Virtual Advertising: Legal Implications for Sport

Paul Turner
Sam Cusumano
Deakin University

The latest technological development in television and stadium advertising is virtual advertising. Virtual advertising (also referred to as virtual signage or electronic billboards) refers to real-time video insertions into television broadcasts. This involves overlaying an advertisement into a space in the telecast – either over the top of existing ground signage, or alternatively in a “free-space” on the field of play or in the crowd. This form of advertising is only visible to the television viewer. People at the ground cannot see the imposed sign. There are important legal ramifications associated with this technology. This paper explores the potential legal impact of virtual advertising on key stakeholders. It considers legal implications this technology will have for facility managers, event operators, sponsors and television broadcasters. This review identifies the legal framework surrounding the use of virtual advertising and the obligations of all parties in ensuring that contractual agreements are upheld. A model is developed which highlights the potential relationships. It provides a description of how each party can seek to protect its respective interests.

Sport and television are naturals together. They are both popular, both artistically damned, and both politically assaulted (Cunningham & Miller, 1994). Turner, Bounds, Hauser, Motsinger, Ozmore and Smith (1995) point out that television influences and changes sports “creating a competitive and money-driven industry…Television and athletics will rely on each other for both promotion and profit into the future” (p. 29).

Paul Turner is with the Sport Management Program at the Bowater School of Management and Marketing, Deakin University, 221 Burwood Highway, Burwood, VIC 3125. E-mail: turnerp@deakin.edu.au Sam Cusumano is coordinator of the sport law program with the School of Law at Deakin University.
allows for these key areas to be allotted to the sponsor during the telecast without interfering with the action at the stadium.

Television networks provide exposure to sponsors through the telecast of ground signage and various advertising mechanisms. Ordinarily these arrangements are conducted to the satisfaction of all parties involved – with exposure being presented to the benefit of all. Virtual advertising, however, introduces a new dynamic into the arrangement – one that could considerably affect the approach of all groups to signage as an advertising medium. Use of virtual advertising enables signs to be incorporated into the telecast without disrupting the view to spectators at the sporting contest. These signs to the television viewer can also be continually changed during the telecast. They can also be varied so that television audiences in different geographic regions see different ads. This has the potential to provide new revenue streams for broadcasters. The development and potential uses of virtual advertising are explained below. A framework is suggested to outline the way in which these arrangements will need to be coordinated and managed by all parties.

**Virtual Advertising**

Virtual signage or electronic billboarding was pioneered by a company based in the United States – Princeton Video Image (PVI) (Burgi, 1997a). There are now four major players in the virtual signage market: PVI and Sci-Del – both from the United States – and ISL Marketing’s Imadgine Video Systems and Symah Vision (EPSIS) – both from Europe (Singleton, 1998). These companies are vying for a slice of the extensive sport advertising markets around the world. Given that this represents US$7 billion in the United States alone (Burgi, 1997b), there is a great deal of interest in any system that can enhance the message to consumers, improve the targeting of messages, or slice through the advertising clutter.

Virtual advertising refers to real-time video insertions into television broadcasts, and employs the same technology that was developed for the guidance systems of “smart-bombs” (Burgi, 1997a). This technology allows broadcasters to place a virtual sign exactly where they want to. The sign will not be seen by the spectators in attendance at the ground, but will be prominently displayed for the viewers at home. This technology has been used to place virtual advertisements for potato chip companies in the centre circle of the pitch during soccer matches in Mexico, to insert advertisements for a beer company into the telecast of the Tour of Spain bicycle race, and to place network logos into the broadcasts of college football games (Burgi, 1997a; Lefton, 1997). Virtual advertising offers networks the opportunity to bypass the traditional static stadium signage, newer flip-operating signage, as well as stadium signage that might conflict with the messages of broadcast sponsors.
Virtual signage technology provides numerous advantages to advertisers – not least of all in the fact that there is no wastage. That is, advertisers can have their logo or advertisement “in camera” at all times. Virtual signage also offers the opportunity for advertisers to better target desired markets. For example, a regional bank may wish to target only its local community rather than outlay great expense for a sign that will receive global coverage. This may enable sponsors to pay for signage to be displayed only in selected markets, and to undertake arrangements with the networks to superimpose an alternative sign for viewers in other markets, allowing the stadium operators, sporting organisations and broadcasters to modify the same space and sell it over and over again (Lieber, 1995). The impact that this may have can be extended to presenting the signs in different languages in different countries, or even to hide controversial signage being beamed into one country while allowing it to appear in another. Cigarette advertising definitely falls into this latter category, where the broadcast of the Australian Indy Carnival to South East Asia can carry lots of Marlboro signage, whilst the same signage space could promote Budweiser in the United States and Fosters in Australia (Lomax, 1998). This approach would not breach restrictions on cigarette advertising enacted through legislation in the United States and Australia.

The use of virtual signage can extend to many facets of the stadium. Not only can the signage be placed over existing signs within the stadium, but it can also be placed in prime locations on or around the facility. Signage can be rotated continuously – becoming something different every time it is seen by the viewer, with the grass painted with different messages, a sign as a background on a mountain, in the sand or in the snow (Lomax, 1998). Movement of a player or vehicle occurring around the signs does not affect viewing of the event.

Signs can also be animated. A Coke-can may be made to dance across the pitch and around the players. The ability to impose a virtual sign on a player or a moving racing car is nearly upon us. Thus, swimmer Michael Klim’s shaved head could be used as a place to put virtual advertising – reaching a worldwide audience without affecting Klim’s appearance or performance at the pool. This prospect raises questions about ownership of the space on the athlete’s head and the ability of all of the various parties to exploit and use this space. The potential this technology creates for the broadcaster is obvious. A new revenue stream that presents these benefits at minimal outlay (other than initial purchase costs) would present the network with the capacity to generate significant additional revenue streams with global ramifications. Presenting a different signage message to every market at a premium price has enormous revenue earning potential.

But what of the stadium operator or event organiser? What if the broadcaster replaces signs in the stadium with one of their own? What if they add signage for their own sponsors on a court that was previously clean? What if the networks replace...
signage in overseas markets without the permission of the sport or stadium operators? Potential revenue loss and impact on a stadium operator’s agreement with signage sponsors could be substantial. Ground owners and trustees who have control over the arena but not the broadcast are confronted by a significant dilemma.

This was the case in 1998 with the Melbourne Cricket Club (MCC) in its role as landlord of the Melbourne Cricket Ground (MCG). The MCC entered into a dispute with the Seven Network in Australia and New Zealand pay-TV network Sky over the use of virtual advertising during the broadcast from the MCG of the Bledisloe Cup rugby union Test between Australia and New Zealand. The MCC excluded representatives of the New Zealand Sky network, forcing them to do a partial broadcast of the game using the Seven Network’s footage. Seven’s live broadcast went ahead, but only following talks between the two bodies concerned. “At one point Channel 7 production staff were told to leave the ground by network executives and a blackout seemed likely” (Linnell, Magnay, & Blake, 1998, p. 1). The Secretary of the MCC indicated that the club (the ground trustees) had the right to determine access to the venue and therefore had the right to grant or restrict exclusive entry into the facility. This situation raises a number of questions over ownership of rights and the resulting obligations applying to all parties associated with the use of virtual advertising.

These questions will have a significant impact on the way sport managers conduct their operations in the near future, and will require that all parties involved in the relationship have a clear understanding of their legal obligations. These obligations obviously will vary depending upon ownership, exclusivity clauses, and other agreements reached between stadium operators, event owners and broadcasters. Aspects relating to the form and types of agreement cognisant of virtual advertising are explained in the following section.

The Legal Implications of Virtual Advertising

Recent innovations in the use of virtual advertising will affect many sporting organisations and the parties with whom they contract. This will lead to a review of their existing contractual arrangements, or to them seeking advice on how best to protect their respective interests from the impact of this form of advertising in future negotiations. It is clear that the facility operator, the sporting organisation, the television network and the sports sponsor will require clearly defined terms in their contractual arrangements. Virtual advertising has emerged so rapidly that it is probable that existing contracts between these key stakeholders do not address the issue at all.

Figure 1 presents the relationships in the television signage equation, displaying the current arrangements in which the agreements flow horizontally among each of the three parties and their sponsors. Each of the operators has clearly defined
arrangements with sponsors that tend to be easily managed. The first party in the arrangement is the facility/stadium operator whose primary dealing with sponsors is through offering signage rights at the venue, corporate hospitality opportunities, or concession rights (such as pouring or catering rights). Rights to signage for stadium sponsors offer global advertising opportunities throughout every country that receives the telecast. The second party in the arrangement is the sport organisation or event organiser, who can offer global signage rights at the venue, naming rights to the event, or association through supply of advertising channels. For event organisers, opportunities for sponsorship also extend into areas of corporate hospitality and concession rights. Again, the signage opportunity is global in its impact, because it is available to every country that receives the broadcast. The third party in the arrangement is the broadcaster, who deals with the sponsor through advertising and program sponsorship. The sponsor’s message is disseminated by the broadcaster through advertising, although an extension of signage agreements may extend to use of advertising pull-throughs integrated into the telecast. Advertising tends to be location-specific on a regional or national, rather than global, basis.

**Figure 1: The television signage relationship**

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Facility/Stadium Operator --- Sponsors (global signage/corporate hospitality/concession rights)

Sporting Organisation/ Event Organiser --- Sponsors (global signage/naming rights/corporate hospitality/concession rights)

Broadcaster --- Sponsors (advertising)
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The primary exception to the above agreements and relationships, which often requires some negotiation, is signage issues between the sport and the facility, or where conflicting sponsorship between the sporting organisation and the broadcaster and its program sponsor might arise. Much of the conflict in these circumstances tends to be clear and easily managed. Each group typically has existing agreements and arrangements with sponsors in order to ensure that each party’s agreements are upheld. Location of the facility sponsor’s signage and the event sponsor’s signage are generally clarified and agreed to well in advance of the event. Event organisers
will also normally have established conditions with respect to program sponsorship with the broadcasters and sponsors.

The introduction of virtual advertising immediately places a barrier between what is essentially a clear modus operandi between each party and their sponsors. The impact of this is developed further and presented in Figure 2. This figure highlights the vertical relationships that have always existed between the facility operator and the event organiser, and between the event organiser and the television broadcaster. Each of these parties enters into an arrangement with one another for rights to the event. Horizontal agreements between each party and their respective sponsors are the aspect which is most affected by virtual advertising. Changes brought about by virtual advertising have the potential effect of altering any existing signage agreements rather dramatically.

**Figure 2: Impact of virtual advertising on the television—signage relationship**

<table>
<thead>
<tr>
<th>Facility/Stadium Operator</th>
<th>Sponsors (local facility signage/corporate hospitality/concession rights)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sporting Organisation/Event Organiser</td>
<td>Sponsors (local facility signage/naming rights/corporate hospitality/concession rights)</td>
</tr>
<tr>
<td>Broadcaster</td>
<td>Sponsors (global signage/advertising)</td>
</tr>
</tbody>
</table>

Virtual advertising is, in fact, a potential prime mover in changing the signage agreements between the stadium operator, the sporting organisation, and the broadcaster. This change is brought about because the control of signage arrangements, which was once held in some joint capacity between the facility operator and the event organiser, now could rest solely with the broadcaster to the exclusion of other groups. Actual arrangements and agreements may vary from circumstance to circumstance, but the broadcaster, with the use of virtual advertising, can now technically control the dissemination of any signage to be broadcast, on a regional, national or global scale. Until the advent of virtual advertising, signage located at the facility was telecast as widely as the telecast itself. Now signage can be artificially altered, adapted and inserted into the telecast, even over the top of existing signage.
Broadcasters now have the capacity to control the signage seen during the telecast of a major sporting event.

This development potentially removes the global signage capabilities of the facility operator and the sport organisation or event organiser. These groups may retain their localised signage capability at the venue, but have their sponsorship opportunities significantly diluted by the introduction of virtual advertising. A broadcaster is now in the primary position of being able to insert their own sponsorship signage into the telecast. Potentially, millions of television viewers will view this virtual signage, resulting from either the superimposition of virtual signs over the current signage at the ground, or by placing virtual signs in strategic positions on the television screen. Facility operators and event organisers have gone from being the exclusive global signage rights owners to being potentially only location-specific signage rights owners. Broadcasters, previously in a position of only presenting the existing signage at the venue, may now be in a position to command global signage rights with a domestic and changeable focus as desired. Additional revenue earning potential for the broadcaster has increased significantly, albeit possibly to the detriment of revenue earning capabilities available to facility operators, sport organisations, and event organisers.

Introducing virtual advertising into the signage equation highlights the need for facility operators, sporting organisations, television networks, sports sponsors and their legal advisers to set out in clear and unambiguous language their rights and obligations towards each other with respect to the technology. If this technological advancement was not in the minds of the parties at the time existing contracts were negotiated, future contracts must address the matters reviewed above in order to protect each group’s respective interests. Whether the law can offer protection will largely depend on how well the contracts between the parties have been drawn. This approach is explored in the following section; the legal issues are defined, and the remedies identified.

The Legal Issues

It is appropriate to define the issues with which this technology is associated. In simple terms the problem can be characterised this way:

**The Problem.** A sports organisation, stadium operator or event organiser enters into a contract with a particular sponsor selling “signage space” at prominent positions in or around the sports arena, such as the scoreboard, perimeter fencing, grandstands, goal posts, or ground level. It also enters into a “media contract” with a television network granting it exclusive rights to broadcast the event. The television network, in order to boost its own advertising revenue, enters into a further contract...
with a different (potentially even a rival) sponsor to that of the sports organisation or facility operator in order to promote its products or services through the medium of virtual advertising. This advertising is either superimposed on the advertising signs of the first sponsor or might appear next to or side by side with the first sponsor’s sign. Whichever way, the first sponsor complains to the sport organisation or stadium operator that its signage is not receiving the “exclusive coverage” to which it thought it was entitled under the contract. Its signage rights, it might argue, have been “diluted” by this innovation known as virtual advertising.

Having stated the primary issue, the question follows: How is it resolved?

The Legal Relationship Between Key Players and the Impact of Virtual Advertising

Identifying the legal relationships between the various parties to the sale of advertising and signage rights focuses on the terms and conditions which should be included in any contractual arrangements between the parties in order to prevent virtual advertising from infringing existing rights. This process of examination is explored, taking into consideration the relationships outlined in Figure 2. There are five direct relationships in existence as displayed in Figure 2. These are the relationships between: (1) the facility operator and the event organiser; (2) the event organiser and the television broadcaster; (3) the sponsor and other parties including the facility operator, the event organiser and the broadcaster.

The Relationship Between the Event Organiser and the Facility Operator

The event organiser or governing body of a sport may own the stadium or premises where the sports event will take place. In Australia, it is likely that these premises are owned or controlled by another party. As a result, the event organiser is required to enter into formal legal arrangements with this party to occupy or use the premises. These arrangements are purely contractual, and it is vital that the contract contain all the rights and obligations that will govern the relationship. The provisions relating to the “conditions of occupation” of these premises need to be clarified. For instance:

- Does the event organiser have “exclusive” possession or occupation of the premises?
- Is the event organiser entitled to a “clean” stadium?
- Does an event organiser have the sole, exclusive and unfettered right to contract with whom it desires regarding the sale of advertising or signage space within the stadium or at certain designated areas of the stadium?
Is there any “reservation” of rights to the owner of the stadium entitling it “to sell,” on its own behalf, any advertising space within the arena?

In order to avoid future possible conflict between the event organiser and stadium owner over the sale of advertising space, it is doubtful whether the event organiser can sell “exclusive coverage” to a television network or sponsor without addressing these questions. A term in the contract must be included to the effect that the event organiser “has the sole and exclusive right and power to negotiate with any third party with respect to the sale of television coverage of the event and advertising space within all parts of the stadium or arena.” Failure to address this issue may lead to a situation where the stadium owner may insist that it, too, be permitted to sell advertising space through whatever medium, including virtual advertising. Similarly, if the issues are unaddressed, the stadium owner may be in a position to refuse exclusive entry into the facility for the broadcaster, as previously described in the situation confronted by the MCC.

In the case of a facility being a “closed or controlled” venue, the owner (event or facility owner, depending upon the agreement reached between these parties) reserves the right to grant access to the facility. This enables the owner to provide an exclusive or compatible environment for sponsors. “It can more easily restrict unauthorised broadcasts and generally create an environment for valuable exploitation of the event for commercial purposes” (Ward, 1997, p. 440).

The Relationship Between the Event Organiser and the Television Broadcaster

The relationship between these two parties is contractual with the rights and obligations of each being defined in the contract. Clearly, the essence of such a relationship, especially from the point of view of the broadcaster, is “exclusivity” for coverage of a particular event – that is, the event organiser grants the broadcaster the right to broadcast the event to the exclusion of all other networks. Particularly if the event is conducted within a stadium, the event organiser can achieve this “exclusivity” by making it a condition of entry into the stadium that no person shall be entitled to bring into the stadium any form of recording equipment.

However, this “exclusivity” agreement prima facie breaches the anti-competitive provisions of the Trade Practices Act 1974 (Cth) and could be rendered void, as well as attracting other sanctions under the Act. Nevertheless, provided that approval of such agreement is sought and received from the Australian Competition and Consumer Commission (ACCC) or notification given to it, such an agreement may be validated. Overcoming this hurdle presents the opportunity for exclusivity of coverage, which is perhaps the most attractive aspect of the agreement leading to the television network’s strong pursuit of these rights.
It is therefore imperative that the television network, in negotiating the terms of the contract, ensures that:

- the event organiser has the sole exclusive right and power to hold the event; and
- the event organiser has not granted similar rights to other broadcasters, and that it will not do so for the duration of the agreement.

At the same time, the event organiser should, in view of virtual advertising possibilities, insist in the contract that the broadcaster will not alter the television signal. McGill and Carroll (1995) have succinctly put the position in this way:

An event organiser wishing to maintain control over signage may add a provision to [the contract] that prevents the broadcaster from altering the signal. Similarly, provisions may need to be included to protect any on screen identification of sponsors sold by the event organisers. (p. 147)

Virtual advertising creates an environment in which the signal may be altered presenting television networks with a means to substantially boost their revenue. Event organisers may see it as a threat to the rights that have been granted to event sponsors. However, if the issue can be addressed, possible conflict may be avoided, enabling both parties to benefit from the introduction of virtual advertising technology. To ensure the maximum benefit to the parties involved, the contract should provide for the following:

- a complete prohibition on any form of virtual advertising; or
- if virtual advertising is to be permitted, the event organiser should be required to give its consent regarding the following matters:
  - the product or service to be advertised;
  - the location in the arena where the advertising would take place;
  - the selected locations in the market place that would receive the advertising;
  - if possible, the timing of the advertising during the event.

Further, if virtual advertising is to be permitted, the issue of revenue sharing from such advertising would need to be addressed. In considering whether the event organiser should give its consent to virtual advertising, care would need to be taken by it to ensure that rights of other sponsors or advertisers under previous contractual arrangements would not be infringed or put into jeopardy. Terms regarding any “ban” or “control” of virtual advertising should be treated as “conditions” of the contract or made the “essence” of it. In this way, any breach by the television broadcaster would mean that, at law, the event organiser would be entitled to terminate the agreement and sue for damages.
The Relationship Between the Sponsor and Other Parties

The sponsor and the facility operator. Clearly, the facility operator, in order to maximise the revenue raising potential generated through the public interest in an event, enters into contracts with various sponsors offering signage at the ground, corporate hospitality and/or concession (catering/pouring) rights. The relationship is purely contractual with the rights and obligations of each needing to be clearly defined in the contract. Of critical importance to the sponsor is that its contractual rights are protected or not “diluted.” This can occur by the facility operator entering into similar contracts with a competitor of the original sponsor, or by the facility operator entering into a contract with an event organiser, granting the latter a “clean” stadium. In either case, the original sponsor may not be receiving what it had bargained for.

The facility operator has a legal obligation, created by the contract, that it fulfils its promises. Provisions should be made in the contract if there is to be:

- any right to the facility operator to enter into contracts with rival sponsors or competitors;
- whether the facility operator has reserved the right to enter into a contract with an event organiser, granting the latter a “clean” stadium;
- any other forms of sponsorship the facility operator can enter into;
- whether any consent is required to be given from any sponsor with whom the facility operator had a contract.

The sponsor and the event organiser. The event organiser enters into a contract with the sponsor and the sponsorship may take shape in such forms as naming rights, merchandising, and signage rights (Rathie & Gaspar, 1995). With respect to “signage” rights, the event organiser sells signage space to a particular sponsor – that being the right to display advertising of products or services at various vantage points in the stadium. The critical issue is in relation to placement of the event organiser’s signage and type against that of the facility operator. As Rathie and Gaspar point out, “Prominent attention-grabbing signage is critical to any sponsorship. When negotiating signage rights, both the sponsor and event organiser should consider signage opportunities that maximise both spectator and television viewing audiences…” (p. 87).

Given the importance of signage to the sponsorships of each party, it is vital that the contract between these parties clearly sets out the rights and obligations of each. A sponsor will be most concerned to ensure that its product or service is “exclusively” advertised. This type of advertising will have the maximum effect on the viewing audience both in terms of sales and consumer awareness of its products and services.
The sponsor and the broadcaster. The influx of sponsorship of sporting television broadcasts has introduced a further complication into the sponsorship equation. Television networks enter into sponsored advertising agreements in which on-air mentions, billboards and pull-throughs identifying program sponsors are now commonplace. These sponsorships can be complementary or in conflict with existing event organiser and facility operator sponsorships. Again, the prominence of message display is paramount in the impact of the messages distributed by this signage.

Rathie and Gaspar (1995, p. 85) indicate that the sponsor should insist that the agreement include, amongst others, one or more of the following terms:

- that any network broadcasting the event will not provide or accept advertising air time, sponsorship or other exposure for competitors of the sponsor during broadcast of the event;
- the event organiser will ensure that no signage of its sponsor’s competitors or their products are displayed at the event venue;
- 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 and not onto the signage of any competitor;
- that commentators make favourable and frequent references to the sponsor’s products or services.

In short, each sponsor will be keen to ensure that none of its competitors has signage at the event that will detract from the value of its sponsorship. With the advent of virtual advertising the sponsor should include the following terms when entering into an agreement:

- The event organiser will take all reasonable steps to prevent virtual advertising or at least control it.
- The “extent” of the exposure of the signs is clearly defined. Is it to be limited to the confines of the stadium itself, or does it “extend” to audiences throughout the entire area of the broadcast, or to audiences in selected areas of the broadcast?

Unless all, or some, of the above terms are included in the sponsorship agreement, the sponsor or event organiser will have little control or redress over the way in which virtual advertising is implemented.
Remedies

Remedies reflect two critical areas of law. These are explained through breach of contract and the Trade Practices Act 1974 (Cth).

Breach of Contract

The impact of virtual advertising in sponsorship and media arrangements largely depends on whether sufficiently drafted terms and conditions have been put in place to control this form of advertising. If the parties have not incorporated reference to it in their contractual arrangements, their position may be somewhat tenuous. However, if protected provisions have been included in these arrangements and a breach has occurred, there are a number of remedies open to the innocent party. An examination of the legal principles relevant to the involved parties and relating to this aspect follows.

Event organiser vs facility operator. Provided that the rights and obligations of each party have been properly and clearly defined in the contract, the event organiser may institute legal proceedings against the facility operator in the event of the latter breaching its contract with the former. Breach may occur, for example, where the facility operator allows, contrary to the terms of its contract with the event organiser, advertising to take place within the stadium, particularly if this advertising was in direct conflict with the event organiser’s own sponsor. Under those circumstances, the event organiser could seek damages for such losses as:

- any lost revenue suffered by the event organiser;
- any damages, including legal costs, for which the event organiser may become liable to pay to its own sponsor;
- any loss of profits suffered by the event organiser;
- any loss of opportunity of renewing sponsorship contracts between the event organiser and its various sponsors.

In the celebrated case of Hadley v. Baxendale (1854), it was held that a party in breach of a contract was liable to the innocent party for all those losses which were likely, in the natural course of things, to be sustained by it, or all those losses of which the party in breach was made aware at the time of entering into the contract. It is contended that all of the above losses would fall within the first limb of the rule in this case. It is no bar to an award of damages that the sum to be awarded cannot be arithmetically calculated; in such circumstance, the court would make its own judgement in making an award. The innocent party may also seek an injunction to prevent the other from breaching its obligations under the contract. For instance, the facility operator would be prevented, by the granting of an injunction against it, from
allowing or continuing to allow any sponsorship that was contrary to the terms of its contract with the event organiser.

Event organiser vs television broadcaster. In the event that the broadcaster, contrary to the terms of its agreement with the event organiser, allows virtual advertising to take place, it may therefore expose itself to liability for breach of contract at the insistence of the event organiser. Similar considerations to those described above would apply with respect to the losses suffered by the event organiser. An injunction may also be awarded against a broadcaster to prevent the breach of its contract. Moreover, the event organiser could seek an order that its contract with the broadcaster be terminated. Provided that the prohibition against virtual advertising was clearly defined in the contract and was made the essence of it, breach of such term would entitle the event organiser to end the contract (Associated Newspapers Limited v. Banks, 1951). No doubt, this would amount to a significant sanction against the broadcaster.

Sponsor vs event organiser. The agreement between these two parties should specify such terms as:

• the location of any signage within the stadium;
• the number of signs erected;
• the duration of the agreement;
• whether the sponsor has exclusive coverage of its signage;
• whether television broadcast of the event will allow the broadcaster to advertise "rival" products or services to those of the original sponsor.

It is imperative to point to the terms of the contract which are alleged to have been breached and, upon doing so, seek to recover damages for the losses the breach had caused. Thus, if it were a term of the sponsorship agreement that the sponsor has exclusive coverage of its products or services and the event organiser allowed a rival competitor to promote its products or services, an action would lie in favour of its sponsor. In these circumstances, the losses that the sponsor would seek to recover would include damages for loss of revenue through lower sales, loss of profits and the like. Again, the fact the precise quantification of losses cannot be made would not be a bar to an award of damages being made by the court. An injunction would also be granted by the court in favour of the sponsor, preventing the event organiser from breaching its contract. Similar considerations apply if the sponsorship contract was with the facility operator.

Sponsor vs television broadcaster. There is no contractual link between the sponsor who has entered into the contract with the event organiser/facility operator and the television broadcaster who has entered into a contract with the event organiser to broadcast the event. Yet the sponsor will benefit from such broadcast. Its signage
will be received by massive audiences. It is this aspect of sport sponsorship which is so attractive to the potential sponsor and which commands huge sponsorship fees to the event organiser.

The sponsor has an action based on breach of contract against the event organiser or the facility operator in the event that the sponsor does not receive what it had bargained for. The sponsor may also have an action against the television broadcaster, not based on breach of contract, but based on the tort (or legal wrong) of interference with contract. In other words, if the television broadcaster permitted virtual advertising of products or services which were in direct conflict with the products or services of the sponsor, then, it could be argued, that the sponsor’s contract with the event organiser (or facility operator) was “interfered with.” Quite simply, the sponsor was not receiving what it had bargained for from the event organiser (assuming that it was a term of such contract that the sponsor had exclusive coverage of its products or services).

The tort of interference with contractual relations is committed when one party intentionally interferes with the performance of a contract made by two other parties. The essential elements that need to be proven are as follows:

- the existence of a valid and enforceable contract between two parties (in this instance, between the sponsor and the event organiser/facility operator; that contract would usually stipulate that the sponsor has, for instance, exclusive coverage of its products or service);
- interference with that contract by inducing one of the parties (in this instance, the event organiser/facility operator) not to fulfil its obligations under the contract with its sponsor (this interference can occur by the television broadcaster embarking in virtual advertising of products or services in competition with the original sponsor);
- damage or its likelihood has been suffered (that is, by the sponsor). In this instance, this could be established by the sponsor producing evidence of lower sales or lower profits as a consequence.

It is not essential to prove that the television broadcaster has specific knowledge of all the terms of the contract between the sponsor and event organiser/facility operator. It is sufficient if it can be shown that the broadcaster knew of the contract between these parties and the likely terms it would contain. If the above elements were found to exist, the courts would grant damages to the injured party or an injunction to prevent the interfering conduct.
Action Under the Trade Practices Act 1974 (Cth)

Action pursuant to section 52. This section provides that a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. For the conduct to be misleading or deceptive, such conduct must be inconsistent with the truth or lead or be likely to lead another into error. The essence of the action based on s52 is misrepresentation by the corporation. A number of points can be made:

- That the conduct in question merely causes confusion amongst the relevant sections of the public to whom the conduct is addressed, will not be sufficient to establish breach. The conduct must be misleading or deceptive or likely to mislead or deceive.
- It is not necessary to show that the conduct actually deceived anyone; merely that there is a real and not remote chance or possibility of deception occurring.
- Intention to mislead or deceive is not relevant. All that needs to be shown is the conduct was misleading or deceptive or likely to be so.

Virtual advertising may breach s52 in a number of ways:

- Viewers may be misled into believing that what they are seeing on the screen is what the spectator sees at the stadium (Richards, 1998).
- Virtual advertising of products or services or the insertion of logos in a position usually associated with a sponsor (for example, a logo on a football player’s jumper) may mislead or deceive the target audience that the corporation is a sponsor of the event organiser or team (Richards, 1998).
- Virtual advertising may convey a representation to the target audience that there is a commercial association or connection between the corporation and the facility operator, event organiser or the original sponsor when in fact there is not.
- Virtual advertising may mislead or deceive the target audience that the facility operator, event organiser or original sponsor have approved this form of advertising when in fact there is no such approval.
- Virtual advertising may mislead or deceive the target audience that the product or service so advertised has received approval from the facility operator or event organiser when in fact there is no approval given.
- Virtual advertising may mislead or deceive the target audience that the corporation on behalf of whom the product or service is advertised is an official sponsor of the event organiser when in fact it is not.
The essence of the conduct in each of the above examples is the misrepresentation of a connection or affiliation when in fact none exists.

The following cases illustrate the application of s52. In *World Series Cricket Pty. Ltd. v. Parish* (1977), the appellant placed advertisements in the Australian Women’s Weekly describing the cricket matches it has organised as “Tests” or “Test Series” or “Super Tests”. Further, pictures were shown of players in action wearing caps bearing the insignia of countries for whom these players have played Test cricket. The Australian Cricket Board, which conducted traditional or “official” Test match cricket between Australia and other countries, initiated proceedings to prevent the appellant from engaging in misleading and deceptive conduct in breach of s52 of the Act. It was held by the court that the advertisements would be likely to mislead or deceive a sufficient number within the target audience (potential purchasers of tickets for the matches) into believing that the “Super Tests” were matches developed by the Australian Cricket Board. Alternatively stated, the target audience would have been misled or deceived or likely to be so into thinking that there was a connection or an association between the parties when in fact there was not.

Similarly, in *Hutchence and others v. South Sea Bubble Company Pty. Ltd.* (1986), the respondent company produced and sold T-shirts bearing the name, symbols and other various designs associated with the rock group INXS including reproductions of album cover designs. Hutchence commenced proceedings seeking an injunction to prevent the continuation of this conduct as it was in breach of s52 of the Act. It was again held that the target audience (rock enthusiasts) would have been misled into thinking that the respondent company had received approval for its conduct from the members of the INXS group in return for some royalty or other fee, when in fact no commercial association existed between the parties. An injunction was granted. Similar findings were made in *Wickham v. Associated Pool Builders Pty. Ltd.* (1988) and *Hogan and others v. Pacific Dunlop Ltd.* (1989). In each case, the essence of the court’s finding was that the relevant target audience would have been misled or deceived or likely to be so into thinking that there was a commercial connection or association between the parties when in fact that was not so.

**Action pursuant to section 53(c) and section 53(d).** Section 53 provides that a corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods and services or in connection with the promotion by any means of the supply or use of goods or services:

- (c) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
- (d) represent that the corporation has a sponsorship, approval or affiliation it does not have.

Whereas s52 is a general civil provision of the Act, s53 is more specific in defining conduct of corporations which is prohibited. Breach of these specific
provisions carry with it substantial fines as well as exposing the corporation to claims in damages to any party who has suffered loss. Indeed, the corporation may be ordered under s80A of the Act to undertake corrective advertising.

Pursuant to s52, as indicated, a suggestion of association or connection with another may have been sufficient to establish breach; pursuant to s53(c) and (d) however, such suggestions would not be sufficient. Its specific requirements must be satisfied. Thus, the key words in those two subsections – “sponsorship,” “approval” and “affiliation” – have been defined judicially and must be satisfied before a breach can be established. The word “sponsorship” conveys that a commercial or other person or organisation stands behind or perhaps wholly or partly finances some activity. The word “approval” suggests to confirm authoritatively; to sanction; to pronounce to be good to commend. The word “affiliation” suggests something akin to sponsorship or approval requiring a positive link” (Richards, 1998, pp. 15-16). Thus, to allege that a corporation has represented an “affiliation” that it does not have would require the aggrieved party to show that the corporation has represented a “positive link” with another that it does not have. As a result, difficulty may be encountered in bringing an action under these particular provisions if the only evidence available is that of a “vague” association with another. However, if breaches of s53 (c) and (d) have been established the offending corporation can incur financial penalties as well as be liable for damages to another who has suffered loss as a result of that conduct.

Value of Disclaimers
A disclaimer clause may in certain circumstances be effective to eliminate the misrepresentation. In determining whether conduct is misleading or deceptive or likely to be so, the court looks at all the circumstances of a particular case including the existence of the disclaimer notice. It may be effective in breaking the nexus between the misleading and deceptive conduct and the damage alleged to have been suffered.

To be effective, the disclaimer must be worded clearly and located conspicuously so as to be seen and understood by all those who would otherwise be misled. In Newton-John v. Scholl-Plough (Australia) Pty. Ltd. (1985), the responding corporation promoted cosmetic products through advertisements which portrayed a photograph of a young lady bearing a considerable likeness to Olivia Newton-John. Across the top of the picture the following words appeared: “Olivia? No, Maybelline”. Newton-John alleged that the combined effect of the young lady on the picture bearing a striking resemblance to her and the use of the name “Olivia” was sufficient to create a representation of an association between herself and the corporation which did not in fact exist. The court rejected Newton-John’s allegation for the corporation made it perfectly clear “that its product did not have any relevant association with the applicant…. [T]he advertisement tells even the most casual reader at even the
first glance, that in fact it is not Olivia Newton-John who is represented in the advertisement” (p. 234). Further, in Hogan and others v. Pacific Dunlop (1988) a re-enactment of the knife scene in the movie “Crocodile Dundee” was created in an advertisement for the promotion of shoes. The characters in the advertisement wore clothing identical to that worn by Hogan in the movie even though those characters did not resemble the characters in the movie. Hogan was successful in his argument that the advertisement created a representation of an association between himself and the responding company. The interesting aspect of this decision was that Hogan was granted qualified injunctive relief “so as not to forbid those activities if it is made clear in the television advertisement and on the posters that Mr Paul Hogan and the makers of Crocodile Dundee have not agreed to the advertisements or their contents and they in no way endorse Grosby Leatherz” (p. 433).

Thus, it can be argued, viewers may not be misled if the broadcaster displays a sufficiently prominent disclaimer. Quite simply, through the display of such a disclaimer, viewers are told that there is no association between the parties and that being so there does not exist any misrepresentation of an association, which is the essence of the provisions examined.

Concluding Remarks

Virtual advertising has the potential to substantially boost advertising revenue for television networks. Sporting clubs and leagues, stadium operators and sponsors could once have been excused if virtual advertising was not factored into their negotiations. There is now no excuse. All parties to a media or sponsorship contract must take virtual advertising into account in the negotiation of contracts. Failure to do so will jeopardise the relationships of all concerned. More importantly from the sport organisation’s point of view, it may miss out on the rich rewards available from the broadcaster. If virtual advertising is to be permitted, the sport organisation should ensure that it, too, can share in the rewards to be obtained.

References


