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SUBMISSION OF EVIDENCE TO THE HOUSE OF LORDS SELECT COMMITTEE ON THE MERITS OF STATUTORY INSTRUMENTS CONCERNING THE GLASGOW COMMONWEALTH GAMES ACT 2008 (GAMES ASSOCIATION RIGHT) ORDER 2009 [SI 2009/1969]

The Advertising Association is the only body representing all sides of the advertising and promotional marketing industries, worth £18.6 billion in 2008. Its membership represents advertisers, agencies, media and support services in the UK. Further information about the organisation is available at: <http://www.adassoc.org.uk/>

1. Introduction & Summary

1.1. The Advertising Association takes the opportunity here to provide the House of Lords Select Committee on the Merits of Statutory Instruments ('the Committee') with its comments on The Glasgow Commonwealth Games Act 2008 (Games Association Right) Order 2009¹ ('the Order'), which was made on 20 July 2009 and laid before Parliament the following day. The Order, which is scheduled to enter into force on 20 January 2010, appears to be modeled on three existing pieces of statute, namely: The London Olympic Games and Paralympic Games Act 2006 ('the 2006 Act'); The Olympic Symbol etc. (Protection) Act 1995²; and, The Olympics Association Right (Infringement Proceedings) Regulations 1995³.

1.2. In this submission, the Advertising Association:

- (a) sets out its principled opposition to the Order, arguing, for example, that the creation of the association right represents an unnecessary addition to the body of intellectual property law in the UK;
- (b) proposes that two non-technical elements of the Order – specifically those clauses governing its duration - be amended so as to shorten the period over which it is in force, thereby rendering the measure more proportionate; and,
- (c) criticises, with the aid of the Explanatory Memorandum (EM) that accompanies the Order, the consultation process undertaken around the creation of the association right as well as noting the absence of an Impact Assessment (IA).

1.3. The Advertising Association looks forward to publication by the Committee of its report on SI 2009/1969 following its next meeting on 13 October 2009. No part of this response should be treated as if it were confidential in nature.

2. SI 2009/1969: an unnecessary addition to the body of intellectual property law?

2.1. The Scottish Government, the Scotland Office and the Intellectual Property Office (IPO) have asserted on a number of occasions that the Commonwealth Games Federation (CGF) made it a contractual condition of bids to host the Commonwealth Games in 2014 that the

¹ Statutory Instrument No. 2009/1969

² The 1995 Act was amended by Schedule 3 ("Olympic Symbol Protection") of the 2006 Act.

³ Statutory Instrument No. 1995/3325

Government of the successful candidate country would create an association right around the event⁴.

2.2. The association right is a form of intellectual property law, of which the objective is to allow only parties that are officially authorized by those organizing the event to claim a connection with the Games. Parties without the necessary authorisation that attempt falsely to associate themselves with the event risk infringing the association right, thereby rendering them liable to civil action through the courts. Amongst these authorised parties will be official sponsors as, in order to help fund the event, its organizers will seek revenue from a range of sources, including from commercial sponsorship. Were any commercial or other party able freely to associate themselves with the event without the risk of legal action being taken against them, then there would be no incentive for companies to become official sponsors, pay for the privilege and thereby off-set the costs of staging the Games. Deliberately misleading activity of this kind falls into a category of commercial behaviour that is sometimes referred to as ambush marketing.

2.3. The Advertising Association is opposed to all forms of ambush marketing, including of the type against which the Order is intended to guard. There is, however, already an existing and comprehensive body of law capable of deterring just such misleading activity. This is made up of: the common law of "passing off"; the Copyright, Designs and Patents Act 1988; the Trade Marks Act 1968; the Business Protection from Misleading Marketing Regulations 2008⁵; and, the Consumer Protection from Unfair Trading Regulations 2008⁶. It is not clear whether the Scottish Government conducted an analysis identifying why the body of law set out above would be insufficient to meet the contractual obligations entered into with the CGF around the protection of intellectual property for the Glasgow Commonwealth Games.

2.4. The opposition of the Advertising Association to the creation of an association right is not only down to a view that the Order represents an unnecessary addition to the body of intellectual property law in the UK⁷. More important from an advertising perspective is that the measure risks creating concern amongst parties with absolutely no intention of falsely associating themselves with the event that they may inadvertently do so thereby attracting civil proceedings against them. It might be anticipated that the creation of such legal uncertainty would have a dampening effect on the advertising economy. The likelihood is that those responsible for creative executions, despite having no intention of creating a false link with the event, will seek external legal advice so as to minimize the chance of their advertisement being deemed by the event organizers to have infringed the association right.

2.5. Necessary or not, it is accepted that the Order has been willed into existence and Section 3 of this submission is aimed at providing practical proposals to the Committee about how its detrimental impact can be off-set, insofar as that is possible, at this late stage. The Advertising Association judges that this can best (and most easily) be achieved through amendment of two non-technical aspects of the Order, specifically those Articles governing the commencement and termination dates for the association right.

⁴ Evidence that controls on the physical location of advertising would have been a contractual requirement between the Scottish Government and the CGF is in the public domain - see Paragraph 3.2 of this submission. (Any equivalent evidence that the creation of an association right was explicitly required by the CGF is not similarly available.)

⁵ Statutory Instrument No. 2008/1276

⁶ Statutory Instrument No. 2008/1277

⁷ There is also a degree of concern that creating association rights around major events hosted here, as has been done by the Government first in respect of the 2012 Olympics (which the Advertising Association also opposed) and now in respect of the 2014 Commonwealth Games, will become the default response, rather than action being taken through the comprehensive body of applicable law already in existence in the UK.

3. Recommendations and rationales for amendment of SI 2009/1969

Commencement

3.1. The provision on when the association right will enter into force is contained within Article 1 (“Citation, commencement and extent”) of the Order. Article 1(2) provides for the association right to come into force six months after the Order is made, in other words on 20 January 2010. Whilst the six-month gap between the Order being made and the measure entering into force is welcome, it is still unclear why the Statutory Instrument had to be made so far ahead of the Commonwealth Games themselves, which are not scheduled to open until 23 July 2014.

3.2. The Candidate City Manual (CCM) for the 2014 Commonwealth Games published by the CGF states in Paragraph Q7.2.1 that candidate countries must provide the Federation with a written guarantee that legislation governing ambush marketing “be passed no later than 30 June 2010”⁸. The CCM does not specify the date by which such legislation should have entered into force.

3.3. If the contract that exists between the Scottish Government and the CGF does contain an explicit requirement that an association right be created, it seems unlikely that the Federation would have chosen to specify a date earlier than 30 June 2010 for legislation in this particular area to be in place, let alone in force. If this deduction is correct the Order effectively gold-plates upon the contractual requirements that exist between the CGF and the Scottish Government. If 30 June 2010 were actually the date contractually required for the legislation to be in place and six months were provided to the advertising industry to adapt, the entry into force date would be 30 December 2010 (rather than 20 January 2010, as is presently the case). Were the approach proposed above adopted, it would still mean that the association right was in force for 43 months before the opening ceremony of the 2014 Commonwealth Games – a period that is more than adequate for the event organizers to attract official sponsors and for the latter to make the most of the authorized status bestowed on them in their marketing and other activities.

3.4. In light of the above, the Advertising Association recommends to the Committee that it seek amendment to Article 1(2) of the Order such that the association right enters into force on 30 December 2010, rather than 20 January 2010. In order to achieve this, Article 1(2) could be reformulated as follows: “This Order shall come into force ~~six months after the day on 30 December 2010 which the Order is made.~~”⁹ (A consequential amendment to the date next to the “*Coming into force*” entry immediately beneath the full title of the Order would also be required.)

3.5. Finally, it is argued, in the context of the commencement date and a proportionate approach being adopted towards the duration of the association right that the Written Ministerial Statement on the subject of better regulation issued on 2 April 2009 by the then Secretary of State for Business, Enterprise & Regulatory Reform has direct relevance. That Written Ministerial Statement laid down that “...during the recession and recovery we have a

⁸ It is notable that the example of ambush marketing given in the CCM is of “preventing competitors of Commonwealth sponsors from engaging in unfair competition in the vicinity of Commonwealth sites”, in other words it relates to the physical location of advertising – there is no mention of association rights. A copy of the CCM can be downloaded from the following location: http://www.thecgf.com/media/games/2014/ccm_v72.pdf

⁹ Struck-through text indicates deletions, underlined text indicates new wording. (This is also the approach adopted later in Paragraphs 3.9 and 3.10 of this submission.)

particular reason to look very carefully at whether we should delay planned new regulation and avoid introducing new regulation which increases burdens on businesses except whether there is a clear case for action now.”¹⁰

Termination

3.6. The sunset clause through which the association right will terminate itself is contained within Article 19 (“Duration”) of the Order. Article 19(1) provides for the association right to cease having effect six months after the closing ceremony of the Commonwealth Games. The closing ceremony is currently scheduled to take place on 3 August 2014. Thus the Order is effectively scheduled to terminate itself on 3 February 2015.

3.7. The CCM does not specify for how long after the Games the legislation introduced to deter ambush marketing should remain on the statute books. No relevant extract from the host city contract that exists between the CGF and the Scottish Government on this subject has been placed in the public domain. In order to ensure that no unnecessary burdens are placed on the advertising industry, it is considered that the association right should terminate itself as soon after 3 August 2014 as is reasonable and proportionate. It is notable in this context that during the passage of the Glasgow Commonwealth Games Bill through Holyrood, the Scottish Minister for Communities & Sport, in addition to clarifying that the regulations governing the physical location of advertising would be in force up to a maximum of a fortnight before the event, indicated that they would cease to have effect no more than four or five days after the closing ceremony.¹¹ Such an approach appears reasonable and proportionate.

3.8. By contrast for a termination date of 3 February 2015 to apply to the association right is considered neither reasonable nor proportionate. Indeed, for the association right for the Glasgow Commonwealth Games to remain in force for such a long period (six months) after the closing ceremony of the event is even less proportionate than is the case for the one created by the 2006 Act that will apply to the London Olympics. The closing ceremony for the Paralympic Games to which the London Olympics association right (LOAR) also applies is scheduled to take place on 9 September 2012. Under sub-Section 40(8) of the 2006 Act, the LOAR ceases to have effect on 31 December 2012 – a date which is less than four months after the 2012 Games close. Thus the duration of the Glasgow Commonwealth Games association right (GCGAR) post-event is 50% longer than that which applies to a considerably bigger event – the Olympic Games, under the LOAR. This appears entirely disproportionate. The Advertising Association considers that a suitable but still disproportionately generous compromise would be for the GCGAR to survive for three months after the closing ceremony for the event. This would give an effective termination date for the Order of 3 November 2014.

3.9. In light of the above, the Advertising Association recommends to the Committee that it seek an amendment to Article 19(1) of the Order such that the association right ceases to have effect on 3 November 2014, rather than 3 February 2015, citing proportionality as the rationale. Article 19(1) might therefore be reformulated as follows: “This Order ceases to have effect ~~six~~ three months from the date of the closing ceremony of the Glasgow Commonwealth Games.”

3.10. A consequential amendment would also be required to sub-Article 19(2), if the above recommendation were adopted. Sub-Article 19(2) would require reformulation as follows: “Notwithstanding paragraph (1), where an action for infringement of the Glasgow

¹⁰ Rt Hon Lord Mandelson, House of Lords, Hansard Column WS100, 2 April 2009

¹¹ The Minister for Communities & Sport (Stewart Maxwell MSP), Scottish Parliament, Official Report Column 8055, 30 April 2008

Commonwealth Games association right is commenced, (including an application made to the court for an order under articles 15 to 17), before the end of ~~six~~ three months from the date of the closing ceremony of the Glasgow Commonwealth Games, this Order continues to have effect in respect of that action.”

4. Comments on the Explanatory Memorandum accompanying SI 2009/1969

4.1. The Advertising Association considers that it would be of assistance to the Committee if the organization were to provide comments on two sections of the EM that the Scotland Office published alongside the Order, namely those entitled: Consultation Outcome; and, Impact.

Consultation Outcome

4.2 Although the Advertising Association participated in the consultative process cited in the EM, it is not entirely clear why the Scotland Office has referred in its Memorandum to the consultation by the Scottish Government on the draft Glasgow Commonwealth Games Bill in the context of the Order. The consultation on the draft Bill engaged advertising in respect of its physical location only, whereas the Order concerns matters of intellectual property.

4.3. The Scotland Office goes on to state that, as a matter of policy, it does not usually consult on draft Orders made under Section 104 (“Power to make provision consequential on legislation of, or scrutinised by, the Parliament”) of the Scotland Act 1998, despite the fact that such Statutory Instruments are ordinarily subject only to the negative resolution procedure. This is arguably of some wider concern, given that Orders so made can impact throughout the United Kingdom, as is the case with SI 2009/1969. It can be accepted that the “informal online consultation”, which ran to less than two pages in total, conducted by the IPO on behalf of the Scotland Office is better than not holding one at all. However, had the Advertising Association and various of its members not identified the Order as having the potential to impact upon the sector and met with relevant officials twice, it appears that the proposals for adding to the stock of intellectual property law under the Scotland Act 1998 would have progressed entirely unnoticed. It is anticipated that others, including small businesses both north and south of the border, whilst possibly unbeknownst to them now will, as the 2014 Games draw closer, be surprised (perhaps as a consequence of being threatened with proceedings for infringing the GCGAR) to learn that they are subject to the provisions of the Order.

4.4. Despite being standard practice, a Government response has not been published to the “informal online consultation” the IPO conducted on behalf of the Scotland Office. The EM, meanwhile, only states (with regard to the responses received by the IPO) that: “The submissions mainly focused on the policy objectives that the Order seeks to make provisions for, but where appropriate the points raised in the submissions were considered in the development of the Order.” Consequently, it remains entirely unclear what effect, if any, the responses to the “informal online consultation” had on the development of the Order.

4.5. In its response to the “informal online consultation” conducted by the IPO, the Advertising Association expressed a number of other concerns it had with the consultative exercise, mainly relating to the application, or otherwise, of the Government’s *Code of Practice on Consultation*. The Advertising Association also expressed concern in its response about the IPO choosing not to publish a copy of the preliminary version of the Order alongside its “informal online consultation”, given that it had already apparently been drafted by that stage. Instead, the IPO merely published a summary of the draft Order,

which ran to a page-and-a-half of text¹², requiring a considerable amount of deduction on the part of interested parties in their attempts to determine what the measure might actually contain. Such an approach has been a recurrent theme throughout the process of the association right being developed.

Impact

4.6. The Scotland Office states in the EM accompanying the Order that it has not prepared a Regulatory [sic] Impact Assessment in respect of the association right it creates. By contrast, the Department for Culture, Media & Sport chose to publish a detailed IA alongside the 2006 Act, which included commentary on the association right created by that statute¹³.

4.7. In the absence of an official IA for the Glasgow Commonwealth Games, the Advertising Association considers that it would be helpful to provide the Committee with, at the very least, a comparison of the GCGAR against the LOAR in terms of their respective durations and the amount of commercial sponsorship being sought for each of the events they are intended to protect. (Clearly the amount of commercial sponsorship being sought also provides an indication of the relative size of each event.)

4.8. The table below well demonstrates the degree to which the duration of the GCGAR appears disproportionate with that for the LOAR when compared with the amount of funds being sought from commercial sponsors for each event. Whilst the GCGAR is 74% the length of the LOAR, the amount of commercial sponsorship being sought for the Glasgow Commonwealth Games is less than 4% of the equivalent target for the London Olympics.

Event	Association right duration	Sponsorship target
Glasgow Commonwealth Games (2014)	20 January 2010 – 3 February 2015 (60 months)	£23,536,000 ¹⁴
London Olympics (2012)	30 March 2006 – 31 December 2012 (81 months)	£650,000,000 ¹⁵

4.9. If the amendments proposed in this submission were adopted, the GCGAR would last for 47 months, which, whilst 13 months shorter than at present, remains a disproportionately generous amount of time if the London Olympics is used as a benchmark in the context of the association right durations and the amount of sponsorship funds being sought. Such an approach would also seem to be more in line with the over-arching better regulation principle of proportionality in Government policy-making than appears to apply with regards to SI 2009/1969 in its current form.

7 September 2009

¹² The Advertising Association response to the “informal online consultation” conducted by the IPO can be downloaded from the following location (concerns with the consultation process were dealt with in Section 4 of the document):

<http://www.adassoc.org.uk/jr-27-04-09-ipoglasgowcommonwealthgames.pdf>

¹³ <http://www.culture.gov.uk/images/publications/LondonOlympicGamesandParalympicGamesActRegulatoryImpactAssessment.pdf>

¹⁴ This figure (at April 2007 prices) is contained in the Financial Memorandum that was published in the Explanatory Notes that accompanied the Glasgow Commonwealth Games Bill. A copy of these Explanatory Notes can be downloaded from the following location:

<http://www.scottish.parliament.uk/S3/bills/04-GlasgowCommGames/b4s3-introd-en.pdf>

¹⁵ The figure of £650m is widely reported. A recent example of this amount being referred to in the media can be found in the following *Financial Times* article dated 27 July 2009:

http://www.ft.com/cms/s/0/180df874-786f-11de-bb06-00144feabdc0,dwp_uuid=aa3af836-77ee-11de-9713-00144feabdc0.html