

AMBUSH MARKETING IN MAJOR SPORTING EVENTS AND THE LEGAL FRAMEWORK SURROUNDING IT

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ABSTRACT

In recent years, due to the controversial nature of 'Ambush Marketing', it has gained importance in the advertising and marketing realm. Ambush Marketing is most prevalent in sports, especially in sporting events such as FIFA, the Olympics, Super Bowl etc. Ambush marketing has posed as a threat to brand equity and the commercial rights of event sponsors for many years, and the growing trend has led to the need to inspect the effectiveness of existing laws that could potentially capture ambush marketing and introduce new laws to curb such practices.

The purpose of this paper is to first introduce the concept of ambush marketing and its manifestations in the sporting realm (Section I), and delve into the existing legal framework of ambush marketing laws (specifically sui generis laws), their effectiveness and how these sui generis laws are being abused by the commercial rights holders like sports governing bodies and multinational corporations (Section II).

INTRODUCTION

It is first important to understand the concept of corporate sponsorship and rights associated with it in order to understand the very meaning of the term ‘ambush marketing’. When sponsors pay a huge sponsorship fee to an event organizer, the sponsors will in return gain, through this commercial arrangement, certain exclusive rights. These exclusive rights include the right to use official marks and logos associated with the event and gain unique advertising and promotional opportunities etc., which help in creating brand awareness and enhance their corporate image as part of this commercial arrangement. Each of these events sets out specific sponsorship categories such as ‘official sponsor’, ‘official supplier’, and ‘official licensee’, and each of these categories entitles the sponsors to different marketing rights.ⁱ

But some corporations (or “free-riders”) who are seeking to associate themselves with an event, or just share some of the event’s publicity, use certain marketing strategies to take advantage of the goodwill attached to the event thereby creating brand awareness and recognition, without actually having to pay for it.ⁱⁱ This form of advertising is called Ambush marketing or parasitic marketing. In other words, it is a planned campaign by an organization to associate itself indirectly with an event in order to gain at least some of the recognition and benefits that are associated with being an official sponsor.ⁱⁱⁱ For example, in 1996 Olympics in Atlanta, Reebok paid a whopping \$50 million to become the official sponsor of the event. However, Nike notoriously sabotaged Reebok’s marketing campaigns in a number of ways. Nike had given Michael Johnson, the winner of the 400-meter dash, a pair of golden colored lightweight racing spikes worth \$30,000 as millions of viewers around the world watched his victory unfold. Days later, Johnson was also seen on the cover of Time magazine with these golden shoes slung around his neck. Nike also bought most of the outdoor billboard spaces to display its advertising, distributed flags to the spectators and set up a Nike center near the athletes’ village. This marketing strategy by Nike led to many guidelines that are present today that were introduced by the IOC and USOC.

Ambush marketing can be broadly put into two categories – ambush marketing by association and by intrusion. Ambush marketing by association involves the ambush marketer to create an association with the event, either directly or indirectly, thereby misleading the public to think that it is the authorized or official sponsor of the event.^{iv} For example, Companies may

sometimes base their advertisements around the time of these events or use the mark or logo of the event without permission.

On the other hand, ambush marketing by intrusion involves the ambush marketer to advertise their products in and around the venue of the event to increase media exposure or to be seen by the spectators of the event, making use of the interest and publicity of that the event generates. This strategy includes placing posters in strategic locations outside the venue, sell or hand out products that spectators can carry inside the stadium, use planes or blimps over the airspace etc. Apart from such strategies, ambush marketers may also run promotional campaigns where tickets to such events can be won and use sports star and even spectators to highlight their products. For example, Bavaria paid groups of attractive women to wear unbranded orange outfits and sit together at the World Cup match to draw attention to its brand.^v

The ethicality of ambush marketing has long been a controversial topic. Ambush marketing in the narrow sense involves infringement of intellectual property rights, trade laws, deception and misrepresentation and free-riding, which allows event organizers and official sponsors to sue them. This, no doubt, is unethical.

However, ambush marketing in the broad sense is often argued to be ethical and legal by corporations. This is because they do not involve misrepresentation as to the sponsorship or infringement of any intellectual property rights and only involves rights that have been legitimately purchased like sponsoring a team or a player taking part in the event. It also involves the skillful allusion to the event. For example, when the Olympic Torch was blown out by the wind in the Sochi Olympics, it was relit using a Zippo lighter by an officer. Zippo in-turn used the opportunity to take credit for the same by using the hashtag #ZippoSavesOlympics. Some scholars like Jerry Welsh and Kim Skildum-Reid have said that successful ambush marketing is the natural result of healthy competition.^{vi} According to them successful ambushes highlight gaps in the official sponsors' campaigns and a failure to properly leverage such official rights.^{vii}

On the other hand, event organizers and sponsors often attach a negative connotation to ambush marketing as it has a detrimental effect on them. This is because sponsorships serve as an important source of revenue for covering the cost of hosting events. For example, revenue

generated by commercial partnerships account for more than 40% of the Olympic Games.^{viii} If these ambushers associate themselves with an event without spending any money, it will demotivate those companies which spend millions of dollars to obtain exclusive rights which result from these commercial arrangements, thereby reducing the value of corporate sponsorship. This in-turn will cause a lot of loss and damage to the event organizers as they heavily rely on such revenue to host the events.

PROTECTION AGAINST WRONG PRACTICES

Event organizers and sponsors can get protection against such practices through a number of ways, the most common being protection under common law such as passing off and unfair competition actions, and intellectual property laws. Other remedies include regulation of rights to events in the founding documents of the relevant sports organizations, the use of contractual regulation, ticketing terms and conditions, venue security and (media) accreditation, advertising and sponsorship codes of practice.^{ix} However, these remedies are not always effective as ambush marketers come up with creative ways of advertising that does not necessarily involve the use of marks, logos and slogans of such events that have protection and fall within the broad concept of ambush marketing as mentioned above, thereby escaping the scrutiny of such laws.

For example, the event organizer will have a claim under passing off if the ambush marketer attempts to deceive the public by creating a false impression that its goods are those of the another or that it is associated with an event. For example, company A cannot pass off its goods as that company B's goods. The event organizer will have to satisfy the classical trinity test – reputation (or goodwill), misrepresentation by a third party and damage the event organizer suffers or may suffer.^x

However, claims of passing off are usually unsuccessful because ambush marketers only want to promote themselves as the source of their products and services and benefit from the larger audiences attracted to the event in question, rather than attempting to suggest that their products or service are those of the competitors.^{xi} Moreover, due to the short duration of such events, it is usually difficult to establish that damage or the likelihood of the damage to the goodwill or

reputation of the event organizer or official sponsor has been caused. In the second condition, the claimant has to prove that the actions or words of defendant's caused the consumers to think that the defendant's goods or services is either derived from or economically connected with that of claimant's goods, which is hard to prove in most ambush marketing cases. Likewise, in the third condition, it may sometimes be difficult to prove real tangible probability of damage in many types of ambush marketing practices.

A notable case in this context is *ICC Development (International) Ltd. Vs Arvee Enterprises and Anr*^{xii}, where the defendant had released an advertisement in which a ticket with an imaginative seat and a gate number saying 'Cricket World Cup 2003' was displayed. The court held that the intention of the defendant was only to convey to the purchasers of these goods that they may win a ticket to the World Cup and that the basic elements of passing off were not fulfilled. The court also held that since no logo or mark was used by the defendant, this cannot be held as an act of passing off.

Another example of the ineffectiveness of these remedies can be seen in the case of claims under infringement of copyright laws. Copyright provides a 'catch-all' protection for the event logos, anthems, taglines, symbols, recorded event films and live broadcasts, without having to register it, provided these materials are eligible for protection and satisfies the requirement of protection.^{xiii} The unauthorized use of such materials by ambush marketers will be considered as copyright infringement. For example, in *ICC Development (International) Ltd. Vs Ever Green Station and Anr*^{xiv}, the plaintiff claimed that the defendant has used its logo during the promotion campaign. The Delhi Court that the logo denoting black and white stripes of Zebra is an artistic work within the meaning of copyright law and hence, the subject to copyright protection and restrained the defendant from using the logo of the plaintiffs in its advertisements.^{xv}

However, copyright laws face the same limitations as trademark laws, in curbing ambush marketing. As mentioned earlier, ambush marketers come up with creative ways of advertising, without having to use these copyrighted logos, symbols, etc. Moreover, copyright laws cannot tackle more prominent ambush marketing practices like buying billboards outside the area of the event, selling merchandise for the spectators to carry inside the event, buying commercial time during the telecasting of events etc.

Apart from the ineffectiveness of the existing laws, a practical difficulty that often arises is due to the short lifespan of an event which often hinders the organizer's ability to initiate law suits under civil procedure since these law suits involve a protracted length of time to bring such suits to court. The organizers also face difficulty in gathering evidence. For example, event organizers often find themselves lacking time to collect evidence such as consumer surveys that assess the confusion caused, due to the quick and rapid ambush marketing strategies that are adopted by the ambush marketers that will be long over by the time the judge passes an order.

The reason for the ineffectiveness of the existing laws against ambush marketing are also largely attributable to the fact that they have been crafted to serve different public policy objectives i.e., to protect the consumers from deception as it has a direct and immediate negative impact on them. Due to such limitations in existing laws, event organizers and sponsors have started demanding for something more event-specific to protect their rights, such as *sui generis* event legislations or anti-ambush legislations that are enacted by the host state. For example, Sydney 2000 Olympic Games (*Indicia and Images Protection*) Act, 1996 during the Sydney 2000 Olympic Games was the first anti-ambush marketing legislation to be introduced, following which many other host countries have since followed suit.

Such legislations are demanded by the organizers of events as a condition for a successful bid and are aimed to tap into the untouched areas of state law and are left largely to private ordering and market forces.^{xvi} They aim to protect the relationship between private individuals and their investments, the commercial rights to such events, maintain market control in respect of commercialization of the event and the publicity value of the event.

However, such anti-ambush marketing legislations have been met with heavy criticism because they lack substantial consumer protection dimensions. The legislative powers are exercised by the state in order to protect the public and not for the purposes of serving narrow or selfish interests of the law makers or specific groups or individuals. However, these specific legislations are introduced to protect the commercial rights of private parties that are involved in the event and impose curtailment of public liberties to a great extent. These rights arise from the contracts that are entered into by the relevant parties and as per the principles of contract law, they are applicable and enforceable only between the parties involved. When such

legislations are passed, they offer a mechanism by which these private parties can enforce such rights against persons outside this contractual nexus and such personal rights are granted the force of law in the public dimension.^{xvii} Moreover, these legislations protect a relationship that many consumers are largely indifferent towards. According to extensive research conducted in this area, this is due to the fact that most of the consumers indifferent to or unaware of the identity of official sponsors and that the identity of the sponsor may not play a significant role in a consumer's choice of product.^{xviii} Therefore, there is a need for a more legitimate justification than the need to only protect these commercial rights.

Another criticism of these event specific legislations is that they curtail freedom of expression. Anti-ambush marketing legislations often impose 'Clean Zone' regulations to protect these commercial rights. These regulations also extend to airspace above the venue and 'clean transport routes' and at times, a person who is just outside the border of a Clean Zone' would not be able to trade with a person inside the Clean Zone.^{xix} For example, under the London Advertising and Trading Regulations, advertising and street trading within the Clear Zones, which are established by event officials without the authorization of the event organizer during 'event periods' are prohibited. Due to the lack of precise definitional boundary for 'association rights', the overzealous enforcement of it is often a problem. For example, during the London Olympics, Trade Standards Officers were required to enforce Clean Zones and were criticized for the same for unfairly targeting small business. One of the reported incidents was that a butcher who sold sausages which were in the shape of the Olympics Rings was ordered to remove them off the display.^{xx} This type of aggressive enforcement mechanisms often leads to monopolization of the event's thematic space by the event organizer and damages not only the reputation of the host nation but also the event organizer and the sponsors. Since these regulations impose mandatory obligation under host city contracts, they are usually unavoidable.^{xxi}

Another way by which the freedom of expression is curtailed is through the concept of 'Event Marks'. This concept maybe understood as any signal used to identify an event, a presentation, performance, in which the event organizer has the interest to use (and protect) the trademark in connection with large number of products and services.^{xxii} This means that FIFA can now claim IP rights to the name of its event or any combination of words that conjure up to the event. For example, it can claim IP rights to 'FIFA 2014', 'World Cup 2014', 'South Africa 2014'

etc. Unlike in traditional IP laws, these marks are granted trademark protection though they lack distinctiveness in such marks or the marks are too descriptive in nature. The rights to event marks are also at times enforced aggressively. For example, during the 2010 South Africa World Cup, a pub near an event was ordered to remove the signage containing the generic words 'WORLD CUP 2010', although it was only for decorative purposes.

Freedom of expression has also been curtailed by restricting people from using words or images that are commonly used. For example, an animal rights activist who was distributing t-shirts depicting the image of a hen with Five eggs was restrained from doing so as it closely resembled the Sydney 2000 Olympic Games logo, although it was only to further a political cause.

When a constitutional right such as freedom of expression is curtailed, such restrictions must fulfil a legitimate public aim. However, as established earlier, association rights are only created through contractual relationships and is debatable as to whether it fulfils legitimate public policy aims. Therefore, when anti-ambush legislations enforce these rights by curtailing freedom of expression, it must be deemed to be held to be constitutionally invalid.

Anti-ambush marketing laws also provide for certain rights called 'Association rights', which help event organizers and sponsors protect their commercial interests. These rights allow such persons to restrict the unauthorized association by corporations with such events. Many legislations often leave the definition of 'association rights' vague, thus leading to event organizers claiming for any form of association, whether intentional or unintentional, as infringement of this right. For example, under the New Zealand Major Event Management Act, there is a prohibition on any form of representation made which is likely to suggest an association and is not just limited to representation made in the course of trade. The implication of such a law is that even representations made at the dinner conversations may be caught under this prohibition.^{xxiii} Moreover, the exercise of association rights has also been criticized for being solely exercised by the event organizers and sponsors. This is because the success of an event is also dependent on the efforts and participation of the public and private bodies and a substantial amount of funds are also from the tax-payers of the host nation. Therefore, it is unclear as to why these rights have to be exclusively at the hands of event organizers and sponsors.

Although certain types of ambush marketing practices must be prohibited, due to the above-mentioned reasons, legislation of anti-ambush marketing laws must either be avoided or there must be enforcement mechanisms that are fair to not only the event organizers and sponsors, but also to the public at large. Moreover, there is also lack of proof as to whether the enactment of these legislations have led to the increase in sponsorship revenue.

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