

# Tokyo 2020 is ready, are you?

## Ambush Marketing and the Law

### Introduction

2020 is set to be a whirlwind of international sporting highlights including the UK hosting UEFA Euro 2020 finals and of course, the always eagerly awaited Tokyo 2020 Olympic and Paralympic Games.

Sporting hysteria will ensue amongst a torrent of marketing activity; such big events are invaluable for brand exposure and marketing stunts, but where is the line? We provide you with a guide to **ambush marketing** to help you promote your brand whilst keeping within the tracks of the law.

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### Ambush Marketing – what is it?

With no codified definition, people have differing views on the definition of ambush marketing. It can be used to describe any attempt to piggy-back on the public interest in an event without proper authorisation. Others will only use the term where marketing activities cross the line from being cheeky but legally acceptable to infringing legal rights. We'll use the more expansive meaning of the term but will try to help you understand where the legal line is drawn.

Ambush marketing is most closely associated with major sporting events but any event or occasion (from music festivals and TV shows, to the Oscars and royal weddings) can be targeted. Sports teams and individual celebrities are also often the subjects of 'ambush'. Essentially anyone or anything that brands are keen to associate with and who would normally sell sponsorship or endorsement rights, will be vulnerable to ambushers who are trying to get similar benefits for free. For ease we'll refer only to events, but the principles in this article generally apply to all.

There are three main types of ambush which, depending on a number of factors (as discussed below), may fall foul of the law.

#### Ambush by association

This occurs when the non-sponsor ambusher seeks to associate itself with the event without authorisation and consequently misleads the public into thinking the ambusher is somehow connected with the event. The most blatant examples will involve direct references being made to the event, and may involve the use of protected marks. For example a brand which is ignorant of the rules may run an "Olympic Offers" promotion or directly refer to the event.

Big companies tend to be alert to such restrictions and will however seek to avoid infringements by making less direct references. For example using iconography or language related to the event (think American footballs or "touchdown" or "game day" language in relation to the Super Bowl, medals and podiums for the Olympics, or trophies and big guys caked in mud for the Rugby World Cup).

Brands that sponsor a team or an athlete participating in an event often capitalise on these rights in a way which may lead the public to think they also have an affiliation with the event. At a minimum they will draw on the public excitement for the event. This is normally a completely legitimate tactic. For example although not an official sponsor of the event, AIG did this during the Rugby World Cup 2019: as a long term sponsor of the All Blacks, it released a rugby-themed advert starring some of the team about '[How NOT to drive in Japan](#)' promoting its car insurance division. AIG alluded to the event but no direct references were made; a clever, funny campaign and in no way infringing legal rights. Similarly Beats by Dre regularly run emotive campaigns ahead of major events featuring athletes competing in the events. Although they don't sponsor the events themselves the timing and creativity of the adverts mean these are seen as, for example, "World Cup" adverts.

However, brands need to be alert to the fact that some events have special 'anti-ambush' rights (see below) which may mean this sort of tactic crosses the line. In 2018 ahead of the Winter Olympic Games SK Telekom got in hot water for running adverts featuring Korean winter athletes and using the slogan "See you in PyeongChang" (the host city). They crossed the legal line based on special laws in South Korea.

#### Ambush by intrusion

An 'intruding' ambusher will normally seek to gain prominent brand exposure at the event, targeting the audience in the stadia and through broadcast media. This may occur within the event's area of control, or just outside. For example tactics can include erecting huge signs on land in shot of cameras, blimps, skywriting, or simply distributing products to fans as they arrive at the event.

Bavaria has famously deployed intrusion marketing in both the 2006 and 2010 FIFA World Cups. 2010 being the year of the Dutch models who entered the match (disguised as Danish fans) revealing shortly after kick off, orange mini-dresses which bore the smallest of Bavaria logos. That, combined with an ad campaign in The Netherlands which featured the same dress, achieved significant exposure (partially due to increased publicity as a result of a number of the girls being arrested).

Contrastingly, a more subtle example of ambush by intrusion was Mumm champagne's #NextVictory campaign during the 2018 Winter Olympics which cleverly engaged Usain Bolt (an official ambassador for Mumm) challenging winter athletes to do his token 'lightning bolt' pose on the podium. If they posted a photo of them doing this and tagged him he would reward them with a bottle of Mumm champagne. Bolt, whilst being an athlete synonymous with the Olympic Games and athletics, was not a participating athlete and so exempt from "Rule 40" (as mentioned below) and as there was no exposure of Mumm's brands by the participating athletes in the stadia, this didn't clearly breach the IOC's rules. However, the campaign went viral and achieved the objective of Mumm being associated with the Games.

### Opportunistic ambush

Whether or not 'opportunistic' advertising, which reacts and refers to topical events, can genuinely be referred to as ambush marketing is up for debate; it is often done in a humorous or tongue-in-cheek manner so is arguably unlikely to mislead the public into believing there is a commercial endorsement or association. A prime example of this was when the flame expired during the Sochi 2014 Winter Olympic torch relay and was caught on camera being relit by a Zippo lighter. Zippo capitalised on this by using the photograph across its social media. Another tactic can be to poke fun at how vigorously an event protects its IP, particularly if the initial ad is pulled. Planet Fitness did just that in the US during the 2018 Winter Olympics, when it used a geographic ploy to claim it was sponsoring "Olympians for the 2018 Games". 'Olympians' being people who live in Olympia, Washington, USA. We believe the advert was pulled after the United States Olympic Committee complained but in response, Planet Fitness posted a new [advert](#) poking jest at the rules and featuring the "*Soul-Crushing, Idea-Killing Lawyers*".

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## What are the consequences of crossing the line?

### Ambush by association

Various legal measures are typically deployed to deal with this type of ambush. The most blatant examples of ambush by association may involve breaches of **trade mark** or **copyright** laws (which will generally apply in one form or another worldwide). For example use of the name of the event, the event logo or official mascots, posters or designs. The Olympic symbol and related terminology has also been granted special protection in many countries pursuant to the "Nairobi Treaty". In the UK we chose to enact the **Olympic Symbol etc (Protection) Act 1995** ("OSPA"), which since 2006 also protects Paralympic words and symbols. (See further below).

If an ambusher avoids using the event's official intellectual property, but nevertheless creates the impression that it is a sponsor of or is endorsed by or affiliated to the event, laws dealing with misleading advertising and unfair competition will be relevant. In England, the tort of **passing off** is likely to be asserted; this is available to address ambush activities if the event has goodwill and a reputation, and the ambusher has made representations which confuse the public into thinking the brand is connected to the event, thereby causing the rights holder damage. Passing off can however be quite a hard cause of action to prove.

Given the creativeness of ambush marketers, many countries hosting major events such as the Olympic Games create **special anti-association laws**. Such laws are often demanded of bidding countries by the international rights holder. The new laws normally go further than other pre-existing rights, preventing all advertising which creates an 'association' or 'connection' between the advertiser and the event. This type of legislation tends only to apply locally in the host country and will be time-limited. For example, for London 2012, the 'London Olympic Association Right' applied in the UK only and expired at the end of the Olympic year and in Brazil, the offence of ambush marketing established under the so called 'World Cup 2014 Law', could only be enforced until the end of 2014. It's worth noting that the Birmingham Commonwealth Games Bill is currently progressing through the UK Parliament and will, if passed, provide the Birmingham 2022 Commonwealth Games with similar protections to those that were in place for London 2012.

At this stage the Japanese don't seem to have any firm plans to pass similar special laws in respect of Tokyo 2020, however we will provide a further update if this changes.

Finally, event organisers may use **contractual terms** to seek to prevent participants in the event (athletes, teams, officials etc.) from allowing their name or image etc. to be used within advertising during the event and/or for the purposes of ambush marketing. (See for example the section on "Rule 40" below).

The **ticket terms and conditions** for events will usually also prevent the use of tickets for any commercial/marketing purposes without the permission of the event organiser. Legislation may also make this a criminal offence. In Japan there is ticket touting legislation prohibiting the resale of Olympic (and other) tickets however it seems that this doesn't extend to promotional use of tickets, so only contractual restrictions are likely to apply.

### Ambush by intrusion

This will normally be controlled by all event organisers by a provision in the ticket terms and conditions which prevents the display of any commercial messages without authorisation in the stadia. Contractual controls will also be deployed to ensure competing athletes and teams, officials and even volunteers do not use their moment in front of the cameras to promote an unauthorised brand.

The biggest events sometimes back up these contractual controls with special laws preventing unauthorised advertising (and often also street trading) in and around stadia, however as mentioned above we are not aware of any special legislation being introduced for Tokyo 2020 as yet.

### Opportunistic ambush

How this is addressed will depend on the execution. Opportunistic ambushes have historically been more difficult for rights holders to tackle. References to an event in opportunistic ambushes are often negative in nature, making it hard to argue consumers will be misled or confused, and it's likely to be more difficult to assert special 'association rights' if the only association is a negative one. Brands deploying this type of tactic may nevertheless receive complaints from the rights holder, even if legal action is not available or pursued.

### Non legal measures

In relation to all forms of ambush, rights holders may deploy non-legal tactics to fight back. Generating negative news stories about the advertising may work if the brand is sensitive to this, but many brands which employ ambushing as a tactic will actually enjoy the additional publicity. Alternatively, rights holders might assert pressure on a 'moral' basis contacting senior executives to try to address the issue directly, and if the brand is accredited to the event for any reason, the threat of withdrawing accreditation may well be the most effective tool available.

## What you need to know for Tokyo 2020

There are a number of different rights holders who will be protecting their rights against ambush marketing in connection with Tokyo 2020. They each sell sponsorship for different things and have different rights that they will be asserting. The table below gives an overview:

Rights-holder	Intellectual Property	Notes
The International Olympic Committee	The IOC is the ultimate owner of all "Olympic" IP at a global level, including: <ul style="list-style-type: none"> <li>• Core "Olympic" marks, such as:                             <ul style="list-style-type: none"> <li>○ the Olympic Symbol (the rings)</li> <li>○ "OLYMPIC GAMES"</li> <li>○ "Citius, Altius, Fortius" ("Faster, Higher, Stronger")</li> </ul> </li> <li>• All official marks of current and historic Olympic Games, such as:                             <ul style="list-style-type: none"> <li>○ "CITY + YEAR" name</li> <li>○ logos</li> <li>○ mascots</li> <li>○ mottos</li> <li>○ torch designs</li> <li>○ pictograms</li> <li>○ 'look and feel' designs</li> </ul> </li> <li>• Official footage and images of all Games</li> </ul>	The IOC sells global sponsorship rights to its "TOP Sponsors" and oversees the global protection of Olympic IP but it delegates much enforcement of its rights to the relevant National Olympic Committee or Organising Committee where the infringement is localised.
The International	As above for the IOC, but the IPC protects equivalents relating	

Paralympic Committee	to the Paralympic Games. (The Paralympic symbol is the three “agitos” and the motto is “Spirit in Motion”).	
The Tokyo Organising Committee of the Olympic Games and Paralympic Games (TOCOG)	<p>TOCOG is responsible for developing IP in relation to the 2020 Games and for protecting this IP in Japan, eg:</p> <ul style="list-style-type: none"> <li>• “Tokyo 2020”</li> <li>• “Games of the XXXII Olympiad”</li> <li>• Games logos</li> <li>• Games motto (not announced at date of publication)</li> <li>• Medal designs</li> <li>• Torch designs</li> <li>• Mascot images and names (“Miraitowa” and “Someity”).</li> <li>• Look &amp; Feel and other designs protected by copyright such as stadium renders</li> </ul>	<p>TOCOG sells rights to local sponsors in Japan and protects their rights in Japan.</p> <p>It will also operate an ‘on the ground’ ambush marketing operation during the Games, looking to prevent ambush by intrusion.</p> <p>As the seller of tickets to the Games TOCOG will also enforce ticket terms and conditions to prevent ambush by intrusion and the use of tickets for promotional use.</p>
National Olympic and Paralympic Committees (eg the British Olympic Association, British Paralympic Association and the United States Olympic & Paralympic Committee)	<p>Each NOC and NPC will protect Olympic/Paralympic IP in their territory, including:</p> <ul style="list-style-type: none"> <li>• Team names e.g. “Team GB” and “ParalympicsGB”</li> <li>• Team logos e.g. the Team GB ‘lion’</li> <li>• Rights under national laws around the world which protect Olympic marks, for example in the UK, Olympic Symbol etc. (Protection) Act 1995 protects: <ul style="list-style-type: none"> <li>○ The Olympic and Paralympic symbols</li> <li>○ The Olympic and Paralympic mottos: “Citius, Altius, Fortius” ( and “Faster, Higher, Stronger”), and “Spirit in Motion”</li> <li>○ The words: “OLYMPIC” “OLYMPIAN” and “OLYMPIAD”, “PARALYMPIC”, “PARALYMPIAN” and “PARALYMPIAD”</li> <li>○ Similar words and symbols (eg “Olympix”)</li> </ul> </li> </ul>	<p>NOCs and NPCs sell sponsorship rights to their teams, and only in their territory, so that is where they focus their efforts against ambush marketing.</p> <p>A brand conducting an Olympic ambush campaign in the UK is likely to hear from the British Olympic Association.</p>
Olympians and Paralympians	<p>Current past Olympians and Paralympians may assert their ‘image rights’ to prevent ambushes that use them without permission. In the UK this will either be through the tort of passing off or by asserting any trade marks they may have registered, for example in their:</p> <ul style="list-style-type: none"> <li>• Name</li> <li>• Image</li> <li>• Logos</li> <li>• Name/nicknames</li> </ul>	<p>If a brand is an official sponsor of a current Olympian or Paralympian they also need to be aware that “Rule 40” of the Olympic Charter (and its Paralympic equivalent) place constraints on how an athlete can be used by personal sponsors (who are not also official Olympic/Paralympic sponsors) in advertising and marketing during the Games.</p>

### Olympic Symbol etc (Protection) Act 1995 (“OPSA”)

OPSA warrants special mention. This UK Act of Parliament prevents the unauthorised use in the course of any trade (i.e. use on any products or marketing materials of any business which does not have consent) of (1) the Olympic and Paralympic symbols and mottos, (2) the words: ‘Olympic’, ‘Paralympic’, ‘Olympian’, ‘Paralympian’, ‘Olympiad’, and ‘Paralympiad’ and (3) any similar words and/or symbols.

Acting in contravention of this law is a criminal offence and the British Olympic Association and British Paralympic Association are also granted rights which allow them to bring civil actions against infringement. However there are a limited number defences available. For example, where relevant factual statements are made which include the protected words there should not be infringement if this in accordance with honest commercial practices. Historic use which commenced prior to 1995 is also permitted (so Olympic Airlines and many “Olympian” restaurants around the country are protected).

### Rule 40 of the Olympic Charter

Brands which are sponsoring current Olympians in the lead up to and during Tokyo 2020 also need to be aware of “Rule 40”.

Rule 40 of the Olympic Charter places restrictions on athletes competing in the Olympic Games; they must not agree to appear in or support any advertising, including social media, during the “Games Period”. For Tokyo 2020 this runs from 14 July 2020 to 11 August 2020. Unless the activities have been authorised by either the IOC or the relevant NOC the athlete will be in breach of the rule which can result in sanctions including, at worst, disqualification from the Games; however we are not aware of that sanction ever being imposed in the past.

Rule 40 is controversial and has attracted a lot of attention over the last decade with many athletes calling for relaxation and/or abolishment of the restrictions. The IOC has taken steps to relax the rule a little, issuing its “key principles” on Rule 40 in 2019. However the IOC has allowed national Olympic committees to determine how exactly they will exercise Rule 40 and what authorisations they may grant to sponsors. As such the rules now vary from country to country, and are quite complex. We’ve written a lot about Rule 40 on our blog so check out <http://sportsinsights.lewissilkin.net> for more information.

Note that there is an equivalent to Rule 40 in respect of the Paralympic Games too.

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## Rule of thumb

If you are considering a campaign linked to Tokyo 2020, in addition to avoiding use of the marks and words listed in the table above, the key is to ensure that the advertising does not mislead people into thinking there is a connection between the brand advertised and the event/team etc. when there is not.

**A useful rule of thumb is that if you look at the advert and would expect to see an official Olympic/Tokyo 2020/Team GB sponsor logo at the end/in the corner of the advert because of the connection made to the event/team, it is likely to have crossed the line.**

**On the other hand, if there is only a minor allusion or nod to the event, the risk will be much lower. In the context of Tokyo 2020, this might be the use of a Japanese or nationalistic theme, something referencing competitions or athletic events. Use of one of these elements alone is unlikely to be problematic, as none of the rights holders can claim a monopoly over any such general element. However, if any of these elements are combined, for example, images of Olympic sports together with Japanese images/themes and/or iconic Olympic iconography such as a torch/flame, medal or podium, complaints, and potentially legal action, are more likely.**

Context is also likely to be key in determining whether a rights holder takes action; the timing and placement of a campaign can add to the suggestion of an association, and even the product and style of advertising will make a difference. If the product has no natural connection to sporting events, but this is used as a theme in a very gratuitous way, the assumption may be that the brand is associated with the event happening at the time. As such, a case-by-case review of the risk will be needed.

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## Top tips

As mentioned above, adverts will need to be considered in the round to decide whether they infringe, but here are our top tips.

Unless you’re an official sponsor and have your campaign approved by the IOC/IPC, TOCOG, NOC/NPC:

- Don’t use any official Olympic/Paralympic, Tokyo 2020 or national team/athlete logos, protected terms, designs, images or footage in your advertising.
- Avoid advertising which otherwise seeks to associate with or ambush Tokyo 2020 – see highlighted “rule of thumb” section above.
- Be cautious when using athlete or team imagery – in addition to permission from the copyright owner, ensure you have permission from the athlete/team and, if the athlete is competing in the Games, be aware that they may be prohibited from contributing to an ambush or other campaign by Rule 40.
- Don’t use tickets to any of the events in promotional activities, without first checking the terms and conditions of any tickets.
- Remember that social media is also a form of advertising - brief your digital teams/agencies. Use of event hashtags or emojis (especially repeatedly or systematically) or even regular re-posting of content related to Tokyo 2020 could be an infringement and result in legal action.

- If you're planning on advertising or undertaking PR or marketing in Japan during or in connection with the Olympic or Paralympic Games, ensure you seek advice from local lawyers with regard to the legality of your activities.

If you've decided to go ahead with a campaign which may be considered an ambush, make sure you consider whether you are prepared to take the legal/reputational risk. Think about the following factors which might impact your exposure and/or the likelihood of action being taken:

- The content of the ad
- The timing
- The nature of the product being promoted
- The scale of the campaign
- Your ability to pull adverts (if a complaint is made)
- Any actual or potential conflicts between the products/services you're promoting and those of any of the official sponsors (as the rights holder is likely to come under pressure from them to take action to prevent your campaign).

If you have any questions about this document, ambush marketing or sports marketing more generally please contact Alex Kelham:

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