

Ambush Marketing



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Introduction

With businesses at times paying many millions to associate themselves with an event it is not surprising that their competitors engage in 'ambush marketing'.

What is Ambush Marketing?

Ambush marketing is an attempt by an unauthorised party, through deliberate marketing activity, to take advantage of the high media profile of an event, team or individual at the expense of another company's (usually a rival's) official association with them, without paying any licence or sponsorship fees.

The International Olympic Committee ("IOC") has defined ambush marketing of the Olympic Games as "all intentional and unintentional attempts to create a false or unauthorised commercial association with the Olympic Movement or the Olympic Games".

Ambush marketing is clearly a very effective marketing tool for brand owners as it attracts consumers at the expense of competitors and at little cost to the brand owner. However, it also has damaging effects, not only for those ambushed competitors, but also for the integrity of the event, team or individual concerned and their potential to attract future sponsors.

Examples of Ambush Marketing

At the 1984 Olympics in Los Angeles, Kodak sponsored TV broadcasts of the Games, as well as the US track team, despite Fuji being an official sponsor of the Games themselves.

Visa was an official partner to the 1994 Lillehammer Winter Olympics. American Express released TV commercials featuring the strap line; "if you are travelling to Norway this winter, you will need a passport but you don't need a visa".

At the 1996 Atlanta Olympics, Nike (not an official sponsor) handed out Nike flags for fans to wave at cameras. Nike also bought up all the outdoor poster sites in Atlanta and set up its own Nike village next to the official Olympic sponsor's village.

How does UK law currently protect against Ambush Marketing?

There is currently no specific legislation in the UK, which outlaws ambush marketing per se (although specific legislation has been brought into force to prevent unauthorised commercial association with the Olympic Games in general

and also the 2012 Olympic Games in particular). Up to now, where event organisers and their official sponsors have felt aggrieved by the ambushing of events by third parties, they have generally sought redress through the more traditional forms of intellectual property protection, such as passing off, trade mark infringement or copyright infringement.

Passing Off

In order to ground an action in passing off, broadly, the event organiser would need to show all of the following:

- it has established a reputation or goodwill in the event in question;
- the third party has made a misrepresentation which has led to confusion in the minds of the public as to whether there is a connection with the event organiser; and
- the event organiser has suffered or is likely to suffer damage.

Registered Trade Marks

Where the event organiser has a registered trade mark for the name of the event itself (eg, World Cup, London 2012, etc) or logos, mascots, expressions, etc associated with it, and that trade mark or a similar mark has been used by a third party in its advertising, the event organiser may be able to bring action against the third party for trade mark infringement.

Copyright

The event organiser may have created a logo to represent the event. If this logo is sufficiently original to attract copyright, reproduction of the logo by an ambush marketer may also constitute copyright infringement.

Advertising Codes and CPRs

Event organisers may also have recourse to the advertising self-regulatory regime, the CAP and BCAP Codes to combat ambush marketing. These Codes require (among other things) that all adverts are honest and truthful and that they should not be misleading.

Ambush marketers may also fall foul of the Consumer Protection from Misleading Marketing



Regulations 2008 (the 'CPRs') if they constitute an "unfair commercial practice", due to them being misleading.

Recourse to the Codes and the 2008 Regulations will be of limited value to brand owners wishing to take action themselves as both involve making complaints to the Advertising Standards Authority/ Trading Standards for them to investigate themselves. However, some other jurisdictions in the EU (eg, Ireland, Germany, etc) provide for a direct right of action for breach of their equivalent versions of the 2008 Regulations and so event organisers should bear this in mind when faced with an ambush campaign which spans more than just the UK.

Olympic Games

The Olympic Games present a number of legal pitfalls for the uninformed promoter. The Olympic Games symbol is one of the most protected logos in the world and has been registered as a Community trade mark in every category of goods and services. In addition, the Olympic five ring symbol and the Paralympic symbol, the Olympic and Paralympic mottos and the words "Olympic", "Olympia", "Olympiad", "Paralympic", "Paralympia" and "Paralympiad" are given special protection under the Olympic Symbol (Protection) Act 1995 (the "1995 Act") as amended by the London Olympic Games and Paralympic Games Act 2006 (the "2006 Act").

The 2006 Act extends the scope of the 1995 Act to prevent any unauthorised use in the course of trade of any representation in a manner likely to create an association between goods/services and the London Olympics. Use of the words "games", "two thousand and twelve", "2012", "twenty twelve", "gold", "silver", "bronze", "London", "medal", "sponsor" and "summer" may be taken in account by the Court when considering whether there has been any infringement.

The 1995 and 2006 Acts provide for a number of defences including:

- honestly made statements;
- registered trade mark/design or other unregistered private rights;
- use of a person's or business' own name or address;

- use indicating the kind, quality, quantity, intended purpose, value or other characteristics of goods or services;
- editorial/journalistic use;
- incidental inclusion;
- exhaustion of rights;
- continuous use;
- no association suggested.

Steps to Counter Ambush Marketing

There are a range of practical steps which event organisers and sponsors may take in order to help prevent ambush marketing occurring including the following:

- In order to prevent ambush marketing occurring in and around the sports stadia themselves, event organisers may want to consider negotiating contractual terms obliging stadia owners to take a proactive approach to preventing ambush marketing, by fully controlling advertising in the vicinity. Organisers could, for example, oblige owners to hand over stadia as clean sites (meaning that they would have to be cleared of all advertising by all unofficial sponsors), to rename the stadia for the duration of the event or to control access to the stadia grounds, including the air space above.
- Event organisers could also buy up all of the billboard and other advertising space in the vicinity of the event and then resell only to official sponsors. Indeed, sponsors may wish to contractually oblige event organisers to do this.
- Event organisers may impose obligations on media organisations to restrict advertising and promotion during broadcasts or webcasts to official sponsors. The restrictions could be extended to cover the period immediately prior to or after the sponsored event.
- Event organisers should put in place effective licensing arrangements. Sponsors should ensure that event organisers not only own and have made effective licensing arrangements for the relevant intellectual property rights,

but that they are contractually bound to take action against ambush marketers within a set period of time after such activity is brought to their attention.

- Event organisers and sponsors should take steps to minimise the effect of online ambush marketing, which could be carried out through activities such as the use of similar website names or unauthorised linking or framing to the official website or to the sponsor's website.
- Event organisers and sponsors may want to consider mounting official sponsor awareness campaigns so that the public know which sponsors are official. Indeed, sponsors may seek to contractually oblige event organisers to run such campaigns and ensure that they are prominently identified as the only official sponsors in all literature and advertising surrounding the event.
- Sporting bodies are increasingly cracking down on the running of unofficial promotions which offer tickets to sporting events as prizes in competitions. For example, only official sponsors and partners of the World Cup are permitted to run competitions or promotions in relation to tickets for the World Cup. The same is true for the Olympics.

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