

The FIFA World Cup 2022 – Ambush Marketing and the Law





The FIFA World Cup stimulates a frenzy of marketing activity – both official and unofficial. Qatar 2022 is unlikely to be any different.

The 2010 FIFA World Cup marked possibly the first time ambush marketing really made headlines in the UK. Bavaria beer's stunt at the Netherlands' first match of the tournament involved Dutch models dressed in orange seeking entry into a match disguised as Danish fans, only to reveal their promotional intent once the match began. This episode led to the South African authorities making arrests, as well as the sacking of the TV pundit Robbie Earle, who had apparently supplied the tickets to the girls: a media storm ensued.

The Brazil 2014 World Cup saw the rise of the 'social' ambush with numerous companies, including Spec Savers and Peperami, opportunistically posting jokes related to Luis Suarez biting the shoulder of Italian player Giorgio Chiellini. Meanwhile, Activia gave the world the most shared commercial through a clever, and no doubt expensive, ambush which culminated in a global-football themed video for Shakira's song La-La-La. It featured some of the world's highest profile players and encouraging public support for the World Food Programme's school meals initiative.

At the Russia 2018 World Cup some brands took a more edgy approach, with one campaign highlighting Russia's poor stance

on LGBT rights by donating £10k to an LGBT focused charity for every goal scored by Russia. Given the human rights issues that have been highlighted in Qatar, this sort of "political ambush" could be a trend that we see more of in 2022. We may also see more ambush of the teams, rather than the event. So, while this note focuses on the protections in place against ambush marketing of the event, remember that each team and their players will also have legal rights that can be asserted if a brand seeks to use their fame for advertising purposes without permission.

What is ambush marketing?

Ambush marketing is very difficult to define, with everyone having their own views as to whether an activity is below the belt or commercially acceptable in a competitive market. It is helpful to distinguish between three types of ambush. How these can be addressed legally will depend on a number of factors which we explore below.

Ambush by association

This occurs when the non-sponsor ambusher seeks to associate itself with the event (or a participating team or player) without authorisation and consequently misleads the public into thinking the ambusher is somehow connected with the event/team/player. The most blatant examples will involve direct references being made to the event/team/player, and may involve the use of protected trade marks. Big companies tend to be alert to such restrictions and will seek to avoid infringements by making less direct references.

A good example from the 2014 World Cup was Beats by Dre, a manufacturer of headphones, which ran a successful advertising campaign "THE GAME BEFORE THE GAME" featuring football stars promoting Beats. Players were banned from wearing headphones at the stadia during the World Cup, but FIFA could not prevent the adverts running globally as they made no express reference to the event.

In the case of the 2022 FIFA World Cup however, companies should be aware of the very wide scope of protection offered to FIFA and its official sponsors in Qatar under the special "2022 World Cup Law" which may prevent this type of activity in the host country (see further details below).

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. The World Cup has seen its fair share of ambush of this nature.

The incident involving the Bavaria girls appearing at the 2010 FIFA World Cup was the sequel to a classic example of ambush by intrusion by Bavaria at the 2006 FIFA World Cup. On that occasion they gave away bright orange lederhosen, heavily branded with the Bavaria logo, to The Netherlands' fans attending matches. The 2014 Bavaria campaign mentioned above was more subtle – the models' orange mini-dresses bore only the smallest of Bavaria logos but,



combined with an ad campaign in The Netherlands which featured the same dress, they achieved a similar exposure (which was of course then maximised due to the publicity achieved as a result of the arrests).

At the 2014 World Cup the Brazilian footballer Neymar took off his shirt and revealed Brazilian coloured boxers peeking above his shorts. Apparently these were a 'gift' sent by Blue Man, a well-known Rio de Janeiro swimwear brand, to all of the Brazilian team. The brand posted images of Neymar on social media which prompted FIFA to investigate possible disciplinary action against Neymar, however no action was taken on the basis that the 'reveal' was incidental rather than intentional, with the brand itself claiming they could never afford to pay Neymar for the publicity.

Opportunistic ambush/advertising

Whether or not 'opportunistic' advertising, which reacts and refers to topical events, can genuinely be referred to as ambush marketing is up for debate. This advertising is often done in a humorous or tongue-in-cheek manner.

Although undoubtedly taking advantage of the public interest in the event, it is less likely to be misleading about the brand's connection to the event. The Suarez biting scandal at Brazil World Cup 2014 is a classic example. Another example is Oreo which took this type of advertising to lightning-quick levels at the 2013 Super Bowl, where a power cut at the stadium prompted its marketing team to produce an advert featuring the image of an Oreo in dim lighting, accompanied by the line 'You can still dunk in the dark'. The advert went viral on Twitter before the lights had even come back on.

Zippo lighters were 'gifted' a similar opportunity when the flame expired during the Sochi 2014 Winter Olympic torch relay and was caught on camera being relit by one of their lighters. They used social media to capitalise on this.

Another tactic can be to poke fun at how vigorously an event protects its IP. This was seen at the London 2012 Olympics with Oddbins, the liquor store, running adverts bemoaning the fact that "We can't mention the event, We can't mention the city, We can't even mention the year. At least they can't stop us telling you about this:..." followed by details of one of their products. They also introduced a 30% discount for customers who wore or displayed a variety of non-London 2012 sponsor products when shopping in their off-licences.

Legal Controls

Advertising agencies are often at their most inspired when coming up with ambush marketing campaigns. As it is not always straightforward in this area, rights holders' lawyers also need to get fairly creative with the law. Below we consider each of the types of ambush mentioned above and look at the legal tools that are available to prevent them.

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, through use of the name of the event, the event logo or official mascots, posters or designs.

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.

Given the creativeness of ambush marketers, many countries hosting major events introduce special anti-association laws. Such laws are often demanded of bidding countries by the international rights holder (in the case of the 2022 World Cup, FIFA). 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 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 2012, 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.

Qatar has introduced similar special laws to tackle this issue, which are listed further below.

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. The ticket terms and conditions will also normally prevent the use of tickets for any commercial/marketing purposes without the permission of the event organiser. Remember that team and players participating in the event will also benefit from protection in various guises, so caution should also be exercised when referring or alluding to them.



Protection against ambush by association for the FIFA World Cup 2022

FIFA's official guidelines for the use of FIFA's Official Marks asserts that all of the following (in amongst others) are protected in relation to 2022 World Cup:

- Official event Emblems, Trophies, and the Mascot ("La'eeb")
- FIFA Logo,
- The words FIFA, FIFA World Cup, FIFA World Cup Qatar 2022, World Cup, QATAR 2022;
- The official event Typeface, and the motto ("Now is All")

FIFA does have extensive trade mark registrations and, putting aside the word-marks above, copyright or design right will also provide protection around the world. FIFA's protection for some of the word-marks such as "World Cup" (without the addition of FIFA, Football or 2022 etc) is more limited, at least outside of Qatar. Nevertheless, use of the words, marks and designs listed above without permission of FIFA, or without having taken specific legal advice, is likely to be risky.

While we are not Qatari lawyers we understand that laws in Qatar have been introduced to bolster its IP protection, and to prevent ambush by association and ambush by intrusion. In particular, Qatar's Law No. 10 of 2021 on Measures for Hosting the FIFA World Cup Qatar 2022 appears to provide sweeping measures to prevent ambush by association by clamping down on misleading advertising practices related to the event and prohibiting the use of tickets for promotional purposes.

Rule of thumb

If you are considering a campaign linked to the World Cup in the UK, in

addition to avoiding use of the marks and words listed 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 almost expect to see an official 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 the 2022 World Cup in Qatar, this might be the use of a football theme, something that references Qatar or a nationalistic theme (but bear in mind that the elements used in the 'official' World Cup design works are protected). Use of one of these elements alone is unlikely to be problematic, as FIFA cannot claim a monopoly over any such element. However, if any of these elements are combined, for example, a Qatari theme which also features a well-known ex-footballer, a complaint is much more likely.

Context is also likely to be key: the timing and placement 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 football, and a football theme is introduced in a very gratuitous way, the assumption may be that the brand is associated with the 2022 World Cup. As such, a case-by-case review will be needed.

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 and even volunteers do not use their moment in front of the cameras to promote an unauthorised brand.

Major events will often back up these contractual controls with special laws preventing unauthorised advertising (and often also street trading) in and around stadia. Special laws introduced for the World Cup 2014 in Brazil, and in the UK for the London 2012 Olympic and Paralympic Games. Similar provisions have been introduced under Qatar's Law No. 10 of 2021 such that any advertising or trading situated within a two-kilometre radius of a stadium (or in the airspace above it) on a match day and the day preceding the match must have the prior approval of FIFA.

If you're proposing any activity in Qatar, we'd recommend taking local law advice before implementing any advertising in the run up to, or during, the World Cup.

Opportunistic ambush/advertising

How this is addressed will depend on the execution. Opportunistic ambushes have historically been more difficult for rights holders to tackle. Implied references to the team/event in advertising 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 tactics

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 for any reason, the threat of withdrawing accreditation may well be the most effective tool available.

Top tips

As mentioned above, adverts will need to be considered in the round to decide whether they infringe, consider content, timing, placement plans, the nature of the product and of course the laws which apply in the relevant territory. Use of a football or a Qatari/English nationalistic theme on its own is likely to be low risk, but the more elements that are combined, the more likely action will be taken. The scale of the campaign and size of the brand/business behind the campaign is also likely to be a factor in determining how high up FIFA's to do list the advert will be.

Unless you're working on an official 2022 FIFA World Cup Qatar sponsor campaign:

- ▶ Don't use any official Qatar 2022 or national team logos, protected terms, designs, images or footage from the event in your advertising
 - ▶ Avoid advertising which otherwise seeks to associate with or ambush the World Cup – see highlighted "rule of thumb" section above
 - ▶ Be cautious when using player or team imagery – in addition to permission from the copyright owner, ensure you have permission from the player/team and, if the player/team is competing in the World Cup, be aware that they may be prohibited from contributing to an ambush campaign
 - ▶ Don't use the World Cup tickets in promotional activities
 - ▶ 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 the World Cup or a national team could present a scenario in which FIFA or the national team would look to take action
 - ▶ If you're planning on advertising in Qatar during or in connection with the World Cup, ensure you don't infringe the local "FIFA" laws either by associating directly or indirectly with the event or by advertising within 2km of stadia without authorisation, and take local legal advice!
- If you're working on a campaign for an official World Cup or national team sponsor:
- ▶ Check the extent of the rights and make sure you're operating within them. In particular, sponsors of the national teams are likely only to have rights to the team and not the event more generally, so they won't have rights to use the World Cup logos (as opposed to the relevant team logos)
 - ▶ Ensure you've gone through the appropriate approval process with the relevant rights holder (either FIFA or the relevant national team), and remember that approvals are likely to be required for all social media activations too
 - ▶ If you're using players or other celebrities, make sure you have their permission

- ▶ If undertaking any advertising in Qatar during the World Cup ensure you've got the necessary authorisations required if you're advertising within 2km of stadia

Pre-employment health questions

The Equality Act contains some restrictions on employers asking pre-employment health questions. The basic rule is that employers must not ask about the health of job applicants before offering work. There are a few limited exceptions to this – including where questions are asked to assess whether an employee is able to carry out a function intrinsic to the job, for diversity monitoring, and to establish if the employee is able to comply with a requirement to attend an interview or requires adjustments to do so.

Although an employer does not automatically discriminate merely by asking about health, its conduct in relying on information received (e.g. turning down an application for a job) may be unlawful discrimination. The fact that the employer has asked the question would switch the burden of proof in a discrimination claim, meaning it would be for the employer to show that it did not discriminate. In addition, the Equality and Human Rights Commission has power to investigate and take enforcement action.

It is still permissible for job offers to be made subject to satisfactory health checks.



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