

SPORTS LAW BRIEFING

OLYMPIC GAMES, AMBUSH MARKETING AND ATHLETES' RIGHTS

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The biggest sport event in history, the London Olympic Games 2012, is just a few weeks ahead of us. A record breaking number of athletes will participate in these Olympic Games and the financial revenues of the IOC from sponsoring and broadcasting contracts will break every record in sporting history. Of course not only the official sponsors and broadcasters want to profit from these Olympic Games. Various companies are, therefore, looking for ways to free ride on this event. This includes potentially also the personal sponsors of the athletes which are not allowed to promote their athlete during the Olympic Games.

Ambush Marketing

Since the biggest sporting event ever held in Switzerland, the UEFA EURO 2008, most people know what ambush marketing is all about. It is understood as any attempt by a company to associate itself with a high profile sporting event through any type of marketing activity with a view to deriving a commercial benefit from the said association. The marketing activity is “ambush” because the company undertaking it is not

authorised to do so and it is often done at the expense of another company’s official association with the sporting event.

No Special Swiss Ambush Marketing Law

In connection with the UEFA EURO 2008 UEFA tried – as a precondition for the holding of their championships – to have a specific legislation introduced. Therefore, the Federal Council prepared a draft for a modification of the Unfair Competition Act (“UCA”), which included a new art. 3 lit. e bis UCA. After lengthy discussions the proposal was turned down. Different sides argued successfully that such a new article is not necessary, not useful and not justified. The possibilities of competitors to promote their products and services would have been very much limited, which would have created a factual restraint of the economic activities, leading to a dysfunctional



legislation for the Swiss economy. In addition, it was argued that the draft was not precise enough (it prohibited “parasitical” advertisement), which would have extended the power of the organizers far beyond their rights. This is why the Federal Council stopped the project with its decision dated 22 November 2006. The main reason for this decision was that Swiss law already provides a set of legal options how the sporting event holders and their sponsors are able to limit ambush marketing.

Legal Basis against Ambush Marketing in Switzerland

In Swiss law the core instrument against ambush marketing is the unfair competition law. Based on article 3 UCA a behaviour or business conduct that includes a degrading, a danger of misleading, a danger of confusion, a linked comparison and/or an exploitation of a competitor’s reputation is prohibited. A non-sponsor is based on the sweeping clause in art. 2 UCA prohibited to entice the visitors in front of a stadium or on the way to the stadium to violate the general terms and condition of the event through methodical equipment with the clothes and messages of a non-sponsor.

The registrations of intellectual property rights such as trademarks and designs help to prevent the use of the brands of the competition. The Olympic rings and the Olympic Games are protected as trademarks worldwide. However, marks such as “European Championships” or “World Championships” or the image of a football can not be registered as these marks belong to the public domain. Furthermore, event songs, event slogans or event logos are basically protected by copyright law. This is also the case for the pictures and the videos made from a certain sporting event which can be qualified as creations under the copyright law. However, sporting events themselves are – just like in the European Union – not considered as a creation according to the Swiss copyright law.

In addition to the unfair competition law and intellectual



property rights “basic” legal instruments such as public concessions, property rights and contracts became very important in the fight against ambush marketing. With a public concession and/or contracts with the communities the exclusivity of the sporting event organizer on the public ground around the sport venues can be guaranteed. The same can be achieved with the property rights regarding the sport venues. Finally, detailed contracts with the venue rights holder, the sponsors, the participating teams and athletes as well as the spectators help to prevent ambush marketing. Therewith, the organizers are able to widely protect their events.

IOC’s Strategy to Prevent Ambush Marketing...

Over the years the IOC has adopted a very well strategy against ambush marketing. IOC has protected its (event-) brands, designs and domain names worldwide. IOC’s marks are even well known trademarks and enjoy therefore a wider protection under Swiss law. Of course the IOC always asks the organizing country for public concessions to guarantee the exclusivity of their sponsors. Finally, the IOC imposes very strict rules on the broadcasters and participants which

prohibit any commercial activities in relation to the Olympic Games. According to art. 40 of the Olympic Charter the athletes are not allowed to carry out any commercial activity 9 days before and 3 days after the Olympic Games. According to the Swiss Olympic guidelines for advertisement and PR in connection with the Olympics it is also after this period completely forbidden to use images of athletes from the Olympics with an “Olympic” background. The athletes are not even allowed to write in newspapers about their Olympic experiences.

... and the Athletes’ Rights?

The IOC redistributes over 90 percent of its revenues within the Olympic Movement, i.e. the International Sports Federations, the National Olympic Committees and the Organizing Committee of the Olympic Games. The athletes who form certainly also a very important part of the Olympic Movement do not participate directly in the revenues from the Olympic Games. This is even more surprising as a lot of athletes have to leave the Olympic village shortly after their competition and they are not even able to enjoy the unique Olympic spirit in the Olympic village. By signing the eligibility forms the athletes give up most of their image rights. They are not allowed to commercially exploit their own rights anymore. The question is, therefore, not only whether such a distribution of the revenues is justified, but also whether it is legally really possible for the IOC as a monopolistic organization to impose such strict rules. According to Swiss jurisprudence and legal literature in such situations a proper balance between the monopoly’s acts and the rights of the people concerned needs to be established. Taking into account the strict rules of the IOC such a distribution of the revenues is at least questionable.

Ways of “Smart” Ambush Marketing

In any case an athlete and his sponsor can generally

use sporting events by exercising “smart” ambush marketing. Such a “smart” ambush marketing is possible if the reference to the sporting event is not too strong, systematic and/or planned. The campaign itself must not be misleading and must not cause a danger of confusion (such as this scientific newsletter for example). Furthermore, personal rights and intellectual property rights have to be respected. In the “smart” ambush marketing campaign the athlete (and his personal sponsor) should rely on his own personality and constitutional rights as well as on his own naming rights and intellectual property rights. These rights are in particular effective in monopolistic situations where a fair balance between the rights of both parties needs to be established. If the athlete and his sponsor use their own rights properly it will be very difficult for the sporting event rights holder to forbid the marketing campaign.

The Sports Law Departement

Wherever our clients’ rights have to be enforced or defended nationally or internationally, be it in courts, including the Swiss Federal Supreme Court, or before other judicial authorities, the members of our litigation team are called in. With our four offices in Switzerland and with one of them in Lausanne, where the Swiss Federal Supreme Court has its seat, we are in a position to act locally in all of Switzerland’s regions in all instances.

The sports law department takes care of both civil and criminal cases and is equally experienced in acting in an offensive or a defensive capacity. As all of our litigators are highly specialised but also active in other fields of law, they have a deep understanding of the commercial and personal grounds for court proceedings and the repercussions such proceedings have. This understanding allows them to find practical solutions where appropriate and to hit hard where needed.

The diverse sporting, cultural and educational back-

ground of the team members, and broad experience in varied fields ensures that their understanding of our client's needs is always excellent.

International judicial assistance in both civil and criminal matters and regulatory enforcement works form a significant portion of our litigation team's work. An in-depth knowledge of and experience with the procedural instruments involved guarantee reliable and efficient advice to our clients.

The litigation team members regularly and successfully represent our clients in time-critical ex-parte

proceedings where decisions without a hearing of the counterparty are either sought or sought to be prevented. Here, the team has repeatedly proven its ability to deliver quality and to work highly efficiently within the shortest of time limits.

Our practice in criminal law cases is mainly focused on cases of white collar crime including issues of money laundering and its prevention, corporate crime prevention in general, criminal liabilities of corporate directors and board members and, in relation to regulators, work to ensure that reputational risks are minimised.

Froriep Renggli in Short



The Firm

Founded in Zurich in 1966, Froriep Renggli is one of the leading law firms in Switzerland, with around 90 lawyers and offices in Zurich, Geneva, Lausanne and Zug as well as an office in both London and Madrid serving clients seeking for Swiss law advice.

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