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RESPONSE OF THE ADVERTISING ASSOCIATION TO THE REQUEST FOR COMMENTS BY THE INTELLECTUAL PROPERTY OFFICE ON ITS “SUMMARY OF SECTION 104 ORDER: GLASGOW COMMONWEALTH GAMES 2014 – AMBUSH MARKETING”

1. Preamble

1.1. The Advertising Association is a federation of trade bodies and organizations representing the advertising and promotional marketing industries, including advertisers, agencies, the media and support services in the UK. It is the only body that speaks for all sides of an industry that was worth over £19 billion in 2007. Further information about the Advertising Association, its membership and remit can be found at the following location: <http://www.adassoc.org.uk/>

2. Introduction & Summary

2.1. The Advertising Association has taken the opportunity to respond to the “Summary of Section 104 Order: Glasgow Commonwealth Games – Ambush Marketing”, of which the Intellectual Property Office (IPO) published notice on its website¹ and that the executive agency describes as a “three-month informal online consultation”.

2.2. In its response, the Advertising Association:

- (a) sets out its principled opposition to the creation of a new strand of intellectual property law aimed at deterring ambush marketers as proposed by the IPO, given the anticipated detrimental impact on the whole of the advertising sector in the UK;
- (b) lays out its concerns with the way in which the IPO has conducted the consultation, in particular the decision of the Office not to publish the draft version of the legislation as part of the consultative exercise;
- (c) comments, insofar as this is possible in light of (b) above, on what measures may be contained within the proposed new intellectual property right;
- (d) identifies, what would appear to be notable omissions from the IPO Summary, for example, how long any intellectual property right would remain in being; and,
- (e) establishes its intention to supply a copy of this submission to the clerks of Parliament’s Joint Committee on Statutory Instruments and the Merits Committee of the House of Lords in light of some of the issues raised within this document to maximise the degree of Parliamentary scrutiny to which any measure will be subject.

2.3. The Advertising Association looks forward to publication by the IPO of its analysis of the responses received to its consultation exercise in line with Criterion 6 (“Responsiveness of consultation exercises”) of the July 2008 version of the Government’s *Code of Practice on Consultation*. No part of this submission should be treated as if it were confidential in nature.

¹ <http://www.ipso.gov.uk/policy-notice-glasgow.htm> (as at 17 April 2009)

3. Overarching concerns with the creation of a new intellectual property right

3.1. Whilst the Advertising Association absolutely opposes ambush marketing activity, the organisation has argued since before the Scottish Government won the 2014 Commonwealth Games for Glasgow that the creation of a new intellectual property right – in this case an association right - was unnecessary, given the protections afforded by the existing body of law in the UK. That body of law, which the Advertising Association considers more than sufficient to deter ambush marketing activity, includes: 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 2008²; and, the Consumer Protection from Unfair Trading Regulations 2008³.

3.2. The Advertising Association took the opportunity, when the Scottish Executive mentioned, in passing, its intention to seek an association right under Section 104 of the Scotland Act 1998 when consulting on the draft Glasgow Commonwealth Games Bill⁴, to set out in detail its principled opposition to the creation of further statute covering issues of intellectual property⁵. The organisation reiterated its concerns about the creation of an association right in the course of a call for evidence by the Local Government & Communities Committee of the Scottish Parliament, although the submission by the Advertising Association was understandably primarily concerned with the provisions the Bill contained on the physical location of advertising⁶. The Advertising Association also repeated its concerns about the Bill and the proposals for the creation of an association right in the course of two face-to-face meetings with officials from the IPO, Scotland Office and the Scottish Executive in March and May 2008 respectively.

3.3. The Advertising Association summarises in this section the rationale behind its principled opposition to the creation of association rights. The theory behind association rights is that they serve to deter ambush marketers from creating the impression of being linked with an event without them having made any financial contribution towards it to the detriment of official sponsors who have paid for the privilege, but see their investment undermined. This would clearly have implications for the funding, and thus success, of an event, if it were unable to raise the necessary funds through sponsorship for which it had budgeted. (The Advertising Association, however, provided evidence in its written submission to the Scottish Government that the absence of association rights far in advance of major events had not deterred sponsors from entering into sponsorship agreements at an early stage.) The practical (and detrimental) effect of association rights, as was forewarned by the Advertising Association and others is currently being discovered in respect of the London Olympics. It takes the form of the doubt that is created amongst companies with absolutely no intention of creating the impression of any link with the event about using such commonly-used words as “games” and “summer” together in their advertising campaigns for fear of infringing statute law. (The proposal of the IPO is to create an association right for the Commonwealth Games similar to that contained within Section 33 and Schedule 4 of the London Olympic and Paralympic Games Act 2006 – ‘the 2006 Act’ - which seeks to extend intellectual property rights over both those two words.) The deliberate creation of such legal uncertainty understandably has a dampening effect on the advertising economy.

² Statutory Instrument No. 2008/1276

³ Statutory Instrument No. 2008/1277

⁴ The Glasgow Commonwealth Games Bill was passed by the Scottish Parliament on 30 April 2008 and received Royal Assent on 10 June 2008, becoming the Glasgow Commonwealth Games Act 2008 (‘the 2008 Act’). The 2008 Act enables Regulations to be made that would restrict the physical location of advertising at the time of the Glasgow Commonwealth Games in 2014.

⁵ http://www.adassoc.org.uk/Position_paper_280907.pdf

⁶ <http://www.adassoc.org.uk/jr-27-11-07-localgovernmentandcommunitiescommittee.pdf>

3.4. The Advertising Association would be the last to defend the creation of the London Olympics association right. The organisation is, however, of the view that the nature, extent, duration and content of any association right around the Glasgow Commonwealth Games should be proportionate to the amount of funds that need to be raised, given the likely dampening effect anticipated on the wider advertising sector. In this context: it is widely reported that the London Organising Committee of the Olympic Games (LOCOG) is seeking to raise £650m from sponsors - a sum that is more than 27 times greater than that which the Organising Committee for the Glasgow Commonwealth Games (OCGCG) needs to achieve that element of its target budget derived from domestic sponsorship⁷.

3.5. The Advertising Association accepts, however, that despite the airing of its deep-felt concerns the UK Government has chosen to support the introduction of an Order under Section 104 of the Scotland Act 1998 ('the 1998 Act'). The measure must pass through the Westminster Parliament rather than through Holyrood, given that intellectual property is a reserved matter under Section 30 of the 1998 Act and that is the route that has been chosen for the Order.

3.6. The Advertising Association comments on the content of the association right being proposed in section 5 of this submission, but would argue here that the IPO should avoid gold-plating on the contractual terms that the Scottish Government entered into with the Commonwealth Games Federation (CGF) to secure Glasgow as the venue for the 2014 event. Unlike the IPO the Advertising Association has not had the advantage of seeing the Host City Contract (HCC), but the Office does cite an extract of that document in Paragraph 5 of its Summary. According to that extract, the HCC requires that: "...no persons conduct any marketing, advertising or promotional campaigns in the Host Country which imply any approval, affiliation, connection or sponsorship of or with the Games, Games Intellectual Property Rights or any Games Team, or the year of the Games which are not expressly authorised by the CGF Executive Board or any other party authorised to grant such rights." As already stated, the Advertising Association considers that this requirement can be achieved without creating new statute law. The organisation also considers that the absence of an explicit reference to any provision requiring the creation of an association right is notable here and consequently remains somewhat doubtful that it appears anywhere in the contract, otherwise the IPO would have cited it to support the case for introducing one. Either way, the Advertising Association takes the view that, given the existing body of law and the existence of the 2008 Act, which provides for ambush marketing through physical proximity to be prohibited, the IPO can afford for the content of any association right to be very narrow in terms of the letters, words or numerals it seeks to protect. By drafting the Order in such a way, the IPO would be able to minimise the risk of gold-plating upon the contractual obligations entered into by the Scottish Government with the CGF.

4. Comments of the Advertising Association on the IPO consultation process

4.1. As stated in section 3.6 above, the Advertising Association has not had the advantage of seeing the HCC, although the IPO could arguably seek to defend this on the basis that it may contain commercially sensitive information that it would, consequently, not be appropriate to put into the public domain.

⁷ According to Annex A of the Financial Memorandum published alongside the Glasgow Commonwealth Games Bill, as introduced on 9 November 2007, the Organising Committee is seeking to raise £23,536,000 via domestic sponsorship (at April 2007 prices). The Financial Memorandum can be accessed via the following link:
<http://www.scottish.parliament.uk/s3/bills/04-GlasgowCommGames/b4s3-introd-en.pdf>

4.2. The Advertising Association is, however, deeply concerned at the way in which the IPO has conducted its “three-month informal online consultation”⁸ – a ten paragraph Summary - about a Statutory Instrument, of which a substantive draft already apparently exists, that will be subject to minimal Parliamentary scrutiny, without sharing it with those likely to be affected by the measures it contains. The organisation draws the conclusion that the draft Order already exists, but that the IPO has not seen fit to share it, based on the following statements expressed in the present tense (*emphasis added*) in the Office’s Summary:

- (a) “The Order *makes* provision for an exception to infringement of the association right for authorised use.” (Paragraph 7 of the IPO Summary)
- (b) “The Order *also specifies* other exceptions to infringement of the association right; this *includes* use of a registered trade mark or design, certain pre-existing legitimate uses or where a Commonwealth Games event is being reported on by the media.” (Paragraph 8 of the IPO Summary)
- (c) “The Order *also provides* a remedy against groundless threats of infringement proceedings by the Organising Committee.” (Paragraph 9 of the IPO Summary)

4.3. Given the limited amount of Parliamentary scrutiny to which any Order will be subject⁹, it is of concern that the IPO considered it unnecessary to consult on what appears to be an all but final version of the Statutory Instrument. It is surely normal practice to consult on a draft, precisely because it has that status, and the fact that the Order will not be debated on the floor of either House of Parliament, should have rendered it incumbent upon the IPO to make the proposed legislative measure available during its consultation, informal or otherwise.

4.4. The Advertising Association has other concerns about the way in which the IPO has conducted its consultation. According to the IPO website¹⁰, the Office subscribes to the Government’s *Code of Practice on Consultation*, albeit not to the current (July 2008) version thereof¹¹.

4.5. With reference to the current version of the *Code of Practice on Consultation*, the Advertising Association considers that the IPO has not abided by Criterion 3, given that the Office has not attempted to set out the expected costs and benefits of the association right being proposed. Equally, in not notifying the Advertising Association of the launch of its consultation the IPO breached Criterion 4¹². (Indeed, at the request of the IPO, the Advertising Association supplied the Office via e-mail on 11 July 2008 with the contact details of those within the advertising sector, including the author of this response, who should be alerted to the launch of any consultation on the creation of an association right for the Glasgow Commonwealth Games.)

4.6. In Paragraph 10 of the IPO Summary - where the Office discusses from when the Order should apply – a statement is made that it is conducting a “three-month informal online consultation”. It is unclear why the IPO considers it necessary to make such a statement in the context of the date on which any Order should commence for two reasons. Firstly, the way it is phrased would appear to reinforce the point made in section 4.2 above that the draft Order has been available since at least the start of the consultation period and suggests that the IPO intends laying the Statutory Instrument before Parliament as soon as possible after

⁸ <http://www.ipo.gov.uk/pro-policy/policy-information/policy-notice/policy-notice-glasgow/policy-notice-section104.htm> (as at 17 April 2009)

⁹ Schedule 7 of the 1998 Act specifies that subordinate legislation made under Section 104 of that statute be subject to the negative resolution procedure.

¹⁰ <http://www.ipo.gov.uk/consult-criteria.htm> (as at 21 April 2009)

¹¹ <http://www.berr.gov.uk/files/file47158.pdf>

¹² The Advertising Association learnt that the consultation had been launched via a third party.

the 27 April 2009 deadline set for receipt of responses. It certainly does not give the organisation much confidence that the IPO, at least, will attach any weight to the responses it receives. The Advertising Association trusts, however, that the IPO will take some account of any submissions received, not least in light of the requirement contained within Criterion 6 of the current version of the Government's *Code of Practice on Consultation*. (See section 2.3 of this response for what Criterion 6 requires.) Secondly, the IPO appears to be making a virtue out of being seen to consult with interested parties. In fact, of course, it is normal practice for those responsible for drawing up legislation to consult formally for a twelve-week period, in line with the Government's *Code of Practice on Consultation*. (Although, not based on the current version of the Government's *Code*, the IPO still states on its website that, in accordance with what it calls the Cabinet Office Code of Practice on Written Consultation, the Office should: "Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy".)

5. Comments of the Advertising Association on the proposed content of the Order

5.1. On the basis that the IPO will be bringing forward an Order, albeit unnecessarily in the view of the Advertising Association (and despite its principled opposition to such a development), the organisation would make the following comments about the limited details provided by the Office about the proposed Statutory Instrument in Paragraphs 8, 9 and 10 of its Summary.

Availability of public register of authorised association right users

5.2. The Advertising Association agrees that any register of those having a right to associate with the Glasgow Commonwealth Games should be made publicly available and assumes that it will be modelled on the equivalent provision contained within Paragraph 4(a) of Schedule 4 of the 2006 Act.

Exceptions to infringement of the association right

5.3. The Advertising Association notes that, in addition to those persons that will be authorised to associate themselves with the Glasgow Commonwealth Games under the Order, it is intended to grant certain exceptions to infringement of any association right. The organisation assumes, from the limited information available, that these exceptions will be modelled on those contained within the Olympic Symbol etc (Protection) Act 1995 ('the 1995 Act') and Schedule 4 of the 2006 Act. The Advertising Association considers it essential that the exceptions contained within any Order eventually laid before Parliament should be at least as wide as those contained in those two earlier pieces of statute, and ideally considerably wider.

Authority to bring an infringement action

5.4. The Advertising Association accepts that for an association right to be enforceable it will be necessary for a public body to be awarded the necessary authority. The Advertising Association assumes that the right of the OCGCG to bring infringement actions will be modelled on Section 6 of the 1995 Act. The Advertising Association considers that the OCGCG should have no authority for enforcing the association right that is wider than that which will be enjoyed by LOCOG under the 1995 Act.

Remedies in relation to infringement

5.5. The Advertising Association accepts that if a body is authorised to bring an infringement action under the Order, it is appropriate for the Statutory Instrument to set out what remedies that authority may seek from the Courts. The organisation assumes that these remedies will be modelled on those set out in Regulation 3 of The Olympics Association Right

(Infringement Proceedings) Regulations 1995¹³ ('the 1995 Regulations'). (The 1995 Regulations are issued under Section 7 of the 1995 Act, to which Paragraph 10(1)(f) of Schedule 4 of the 2006 Act refers.) The Advertising Association considers that the list of remedies specified in any Order eventually laid before Parliament should be no wider than those contained within the 1995 Regulations.

Period after which remedy of delivery up is not available

5.6. The Advertising Association assumes that the proposal to include a provision whereby a time limit is placed on the Organising Committee such that it may not make an application for delivery up of goods once six years have passed since they were made or the offending representation was applied is modelled on Regulation 4 of the 1995 Regulations. (The IPO also sets out its intention that the Order should provide for circumstances where fraudulent activity has prevented discovery by the OCGCG of an infringement. Regulation 4 of the 1995 Regulations also provides for such a scenario.) The time limit cited raises concerns that the Order being proposed by the IPO will remain in being until at least 2020 or, indeed, that the Statutory Instrument will contain no termination date whatsoever. The Advertising Association discusses its concerns in this regard in the context of the duration of any association right in more detail in section 6.3 of this response below.

Alternative remedies in relation to infringement

5.7. The Advertising Association notes that the IPO proposes that the Courts be given discretion to suggest alternative remedies in relation to infringement. The Advertising Association is unable to identify the precedent in statute, if indeed one exists, for such a provision. The organisation considers, however, that allowing the Courts to suggest alternative remedies would only be acceptable if the effect of them was that those proposed were no more punitive than those provided for in the 1995 Regulations.

Service of notice on persons having an interest in infringement proceedings

5.8. The Advertising Association notes the proposal of the IPO that the proposed Order contain a provision that any persons with an interest in the goods in question are made aware of any infringement proceedings affecting them. The Advertising Association assumes that this provision will be modelled on Regulation 5 of the 1995 Regulations.

Remedy for groundless threats of infringement proceedings

5.9. The Advertising Association notes that the IPO intends that the Order contain a remedy against groundless threats of infringement proceedings issued by the OCGCG. The Advertising Association is concerned that the IPO will model any such groundless threats provision on Section 16 of the 1995 Act (which applies to the London Olympics association right as a consequence of Paragraph 10(1)(h) of Schedule 4 of the 2006 Act). Whilst the Advertising Association considers that any Order would certainly need to contain a provision aimed at dissuading groundless threats by the OCGCG, from experience such a remedy could and should be rendered more effective than the one contained within Section 16 of the 1995 Act, if the measure is to deter the mischief it is intended to address. It may be that the deterrent effect of such a remedy would be greater if the Order contained more punitive measures against the OCGCG than are currently provided for against LOCOG for issuing groundless threats of proceedings for alleged infringement of the London Olympics association right.

Commencement

5.10. The IPO sets out its intention to incorporate within the Order a provision whereby the Statutory Instrument would enter into force six months after the secondary legislation is made by Parliament. Whilst a six month delay between the Order reaching the statute books and entering into force is preferable to an even shorter period, the Advertising

¹³ Statutory Instrument No. 1995/3325

Association is unclear as to why the legislation needs to be in place, let alone in force, so far ahead of the opening of the Commonwealth Games scheduled for 23 July 2014. One could be left with the impression from Paragraph 6 of the IPO Summary, which talks about legislation being in place “by 2010”, that the Order needs to be in place by the end of 2009.

5.11. As set out in section 3.6 above, the Advertising Association has not had the advantage of seeing the HCC and is therefore unable to establish whether the creation of an association right is actually contractually required. (The organisation notes that the IPO has chosen not to cite a relevant extract from the HCC, which would settle the matter as to the existence or otherwise of such a contractual requirement and, if it does exist, the date on which it should come into being.) The CGF Candidate City Manual¹⁴, however, states in Paragraph Q7.2.1 that candidate countries provide a written guarantee that legislation covering ambush marketing through the physical location of advertising be introduced, but need not be on the statute books, let alone in force, until 30 June 2010. (Primary anti-ambush marketing legislation covering the physical location of advertising, which the Advertising Association accepts is a contractual requirement between the Scottish Government and the CGF reached the statute books on 10 June 2008 in the form of the Glasgow Commonwealth Games Act. Any secondary legislation, governing the physical location of advertising, issued under that Act of the Scottish Parliament does not need to be in place until much closer to the time of the Games in 2014.) The organisation surmises that if the CGF required the imposition, via its contract with the Scottish Government, of new intellectual property law, the Federation would have set no earlier a date for it coming into being than any relating to enabling legislation aimed at controlling the physical location of advertising.

5.12. The Advertising Association therefore considers that a compromise approach, so as to ensure that the HCC is not being gold-plated upon, would be for the Order granting the association right (if contractually required) to be made by Parliament as close to 30 June 2010 as possible and for entry into force on 31 December 2010 at the very earliest. That latter date is still more than three and a half years before the Games will commence and the organisation would consider it preferable for a date considerably closer to the event to apply in order to minimize the burden that will be imposed on the sector that it represents. This would also provide the IPO with sufficient time properly to consult with interested parties with access to a copy of a draft Order, which would provide for better informed policy-making by the Office.

5.13. Finally, given the burdens identified by the Advertising Association that any Order will impose in section 3.3 above, it is considered necessary that full account in selecting a commencement date should be taken of the identical Written Ministerial Statements (WMSs) issued on 2 April 2009 on the subject of better regulation. The organisation regards these WMSs as pertinent to the date chosen for the coming into force of any Order introducing an association right for the Glasgow Commonwealth Games. These WMSs were issued by the Rt Hon Lord Mandelson (Secretary of State for Business, Enterprise & Regulatory Reform) and the Rt Hon Pat McFadden MP (Minister of State for Employment Relations & Postal Affairs, Department for Business, Enterprise & Regulatory Reform). The WMSs lay down that: “...during the recession and recovery we have a particular reason to look very carefully at whether we should delay planned new regulation and avoid introducing new regulation which increases burdens on business except where there is a clear case for action now.”¹⁵ The Advertising Association considers that this principle should be applied to any Glasgow Commonwealth Games Order so that, in light of current economic circumstances, the nationwide measure comes into force and imposes a burden on the latest contractually

¹⁴ http://www.thecgf.com/media/games/2014/ccm_v72.pdf

¹⁵ Lord Mandelson, House of Lords, Hansard Column WS100, 2 April 2009; Pat McFadden MP, House of Commons, Hansard Column 74WS, 2 April 2009

permissible date apparently entered into by the Scottish Government with the CGF in order to meet UK Government policy in this area.

6. Identification of notable omissions from the IPO Summary

6.1. The Advertising Association has already set out elsewhere in this submission how it regards it as unfortunate that the IPO chose not to publish a copy of the Order that the Office has already apparently drafted alongside its Summary. The IPO Summary remains silent on a number of issues about which the Advertising Association would welcome clarity or comfort and that the Order should certainly address. These issues are set out below:

Duration

6.2. The Advertising Association notes with considerable concern the absence of a reference within the IPO Summary to a date on which any association right created would eventually terminate. The organisation had been under the impression following discussions with IPO, Scotland Office and Scottish Executive officials in May 2008 that the Order would contain just such a provision and thereby eventually disappear from the statute books. Indeed the Advertising Association had been led to believe that the Order would be more proportionate in this regard than the London Olympics association right, which under Section 40(8) of the 2006 Act, falls away on 31 December 2012. The organisation argued that to render any Glasgow Commonwealth Games association right more proportionate than the association right contained within the 2006 Act, any Order should terminate itself as soon as possible after the closing ceremony for the event, which is scheduled for 3 August 2014. In the view of the Advertising Association the very last day that it would be possible to argue that the Order should remain in effect should be 31 December 2014, so as to ensure that it was not more disproportionate than the association right around the London Olympics. After that date, the CGF would still be able to rely on the body of law laid out in section 3.1 of this response to protect the interests of the Commonwealth Games in the UK.

6.3. In the context of the duration of any Order, given the absence of any reference to a termination date in the Summary, the Advertising Association is, as set out in section 5.6 of this response above, concerned by the IPO proposal to set a six year limit after which the remedy of delivery up will not be available. The organisation appreciates that the provision in question is modelled on Regulation 4 of the 1995 Regulations, but is concerned that by setting this time limit after which the remedy of delivery up will not be available it will mean that the Order (and the association right it contains) might remain on the statute books well beyond 2014, perhaps permanently. As argued in section 6.2 above, the organisation would regard such a long, indefinite or indeed infinite duration of the Order as completely disproportionate for the reasons already outlined in this response.

Scope to issue further secondary legislation under the Order

6.4. The IPO Summary is silent on the subject of whether the Order will contain powers to issue any form of further secondary legislation under the measure. The Advertising Association is unclear as to whether this is legislatively possible¹⁶, but the London Olympics association right contained in primary legislation, to which the IPO states that the draft Order will be akin, provides scope for the Secretary of State in Paragraphs 1(3) and 3(9) of Schedule 4 of the 2006 Act to vary its provisions. If the Order is to contain such powers then the Advertising Association considers that the Statutory Instrument should incorporate the same safeguards that are contained within the 2006 Act. For example, the 2006 Act places a duty on the Secretary of State to consult with the advertising industry and ensures that any Statutory Instrument would be subject to the affirmative procedure in Parliament, to ensure that it would receive the fullest possible scrutiny. The organisation anticipates that the

¹⁶ Some Statutory Instruments make provision for sub-delegated legislation to be issued under them.

Delegated Powers & Regulatory Reform Committee of the House of Lords would also support the need for such safeguards, given the recommendations that it made and which were subsequently adopted by Government, as a consequence of Peers' analysis of the draft Olympics legislation in the course of its Parliamentary passage¹⁷. Furthermore, during the passage of the draft Olympics legislation, because it was subject to full Parliamentary scrutiny, the Government was able to clarify orally that any consultation with the advertising industry would last for at least twelve weeks¹⁸. Given that it appears, as things stand, that any Glasgow Commonwealth Games Order will be taken through Parliament under the negative procedure without the benefit of Ministerial clarifications being made, the Advertising Association considers that the twelve week consultation requirement should be specified on the face of any Statutory Instrument laid.

Burden of proof

6.5. The IPO Summary is silent on the subject of the extent to which the evidential burden will be upon the OCGCG to prove that an infringement of any Glasgow Commonwealth Games association right has occurred. The Advertising Association considers that the burden of proof should be placed squarely on the OCGCG and proposes the following provision, which uses Section 17(1) of the 1995 Act as a precedent, to achieve this. The provision would be: "If in any civil proceedings under this Order a question arises as to whether the Glasgow Commonwealth Games association right has been infringed, it shall be for the Organising Committee to show what use was made of it." The Advertising Association takes the view that whilst an improvement on the version of the Bill originally published, which Parliament decided unacceptably reversed the burden of proof, Paragraph 3(1) of Schedule 4 of the 2006 Act sets the evidential bar placed on LOCOG to prove an infringement at too low a level. It is for this reason that the organisation recommends that the IPO uses Section 17(1) of the 1995 Act as a precedent for establishing upon whom and the degree to which the evidential burden rests, rather than the 2006 Act.

Nature of penalties

6.6. The Advertising Association makes reference in section 6.5 above to civil proceedings. The IPO Summary is, however, itself silent as to the penalties that will apply. As the Government reiterated on numerous occasions during the passage of the Olympics legislation, infringement of the London Olympic association right could only incur civil actions. The Advertising Association is, however, concerned at the silence of the IPO on this subject and the fact that the Office has clearly drawn so heavily on the 1995 Act, or so one would surmise from its Summary, in modelling the draft Order. Sections 8 and 9 of the 1995 Act contain provisions relating to criminal proceedings. The Advertising Association considers that it would be disproportionate if any eventual Order created criminal offences.

7. Other issues

Legislative and Regulatory Reform (Regulatory Functions) Order 2007

7.1. The Advertising Association considers that any Order should contain a provision to amend Part 3 of the Schedule to the Legislative and Regulatory Reform (Regulatory Functions) Order 2007¹⁹ or any revised version thereof²⁰, which already lists the 1995 Act

¹⁷ Delegated Powers & Regulatory Reform Committee of the House of Lords, 11th Report of Session 2005-2006 (HL Paper 95)

¹⁸ Lord Davies of Oldham, House of Lords, Hansard Column 612 (taken with Column 608), 6 March 2006

¹⁹ Statutory Instrument No. 2007/3544

²⁰ The Better Regulation Executive (BRE) recently conducted a consultation on the content of the 2007 Order, to which the Advertising Association responded. The BRE is expected to publish the Government response to its consultative exercise shortly.

and the 2006 Act. The 2007 Order essentially requires that those responsible for enforcing the legislation contained in Part 3 of its Schedule must abide by the principles of better regulation. Given the nationwide impact of any Glasgow Commonwealth Games Order, as an intellectual property measure emanating from the Government in Westminster, the proposed Statutory Instrument should certainly be included in Part 3 of the Schedule to the 2007 Order. In respect of this technical amendment, the Advertising Association notes, however, that the Explanatory Note accompanying the Scotland Act 1998 describes Section 104 as an “open power”²¹. Given this definition, the Advertising Association is unclear as to whether Paragraph 5 of Schedule 7 of the Scotland Act 1998 has any procedural implications for how the reference is listed in the 2007 Order or indeed in the proposed Glasgow Commonwealth Games Order itself.

Provision of Advertising Association response to third parties

7.2. As set out in section 2.3 of this response, the Advertising Association considers that no part of this submission should be treated as if it were confidential in nature. Given that any Glasgow Commonwealth Games Order laid before the Westminster Parliament will be subject to the negative resolution procedure, the Advertising Association considers it important that those Parliamentary bodies that will provide scrutiny are alerted to the areas of concern it has outlined. Consequently, given the several policy and technical issues contained in this submission, the organisation will be sharing this response with the clerks of the Joint Committee on Statutory Instruments and the Merits Committee of the House of Lords respectively to draw it to the attention of the Parliamentarians on those bodies²². Given the reference to the 2007 Order and other matters impinging on better regulation issues, the Advertising Association will also be sharing this response with appropriate officials within the Better Regulation Executive.

Jim Rothwell
27 April 2009

²¹ <http://www.opsi.gov.uk/acts/acts1998/en/98en46-q.htm>

²² If, when eventually laid before Parliament, the Order provides for further secondary legislation to be made under it, the Advertising Association would of course draw the measure to the attention of the Delegated Powers & Regulatory Reform Committee of the House of Lords, given the concerns expressed in section 6.4 of this response.