the significance and effect of morality clauses in endorsement agreements. Corporate sponsors usually use morality clauses in an effort to eliminate the footballer/product association in consumer's mind where the footballer's image has come into dispute in the view of the public.²³⁵ the former Sunderland FC and England star Adam Johnson was earning £10,000 per season from endorsement agreements with Adidas.²³⁶ However, Adidas terminated their agreement of Mr Johnson after he pleaded guilty to child sex offence in 2016.²³⁷ The public took such a dim view of Mr Johnsons' conduct that the reputation of certain of his sponsors was damaged by their association with him.²³⁸ Accordingly, corporate sponsors must choose footballers carefully to ensure that they are protected against their not infrequent falls from grace, brought to light by increasing public scrutiny, and often caused by a combination of money, youth and power.²³⁹

²³² Ibid.

²³³ Ibid.

²³⁴ See page 160 of this research.

²³⁵ Kittel and Stango, *Celebrity Endorsement, Firm Value and Reputation Risk: Evidence from the Tiger Woods Scandal*, (2014) *Management science* 60(1) 22.

²³⁶ Sunderland under pressure to explain Adam Johnson support, www.theguardian.com, 3 march 2016, available online on <https://www.theguardian.com/football/2016/mar/03/sudnerland-adam-johnson-sexual-abuse> accessed on 29 February 2019.

²³⁷ Ibid.

²³⁸ Kittel and Stango, *ibid* (n 234) 26.

²³⁹ Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) H2.107.

A sponsor's entitlement to sever ties with a sportsman for bad behaviour will depend on the width of the morality clause. Agreements tended to have very specific morality provisions, triggered only by criminal conviction for specific offences such as that of Adam Johnson. However, modern clauses tend to be far more general. Provided that disreputable conduct is unlikely to affect a sponsor's revenue, it is improbable that a sponsor would seek to invoke the clause. Morality clause are only relied on where the sponsors wish to escape from an unprofitable contract or where the commercial value of the endorsement has been affected. It would be very rare indeed for a sponsor to invoke a morality clause simply as a matter of principle.

Football players' agents often negotiate for specific language that limits termination clauses to the athlete's conviction of a crime. On the other hand, sponsors generally want the flexibility to get out of a contract at the first whiff of scandal. Reliance on a morality clause as regards convictions, doping violations and disreputable conduct that there is no doubt the player committed should be reasonably straightforward. But what of allegations of material infidelity that are denied by the player? For example, the five-time Ballon d'Or winner Cristiano Ronaldo's sponsors Nike and EA Sports issued statements to the Associated Press after a lawsuit was filed in September 2018 by a woman claiming she was raped by Ronaldo in 2009.²⁴⁰ Police in the Nevada have since re-opened an investigation which the accuser claims initially ended with a 375,000 payoff in return for her silence.²⁴¹ Nike first teamed up with Ronaldo in 2003 and signed new terms with Ronaldo worth a reported \$1 billion.²⁴² Ronaldo suggested that the deal was for life, but Nike has admitted to being troubled by

²⁴⁰ Sam Crap, *Nike and EA 'deeply concerned' by Ronaldo rape allegations*, www.sportspromedia.com, 5 October 2018. <<http://www.sportspromedia.com/news/cristiano-ronaldo-allegations-nike-ea-juventus>> accessed on 14 March 2019.

²⁴¹ Matt Bonesteel, *Cristiano Ronaldo denies sexual assault allegations, says he has a 'clear conscious'*. www.washingtonpost.com, 3 October 2018. Accessed on 14 March 2019.

²⁴² Ibid.

details published in German magazine Der Spiegel.²⁴³ Ronaldo is also the cover star of EA Sports' latest edition of the FIFA video game franchise which has also ramped up the pressure on Ronaldo in light of the mentioned reports.²⁴⁴ The statements issued by Nike and EA came on the same day that Ronaldo's parent club, Juventus, sent out a pair of tweets supporting the player they signed from Real Madrid for \$130 million in summer 2018. Accordingly, a wide morality clause gives the sponsor a broad discretion, leaving it under the sponsor's reasonable opinion about the effect of the player's actions. This reasonable opinion will depend on the sponsor's view of morality, its product and the target market.

It seems that the benchmark of acceptability will depend on the commercial clout of the footballer. A high-profile football player, such as Cristiano Ronaldo in the above mentioned example, can expect a more moderate clause and a more indulgent sponsor. The player could also insist the contract provide that any dispute arising out of his conduct, including the lawfulness of termination and whether a particular incident had adversely affected the value of his endorsement, should be referred to arbitration. For example, the arbitration clause in American basketball star Chris Webber's shoe endorsement with Fila allowed him to challenge Fila's decision to terminate the agreement after he was caught and charged with marijuana possession while on a Fila promotional campaign.²⁴⁵ Webber was awarded \$2.61 million for Fila's wrongful termination. According to Howe Burch, Fila's senior vice-president of marketing, '[t]he contract said that had he been convicted of a crime, we could

²⁴³ Nike published a statement to the Associated Press that the company is 'deeply concerned by the disturbing allegations and will continue to closely monitor the situation. Ibid.

²⁴⁴ EA Sports told the associated Press, 'we have seen the concerning report that details allegations against Cristiano Ronaldo. We are closely monitoring the situation, as we expect cover athletes and ambassadors to conduct themselves in a manner that is consistent with EA's values.' Ibid.

²⁴⁵ Fila Drops Webber for pot bust, www.cbsnews.com, on 28 August 2008. <https://www.cbsnews.com/news/fila-drops-webber-for-pot-bust/> accessed on 16 March 2019.

terminate him, but since he only paid an administrative fine and wasn't technically convicted, the court ruled in his favour.'²⁴⁶

Furthermore, the community in some countries, for example France, are less likely to be shocked or offended by sexual shenanigans than others. For example, the French national team forward Karim Benzema faced possible charges of complicity in a blackmail attempt in 2015.²⁴⁷ However, Benzema remains one of the world's highest-paid athlete according to Forbes.²⁴⁸ Therefore, image rights contracts for footballers whose image transcends national boundaries must take account of such cultural differences.

It is also relevant to point out that if a sponsor has already launched an advertisement campaign using a footballer's image that it cannot use has to take down as the result of player misconduct, it will have incurred significant wasted costs. Accordingly, sponsors should also request a 'no bad behaviour' warranty.²⁴⁹ Although morality clauses generally focus on the endorser's behaviour, 'the endorsing athlete should also consider the risk of being associated with certain advertisers. In light of recent well-published corporate wrongdoing, athletes may now want to think about including morals clauses language for advertisers' behaviour as well, thus ensuring that they have the ability to extricate themselves from an endorsement deal if an advertiser engage in questionable behaviour. Such a 'reverse morals clause' may include language that would allow the athlete to terminate if punitive actions are taken by a court or governmental authorities...'²⁵⁰

It can be said then that a sponsor should seek to include a wide-reaching morality clause that is expansive and subjective in nature, thereby allowing the sponsor broad discretion in its

²⁴⁶ Ibid.

²⁴⁷ Hugh Schofield, *Karim Benzema's France career threatened by sex tape case*, www.bbc.com, on 12 November. <https://www.bbc.com/news/world-europe-34787802> accessed on 16 March 2019.

²⁴⁸ See the full list of the World's highest-paid athletes 2018 on <https://www.forbes.com/pictures/mlh45lkd/20-karim-benzema-2/#18bc8b111678>, Accessed on 18 March 2019.

²⁴⁹ ²⁴⁹ Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) H2.116.

²⁵⁰ Christopher Chase, *A Moral Dilemma: Morals Clauses in Endorsement Agreements* (2009), available at <http://fkks.com/news/a-moral-dilemma-morals-clauses-in-endorsement-contracts>, accessed on 17 March 2019

invocation of the clause, secures exclusive authority to determine whether the player's conduct violates the morality clause, and includes a 'no bad behaviour' warranty. On the other hand, players should take the opposite approach, seeking narrow and objective morality clauses that give the sponsor minimal discretion to invoke the clause an independent third party review in determining whether the alleged violation meets the threshold for termination, and the inclusion of a 'reverse moral clause'.

4-7) Conclusion

It is clearly stated in the introduction section that this chapter was designed to, firstly, examine the practical problems that might be arisen from the commercial exploitation of footballers' image, identity and other identifying characteristics. Secondly, this chapter also seeks to examine the extent to which the English law recognises and protect the rights of individuals to control the commercial exploitation of his identity and personal image. This examination is essential because the United Kingdom law does not recognise an individual's property interests in his personality image. Instead, the law require the footballer and other celebrities to use other existing laws to exploit their image commercially. Finally, this chapter will be concluded with the implications of the exploitation of footballers' image rights on the exclusive rights of the official sponsors.

The chapter has been through some sections including the discussion on the legal status of the players' image rights. Next, this chapter also explains some protecting arrangements on players' image rights through the defamation law, the trademark registry, and copyrights, provisions under the Data Protection Act 1998 and Human Rights Act 1998 as well as the law concerning the action of passing off.

Also, this chapter has undertaken comprehensive analyses regarding the contractual relationship between the players and the football clubs, which mainly related to the application of the image rights. This contract is regulated under clause 4 of the FAPL, which provides some restrictions and provisions. The provisions include the clothes wearing limitations, free players' decision on wearing boots and gloves, endorsement arrangements while the players are not performing 'under contract activities', limitation to exploit players' image in a club context, the obligation of the players to attend the sponsored events and the right of the club to take the photographs.

It can be said then that high profile football players have become a brand in their own right, and worth a significant amount of money not only to themselves, but also to their clubs and football governing bodies. As a result, they can be associated, either directly or indirectly, with a range of different, sometimes competing, brands including, unauthorised parties, their individual sponsors, their club's sponsors and their international team's sponsors.

There have been decisions which provide support for high profile footballers and other celebrities who complain of unauthorised use of his identity to assist the marketing of products or services. But it must be recognised that the British courts have generally appeared reluctant to find that the evidence is sufficient to establish an actionable passing off, whether in relation to an appropriate misrepresentation of connection or to likely consequence of confusion. This may drive from a reluctant to acknowledge that, in the modern age, endorsement or licencing name or image for commercial purposes has become an increasingly important source of income football players and other athletes with marketable profile.

Whatever the legal position, when the football player establish the exploitation of his image rights, competitor of official sponsors may seek to exploit relationships with football players

to associate their brands with the football event. The FAPL standard contract provides some significant provisions that could be used to limit what the player can do with his image. The most important provision is that the player cannot use his image for commercial purposes in his club's context. As a result the player's image will not be used for commercial purposes during football matches.

However, there is still an opportunity for ambush markets to associate their brands with football associations and related enterprises through endorsement rights. The rights of image usage and the degree of cooperation required of a player for promotional activities tend to focus on the player in a club context. So the image rights demand placed on a player tend to be centred on the use of his image in his club kit. The FAPL contract allows the player to engage in other promotional and public relation activities outside of the club. However, one of the most important points in this regard is that the FAPL contract provision is negotiable.²⁵¹ This means that its content serves merely as a guide to the parties. Thus, high profile stars may require decreasing the restrictions against their freedom to use their image commercially. In contrast, less well known players will not normally be as well placed to negotiate a similar dilution of obligation. This negotiable nature of the FAPL contract makes it difficult to categorise and ascertain which party owns and controls the player's image rights. Therefore, football clubs must own the players image rights if they want to protect the exclusive rights of their sponsorship arrangements.

²⁵¹ Clause 4.11 of the FAPL contract.

Chapter Five: Chapter Five: The Exploitation of Football Stadiums and its Implications on Exclusive Sponsorship Rights

5-1) Introduction

Commercialisation of football has changed the scope for club management seeking increasing commercial opportunities to compete within the experience economy. This new approach to clubs has turned them to ‘brands’ that compete for market share with different value propositions based on their history, identity, trophies, players, etc. Many factors have determined this change including the improvement of communications, development of new technologies, the commercial growth of the sports sector and globalisation, etc.¹

Football stadiums are significant assets for clubs, since they provide revenue through gate takings, concessions and merchandise on match days. The exploitations of stadiums outside of match days, such as non-football events and stadium tours, have increased their significance. Deloitte estimated that total stadia investment by English clubs since 1992/1993 is now well into its fifth billion, suggesting that stadium investment can deliver a significant element of a successful club business strategy.² But apart from this financial perspective, stadiums as ‘homes’ of the club have contributed to their value by creating memorable experiences and representing better than any other asset the identity of a club.³

This new approach of stadiums also represents an ambition to attract wider sponsors and commercial partners. Certainly, an effective exclusive sponsorship programme depends significantly on the commercial exploitation of the stadium in which the commercial brands

¹ Beech, and Chadwick, Introduction: the commercialisation of sport. In beech and Chadwick, 2nd edn (Harlow, 2013) at 6.

² Deloitte, *Ahead of the curve, Annual Revenue of Football Finance*. Sports Business Group, July 2017, <<https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/sports-business-group/deloitte-uk-annual-review-of-football-finance-2017.pdf>> access on 22 January 2018.

³ Kennedy, *Football stadium relocation and the communication of football: the case of Everton supporters and their adoption of the language of commerce*, (2012) 13(3) Soccer and Society 342.

will be featured. These brands will be viewed by millions of people who attend football stadiums or watch the matches on television and other visual media around the world. According to Deloitte,⁴ Premier League total attendances increased to 14.6 million, up 7% on the previous season, with average stadium utilisation of 96% resulting in average matchday attendance approaching 38,500.⁵ Furthermore, the Premier League is carried by 80 broadcasters in 212 territories worldwide, and an average game is watched by over 12 million people.⁶ Football stadiums thus are great platform for corporate sponsors to sell⁷ and promote their products and services through traditional advertising boards, merchandising, television coverage and other means.

Furthermore, many football clubs nowadays sell the naming rights of their stadiums for millions of pounds to corporate sponsors. One needs to only recall Arsenal FC's monumental £500 million naming rights deal with Emirate Airline in 1999⁸ for an example of how highly corporate sponsors continue to value such rights. Like other sponsorship arrangements, naming rights programmes are meant to develop brand equity via increased exposure, heightened brand awareness and stronger and more positive brand associations.⁹ For the club, such revenue makes football stadiums a lucrative asset for owners.¹⁰

⁴ Deloitte, *Roar Power, Annual Review of football Finance*, Sports Business Group, June 2018 at 30.

⁵ The main driver of this was Tottenham Hotspur's season at Wembley Stadium. The club saw a match day attendance increase of 123% (compared to their previous season at White Hart Lane) to over 70,500 per match resulting in almost 740,000 additional spectator watching the team's Premier League fixture. Ibid.

⁶ Ibid. similarly, according to final figures from FIFA, more than one billion fans attended the FIFA World Cup 2014 in Brazil, with the competition reaching worldwide in-home television audience of 3.2 billion. 2014 FIFA World Cup reached 3.2 billion viewers, one billion watched final. Fifa.com on 16 December 2015.

⁷ For example, football stadiums offer a competition free area for many corporate sponsors to sell their products or services inside the stadium. Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) 12.78.

⁸ Bobby McMahon, *Tracking the Impact of Arsenal FC's Move to Emirates Stadium Ten Years on: Was it worth it?* [forbes.com](https://www.forbes.com), 4 October 2016:

<https://www.forbes.com/sites/bobbymcmahon/2016/10/04/tracking-the-impact-of-arsenals-move-to-emirates-stadium-ten-years-on-was-it-worth-it/>, accessed on 22 May 2018.

⁹ Leeds E, Leeds M and I Pistolet, *A Stadium by Any Other Name, the Value of Naming Rights* (2007) 8(7) *Journal of Sport Economic* 581-595.

¹⁰ In a lower level, football clubs may offer substantial sections in their stadiums to corporate sponsors. This may include a unique design of specific portions of a stadium. For example, Liverpool FC are reportedly closing to sign a deal allows them receiving £9 million a year in return for the naming rights to their new main stand at

However, the use of access tickets as a means to display rival brands within the stadium is one of the most popular forms of ambush marketing nowadays. Usually, such ambushing activities are done by the rival companies offering admission tickets as a prize in a competition. For example, Bavaria beer ambushed the South Africa 2010 World Cup and its official sponsors Budweiser when they bought tickets for a section of the seats in the stadium for girls dressed in bright orange clothing (associated with the brand) who were then told to sing and draw attention to themselves during a live game.¹¹

Furthermore, the attraction of stadiums' naming rights for a sponsor will be the opportunity to be associated with all the positive aspects of the club, including the stadium, in a high-profile way. This association requires the club to have an exclusive possession over the stadium to prevent any competing promotional messages around the stadium. However, it is increasingly the case that some stadiums are shared by more than one club or may be owned by a local authority. Certainly, both the stadium owner and the guest club have their own sponsors to consider. This will create an obvious conflict as the official sponsors of the stadium owner will not be willing to give up advertising space, in particular if the guest club's sponsors include rival brands. The City of Liverpool, for example, accommodates two top flight professional football clubs within its boundary; Everton FC and Liverpool FC. The latter has sponsorship agreement with the online betting company BetVictor,¹² while Everton Football Club has a sponsorship agreement with SportPesa,¹³ the commercial competitor of BetVictor. Should representatives of both clubs think to share a stadium when the financial

Anfield Stadium. See Alex Miller, *Anfield Main Stand naming rights deal announcement unlikely before 2017*. www.thisisanfield.com published 17 August 2016.

¹¹ Jon Kelly, *How ambush marketing ambushed sport*, bbc.co.uk, 17 June 2010, <http://news.bbc.co.uk/1/hi/8743881.stm>, accessed on 15 May 2018.

¹² www.liverpoolfc.com.

¹³ www.evertonfc.com.

circumstances of one club necessities a temporary or ongoing use of the other?¹⁴ Both clubs should consider the exclusive sponsorship rights of their official sponsors when entering into a ground sharing agreement and the impact this may have on their sponsorship arrangements. The existence of two competing brands at a same stadium questions the level of exclusivity that sponsored enterprises can offer perspective sponsors.

Before going further to discuss the implications of ground sharing agreements on sponsorship rights, it is necessary to illustrate how football stadiums could be used as a means of ambush marketing, and the extent to which the stadium occupier is able to protect the commercial value of its sponsorship arrangements.

This chapter focuses on the commercial exploitation of football stadiums and assesses the implications of this exploitation on an exclusive sponsorship programme. First, the chapter illustrates the importance of football stadiums for corporate sponsors. It indicates the use of such stadiums as a means of ambush marketing activities. This will be followed by indicating the extent to which stadium occupiers are able to protect the commercial value of their sponsorship programmes. The chapter also discusses the legal occupation of a football stadium, particularly when the stadium is shared by several clubs or owned by a separate commercial organisation. Then, it explains the importance of football stadiums to official sponsors and implications of ground sharing agreements on exclusive sponsorship rights. This will be investigated with special reference to the practice of selling stadium's naming rights to corporate sponsors. The chapter will conclude with the implications of multiple sponsorship contracts in football stadiums on the value of exclusivity in sponsorship contracts.

¹⁴ For more details see, *Everton consider ground-share with Liverpool*, telegraph.co.uk, 26 November 2017. <https://www.telegraph.co.uk/sport/football/teams/everton/6660719/Everton-consider-ground-share-with-Liverpool.html>, accessed on 25 March 2018.

5-2) The protection of sponsorship rights through stadium's admission tickets

Professional football club owners have become increasingly aware of the need for appropriate facilities to maximise revenue. A number of football clubs have recently been willing to extend the capacity of their stadiums in order to help increase and maintain attendance. For example, it is reportedly believed that Manchester United FC are now actively considering rebuilding the old Sir Bobby Charlton (Main) Stand on one side of Old Trafford, the club's home stadium.¹⁵ This side of the stadium is the only side that has not been expanded in the last 20 years. That would increase the capacity of Old Trafford from nearly 75000 to just under 90,000 seats.¹⁶ Other football clubs have already spent hundreds of millions to build new stadiums when attendance approached capacity. Tottenham Hotspur FC, for example, have recently announced that they will soon move to their new stadium ending their 118-year residency at White Hart Lane.¹⁷ Reports in the British press have suggested that the new stadium will cost the club roughly £1 billion in the final analysis.¹⁸ The new stadium is set to have a capacity of more than 62,000 seats, which is an increase of over 25,000 from the capacity of the old White Hart Lane.¹⁹

For football clubs, controlling access to the stadium allows them to charge for entrance, and so to generate revenue stream from the sale of admission tickets. Despite the recent growth in the value of broadcast and sponsorship rights, ticketing remains a crucial income source for

¹⁵ *Manchester United plan Old Trafford extension to increase capacity to 88,000*, talksport.com, 25th January 2017, <https://talksport.com/football/186437/manchester-united-plan-old-trafford-extension-increase-capacity-88000-170125225116/>, accessed on 3 May 2018.

¹⁶ *Ibid.*

¹⁷ However, the club has been forced to delay its move into the new stadium due to unavoidable issues surrounding safety. www.tottenhamhotspur.com

¹⁸ Matt Law, *Tottenham insist suggestions of £1.2 final stadium bill are inaccurate*, telegraph.co.uk, 21 September 2018. Accessed on 23 September 2018. <https://www.telegraph.co.uk/football/2018/09/21/tottenham-insist-suggestions-12bn-final-stadium-bill-inaccurate/>

¹⁹ *Ibid.* Recently, Chelsea FC have reportedly received planning permission to build a new 60,000 capacity stadium on the existing Stamford Bridge site at cost of approximately £500 million. Chelsea football Club stadium plans given approval by council, bbc.co.uk, 11 January 2017. Accessed on 3 May 2018. <https://www.bbc.co.uk/news/uk-england-lancashire-38572335>

football clubs. The English Premier League generates more revenue on ticket sales than any other football league.²⁰ Based on 2015/16 season revenue, the English Premier League generated £831 million from ticket sales (17% of total revenue) according to the latest figures released by Deloitte.²¹

However, the sale of such tickets without controlling what the buyers may do with them is an invite to ambush activities against official sponsors' exclusive association with the stadium. This ambushing activities could be done through displaying rival company's brands within the stadium, or by the rival companies offering admission tickets as a prize in a competition. This tactic was challenged by the National Collegiate Athletic Association (NCAA), which in 2002, sued Coors Brewing Company for the unauthorised use of NCAA Final Four tickets in a consumer promotion.²² The NCAA tickets expressly prohibit the use of the ticket in consumer sweepstakes, which is stated on the back of the ticket: '[U]nless specifically authorized in advance by the NCAA, this ticket may not be offered in a commercial promotion or as a prize in a sweepstakes or contest'.²³ Therefore, The NCAA based its claim against Coors on breach of contract.²⁴ The claim alleged that Coors' ticket sweepstakes offering two tickets to the final three games of the tournament run annually in March and April violated the terms of the NCAA's revocable licence.²⁵ Both parties agreed that the

²⁰ For more details see Deloitte, *Ahead of the Curve*, Annual Review of Football Finance, Sports Business Group, July 2017 p.9.

²¹ *Ibid*

²² *National Collegiate Athletic Association and Host Communications, Inc (NCAA) v Coors Brewing Company*, (S.D.Ind. filed Nov.27,2001). In Mckelvey 2006, *ibid*, at 119-120.

²³ *Ibid*.

²⁴ NCAA also alleged Coors violated unfair competition laws. This theory of recovery contented that it was wrongful and unfair competition for Coors to associate itself with the NCAA and the Final Four. According to Mckelvey, This legal theory is a difficult one to prevail upon since unfair competition claims normally require a showing of consumer confusion. This is similar to trademark and passing off infringement claims in the United Kingdom. Therefore, the NCAA would have to prove that Coors's promotion had confused the public into believing that Coors is somehow associated with, sponsored by, or endorsed by the NCAA. Courts have been reluctant to apply trademark infringement and unfair competition laws to defendants who have not used identical or strikingly similar marks on tangible products. If the ambusher is only making creative reference to a sporting event in its advertising and promotion materials the courts have not been inclined to prohibit such activities as unfair competition or trademark infringement. *Ibid*.

²⁵ *Ibid*.

tickets were revocable licences but they disagreed as to whether the law recognised a cause of action for breach of revocable licence.²⁶ The traditional right of the licensor is to simply revoke the licence, not sue for damages under a breach of contract theory. The NCAA attempted to use contract law principles to enforce a ticket-back language. Although the case was supposed to provide ‘a novel opportunity to establish the legal parameters of ambush marketing’, it was settled out of court.²⁷

However, the case is significant because it demonstrates that access tickets must include terms and conditions that restrict the purchaser carrying any form of advertising into the stadium. This terms and conditions will allow the occupier to prohibit advertising tools such as hats, scarves, shirts, flags, etc. from entering the stadium. For example, the ticket conditions for the Manchester United FC provided that ‘[T]icket Holders shall not bring into, use or display within the Stadium any sponsorship, promotional or marketing materials provided that this paragraph will not prevent the Ticket Holder wearing any standard items of clothing’.²⁸ Such a term allows the stadium officials to prevent the ticket holder entering the stadium in case if he/she use that ticket to promote brands inside the stadium. Indeed, it was such a term that allowed stadium officials to prevent around 1000 Dutch fans entering the Stuttgart Stadium for Holland’s match against the Ivory Coast during the 2006 Football World Cup in Germany.²⁹ Budweiser was the official sponsor of the event. However, its rival ‘Bavaria’ distributed imitation lederhosen in the Dutch national colour orange bearing the Bavaria advertising imprint.³⁰ The idea was to have the Dutch fans wear these lederhosen

²⁶ *ibid*

²⁷ *Ibid.*

²⁸ Match Ticket Terms and Conditions 2017/18. Available online on: [http://www.manutd.com/pix/emails/Files/2017/Match Ticket Terms Conditions 2017-18.pdf](http://www.manutd.com/pix/emails/Files/2017/Match%20Ticket%20Terms%20Conditions%202017-18.pdf) accessed on 2 March 2018.

²⁹ Laura Smith-Spark, *Sponsor police guard World Cup brands*, bbc.co.uk, 21 June 2006.

³⁰ <http://news.bbc.co.uk/1/hi/world/europe/5096198.stm> accessed on 15 May 2018.

³⁰ *Ibid.*

when they attend the stadium.³¹ The ticket condition provided that ‘all promotional, commercial, political or religious items of whatever nature, including but not limited to banners signs, symbols and leaflets are prohibited and may not be brought into the Stadium if the Organising Committee reasonably believe that any such items may be used for display purpose within the stadium’.³² According to this condition, the fans were forced to take off their lederhosen or they would have been prohibited from entering the stadium.³³

A similar story occurred at the 2010 World Cup in South Africa. Bavaria Beer was accused of initiating an ambush during the football match between Denmark and Netherland. During the match, 36 female members of the crowd were ejected by FIFA security, with the FIFA citing ‘a clear ambush marketing activity by a Dutch brewery company’.³⁴ The crowd members were all models, dressed in identical orange dresses which were part of a gift pack offered by Bavaria Beer. There was no explicit marking identifying Bavaria’s brand on the clothes, the colour of which was famous orange worn by the Netherland football team, and which could have been said thus simply to be signifiers of national identity and support.³⁵ The 36 women were ejected from the stadium by the officials and two were arrested on charges of promoting a non-official sponsor brand.³⁶ It was claimed that the women, who used tickets

³¹ Ibid.

³² Ibid.

³³ Ibid. The offering of tickets for special events in consumer sweepstakes is one of the most popular forms of ambush marketing. For example, similar ambush marketing tactic occurred in 2002, when two completely naked spectators tattooed with Videophone logos interrupted a rugby match between New Zealand and Australia, streaking across the field before being arrested by the police. Saucet, M, *Street Marketing, The Future of Guerrilla Marketing and Buzz*, (Praeger, 2015) at 97. In June 2005, it was reported that All England Club had prevented Palmolive’s attempted ambush of Wimbledon Tennis Championships by confiscating branded water bottles given to spectators as they approached the gate. Wimbledon confiscations foil ambush marketing bid, 2005 sportcal.com 29 June 2005.

³⁴ Jon Kelly, *How ambush marketing ambushed sport*, bbc.co.uk, 17 June 2010. <http://news.bbc.co.uk/1/hi/8743881.stm> accessed on 23 May 2018.

³⁵ Ibid.

³⁶ Ibid.

provided by Bavaria, were at the match to promote Bavaria in breach of the FIFA guidelines detailed on the tickets.³⁷

In the UK, however, in order to be enforceable, such terms and conditions must be brought to the attention of the ticket purchaser, and therefore incorporated into the contract of sale, prior to the sale taking place. This is well illustrated in the case of *Thornton v Shoe Lane Parking* (*Thornton*).³⁸ The claimant drove his car to the entrance of defendant's car park.³⁹ As any other customer, he was given a ticket after putting money into a machine.⁴⁰ The ticket stated that the contract of parking was subject to terms and conditions which were displayed on a pillar inside the car park.⁴¹ One of the terms excluded the defendant from liability for any damage on the car or personal injuries arising inside the car park.⁴² The claimant suffered personal injuries within the car park due to the defendant's negligence.⁴³ However, the claimant denied liability due to the term of an exemption clause displayed on the pillar. He argued that these conditions formed part of its contract with the claimant.⁴⁴ The question for the court was whether the terms were incorporated into the contract. This question depended upon where the offer and acceptance took place in relation to the machine.⁴⁵

According to Lord Denning MR, the machine itself constituted the offer and not an invitation to negotiate.⁴⁶ The claimant accepted the offer when he put the money into the machine.⁴⁷ Therefore, the exclusion clause had not been incorporated into the contract.⁴⁸ Lord Denning

³⁷ *ibid*

³⁸ *Thornton v Shoe Lane Parking* [1971] 2 QB 163

³⁹ *Ibid* at 163.

⁴⁰ *Ibid*.

⁴¹ *Ibid*.

⁴² *Ibid*. Just below the time, there was some small print in the left hand corner which said: 'this ticket is issued to the conditions of issues as displayed on the premises.' *Ibid* at 168.

⁴³ *Ibid*.

⁴⁴ *Ibid* at 164.

⁴⁵ In the High Court, Mocatta J held that the defendants were half to blame for the defendant's accident and awarded him £3,637 damages. *Ibid* at 163.

⁴⁶ *Ibid* at 169.

⁴⁷ *Ibid*.

⁴⁸ *Ibid*.

MR found that the defendant had not done enough to bring the existence of the terms to the claimant's attention prior to the contract formation.⁴⁹ The offer was contained within the notice at the entrance, and the claimant accepted the offer on those terms when he drove inside the garage. It was very late to seek to incorporate further terms after the claimant had driven his car to the garage.⁵⁰

The claimant in that case sought to rely on the House of Lords' decision in *McCutcheon v David MacBrayne Ltd (McCutcheon)*.⁵¹ In that case, a ferry belonging to the defendants decided to rely on an exclusion clause contained in a note which, contrary to their usual practice, they had not asked the claimant to sign.⁵² The House of Lords held that the course of dealing must be both regular and consistent. According to Lord Devlin, no term can be implied into a contract by a course of dealing unless it can be shown that the party charged has actual and not only constructive knowledge of the term, and with such actual knowledge has in fact assented to it.⁵³

Stadium owners accordingly must be vigilant to ensure that the restrictions imposed in the form of ticket conditions brought to the attention of the ticket purchaser prior to or at the time the sale takes place. There may be notices posted on the matter at the stadium but the ticket holder could claim that this restriction was not brought to his attention at the time he purchased the ticket and therefore it is not enforceable against him.

Usually, stadium owner sell their tickets through many distribution channels. For example, tickets may be sold by the sales office at the venue, in person and by email; over the Internet, via the issuer's website; by commercial agency such as Ticketmaster (phone and online sales); to member clubs (or, via those clubs, to their members); or to stadium debenture-

⁴⁹ Ibid at 170.

⁵⁰ Ibid.

⁵¹ [1964] 1 All ER 430

⁵² Ibid at 430.

⁵³ Ibid at 437.

holders. In order to avoid ambush marketing attempts, care must be taken in each case to bring the ticket conditions and terms to the attention of purchasers prior to the time the sale is taking place. Each purchaser should be required to confirm in writing that he/she had the ticket conditions brought to his/her attention prior to sale and accepts them as condition of sale.

However, that may not always be practicable. For example, if any telephone sales take place, the order will be carried out to a reservation centre which informs the interested customer, by means of spoken menu presentation, about the terms and conditions of admission tickets.⁵⁴ The interested customer will be given a specific option to say that he/she acknowledges and accepts the ticket terms and conditions via the dialling keys of his/her telephone apparatus prior to making the purchase online.⁵⁵ Electronic commerce operators should be instructed to make sure that the interested customer is given a clear opportunity to read the terms and conditions before any online purchase is allowed to take place.⁵⁶ Ideally, the interested customer should confirm that he/she accepts the ticket conditions by taking some positive actions prior to purchase, such as ticking a box.⁵⁷ Similarly, a commercial agency such as Ticketmaster should be required to agree to bring the attentions of sale of the tickets to the attention of the purchaser and to obtain firm evidence of the purchaser's acknowledgement and acceptance of those conditions prior to allowing any sale to take place. If the ticket purchaser approved that such terms and conditions were not brought to his attention at the time he purchased the ticket, then it will not be enforceable against him.

It seems that these distribution channels can guarantee the delivery of the terms and conditions of the tickets to the attention of ticket holder as required in *Thornton* and

⁵⁴ For further details, see Ritter and Lauper, *Method and system for ordering, loading and using access tickets*, (2006) Swisscom Mobile AG (Bern, CH) at 1.

⁵⁵ *Ibid.*

⁵⁶ *Ibid* at 2.

⁵⁷ *Ibid.*

McCutcheon. This will allow the stadium officials to eject any ticket holder from the stadium if he/she brings a form of advertising into the stadium. However, ejecting people from the stadium could have a negative impact on the sponsorship arrangements of the stadium occupier. In the above mentioned example,⁵⁸ FIFA was strongly criticised for its way of handling of the situation when the women were ejected from stadium by FIFA security. Most media coverage of the incident presented the enforcement negatively. As a result, it was suggested that substantial publicity was generated for Bavaria as a consequence of the official action taken.⁵⁹ The way the match officials ejected the women and detained them for questioning the brand has likely got much more coverage than the actual match would have got otherwise.⁶⁰

5-3) Ownership of Football Stadiums in the light of Ground-Sharing Agreements.

English football clubs pride themselves on their home ground being central to their heritage and identity. For football clubs and their supporters, stadiums are viewed in emotional terms that one usually associates with places of religious worship.⁶¹ The vast majority of these clubs own their stadiums. For example, 16 out of 20 football clubs own their stadiums in the English Premier League.⁶²

Freehold ownership by a football club on a stadium is the most straightforward arrangement because the club will be the exclusive occupier of the stadium. This exclusive occupation is

⁵⁸ See page 179.

⁵⁹ Gary Hughes, *Ambush Marketing laws and the power of exclusivity: lessons from New Zealand and South Africa*, lawinsport.com, 14 March 2012. Accessed on 20 May 2018.
<https://www.lawinsport.com/topics/articles/intellectual-property-law/item/ambush-marketing-laws-and-the-power-of-exclusivity-lessons-from-new-zealand-and-south-africa>

⁶⁰ *Ibid.*

⁶¹ Kennedy D, *Football stadium relocation and the communication of football: the case of Everton supporters and their adoption of the language of commerce*, (2012) 13(3) Soccer and Society 342.

⁶² Emanuele Midolo, *Who owns Premier League stadiums?*, Property Week, 11 August 2017, <https://www.propertyweek.com/news-analysis/who-owns-premier-league-stadiums/5090883.article> accessed on 15 May 2018.

grounded in the law of contract, real property and tort. Contract law enables the occupier to legitimately place restrictive terms and conditions on access to the stadium. The aim of such conditions and terms is, among other things, to protect the interest of commercial partners, including official sponsors. In *our dogs*⁶³, Swinfen Eady L.J said: ‘No doubt the [occupier] had the grounds for the day, and also the right of allowing those persons to enter of whom they approved and excluding those of whom they did not, and that right carried with it the right of laying down conditions binding on the parties admitted.’⁶⁴ Real property law provides the occupier interest in the land which allows the occupier to claim the right of exclusive control and possession over the stadium.⁶⁵

However, some football clubs may share use of the stadium with other organisations or clubs on a non-exclusive licence basis. Ground sharing arrangement refers to the ‘shared use of a stadium, for hosting fixture, by two or more sports teams or organisations’.⁶⁶ This usually occurs when the stadium is owned by sporting organisation with one or more sporting organisations being granted a licence to use the stadium.⁶⁷ In the United Kingdom, the shared use of stadiums in football is becoming an increasingly common option for many clubs nowadays.⁶⁸ For some football clubs, the overheads associated with the running of stadiums and the cost of development of new stadiums may necessitate a temporary or ongoing use of another stadium. For example, it was financial realities that forced Coventry City into selling their stadium, the Ricoh Arena, where they are now a tenant of Wasp Rugby Clubs.⁶⁹ Football

⁶³ Similarly, in *Victoria Park*, Latham CJ said: ‘At Sports grounds and other places of entertainment it is the lawful, natural and common practice to put up fences and other structures to prevent people who are not prepared to pay for admission from getting the benefit of entertainment’. Ibid at 494.

⁶⁴ Ibid at 128.

⁶⁵ See generally Megarry and Robert, *THE LAW OF REAL PROPERTY*, 8th edn (Sweet & Maxwell, 2012).

⁶⁶ Cripps, *A review of the regulations that govern ground sharing arrangements in the Premier League and Premiership Rugby*, (2016) Sport Law at 1.

⁶⁷ Ibid. see also Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para I2.39.

⁶⁸ For more information on current shared stadiums in the United Kingdom see, *the 10 current top-flight teams to have moved stadiums in the Premier League era*, bbc.co.uk, 12 May 2017. Accessed on 18 March 2018. <http://www.bbc.co.uk/sport/football/39892733>

⁶⁹ *Wasps move to Coventry’s Ricoh Arena backed by council*, bbc.co.uk, 7 October 2014. Accessed on 14 March 2018

clubs may also use other's stadium when they have ongoing schemes to redevelop existing stadiums, or to move to a newly constructed stadium. For example Chelsea FC, Southampton FC and Everton FC, Watford FC all have major forthcoming stadium redevelopment and may need to make ground sharing arrangements.⁷⁰

Ground sharing arrangement is usually an agreement between two local sport teams; the owner and the guest club. This could be made between two local sport teams that play the same sport, such as when Crystal Palace Football Club and AFC Wimbledon shared Selhurst Park Stadium.⁷¹ However, it is common to see the sports of football and rugby sharing the same stadium, such as Wigan Athletic Football Club and Wigan Warriors Rugby League Club ongoing shared use of the DW Stadium⁷² and Wasps Rugby Club and Coventry Football Club's shared use of the Ricoh Arena.⁷³

A Multi-purpose stadium is another variation. Some stadiums are owned by local authorities who grant licences to one or more sporting organisations to use their stadium. In such circumstances, the stadium owner may grant licences to many sports organisations. For example, Tottenham Hotspur Football Club moved to Wembley Stadium for the start of the 2017-2018 campaign while construction work on their new stadium takes place.⁷⁴ Wembley Stadium is the home of England international team.⁷⁵ It is also the stadium that hosts the finals of the most important domestic club competitions in the country, such as the FA Cup

⁷⁰ Jack Wilkinson, *New football stadiums: the next generation of venues*, skysports.com, 10 March 2016. <http://www.skysports.com/football/news/11095/10198482/the-changing-face-of-european-football-stadia>, accessed on 18 March 2018.

⁷¹ *Wimbledon's Plough Lane return approved by planners*, bbc.co.uk, 10 December 2015. Accessed on 15 March 2018. <https://www.bbc.co.uk/news/uk-england-london-35066622>

⁷² *Wigan Athletic and Wigan Warriors to play on same day at DW Stadium*, bbc.co.uk, 23 February 2016. Accessed on 15 March 2018.

⁷³ *Wasps complete Ricoh Arena takeover*, bbc.co.uk, on 14 November 2014. Accessed on 15 March 2018.

⁷⁴ It was expected that Tottenham Hotspur will play its home matches on their new 61,559 capacity stadium for the season 2018/19. However, the club are facing yet another setback in the completion of their new stadium as they await their plans to regenerate the surrounding area to be approved. *Tottenham stadium: Spurs granted extension to stay at Wembley*, bbc.co.uk, 11 November 2018. <https://www.bbc.co.uk/sport/football/46171505>, Accessed on 25 November 2018.

⁷⁵ wembleystadium.com.

and the League Cup finals.⁷⁶ In addition, the FA Community Shield⁷⁷ is also held at Wembley Stadium before the start of each new season.⁷⁸

There is no specific form of ground sharing contract. In basic contract law, to make an agreement enforceable at law, the parties must show an intention to create legal relations.⁷⁹ That agreement is also required in Land Law which includes certain requirements in order to be valid.⁸⁰ Most importantly, such a contract is required in the English Premier League to show the ability of the football club to schedule its fixtures and the legal enforceability of its right to use the stadium.⁸¹

Legally enforceable agreements for the use of real property usually take the form of either a licence or lease. The subject matter of the lease and the licence is much the same. Both involve dealing with land or the right to use it in certain ways. In addition, the transaction which creates a lease is the same that creates a contractual licence, namely the creation and formation of a contract, subject to formalities imposed by statute or common law property. These factors ensure that many of the characteristics of a lease are shared by a contractual licence. However, the consequences of the two alternatives are very different. The reason for this difference is because only a lease is a legal interest in land and is capable of registration under the Land Registration Act 2002.⁸² This grants the lessee the right to assign the interest.⁸³ In contrast, a licensee could be revoked by a licensor much more easily than

⁷⁶ Ibid.

⁷⁷ The FA Community Shield is a game played between the winners of the League and the winners of the FA Cup. See www.thefa.com

⁷⁸ Ibid.

⁷⁹ Elliott, and Quinn, *Contract Law*, 9th edn, (Pearson, 2013) p. 61.

⁸⁰ See for example Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

⁸¹ The English Premier League requirements for ground sharing arrangements will be explained in more detail later in this section.

⁸² *Street v Mountford* [1985] 2 All ER 289 at 292 per Lord Templeman. In addition, section 23(1) of the Landlord and Tenant Act 1954 makes it clear that the Act applies only to tenancies, with the result that licences are excluded from statutory protection.

⁸³ Ibid.

determining a lease.⁸⁴ Most importantly, a lessee is protected by the Rent Act 1977 which grants him/her an exclusive possession over the land.⁸⁵

This might be illustrated by the case of *Street v Mountford*,⁸⁶ which re-established the test of exclusive possession as the sole determinant of the distinction in English law. The plaintiff entered into an agreement with the defendant granting the latter the right to occupy two rooms in the claimant's house, with exclusive possession for a period determinable by fourteen written days' notice. The agreement contained an express declaration that the right to occupy constituted a licence and not a lease. The appellant applied for the registration of a fair rent under the Rent Acts six months after signing the agreement.⁸⁷ The landlord then applied to the county court⁸⁸ for a declaration as to whether what he had granted was a licence or a lease.⁸⁹ At first instance, the county court judge held that the appellant was a tenant entitled to the protection of the Rent Act.⁹⁰ The Court of Appeal reversed that decision⁹¹ on the basis that 'there is manifested the clear intention of both parties that the rights granted are to be merely those of a personal right of occupation and not those of a tenant.'⁹²

In the House of Lords, Lord Templeman laid down the essential elements of lease. He held that a tenancy arises where the arrangement is intended to create legal relations, and the occupier was granted a right to *exclusive possession* of the land for fixed or periodic term at a rent.⁹³ He provided a guidance as to how exclusive possession differs from the right to occupy enjoyed by a licensee. He explained that exclusive possession is the right to use the land to the exclusion of all others, including the landlord himself. He said: 'the tenant

⁸⁴ Ibid.

⁸⁵ Section 23(1) of the Landlord and Tenant Act 1954 also makes it clear that the Act applies only to tenancies, with the result that licences are excluded from statutory protection.

⁸⁶ [1985] 2 All ER 289.

⁸⁷ Ibid at 295.

⁸⁸ Under section 51A of the County Courts Act 1959. Ibid at 289.

⁸⁹ Ibid at 292

⁹⁰ Ibid at 292.

⁹¹ [1984] 2 EGLR 119.

⁹² Ibid at 121.

⁹³ [1985] 2 All ER 289, ibid at 294.

possessing exclusive possession is able to exercise the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain restrictions. A tenant armed with exclusive possession can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair.⁹⁴

Therefore, according to the House of Lords, there can be no tenancy unless the occupier enjoys exclusive possession. However, this exclusive possession is not decisive because an occupier who enjoys exclusive possession is not necessarily a tenant.⁹⁵ The occupier's right to exclude others from the land is compatible with the fact that there are limited exceptions, such as the landlord's right to enter the land for certain limited purposes. According to Lord Templeman, 'the occupier is a lodger [and therefore a licensee] if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises. A lodger is entitled to live in the premises but cannot call the place his own'.⁹⁶ The landlord in this case did not provide any services or attendance⁹⁷ and, therefore, the occupier was not a lodger but a tenant. The House of Lords thus upheld the decision of the trial judge.

While this case involved residential premises, the same principles could be held to apply in the case of ground sharing agreements. Given that when ground sharing, the home team or other third parties are not excluded from using the stadium, therefore, any contract for occupation is likely to be licenced. West Ham United FC's recent concession of the Olympic

⁹⁴ Ibid at 292.

⁹⁵ Ibid at 297.

⁹⁶ Ibid at 293. Lord Templeman cited the case of *Allan v Liverpool Overseers* (1874) LR 9 QB 180 at 191-192 when Blackburn J said 'A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger.'

⁹⁷ Ibid 299.

Stadium is widely considered to be a good example of the latter.⁹⁸ The club were awarded the right to use the Olympic Stadium by the stadium's long leasehold owner, E20 Stadium Limited.⁹⁹ West Ham United FC have to share the stadium with other sports entities, including athletes and rugby unions.¹⁰⁰ Such sports organisations entered into licence agreements with the stadium owner in which West Ham United FC is not a party.¹⁰¹ West Ham United FC do not have an exclusive possession over the Olympic Stadium, because they have no rights to exclude other sporting bodies from using the stadium. Such ground sharing agreements are, therefore, licence and not tenancy.

In addition, according to the concession agreement, West Ham United FC would not have to pay directly for a range of things including turnstile operators, security, cleaning the stadium.¹⁰² Accordingly, West Ham United FC's right to exclude the owner, E20 Stadium Limited, from the stadium is compatible with the exceptions explained by Lord Templeton in *Street v Mountford*. Therefore, West Ham United FC's concession agreement is not a tenancy, but a lodger, and thus a licensee.

However, this is not the case where the occupier has exclusive possession over the stadium. For example, Manchester City Council owns the City of Manchester Stadium, the home ground of Manchester FC.¹⁰³ Manchester City Council grants right to Manchester City FC to use the stadium in return for the club financing the stadium's redevelopment after the 2002

⁹⁸ See, the Concession Agreement on 22 March 2013 between E20 Stadium LLP as the grantor, WH Holding Limited as the concessionaire and West Ham United FC Limited as the club (the Concession Agreement). The agreement has been released and is available online below except the parts which are commercially confidential. <https://www.queenelizabetholympicpark.co.uk/~media/lldc/concession%20agreement%202016.pdf>

⁹⁹ West Ham United FC are paying £2.5 million to use the stadium for 25 matchdays annually. See clause 47.2 (d) of the concession agreement.

¹⁰⁰ See clause 6.3 of the Concession Agreement.

¹⁰¹ Ibid.

¹⁰² See clause 10.4 of the concession agreement.

¹⁰³ See David Conn, *Manchester City to pay council £2 million a year for stadium naming rights*, the Guardian, 4 October 2011, <https://www.theguardian.com/football/2011/oct/04/manchester-city-council-stadium-naming-rights> accessed on 20 June 2018.

Commonwealth Games.¹⁰⁴ As a result, the Council benefits from the commercial exploitation of the stadium by the club.¹⁰⁵ The agreement grants Manchester City FC an exclusive possession over the stadium by preventing the owner from giving licences to other third parties. Manchester City Council is not providing any services or attendance to the stadium. Therefore, Manchester City FC is not a lodger but a tenant and has an exclusive position over the stadium. Indeed, it was this exclusive possession which allowed Manchester City FC to pay an extra £2 million per year to complete the stadium's naming rights agreement with Etihad Airways.¹⁰⁶

Accordingly, the agreement between the stadium owner and the occupier could be only a licence to use the stadium, or a lease creating an estate in the land. Exclusive possession is the main element that indicates whether the agreement is a licence or tenancy. That element is crucial not only to enable the club and the league to schedule fixtures, but also to deliver the exclusive rights of commercial partners with certainty.¹⁰⁷

5-4) Ground sharing arrangements under English Premier League regulations

Applicant clubs are all expected to satisfy English Premier League requirements as to their ground sharing proposal. The English Premier League is governed by its own respective sets of regulations. The regulation relating to football stadiums are contained within the Premier League Handbook. The Handbook requires the provision of a home stadium by member

¹⁰⁴ According to minutes of its executive meeting, the council excluded the public from the agreement because they involve consideration of exempt information relating to the financial or business affairs of particular persons. Ibid.

¹⁰⁵ The City of Manchester Stadium cost the council £112 million which was paid for by tax payers and lottery revenue. See Steven Wilson, *How Manchester City won the stadium lottery*, telegraph.co.uk, 31 January 2011. Accessed on 14 April 2018.

¹⁰⁶ Manchester City council allowed Manchester City FC to negotiate the naming rights as part of an improvement rental agreement which force the club to pay £20 million to an authority in the grip of financial cuts. However, under the tenancy agreement, Manchester City Council retained control the stadium's naming rights which remains a publically owned asset. Ibid.

¹⁰⁷ This will be explained in more details below.

clubs.¹⁰⁸ It also contains specific criteria relating to sharing stadiums. Every football club should comply with these regulations whether they own the stadium or share it with another club.¹⁰⁹ The league will scrutinise every ground sharing application against these regulations and the application will be approved or rejected accordingly.

Section K of the Handbook ‘Stadium Criteria and Broadcasters’ Requirements’ sets out the rules relating to stadiums. English Premier League clubs are expected to have the use of a stadium for hosting fixtures. This basic requirement is set out in Rule K.3 of the Handbook: ‘Ownership of Ground and Training Facilities’, which is principally concerned with the ability of a football club to schedule its fixtures and the legal enforceability of its right to use the stadium. The rule states that:

“Each club shall either own its stadium and training facilities or have a *legally enforceable agreement* with its owner for its use by the club, expiring not earlier than the end of the current Season”.¹¹⁰

Clearly, the rule requires each football club to have a legally binding agreement in place to occupy their home ground for at least the remainder of the current season. Each football club, therefore, shall register its stadium with the Board,¹¹¹ at the beginning of the season.¹¹² This registration means that the club is not allowed to move from its registered stadium (either on a permanent or temporary basis) without a written consent from the Board.¹¹³ For example, Tottenham Hotspur FC had looked at splitting their home matches between Wembley

¹⁰⁸ See generally Section K ‘Stadium Criteria and Broadcaster’s Requirement’ of the Premier League Handbook.

¹⁰⁹ Section K.2 of the Premier League Handbook at 139.

¹¹⁰ Section K, Rule K.3 ‘Ownership of Ground and Training Facilities’, of the Premier League Handbook, at 139.

¹¹¹ “‘The Board’ means the board of directors for the time being of the league (or its designee)”. Rule A.1.19 of the Premier League Handbook.

¹¹² Rule K.5 of the Premier League Handbook.

¹¹³ Rule K.6 of the Premier League Handbook provides the circumstances that the Board should take into consideration when allow the club to change its home stadium.

Stadium and Milton Keynes Stadium while they were will building their new stadium.¹¹⁴ The club had been informed by the Premier League that they will not be allowed to host matches at two different grounds in one season.¹¹⁵ However, the applicant club will not be prevented from using stadium for the Premier League and another for different competitions, such as the FA Cup, League Cup or European matches. The club have to simply own a single stadium for league games over a season. Tottenham Hotspur FC, therefore, were able to play all his home Premier League matches in Wembley Stadium, and the FA Cup or the UEFA Champions League in Milton Keynes Stadium.

Furthermore, section K the Handbook sets out a number of other criteria for sharing grounds arrangements. The most essential requirement is enshrined in rule K.4, which expressly mentioned ground sharing arrangements. The rule requires applicant clubs to approve their priority rights at their home stadium as a pre-condition to stadium consent:

“No Club shall have or enter into a ground-sharing agreement unless the agreement contains a legally enforceable provision to the effect that the playing of the Club’s League Matches shall always take *precedence* over the activities of the other party to the agreement.”¹¹⁶

The Rule provides certainty for the delivery of English Premier League fixtures. In the above example, the Concession Agreement, between E20 Stadium West Ham United FC, described this requirement as the ‘overriding priority principle’ for the effect of prioritising English

¹¹⁴ Nick Callow, *Tottenham told Premier League home matches must all be at one ground*, theguardian.com published 17 July 2015. Accessed on 27 May 2018.

<https://www.theguardian.com/football/2015/jul/17/tottenham-premier-league-richard-scudamore-wembley>

¹¹⁵ The Premier League’s chief executive, Richard Scudamore, said that ‘[Tottenham Hotspur FC cannot have 19 home games with 10 at Milton Keynes and nine at Wembley. They have to play in the same stadium for the entire year for the integrity of the competition. Ibid.

¹¹⁶ The Handbook, at 139.

Premier League fixture.¹¹⁷ This means that the stadium owner must grant West Ham United FC a priority to use the stadium. Clause 7.2.C of the agreement states:

‘playing of the Club Matches in the Premier League shall always take *precedence* over the activities of the other party to an agreement granting it the right to stage events at the Stadium, as currently required by Rule K4 of the Relevant Rule of the Premier League.’

This principle confirms that the club’s application for ground sharing will meet with the requirement imposed in rule K.4 of the Handbook. The Board cannot approve any application unless both Rules K.3 and K.4 are fulfilled as no exclusions are permitted to these rules. Clearly, such rules are proposed to protect the English Premier League’s operational integrity, enabling the club and the League to schedule fixtures. Accordingly, such rules cannot be used to provide protection to the official sponsors of the club by preventing advertising messages around the stadium.

5-5) Ground sharing agreements and sponsorship rights

Sponsorship programmes within football stadiums are usually driven by a sponsor’s desire to supply its goods and/or services at the stadium. As part of the sponsorship package, the official sponsor will want to promote its association with the stadium as an official supporter. In doing so, the sponsor seeks to put its brands and logos within the stadium. The sponsor, therefore, may negotiate to define the word ‘stadium’ as wide as possible to include the public area around the stadium and not only perimeters inside the stadium.

In general, football stadiums can generate revenue through a variety of supply agreements. It is common for stadium owners to appoint a number of suppliers, with each supplier having

¹¹⁷ See section 7 of the Concession Agreement, p 38.

exclusive rights its product or service category. Stadium owners may award supply rights in the following categories: beer and alcohol, soft drinks, snacks, transport, financial services and betting. For example, Wembley Stadium has a confectionary agreement with Mars, a snack food supply agreement with Walkers, pouring rights agreements with Coca-Cola and Carlsberg, and an official bookmarker agreement with Betfred.¹¹⁸

Furthermore, stadium owners may also agree lower level partnerships with suppliers on 'sponsorship-in-kind deals'.¹¹⁹ Examples would include the supply of products or services such as office equipment, turf care products and waste removal. In the above mentioned example, Wembley Stadium has partnership agreements with official suppliers and local partners with low marketing budgets including UCFB, IMG, DNC, Quintain Estates, Brent, West LB and Multiplex and Constructions (UK) Ltd.¹²⁰ These partners are depicted at lower level in all acknowledgements, because they supply goods or services at no charge to the stadium.

For those sponsors, the stadium perimeter board is a fundamental platform because it allows them to display their brands to spectators and press. The perimeter board is considered to be one of the most common ways to let general public know about a company's sponsorship role and has become an inevitable part of football stadiums.¹²¹ It allows the sponsor's brand to be seen regularly during the match.¹²² In the past, perimeter advertising boards were basic signs with static graphics and, therefore, limited each display board promote one brand. Nowadays, however, these have been replaced with LED scrolling display boards that acts as an electronic billboards for potential sponsors, giving a greater potential for revenue.

¹¹⁸ Wembleystadium.com

¹¹⁹ See Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para I2.73.

¹²⁰ wembleystadium.com

¹²¹ For more information regarding the effectiveness of perimeter advertising in terms of recall, see Walliser, B, *What Sponsorship can Learn from Outdoor Advertising*, (1995) 5(1) Australia Marketing Journal, 21-31 at 22.

¹²² *ibid.*

Clearly, spectators inside the stadium are very small compared to the indirect audience who watch matches through television.¹²³ Therefore, the sponsorship agreement will specify the number of hoardings the sponsors will get, and its location during the match. Location value will be determined by the positioning of the parameters within the television angle.¹²⁴ For example, the location behind the goals are particularly valuable for sponsors because it will be seen on any goal replays during and after the match. These sites should be scheduled to the sponsorship contract marking chosen sites.

Similarly, the sponsorship parties should consider how time on rotating signage boards is utilised during the match. In football, certain times slots (such as the extra time) have the most value for sponsors. For example, Manchester United FC's incredible injury time comeback to beat Bayern Munich 2-1 in the Champion League final in 1999 was the most dramatic three minutes in the history of the game for many people.¹²⁵ Those two goals had an extra value to official sponsors because they came in the last minutes of the match and, therefore were shown more frequently in goal replays or pictures accompanying match reports in the media.

In addition to perimeter board branding, there are many valuable other platforms within football stadiums that should be considered carefully in the sponsorship agreement. Football clubs frequently offer opportunity to exploit other possible publicity places both within the stadium bowl (such as the stand) and outside the bowl but within the stadium (such as hospitality areas).¹²⁶ For example, Liverpool FC is reportedly closing in on a ten years

¹²³ However, some assume that perimeter advertising is more likely than advertising to break through the media clutter, because the spectator is unable to skip the commercial messages around the stadium. See Walliser, *ibid* at 25.

¹²⁴ Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para I4.58.

¹²⁵ Chris Wheeler, *Party like it's 1999: We reveal the secrets of the night Manchester United made history against Bayern Munich*, [dailymail.co.uk](https://www.dailymail.co.uk/sport/football/article-1262107/Party-like-1999-We-reveal-secrets-night-Manchester-United-history-Bayern-Munich.html), 30 March 2010, accessed on 16 November 2018.

¹²⁶ However, stadium owners should consider the rules that regulate the commercial exploitation of their stadiums. For example, football's Laws of the Game prevents any form of commercial promotion, whether real

agreement that would see the club receive £90 million in return for sponsorship right to the main stand at Anfield Stadium.¹²⁷

Exclusive sponsorship rights are predicated on the football club having exclusive possession over the stadium at which football matches will be held. This exclusive possession is essential for official sponsors because there will be no licensing of the stadium to other clubs. Excluding other clubs from using the stadium will enable the official sponsor to receive the sponsorship package exclusively. This sponsorship package will include both team and stadium exploitation rights, excluding any competing promotional messages around the stadium.

However, this exclusive privilege could be infringed by a competitor brand when the club enter into a ground sharing agreement. Both the licensor and the licensee have their own sponsors to consider, creating an obvious conflict. The appearance of a rival company's brands in the stadium will infringe the sponsor's exclusive rights. Obviously, the ground sharing agreement will set out what rights the owner and the hosted club will control in relation to the stadium. This control is supposed to indicate which right can both of them then pass onto their official sponsors. Nevertheless, the rights granted by stadium owner under ground sharing contract may infringe the rights granted under sponsorship arrangements, and vice versa. In other words, the official sponsors of the stadium and the hosted club may ambush the exclusive rights of each other.

The only practical way in this regard is for the owner to provide the stadium on a 'clean' venue basis devoid of any competing advertising messages. For example, West Ham United

or virtual, on the field of play until the players left the field at half-time and from the times the teams enter the field of play until the end of the match. The Laws of the Game also prevents any commercial promotion on the ground goal, nets, and flag spots. In addition, upright advertising must be within the technical area or within one metre of the touchline.

¹²⁷ James Pearce, *Liverpool look to tie up £90 million deal for Anfield main stand naming rights*. Liverpoolecho.co.uk 9 August 2017. Access on 11 November 2018. .
<https://www.liverpoolecho.co.uk/sport/football/football-news/liverpool-no-plans-sell-new-13453532>

FC's concession of the Olympic Stadium grant them the right to the stadium on a 'particularly clean... basis'¹²⁸, meaning they have an exclusive control of the advertising space at their home matches, but must return the stadium to its clean format after each such matches.¹²⁹ However, this does not mean that the club have an exclusive possession over the stadium and, therefore, a tenant. In addition to the fact that the club's exclusive possession is, in this example, in very a short time, it is limited to control the advertising spaces only, and not the entire stadium. As discussed above, the club is still a licensee because the stadium owner provides attendance and services which require the stadium owner to exercise unrestricted access to use the stadium.¹³⁰

Providing a clean venue is also the case when the stadium is used by other rights-holders for their event. For example, the UEFA requires clean stadiums for Champions League matches which are played at the various clubs' home grounds. The hosting club must supply a stadium without branding, except that officially authorised by UEFA, at least two days before a match. Rule 65.1 of the UEFA Champions League states:

'... the home club must provide a 'clean stadium' by at least the morning of two days before a match, meaning that no advertising except that officially authorised by UEFA may be located within the exclusive area'.¹³¹

The term exclusive area is widely defined by UEFA to include 'the stadium itself (including without limitation scoreboards, advertising board system, video boards, giant screens, clocks, dressing rooms, plyers' tunnel, technical zone and all seating, hospitality and VIP areas), all areas in the vicinity of the stadium owned, controlled, managed or operated by the club, as well as the area around it, up to and including the fencing surrounding it or roads which

¹²⁸ Clause 11.2(a) of the Concession Agreement.

¹²⁹ Clause 11.3 of the Concession Agreement.

¹³⁰ Ibid.

¹³¹ The last version of the UEFA Champions League 2015-18 Cycle, Season 2017-18, is available online on www.uefa.com.

naturally demarcate the area of the stadium, the air space immediately above the stadium (if the LOC holds or controls such rights or is reasonably able to do so), and the broadcaster, press and media areas.’¹³² This wide definition will help the official sponsors of the UEFA Champions League to avoid any attempts by rival companies using advertising sites around the stadium.

Clean stadia are also required for worldwide sporting events such as the Olympic Games. Rule 50.1 of the Olympic Charter 2015 prohibits visible advertising within its venues:

‘except as may be authorised by the IOC Executive Board on an exceptional basis, no form of advertising or other publicity shall be allowed in and above the stadia, venues and other completion areas which are considered as part of the Olympic sites. Commercial installations and advertising signs shall not be allowed in the stadia, venues or other sports grounds.’

Therefore, the IOC requires cities bidding for Olympic events to guarantee the delivery of a clean city.¹³³ This guaranty may involve the use of local laws to avoid ambushing efforts using advertising sites along the routes to a particular venue.¹³⁴ According to Payne, former marketing manager of the International Olympic Committee (the IOC):

‘This is not just a venue devoid of the advertising messages and media, but control of all forms of commercial activity, including concessions, franchises, and type of food sold in restaurants. Such agreements will even specify the credit card to be accepted and the brand of soft drink to be served. Once a clean venue has

¹³² Ibid, Article 2.01(d).

¹³³ For more details see generally, International Olympic Committee, *Olympic Marketing Ambush Prevention and Clean Venue Guidelines*, 2005, available online on:
http://www.gamesmonitor.org.uk/files/Technical_Manual_on_Brand_Protection.pdf

¹³⁴ For example, the Organising Committee for the Olympic Games rely heavily on co-operation of the appropriate government offices to ban commercial airships from flying over the venue during the Olympic Games. Ibid at 16.

been achieved and sponsor brands installed, the next task is to police infringements of agreements.’¹³⁵

Section K of the English Premier League Handbook, however, does not require clubs to deliver a clean stadium for its matches. The ground sharing agreement, therefore, should detail the scope of commercial rights that may be exploited by the stadium’s owner and the guest club respectively. In this case, the stadium owner will be required to remove or cover its official sponsors’ brands in and around the stadium. The guest club then must ensure that its ground sharing contract with the stadium owner guarantee delivery of completely clean stadium, devoid of competing advertising messages. In fact, the ground sharing contract should provide mutually effective anti-ambushing provisions so that neither the stadium owner nor the guest club permits its sponsors to ambush the rights of the other. However, this may become more complex when the stadium owner sell the naming rights of the stadium.

5-6) The issue of stadium naming rights

Football stadium names usually reflect either the clubs that occupied a sports complex, a club owner, a region, or a local sporting legend. Stadium owners, however, started to look toward companies to sell the naming rights as a source of income. The selling of a stadium’s naming right is a particular type of sponsorship that is defined as ‘a transaction in which money or consideration change hands in order to secure the right to name a sports facility’.¹³⁶ Stadium naming rights are one of the fastest growing form of sponsorship,¹³⁷ with many major professional football clubs facilities in the United Kingdom now bear the name of a

¹³⁵ Payne, *Ambush Marketing: The Undeserved Advantage*, (1998) 15(4) *Psychology and Marketing*, 323-331 at 329.

¹³⁶ Thornburg, R, *Stadium Naming Rights: An Assessment of the Contract and Trademark Issues inherent to both Professional and Collegiate Stadiums*, (2003) 2(2) *Sport and Entertainment Law Journal* 330

¹³⁷ DeSchrive and Jensen, *What the name? Price variation in sport facility naming rights*, (2003), 29(3) *Eastern Economic Journal* 360.

corporation. Examples include the Etihad Stadium (Manchester City), Emirates Stadium (Arsenal FC), Rebook Stadium (Bolton Wanderers FC), Bet 365 Stadium (Stock City FC), Vitality Stadium (AFC Bournemouth), King Power Stadium (Leicester City FC), KCOM Stadium (Hull City FC) and Liberty Stadium (Swansea City FC).¹³⁸ Generally, the trend is growing due to the additional revenue stream available to owners of sports stadia.¹³⁹

Naming rights agreements are identified as a consistent source of long-term income for sport franchises.¹⁴⁰ This may be as simple as a company logo over the entrance to a stadium or involve signage within the stadium and shirt sponsorship.¹⁴¹ Usually, club and shirt sponsor agreements are shorter in duration and, thus, changes to the sponsors occur on a periodic basis.¹⁴² Stadium naming is far more likely to be a long term deal, particularly where it is tied in to the funding of a new stadium development.¹⁴³ For example, in November 1999, Arsenal FC decided to construct a new 60,000 seat stadium in nearby Ashburton Grove and leave its home ground Highbury Stadium.¹⁴⁴ In 2004, Arsenal FC agreed to a £90 million deal with Emirates Airline to sponsor their new stadium for 15 years.¹⁴⁵ Emirates Airline is also Arsenal FC's shirt sponsor.¹⁴⁶ The deal allocated revenues of approximately £48 million to shirt sponsorship and £42 million for naming rights.¹⁴⁷ That deal was extended in 2012 and

¹³⁸ Other football clubs such as Tottenham Hotspur FC and Chelsea FC are also reportedly looking forward to closing important naming rights deals. Matt Hughes, *Spurs to drop stadium name*, thetimes.co.uk, 15 February 2017. Accessed on 15 April 2018.

<https://www.thetimes.co.uk/edition/sport/tottenham-set-to-drop-stadium-name-7202tp9hh?t=ie>

¹³⁹ in 2013, 24 out of 31 NFL (National Football League) stadia and 27 out of 30 NHL (National Hockey League) stadia in North America are named after a corporate sponsor. In Germany, 14 out of 18 of the Bundesliga football stadia have naming right deals. Woisetschlager et al, *Fans' resistance to naming right sponsorships* (2014) 48(7/8) *European Journal of Marketing* 1487-1510 at 1488.

¹⁴⁰ Leeds, et al, *ibid* at 583.

¹⁴¹ In addition to naming rights, any venue sponsor will expect a whole host of further rights connected with the venue, which may include internal or external displays, perimeter advertising, name check on PR announcement, as well as its name appearing on tickets and other literature connected with the venue. Lewis and Taylor, *ibid*, para I2.90

¹⁴² Neils, *ibid*, at 54.

¹⁴³ *Ibid*.

¹⁴⁴ www.arsenal.com.

¹⁴⁵ *Arsenal football club in £150m Emirates deal*, bbc.co.uk, 23 November 2012. Accessed on 14 April 2018
<http://www.bbc.co.uk/news/business-20464096>

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid*.

Emirates paid £150 million to put their branding on Arsenal FC's shirt until 2019 and extend their stadium naming rights to 2028.¹⁴⁸ In total, the new agreement brings in £30 million a season for Arsenal FC in terms of shirt and stadium sponsorship.¹⁴⁹

Such considerable amount of money that companies are willing to pay to sponsor a football stadium for a long term deal could have a significant impact on the decisions of numerous clubs considering building a new stadium. Tottenham Hotspur FC, for example, are reportedly willing to shed the name White Hart Lane from the new stadium in order to earn up to £400 million in naming rights.¹⁵⁰ It can be said that the explosion of naming rights is being driven by the desire of clubs and stadiums owners to cover the cost of redeveloping their stadiums or building new ones.

For the corporate sponsors, stadium naming rights are considered to be one of the most effective marketing communication options in the market.¹⁵¹ One advantage that corporate sponsors drive from acquiring the right to name a stadium is that the company's name appears each time the stadium is mentioned in spoken and print news reports.¹⁵² It is also an opportunity for corporate sponsors to reach stadium attendees in signage, programmes and spoken announcement at sporting events. Therefore, like any sponsorship programme, naming rights are meant to develop brand equity through increased exposure, stronger more positive brand associations and heightened brand awareness.¹⁵³

¹⁴⁸ Ibid. One of the main problems with providing a longer-term naming rights deal is that it is difficult for both the sponsor and the club to determine the value which should be attached to the rights. Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para I2.86

¹⁴⁹ Ibid.

¹⁵⁰ Matt Hughes, *Spurs to drop stadium name*, The Times, 15 February 2017. Accessed on 14 April 2018. <https://www.thetimes.co.uk/edition/sport/tottenham-set-to-drop-stadium-name-7202tp9hh>

¹⁵¹ Donovan et al, *Increasing brand recall for naming rights Sponsorships*, (2016) Journal of Social Marketing 6(4) 378. McCarthy and Irwin, *Naming in Lights: corporate purchase of sport facility naming rights*, (1998) 2 the cyber-journal of Sport Marketing 3.

¹⁵² Ibid.

¹⁵³ However, variation have been reported in the success of naming rights programme, with not all naming rights are equally performant in delivering awareness gains. Quester 1997 p. 107.

However, audience members may react negatively to corporate renaming of a stadium where there are already names for the stadium which has taken on historical importance for fans. In 2011, for example, Newcastle United FC renamed their home ground St James Park the Sport Direct Arena after owner Mike Ashley's company.¹⁵⁴ The club announced that the new name is a temporary authorisation until they find a sponsor to take over the full naming rights for the stadium on a permanent basis.¹⁵⁵ In 2012, Newcastle United FC agreed a four-year shirt sponsorship and stadium naming rights deal with Wonga.com.¹⁵⁶ Newcastle United's fans vigorously protested against the idea and reacted with fury.¹⁵⁷ This led to Newcastle City Council requesting the media to refer to the stadium by its old name St James' Park in their reports instead of Sport Direct Arena.¹⁵⁸ Newcastle United FC and Wonga.com, thus, decided to revert to the traditional St James' Park name rather than incorporate branding into the stadium title.¹⁵⁹

If the club wishes to maintain some forms of continuity, they can ensure that some forms of name remain in addition to that of the new stadium sponsor. Therefore, some football clubs insist that a reference to their historic home must be included in any naming rights deal. For example, Chelsea FC received a planning permission to redevelop their historic stadium Stamford Bridge at a cost of around £1 billion.¹⁶⁰ Chelsea reportedly seeks a naming rights

¹⁵⁴ *Newcastle rename St James' Park the Sport Direct Arena*, bbc.co.uk, 9 November 2011. Accessed on 16 April 2018.

<http://www.bbc.co.uk/sport/football/15668207>

¹⁵⁵ St James' Park is the oldest stadium in the north east with football having been played on its ground since 1880. Ibid.

¹⁵⁶ Damian Spellman, *Newcastle stadium name returns to St James' Park after four-year sponsorship deal with wonga.com is struck*, independent.co.uk, 9 October 2012. Accessed on 17 April 2018.

www.independent.co.uk/sport/football/premier-league/newcastle-stadium-name-returns-to-st-james-park-after-four-year-sponsorship-deal-with-wongacom-is-8203956.html

¹⁵⁷ *ibid.*

¹⁵⁸ Newcastle City Council's cabinet member for quality of life, Henri Murison, said 'As far as the fans and Newcastle City Council are concerned, the home of Newcastle United will always be known as St James' park'. *Newcastle City Council condemns St James' Park name change*, bbc.co.uk, 10 November 2011. Accessed on 16 April 2018.

<http://www.bbc.co.uk/news/uk-england-tyne-15681118>

¹⁵⁹ Lewis and Taylor, *Sport: Law and Practice*, 3rd edn (Bloomsbury, 2014) para).

¹⁶⁰ Simon Stone, *Chelsea stadium: £1 billion Stamford Bridge plan moves step closer*, bbc.co.uk 15 January 2018. Accessed on 16 April 2018.

partner, but will insist that a reference to Stamford Bridge must be included in the naming rights deal.¹⁶¹ However, there are suggestions that simply aligning the sponsor brand alongside the stadium name could be ‘sub-optimal’.¹⁶² For example, in 1994, BT Cellnet signed a ten-year deal for £3.5 million with Middlesbrough FC for naming rights sponsorship at the Riverside Stadium.¹⁶³ Middlesbrough FC’s strategy is that the stadium will always be known as the Riverside as well as any associated naming rights and, thus, the stadium’s name changed to BT Cellnet Riverside Stadium.¹⁶⁴ The deal ended in 2002, however, even beforehand no one really called it by its full name.¹⁶⁵

Such controversy could be avoided where the naming rights are applied early enough during a stadium’s construction. For example, Emirates has become a synonym with the new stadium and Arsenal FC’s fans may not even recognise the actual name of the stadium. This, however, can lead to the name being associated with the stadium to such an extent that it becomes always known by Emirates. This association can have a detrimental effect on the value of any future naming rights.¹⁶⁶

The strong association of the stadium with a particular brand through naming rights may also delude the value of other sponsorships of the club. This association may also impact on the value of future sponsorship rights of the club.¹⁶⁷ For example, Liverpool FC have the longest-standing partnership with the Danish beer brand Carlsberg.¹⁶⁸ In 2016, Carlsberg has marked the 25th anniversary of its commercial partnership with Liverpool FC by unveiling a new

www.bbc.co.uk/sport/football/42696760

¹⁶¹ Matt Hughes, *Spurs to drop stadium name*, thetimes.co.uk, 15 February 2017. Accessed on 15 April 2018.

¹⁶² *ibid.*

¹⁶³ *The Emirates, Signal Iduna and other sponsored stadium names that make sense*, talksport.com, 29th July 2017. Accessed on 14 July 2018.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ Oliveau, M, *What’s in a Name? (Or, Why Pay Millions to Name Building?)*, (2005) 23(1) *Entertainment and Sports Lawyer* 33.

¹⁶⁷ Lewis and Taylor, *ibid*, para I2.89.

¹⁶⁸ www.liverpoolfc.com.

2,000 capacity lounge named the Carlsberg Dugout in Anfield's redeveloped Main Stand.¹⁶⁹

The naming of Anfield Stadium in the context of brewing sector can effect negatively on the value and marketability of Carlsberg's pourage rights at the stadium.

5-7) Ground sharing issues inherent in Stadium Naming Rights

Stadium naming rights may become even more complicated if a number of sporting organisations use the stadium under a license. Indeed, the grant of stadium naming rights makes it difficult, if not impossible, for stadium owners to deliver a clean stadium to other rights-owners who may use the stadium for their competitions. As mentioned earlier,¹⁷⁰ ground sharing and some football competitions (such as Football World Cup, Olympic Games, and UEFA Champions League) require clean stadiums. For worldwide events, it has been suggested that stadium naming may impact on the choice of any governing body wishing to use that stadium for their events.¹⁷¹ Therefore, the naming rights agreement should include an appropriate carve-out if the stadium owner want to host such or any similar sporting events sporting event in the future.¹⁷² For example, the Millennium Dome was renamed 'the O2 Arena' as part of a naming rights deal with the mobile giant in 2006.¹⁷³ However, it had to be referred to as the 'Greenwich Arena' while it was used as an Olympic venue duration the 2012 Olympic Games in London.¹⁷⁴ Similarly, the Sports Direct Arena

¹⁶⁹ Ibid.

¹⁷⁰ See Section (5-5) of this chapter

¹⁷¹ Lewis and Taylor, *ibid*, para I2.91.

¹⁷² Ibid.

¹⁷³ Liam Allen, *White elephant 'not forgotten'*, [bbc.co.uk](http://news.bbc.co.uk/1/hi/england/london/4903922.stm), 12 April 2006. Accessed on 16 April 2018.

<http://news.bbc.co.uk/1/hi/england/london/4903922.stm>

¹⁷⁴ Similarly, the Allianz Arena in Munich became the FIFA World Cup Stadium Munich for the duration of the 2006 FIFA World Cup in Germany. *Munich – Allianz Arena*, [bbc.co.uk](http://news.bbc.co.uk/1/hi/england/london/4903922.stm), 3 December 2005. Accessed on 20 April 2018.

http://news.bbc.co.uk/sport1/hi/football/world_cup_2006/venues/4459106.stm

(Newcastle) was referred to as St James' Park, the Ricoh Arena (Coventry) was re-named the City of Coventry Stadium during the London 2012 Games.¹⁷⁵

Similarly, the branding around stadiums in the UEFA Champions League should be cleaned and passed on to UEFA's official sponsors.¹⁷⁶ UEFA's requirement of clean stadium also applies in relation to the branding of any naming rights of the stadium itself.¹⁷⁷ However, this requirement is subject to the following limited exceptions:

1) The name of the naming rights sponsor may be announced over the PA system for the sole purpose of denominating the stadium if required for safety and security reasons. No additional identification connected with the stadium sponsor may be included in the announcement;

2) the name of the naming rights sponsor may appear on printed materials (e.g. tickets) for the sole purpose of denominating the stadium for safety and security purposes and only in a non-commercial typeface, colour without logos;

3) Any permanent signage for the naming rights sponsor on the outside of the stadium does not have to be removed or covered up.¹⁷⁸

Such limited exceptions could be included in the sharing stadium agreement in order to avoid any potential conflict between the sponsors. However, the mere existence of the name of the naming right sponsor is enough to invade the exclusive rights of the guest club's sponsors. Therefore, if the stadium is likely to be shared by a number of sporting organisations, the impact of granting stadium naming rights should be considered. In other words, naming rights do not involve only contract issues between stadium owners and corporate sponsors,

¹⁷⁵ *ibid.*

¹⁷⁶ Rule 65.01 of the UEFA Champions League Regulations 2016/2017.

¹⁷⁷ *Ibid.*

¹⁷⁸ Rule 65.03 of the UEFA Champions League Regulations 2016/2017.

but also issues addressed in the leasing contracts between the stadium ownership and the clubs that occupy the stadium.

Ground sharing agreements between stadium owners and sports organisations should determine the allocation of which party controls the choice of corporate sponsors. Ground sharing agreements may specify that the stadium's name must remain the same throughout the length of the agreement. Most importantly, ground-sharing agreements should include specific restrictions on the kinds of corporations that can be chosen for the stadium naming rights. Such restrictions allow the clubs to protect the exclusive rights of their official sponsors. The ground sharing may require a party to seek consultation before entering into a stadium naming rights agreement. The club, therefore, should incorporate a right of refusal in the ground sharing agreement. This right will determine what kind of corporate sponsors could be qualified as a stadium's name.

5-8) Conclusion

The main goal of this chapter was to examine the implication of the exploitation of football stadiums on the exclusive rights of event sponsors. The first section of the chapter focused on the protection of sponsorship rights through admission tickets. The revenue generated from the sale of tickets has encouraged football clubs to increase the capacity of their stadiums. However, spectators inside the stadium may use their access tickets to promote commercial brands. Such brands could be in the same category to that of the official sponsors of the event.

Therefore, football associations and related enterprises include terms and conditions to restrict the ticket holder to carry any form of advertising to the stadium. Such terms and conditions allow the stadium occupier to prevent the ticket holder entering the stadium.

However, such terms and condition must be brought to the attention of the ticket purchaser prior to the sale taking place. Such terms and conditions cannot be applied on the ticket holder unless it can be shown that the latter has actual knowledge of the conditions.

There were some cases when the courts in the United Kingdom have supported the ticket holder in the past. However the advance of technology nowadays can guarantee the delivery of the terms and conditions to ticket holder's attention. This means that event organisers are able to eject spectators from the stadium if they promote a competitive brand to that of the official sponsor. The result of this investigation show that event organisers could use contract to prevent ambush marketers from the sponsored subject.

The most obvious finding to emerge from this finding is that the event organiser uses contract to increase ambush marketing opportunities. In the United Kingdom, the shared use of stadiums in football is becoming an increasingly common option for many clubs nowadays. The potential of conflict is obvious because both the stadium owner and the guest club have their own sponsors to consider, in particular if the guest club's sponsors include rival brands.

Ground sharing will not only effect hosting clubs' sponsors but also the hosted clubs sponsors as well. Section three of the chapter has investigated whether sharing ground will give the hosted club an exclusive position over the stadium. The finding was that the ground sharing agreement of some football clubs do not give the club an exclusive possession over the stadium. West Ham United FC, for example, do not have an exclusive possession over the Olympic Stadium, because they it have no rights to exclude other sporting bodies from using the stadium. Such exclusive possession is crucial to deliver the exclusive rights of official sponsors.

Section Four of the chapter examined the ground sharing agreement under Section K of the FA Premier League Regulations. The rule requires each football club to have a legally

binding agreement in place to occupy their home ground for at least the remainder of the current season. Most importantly, the rule requires applicant clubs to approve their priority rights at their home stadium as a pre-condition to stadium consent. This could provide protection to the official sponsor of the event in terms of providing preventing advertising messages around the stadium.

Chapter Six: Conclusion

Sports have always been a significant part of human social being. They are so ingrained in peoples' lives and have hence become an exciting part of their daily lives. This is particularly true with football, the most popular and lucrative sport in the world. Since the end of 1970s, football has transcended from entertainment or leisure and have now gained commercial and economic significance, especially in the United Kingdom. Through marketing, brand building, licencing and merchandising, football associations and related enterprises have now become more economically important and viable and have assumed the influences associated only with national companies. Football association and related enterprises have been able to gain enormous financial revenue by exploiting and leveraging on aggressive marketing campaign taking advantage of marketable potentials resident in football. Therefore, football teams and corporations started to exploit and capitalise on varying intellectual property rights. These intellectual property rights are usually exploited via merchandising, broadcasting rights and sponsorship rights.

Sport sponsorship as a promotional activity has grown remarkably in recent years. According to figures from Statista, the value of global sports sponsorship increased from \$44 billion in 2009 to \$65.8 billion in 2018.¹ For corporate sponsors, a sponsorship with popular sports properties can achieve multiple objectives for corporate sponsors, including, obtaining brand exposure, achieving brand recall, enhancing brand image, achieving a brand association with the property and its consumers, and communicating a brand theme in hope of obtaining sales.²

¹ Statista, Global Sponsorship Spending by region from 2009 to 2018 (in billion U.S dollars), Statista 2018, <https://www.statista.com/statistics/196898/global-sponsorship-spending-by-region-since-2009/>, accessed on 14 August 2018.

² Gwinner, *A model of image creation and image creation and image transfer in event sponsorship* (1997) 14(3) *International Marketing Review* 148. O'Reilly and Madill, *the Development of a process for Evaluating Marketing Sponsorships* (2011) 29(1) *Canadian Journal Administrative Science* 50.

Generally, brand exposure is the most vital element to the success of the entire sponsorship agreement. For corporate sponsors, such brand exposure should be the first main focus objective of the sponsorship agreement. Brand exposure contemplates the dimensions of both audience size and demographic profile.³ Corporations have to identify who their target customers is previous to entering sponsorship agreements. Sponsoring football properties are desirable because companies have the opportunity to receive brand exposure during actual games or events, whether the fans are attending the football matches or watching them through mass media. Brand exposure opportunities such as this can help achieve the important objective of brand recall.⁴ Consumers should be aware of the product or service category and able to recall the specific brand name at the time when the purchase decision is being made.

To assist with brand recall, the sponsor must have an exclusive right within its product or service category. Such exclusive right is valuable because it excludes any competition that the corporate sponsor might receive from a competitor company within that product category at the sponsored event, league or club. The result of exclusive sponsorship rights could be a distinct competitive advantage for the corporate sponsor.

However, instances of competing sponsorship interests within the same competition in English football have become common. Many active actors in English football, such as licensed broadcasters, football players and stadium owners pursue corporate support. Accordingly, corporate sponsors may find it difficult to establish unique image associations within the football domain apart from category competitions. This thesis has examined the practice of selling multiple sponsorship rights within the same product or service category in English football. The study raised an important question about the nature and the extent of

³ Fortunato, *Sponsorship Implications of the Lance Armstrong v. USPS Law suits* (2014) 3(1) Berkley Journal of Entertaining and Sports Law 75.

⁴ *Ibid.*

sponsorship rights that football associations and related enterprises provide to their official sponsors.

In fact, questions with regard to the nature and extent of sponsorship rights in football as such have never served before the English courts. Nevertheless, it is often indicated that English law does not acknowledge that there is any proprietary interest inherent in football and other sports and that sponsorship rights in sports as such thus cannot exist. Therefore, the sponsorship rights is not automatically protected from a third party who may wish to exploit the sponsored subject. In order to receive the required level of protection, football associations and related enterprises will have to use various mechanisms of law in order to ensure that the sponsored subject is not exploited without consent.

Nonetheless the failure of English law to recognise exclusive sponsorship rights capable of legal enforcement in football competitions per se, however, it must be taken into account that football in earlier times was more of a pastime than an economic enterprise. Modern football has become a huge business which makes a significant contribution to the world economy. As in any other industry, football federations and football clubs can rely on goodwill which has been built up with much expertise, effort, diligence and expense. It is consequently crucial that the law must develop to take these realities into consideration.

Modern football is only possible as a result of the enormous investments corporate sponsors make in football because of the fees they pay for the acquisition of sponsorship rights in football. The goodwill that football federations and related enterprises accumulate and the astronomical amounts of money corporate sponsors are prepared to pay for the right to sponsor football entities are a clear sign that a proprietary interest in football exists; that such an interest can be traded by football bodies; and that the right should legally protected in the

lands of the particular football body or the corporate sponsor to whom the interest has been traded.

Of fundamental significance to the preceding discussion is the issue of ambush marketing. Ambush marketing is any sort of unauthorised association by a business of its name, brand, products or services with a sport event, through anyone of a range of marketing activities, in order to benefit from the goodwill that the organiser has generated in the event without paying the rights fee for the privilege.⁵ Ambush marketing companies employ various techniques and methods in order to associate themselves with a sporting property and weaken a competitor's official sponsorship. Therefore, this study has explored the implication of ambush marketing on exclusive sponsorship rights. The study does not attempt to identify and examine the whole range of ambush marketing, because ambush activity can vary enormously in scale and can be domestic or international in scope. This study is more concerned with the most common forms of ambush marketing, in particular, ambushers who seek to exploit contractual relationships with participants in a football competition.

In this chapter I draw on the work of Chadwick and Burton to make my argument that the practice of ambush marketing is not limited only to the unauthorised exploitation of the sponsored subject by third parties, but also to ambushers who are seeking to exploit relationships with participants in football events. Chadwick and Burton's emphasis on ambush marketing strategies generally is especially useful to my argument as it allowed me to think through the ways in which ambushers could exploit their contractual relationships with participants in a football competition to diminish the overall value of the exclusive sponsorship rights of official sponsors. To this end, Chadwick and Burton's division of ambush marketing is generative for grasping how football associations and related enterprises can be instrumental in increasing ambush marketing opportunities.

⁵ Hoek and Gendall, *Ambush marketing: More Than Just Commercial Irritant?* (2002) 1(2) Entertainment Law 72; Wall, A, *the Game behind the Games* (2002) 12 Marquette Law Review 557.

The thesis is builds on and contributes to work in the field of the legal protection of sponsorship rights against ambush marketers in football activities. Although a number of studies⁶ have examined the issue of ambush marketing and its implications on sponsorship arrangements, there has not been a strong focus on football, the most popular and lucrative sport in the United Kingdom. As such, the study provides additional insights about the legal mechanisms available in the United Kingdom that could be used to protect exclusive sponsorship rights in football competitions. This research differs from previous studies in the field of such protection by identifying the effectiveness of such legal weapons to prevent competitors within the same product or service category to associate their brands with the sponsored subject. In doing this it draws strongly on independent regulatory bodies that could limit the scope of multiple sponsorships within the same product or service category in English football.

The study has shown that the exploitation of exclusive sponsorship rights in English football is based on the following elements:

A) The creation, protection and enforcement of a range of registered and unregistered trade mark, copyrights and other intellectual property rights in the various elements that go to make up a football competition. The study has shown that the law of intellectual property rights could be used against ambushers who are truly unrelated third parties. Unrelated third parties are ambushers who are not seeking to exploit relationship with participants in a football competition to associate their brands with the sponsored subject. In general, the ability to take effective actions against such ambushers will depend on the extent to which they are making

⁶ Louw, *Ambush Marketing and The Mega Event Monopoly: How Law are Abuse to Protect Commercial Rights to Major Sporting Events* (Permalink, 2012). Scassa, *Ambush marketing and the right of association: Clamping down on references to that big event with all the athletes in a couple of years*, (2011) 25(4) *Journal of Sport Management* 354. Hoek and Gendall, *Ambush marketing: More Than Just Commercial Irritant?* (2002) 1(2) *Entertainment Law* 72. Crow and Hoek, *Ambush marketing: A critical review and some practical advice* (2003) 14(1) *Marketing Bulletin* 14.

use of elements of the event – such as emblems, logos, mascots and photographs – in which football associations and related enterprises own or control such intellectual property rights.

Where ambush marketers make unauthorised use of trade marks, designs, copyright protected works etc. the event organiser may be able to make use of the usual remedies for intellectual property infringement. It may be also possible to for football entities and official sponsors to pursue an action in passing off, where a business has made a misrepresentation which led to confusion in the minds of the public as to whether that business has an official connection with the event.

However, the creativity of such kind of ambush marketers has caused a constant headache to football organisations and their official sponsors. In many cases, those seeking to make unofficial connection with the sponsored subject have been clever enough to avoid making use of protected logos or signs and passing off is not easy to establish in these circumstances. Activities not prohibited by intellectual property law would be legitimate marketing tactics; however, their potential effect should be more explicitly recognised during negotiations between rights owners and prospective sponsors.

B) Contractual restrictions: it seems that in order to maximise the protection sponsors might receive from ambushing activities of all types, the normal commercial protection protections provided by trade mark, copyright, passing off and other intellectual property laws need to be supplemented by tight contractual provisions between all of the parties involved in the sponsorship of a football competition. Rights owners need to impose contractual restrictions on:

B-1) The licenced broadcasters, to ensure that they neither overstep their own contractual rights nor inadvertently assist competitor brands in hijacking the goodwill in the sponsored subject.

Where corporations have not gained rights to sponsor a football competition, they may be able to buy rights to other indirect sponsorships that still offer opportunities for airtime. For example, companies that do not have official Premier League sponsor status may buy the rights to sponsor the media broadcasting the league. From the official sponsor's point of view, these arrangements encroach on their exclusivity, and so many diminish the overall value of the sponsorship to them.

Chapter Three of this research has discussed the main arguments that deal with the issue of selling commercial references on television and other visual media to competitors of official sponsors of a football entity. This was examined in the context of the dramatic changes in the media coverage of the football competitions in the United Kingdom. The purpose of the chapter was to highlight the contractual relationship between football entities and licensed broadcasters by pointing to the implications of such relationships on the value of the exclusive rights of official sponsors.

Many researchers have cited examples where competitors of official sponsors obtained broadcast rights to the events their competitor sponsored. Yet, although several researchers have cited this behaviour as a prime instance of ambushing, it is difficult to see how advertisers can be held to account if the sponsorship contracts did not specifically exclude competitors. Where sponsorship contracts do contain provisions along these lines, competitors' access to sponsorship rights would constitute a breach of the contract and the original sponsor would be entitled to the remedies prescribed by the contract. Ultimately, determination of the original sponsor's claim would depend on wording of the contract.

Cases involving conflict between sponsors of an event and sponsors of the media rights to that event have led some major event owners, such as the UEFA Champions League, to implement stricter contracts that ensure official sponsors have first right of refusal to media

opportunities. As some commentators have pointed out, however, the cost of securing sponsorship rights may leave companies with few funds to promote their status. In addition, where official sponsors decline to secure media rights, they and the event owners may be unable to prevent competitors from obtaining them.

These situations highlight an implicit conflict of interest between event owners, who wish to maximise the revenue they can obtain from the event, and sponsors, who wish to protect their investment. Event owners have arguably been slow to react to this conflict, perhaps because, as some researchers have suggested, to do so would reduce their revenue stream. Ultimately, sponsors' increasing concern that these conflicts devalue the rights they have purchased means event owners must pay more attention to the manner in which they structure their sponsorship packages and contracts. Given that conflicting sponsorships still occur, and that these are widely cited as examples of ambushing, changes to sponsorship contracts appear well overdue.

In the case of conflicting sponsorship arrangements, official sponsors may not have been able to claim against their competitors, since the promotion packages they secured were legally available to them. They may, however, have ground of claiming against the event owner, for failing to deliver full sponsorship benefits. Clearly, actions taken on the latter grounds would also depend on the substance of the contract and any related documents outlining benefits sponsors could expect. Growing evidence that sponsors may claim against event owners who failed to deliver the benefits they could reasonably expect may mean it is no longer in the interests of event owners to turn a blind-eye to the competitive arrangements that have been possible.

B-2) The footballer, to ensure that the sponsorship programme for the event is not undermined or diluted by their own personal endorsement deals. One of the most important

findings of this research has discussed in chapter four of this study. The thesis has provided debates on the impact of the commercial exploitation of football players' image rights on exclusive sponsorship rights. Chapter Four concentrated on the legal and the practical issues that arise from the commercial exploitation of the footballer's image rights.

The chapter has revealed the significance of image right in football business in terms of its enormous commercial potentials. This has led me to examine the conflict between football clubs and their players, in particular on the issue of control and ownership of this right. Clause 4 of the FAPL contract was then identified as the standard provision to solve the potential conflict that could arise between the parties. In general, clause 4 was shown to maintain a balance between the interest of the football clubs and that of the players. It also clarifies the confusing aspect of the relationship between footballer and their clubs. The study has shown that it is the players that own and control their image right. Nevertheless, as regard unauthorised third parties, the joint stand taken by the footballers and their clubs on image right through clause 4 strengthens the commercial value of the image right.

Conclusively, clause 4 works to extend the commercial scope of image right as an intellectual asset. It also helps to set the stage on how competing interests can come together to manage this asset. Most importantly, it prevents the player using his image for commercial purposes in his club's context. Nonetheless, there is scope for improvement particularly regarding the negotiable nature of clause 4 as its content serves merely as a guide to the parties. This negotiable nature of clause 4 enables high profile footballers to hold their clubs to ransom because of their popularity while the average player is bound to take the terms dished by their clubs. As a result, such high profile footballers may enter into endorsement contracts with competitors of official sponsors of the football entity enabling them to associate their brands indirectly with the sponsored subject.

B-3) The stadium owners, to ensure that they have the right to exclusive possession of the stadiums at which the football matches are held.

The next valuable finding had been examined in chapter five of this thesis, which is on the chapter concerning the exploitation of football stadiums and its implications on exclusive sponsorship rights. Chapter Five examined the commercial exploitation of football stadiums and analyses the implications of such exploitation on the exclusive sponsorship programme. In order to deliver exclusive sponsorships to their official sponsors, the organiser of football competition must have the right to exclusive possession of the stadium. The exploitation of exclusive sponsorship rights requires the football association and related enterprises to have exclusive possession over the stadium to prevent any competing promotional messages around the stadium. The event organiser must ensure through the use of contractual terms and conditions that the public admitted to watch the event are confine themselves to watching and do not stray into commercial exploitation of their own. However, some stadiums in English football are shared by more than one club or may be owned by a local authority. The potential of conflict is obvious because both the stadium owner and the guest club have their own sponsors to consider, in particular if the guest club's sponsors include rival brands. Therefore, Chapter Five of the thesis analysed ground sharing agreement between the stadium owner and the hosted club in English football. The analysis was based on Section K of the FA Premier League Regulations. Section K of the English Premier Handbook sets out the rules relating to stadiums. It contains specific criteria relating to sharing stadiums. Ground sharing agreements will almost always take the form of a licence, or concession creating an estate in the land. As licences create no interest in land and warrant very little interference with their terms by the courts, it is absolutely essential the clubs negotiate those terms carefully to ensure they reflect the balance of interests required over the duration of the ground share. Exclusive possession is the key element that indicates whether the ground sharing contract is

a licence or tenancy. That element is crucial to enable the club and the league to deliver the exclusive rights of official sponsors with certainty.

However, the study has found that ground sharing agreements in English Football may not grant the occupier an exclusive possession over the stadium. The study has identified that the football club could be a licensee if the stadium owner provides attendance or services. Such attendance or services require the stadium owner to exercise unrestricted access to the stadium. In West Ham United FC's concession of the Olympic Stadium, for example, the stadium owner provides services and attendance. Such ground sharing agreements are thus licence and not tenancy. Consequently, the club, do not have an exclusive possession over the stadium, because they have no rights to exclude other sporting bodies from using the stadium.

It can be said that the commercial exploitation of sponsorship rights in English football investigates an important problem as the exact nature and the extent of the rights possessed by football associations and related enterprises. In general, the legal system in the United Kingdom enables such football entities to create, exploit and, to a large extent, protect the sponsorship rights of their leagues and events. Once the existence of such sponsorship rights is established, football associations and related enterprises possess certain rights, privileges, powers and immunities as regards the sponsored subject, similar to those possessed by any owner of a property.⁷ This means that the football entity possesses rights to enforce action or forbearance by another; privileges to do as one pleases in a certain matter: powers to create new legal capacities for others; and immunities to be free from the legal power or control of another.⁸

⁷ For the hypothesis that rights, powers, privileges and immunities are fundamental legal concepts which rationalise all branches of the law, see Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16. (1913).

⁸ Ibid.

It is assumed off course that once the existence of this aggregate of rights, privileges, powers and immunities is established, they are transferable at will. Indeed, it should be noted that when the term exclusive rights is employed what is meant is not only a right in the sponsor to associate its brand with the sponsored subject, but also a privilege that its competitors should not; a power to extinguish its own interest and create a new and corresponding interest in the sponsor; and an immunity from the legal power or control of the football entity itself.

This study has investigated the exact content of exclusive privilege secured by the official sponsor. As we have discussed above, the exclusive sponsorship privilege undoubtedly possessed by the football entity previously to the sponsorship contract. After the transfer of the exclusive sponsorship rights from the football entity to the official sponsor, did the former (the football entity) retain any such privilege which he could grant to other parties (ie the broadcaster, the footballer and the stadium owner)? Certainly, the official sponsor ought to get all the rights, privileges, powers and immunities possessed by the football entity, which indeed would leave the latter (the football entity) with no right to grant to other parties. On contrary, after the transfer of the exclusive sponsorship rights, the football entity would clearly be under a duty not to infringe the sponsor's exclusive right in the sponsored subject, similar to all the rest of the world. The football entity had exercised its power to extinguish its interest and created a similar interest in the official sponsor. After voluntarily extinguishing its rights, the football entity is in the same position as the rest of the world, in that they are under a duty to not use the goodwill of the sponsored subject.

The finding of this study, however, suggest that in general football federations and clubs retain the exclusive privilege after they sign sponsorship contract and grant them to other parties; namely licensed broadcasters, football players and stadium owners. The football entities' contractual relationships with broadcasters, footballers and stadium owners would not enable such active parties to sell sponsorship rights in the same product or service

category to that of the official sponsor of the football entity. A contract exists between the football entity and its official sponsor under which the football entity gives the sponsor an exclusive right for value of the sponsored subject. The football entity's failure to fulfil its contractual obligations to deliver exclusive sponsorship rights to its official sponsor is a breach of the contract. Therefore, the official sponsor has a right of action against the football entity.

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