

Ambush Marketing

How can official sponsors of sporting events prevent competitors from using the event for marketing purposes?

Views from the United States, the United Kingdom and Germany.

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What is Ambush Marketing?

As the costs of becoming an official sponsor of a major sporting event have mushroomed over recent years, sponsors increasingly have to deal with what has become known as ambush marketing. Ambush marketing occurs when a brand tries to exploit the media attention of a major sporting event by connecting itself with the event without being an official sponsor, in other words, without paying a sponsorship fee.

Ambush marketing is undeniably effective, and some marketing professionals even praise it as the boldest and most creative form of advertising ever. On the other hand, ambush marketing substantially undermines an event's integrity as well as its ability to attract future sponsors. Thus, some argue, it threatens to erode the fundamental revenue base of mega-sporting events such as the Soccer World Cup, Formula 1 Racing or the Olympic Games. Whichever standpoint one may take, the prevalence of ambush marketing raises the question of what legal options are available to organizers and official sponsors of such events to prevent ambushers from "hitching a free ride" without making any financial contribution. For example, how can Adidas, who is an official sponsor of the upcoming 2006 Soccer World Cup, prevent Nike, who is not, from advertising soccer shoes in front of a stadium?

Legal Options to Combat Ambush Marketing

Neither Germany nor the United States nor the United Kingdom has any specific law or statute that explicitly addresses the issue of ambush marketing. Sponsors and organizers of major sporting events must therefore rely on the more general provisions of trademark and unfair competition law, contracts and on their rights as lessees of the respective sporting venues in order to protect the exclusivity of official sponsoring.

Trademark Law

Under German law, if an ambush marketing campaign includes the unauthorized use of any words, symbols, logos or slogans that are similar to or identical with protected trademarks, the mark-owner may ban such use under section 14 of the Trademark Code (MarkenG) and seek injunctive relief to end the ambush campaign immediately. He may also sue for damages under the same provision.

The UK Position is broadly similar to that in Germany. It is an infringement of a registered trademark for a party without the permission of the trademark owner to apply the trademark to any goods or services. It is also common law passing off to misrepresent the origin of goods and services. Under UK statutory law, it is not an infringement of any third party registered trademark right for a proprietor or licensee of a registered third party trademark to use that trademark in its proper context.

Similarly, in the United States, an event organizer who owns a federal, state or common law trademark can seek an injunction under the Lanham (Trademark) Act, state law or common law against the unauthorized use of the trademark or a colourable imitation. To prevail, the trademark owner must demonstrate a likelihood of confusion – for example, that consumers would likely believe the infringer was affiliated with or a sponsor of the event. However, many ambush marketers are savvy enough to avoid infringement.

In order to prevent ambushers from passing off their products as official World Cup 2006 merchandise, Soccer's world governing body FIFA has registered numerous World Cup-related trademarks for a whole variety of goods and services. However, there is some argument between courts and legal scholars if and to what extent terms such as "Soccer World Cup" or "Germany 2006" are at all protectable as trademarks, or whether they are generic. In June 2005, the German Patent and Trademark Office refused to register a number of World Cup-related trademarks, holding that they

were generic, but on appeal, the Federal Patent Court overruled the decision if not for all but for many claimed goods and services. The case is now pending at the Federal Court of Justice, and a final resolution of this dispute is not expected before the end of the World Cup. In another case, the Office of Harmonization for the Internal Market (OHIM) recently refused to delete some of FIFA's Word Cup-related Community Trademarks, holding that they were not generic terms.

Moreover, unlike the International Olympic Committee (IOC) in 2003, FIFA has no hopes for the German legislature to step in. While in the course of Germany's bid to host the 2012 summer Olympics, the German Federal Parliament passed a statute to protect expressions such as "olympic" or "Olympic Games" – being of the opinion that they were in fact generic terms not protectable under trademark law – there are no plans for passing a similar statute with respect to the soccer World Cup.

In the UK the most foreseeable problems will involve the London 2012 Olympics. There is a fundamental tension between English and European law on one hand relating to freedom of speech and advertising and the requirements of the International Olympic Committee (IOC) to protect sponsorship to make the Olympics a financial success. It is ironic that when the Olympics were revived in the 1890's they were revived as games for athletic prowess and not as a commercial money making event. It appears that these days the IOC can dictate requirements to the Government of the host city and acceptance of the requirements is a criteria for IOC host city selection.

To appease the IOC, the UK Government has proposed a London Olympics Bill which includes anti-ambush marketing provisions, although it does not cover the Olympic symbol itself, which is already protected under the UK Trade Marks Act 1994. The bill will establish the Olympic Delivery Authority which will have the authority to make arrangements in respect of the London Olympics and enable regulations to be made about advertising in the vicinity of London Olympic events.

Those regulations will allow the Olympic Delivery Authority to control all advertising and sale of goods which might geographically or by the way they are advertised be associated or imply an association with the Olympic games. The bill does not provide details of how wide any marketing "exclusion zone" around the Olympic venues will be. It does, however, make clear that any unauthorized advertising within the exclusion zone, whether printed word, sound or light media, whether commercial or non-commercial, could

result in a fine of up to £20,000 (approximately US\$37,700). There are exceptions for honest use of a registered trade mark and where the use of the mark or sign is necessary in context (e.g. gold chain; silver polisher). Otherwise the proposed bill outlaws any commercial association with the Olympic Games, which goes far beyond ambush marketing.

Any unauthorized trader seeking to profit from the Olympics may face various penalties, including possible criminal prosecution. Whether the wheels of justice will move quickly enough to be effective is debatable, especially as the Olympics will only last two weeks. But the methodology is clear: ban everything which is unauthorised and which could be commercially associated with the Olympics, including the contiguous words "summer" and "games" in the UK.

The proposed legislation is so draconian that the use of "The London Olympics 2012" as a subtitle in 2012 to showcase this firm's legal ability might result in a criminal prosecution. Whether the bill, which protects private interests, will survive parliament, the Human Rights Act and the free movement of goods and services provisions of the EU Treaty will be an interesting debate.

The U.S. Olympic Committee (USOC) also has weapons against ambush marketing that it uses aggressively. It is particularly important to the USOC to ward off ambushers and maintain the value of sponsorships, because the sponsorships fund U.S. participation in the Olympic games. Recognizing this, Congress in 1978 passed the Olympic and Amateur Sports Act (OASA) (amended in 1998) to give the USOC the exclusive right to control the use of various Olympic symbols, including the interlocking-ring logo and the word "Olympic". The USOC need not prove that a use would cause consumer confusion, and there is no "fair use" defense, although free speech considerations come into play. However, the OASA cannot be used to prevent ambush techniques that do not employ protected Olympic symbols.

Unfair Competition Law

In Germany, some ambush marketing practices may also be actionable under the Unfair Competition Code (UWG), under which a claimant may enjoin competitors from engaging in "unfair competition" practices. The UWG provides no clear rule as to which practices are "unfair" and which are legitimate. However, German courts agree that unfair competition lies where a company engages in misleading or deceptive advertising. Such deceptive advertising may be

present where a company, by choosing a specific form or venue for its promotional activities, raises the impression of being the official sponsor of a sporting event when it is actually not. However, no case law has been published so far which explicitly addresses the issue of whether and which ambush marketing practices are permissible under the UWG.

In the United States, the Lanham Act provides a cause of action for false advertising, if the event organizer can point to a false or misleading statement or implied statement by the ambusher. The organizer must also show that it was damaged by the statement. Courts generally also require a plaintiff to show that consumers are likely to be misled and that the false or misleading statement would be material to the consumers' purchasing decisions. If the nature of an advertisement would lead a reasonable consumer to believe that an ambusher is an event sponsor when it is not, and sponsorship would matter to the consumer, a claim might lie, although it could be difficult and expensive to prevail. In addition, virtually every state has a statute governing unfair trade practices, although what is considered unfair differs.

Contracts

Arguably the most effective means for organizers of sporting events to block out unauthorized advertising is to negotiate deals with the stadium owners (which may be, for example, cities, sports clubs or operating companies) that allow the organizer to fully control advertising on the premises. For example, the organizer may demand the stadium to be handed over "clean site," that is, cleared of all advertising

by companies that are not official sponsors. The organizer may also demand to rename the stadium for the time of the event, and control access to the stadium grounds including the airspace above the premises. By means of cannily designing the general terms and conditions of ticket sales, organizers may even impose "dress-codes" on the spectators, leaving out those wearing shirts or caps which blatantly display the logos of non-sponsors. In order to create ad-free "special zones" beyond the boundaries of the stadium grounds, the FIFA has even engaged the German government to pass anti-advertising ordinances for the areas surrounding the World Cup 2006 venues and for the main access roads. The UK proposed position for the 2012 Olympic Games is similar.

One popular ambush technique in the United States is to promote a sweepstakes in which event tickets are a prize. To prevent this, the National Collegiate Athletic Association (NCAA) issues tickets to its annual basketball tournament games as revocable licenses. Under the terms printed on the back, the ticket may be revoked if it is used as a sweepstakes prize without the NCAA's permission. The NCAA brought state law breach of contract and unfair competition claims against a company that nonetheless gave away the tickets as part of a promotion, but the parties settled before the merits of this approach could be determined.

Conclusion

As ambush marketers become more creative in their efforts, event organizers will have to use their own creativity to devise legal means to protect the value of official sponsorships.



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