

Ambush Marketing: The Olympics, Euro 2004 and the Limits of the Law

Date of publication: July 2004

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This summer, huge sums are being invested in blue riband sporting events such as the Olympic Games and UEFA's European Championships by companies keen to benefit from official association with such events. For the organisers of those events it will be a constant source of irritation that those who aren't official licensees, suppliers or sponsors are able still to lawfully take commercial advantage of the "buzz" around such events.

During last year's Cricket World Cup, Johannesburg businessman Arthur Williamson was evicted from South Africa's Centurion Ground during a game between Australia and India. He had refused to hand over the Coke cans he had brought to the ground to stadium officials attempting to protect the interests of the tournament's official sponsors, who included Pepsi. Mr Williamson's eviction is just one (albeit fairly extreme) example of the lengths event organisers can go to in order to try and protect the rights of official sponsors and licensees.

When put in the context of the amounts of money paid to event organisers for the rights of official association, such measures may perhaps seem less surprising. The world's biggest sporting event, the Olympic Games, will take place in Athens in August. Alpha Bank, a so-called "Grand National" sponsor of the Games, is paying the princely sum of EUR 70 million for the status of "Official Bank of the Athens 2004 Olympic Games". UEFA, organisers of this summer's other blockbusting sporting event, Euro 2004, expect an income from the tournament in the region of EUR 700 million.

With the very biggest events – such as the football, cricket and rugby World Cups, the Olympics and the Euro football championship – event organisers sometimes receive government assistance in the form of legislation to protect the rights of their sponsors. "Ambush marketing" laws enacted in South Africa ahead of the Cricket World Cup meant that marketing tactics such as referring to an event without implying any official sponsorship or using airships emblazoned with advertising in the environs of tournament stadia could be illegal. The Portuguese government has ensured that similar laws were put in place ahead of Euro 2004.

Event organisers will also take whatever steps they can to protect their rights. For example, ahead of the next football World Cup in Germany in 2006, organisers FIFA have already applied for and

obtained trade mark registrations for "WORLD CUP 2006", "WORLD CUP GERMANY", "WORLD CUP 2006 GERMANY" and even "GERMANY 2006". Mascots such as UEFA's Kinas (the Euro 2004 mascot) and official event emblems and catchphrases may also be protected by trade mark and copyright laws. Both the IOC and UEFA have standing instructions to in-house and external lawyers and specialist Internet rights monitoring and infringement tracking companies to take action against companies and individuals who are perceived to be infringing commercial and intellectual property rights to the tournament. Such action usually takes the form of "cease and desist" letters and, if the terms of the accompanying undertakings are not complied with, legal proceedings in appropriate cases. The budgets required for such international anti-infringement programmes can be very significant, running into many hundreds of thousands of Euros. Leading event rights holders, however, continue to see them as worthwhile investments to protect the interests of their commercial partners – and the value of the rights packages they purchase – without which the events could not continue.

While suppliers of officially licensed products and services will welcome moves by governments and event organisers to protect their investments, sports governing bodies will nonetheless be concerned that their ability to control all potential types of ambush marketing is generally limited to those which fairly clearly infringe a recognised legal right (whether this is contractual or based upon intellectual property).

This area of the law is a tricky one with trade mark, passing off, copyright, unfair competition laws and specific ambush marketing legislation all having a possible bearing on the activities of licensees and other merchandisers or suppliers. Laws and regulations will also vary from territory to territory, serving only to complicate matters.

It is, for example, perfectly possible for unofficial merchandisers and suppliers to take advantage of the "buzz" around a particular sporting occasion, without stepping on the toes of the organisers or those who have paid to be associated with it. A good example in the UK is Carling's recent "Love Football" TV advertisements showing football fans engaging in a spontaneous street kickabout. While the advert has clearly been timed to hit our screens directly ahead of the Euro 2004 championship, it carefully avoids suggesting any sort of official association with the tournament.

Whilst there are no hard and fast rules for defining exactly when an activity will infringe an event owner's legal rights, sports rights owners should be advised that their ability to effectively police rights is limited in law and certain common ambush marketing activities, however much they may irritate those on the "official" side of the fence, are quite lawful. Brands, hospitality suppliers and other traders are often well-advised of the extent of sports right-holders legal monopolies and adhere to practices which, though they may sail close to the wind do not cross the line into unlawful activity. Classic tactics by unofficial merchants and ambushers include:

1. Avoiding using a direct reference to the event itself. Use of phrases which one might have thought are public property such as "Euro 2004", "Cricket World Cup" and so on, may infringe

the trade mark rights of the event organisers. Instead merchants will use phrases such “Portugal 2004” or “Euro Champs” which are not registered as trade marks.

2. Ensuring that merchandise and promotional materials do not use any artwork that is identical or confusingly similar to any of the official event logos, mascots or catchphrases. Often these items or accompanying promotional materials will include a disclaimer, “e.g. 100% Unofficial – this is not an official product of the XXXX Championships”. Such disclaimers are designed to support arguments that there can be no likelihood of confusion that the products being offered for sale are official.
3. Using participants in events to endorse unofficial products and services. Rights holders can attempt to circumvent this to a degree by imposing restrictions on participants’ ability to do so in the terms and conditions of a participation contract. However this is often a major area of controversy.
4. Using celebratory messages in advertising such as, “[BRAND] wishes the England team the best of luck in Portugal this summer”.

The question that arises therefore for sports rights holders is how to stop this sort of activity, if indeed such a thing is possible.

Practical and legal solutions for Sports Rights Holders

The legal remedies available to sports bodies to protect their events, commercial programmes and sponsors vary from one territory to another, but will largely be governed by the following factors:

- (a) the extent to which emblems/logos/mascots, photographs, film, TV material, data/statistics/results, images of participants and other material capable of intellectual property protection is protected in law and controlled by the sports body itself;
- (b) the availability of alternative legal measures, other than trade mark/copyright law, to deal with instances of unfair competition, misleading advertising, false trade descriptions, street vending and appropriation of goodwill; and
- (c) the ability of the governing body/event owner to control contractually or otherwise the activities of those participating in the event, including the sportsmen and women, their associations/federations, the media including TV, radio, internet, press and photographers, spectators and the venue, surrounding areas and airspace.

Dealing with (a) first, most emblems and logos will be capable of copyright protection under English, US, and most other nation's laws as original artistic works. Civil and/or criminal proceedings for infringement of copyright can generally be brought in most relevant territories by the copyright owner

where the emblem or logo has been substantially reproduced on any item for commercial gain. Similarly, and usually more expediently, proceedings for trade mark infringement can be instituted where part or the whole of the logo has been applied without authority to goods in territories for which the sports body has a valid trade mark registration.

In both cases, however, there may be less protection available if there has simply been an unauthorised commercial use of the event title or words associated with the event, e.g. "Soccer World Cup" as such titles/words are not usually protected by copyright and will often be difficult to register as trade marks on the basis that they are insufficiently distinctive. Increasingly, however, governments of nations seeking to host major sporting events, are enacting specific legislation giving increased protection to the logos and key descriptive words relating to these events, including Olympic symbol protection legislation. Such acts can only be properly interpreted as creating rights for the protection of event titles.

Where trade mark or copyright law is of no real assistance, alternative legal measures mentioned in (b) above must be examined and employed. "Passing off" and/or unfair competition laws in the UK, most Commonwealth countries and the US, can protect against situations where the goodwill of a sports event is appropriated or damaged by the misrepresentation of a third party. Similarly most civil law states have general unfair competition provisions.

While these are generally much more complex and onerous procedures than pursuing trade mark or copyright infringements, to claim or imply without authority that one's product or service is officially associated with a sports event, whether or not the official emblems or mascots are used, can amount to a misrepresentation damaging the goodwill in a sports event commercial programme, giving rise to a claim under passing off or unfair competition.

A variety of other legal and practical measures may be available including actions for defamation, injurious falsehood, unjust enrichment and conspiracy to defraud and complaints to the relevant advertising and broadcasting regulators. Local laws on street vending, ticket-touting, advertising hoardings or aerial advertising should also be examined.

Factor (c), raised at the beginning of this section, i.e. the contractual control of commercial rights relating to sporting events is arguably the most important weapon in the fight against ambush marketing.

If, for example, a sports event organiser enters agreements with participating bodies (a "participation agreement") who in turn exert some form of contractual control over their individual members, perhaps in the form of eligibility requirements, it should in theory be possible to prevent their participation or acquiescence in promotional activity in conflict with the commercial programme of the event itself (this however requires careful and proportionate handling as it is often a major source of public controversy in the run-up to an event).

Other contractual controls which may help stop ambush marketing include control of accreditation for photographers, and access to the venue generally for any commercial purposes which may conflict with existing categories of licence. These are dealt with in greater detail in the next section but it is important to stress here that their effectiveness is contingent upon the ability to control access to a private geographical area.

Only by taking practical and legal preventative measures beforehand can a sports body feel confident that it will be able to deliver the necessary degree of exclusivity to its sponsors. For this reason, it is imperative that a long term strategy is developed and tailored to suit the requirements and budgets of each sport, incorporating realistic and achievable objectives.

Developing legal strategies

In designing an anti-ambush strategy four essential areas must be covered:

- (a) control of the intellectual property;
- (b) control of the event environment;
- (c) control of the event 'partners';
- (d) setting the monitoring and enforcement policy.

(a) Property : protect event mascots and logos via trade mark registrations

Ideally, logos and titles should be protected by specifically enacted legislation, such as the various Olympic insignia protection acts. As described above heavyweight event owners may be able to secure promises to enact such legislation from governments seeking to benefit from hosting a major sporting event.

An original logo or device will often attract copyright protection as an artistic work. Claims to copyright ownership, however, can be subject to challenge, for example as to a work's originality or ownership by third parties, which can have perilous results. Further, copyright does not usually protect names or slogans. For these reasons it can be difficult to protect an international licensing programme by copyright alone.

As mentioned above, a domestic or international trade mark programme can be an effective tool against the more direct forms of ambush marketing as it provides a relatively straightforward mechanism to prevent misuse of logos. In order to avoid pirates from claiming rights, defensive registrations should be considered in relevant territories/categories.

Other considerations shaping the nature and extent of any international trade mark registration programme will include the life expectancy of a mark, the time required to effect registration and the identification of the important markets, product categories and potential licensees.

To maintain proprietorship, the marks once adopted should be continuously used in accordance with terms set out in a brand manual. These procedures should include the use of the trade mark and copyright notices and indications of the relevant official status e.g. "Officially Licensed Product" whenever appropriate.

For longer term marks, the registrations will need to be maintained and updated periodically to take account of new categories of licensing opportunity as and when they are developed.

(b) Environment: control the venues and locality

An essential point for inclusion in any successful strategy is that the event owner must be guaranteed delivery of a completely "clean" venue. The definition of "venue" is one which is continually changing and should not be thought of as simply, for example, a single stadium. The IOC's definition of venue is now a "clean" City and it is essential that local authorities are brought "within the fold" of any sponsor protection programme.

The stadia themselves and any other "field of play" should be free of signage, advertising, promotions and concessions either on the field of play, the perimeters, stands, public areas, bars and eating areas or elsewhere, including the airspace above and, if possible, any mobile or static objects/buildings visible from within the venue by spectators or TV cameras. Terms of admission should be carefully drafted and printed on all tickets and accreditation passes, reserving the right to refuse admission or to eject offenders. Terms of accreditation are particularly important in controlling ambush activity and rights infringements via interactive media.

Also for a truly "clean" venue, the extent of control should be maximised geographically so that ambush activity outside the stadium itself can be dealt with. It must be stressed that for certain types of events, for example marathons and yacht races this can be difficult to achieve. Announcements over public address systems, and local radio and television stations regarding pirate products, may assist in informing and directing people to the licensed merchandise concessionaires. Local radio and television stations as well as news agencies should be informed by pro-active correspondence of the details of any sponsor protection programmes in place and the need for their acquiescence in these programmes. Local trading standards, police and customs officers should be briefed to prevent unauthorised goods from entering the event environment.

(c) Partners: control the participants, sponsors and media

The entire network of participants in an event needs briefing as to the anti-ambush programme and, to the extent practical, be contractually bound to adhere to it. We have already mentioned the news media and local authorities - the other participants who need to be involved in this process may include:

Licensed Broadcasters

Broadcasters should be bound to support the commercial programme and, for instance, give official sponsors first rights to purchase broadcast advertising and sponsorship slots. Further there should be strict prohibitions on broadcasters adding “virtual advertisements” by using computer-generated image manipulation techniques to alter the “clean” feed. As a strategic measure, a sports body should, to the extent practical, seek to retain rights in photographs, films, TV material and data relating to events in order to develop and control an archive of material for licensing purposes.

Sponsors/suppliers/ merchandisers

Official licensees within a sports commercial programme should be prevented from, themselves, purposefully or inadvertently acquiescing or assisting in non-licensees' marketing activities by, for example, providing official merchandise to ambushers for distribution as prizes in competitions, participating in joint promotions which give credence to an ambusher's attempts to imply official association with an event or allowing misleading advertising by ambushers in official publications and using legitimate rights to market products or services not included in the contractual brand category.

Preventative contractual provisions should therefore be placed in all licence agreements including, where appropriate, and taking into account relevant competition law issues:

- restrictions on distribution of licensed merchandise as premiums;
- rights of prior approval over all licensees' promotional material;
- prohibitions on joint promotion of any kind connected with the event (save with other licensees);
- prohibitions against sub-licensing, sharing or assignment of licensed rights;
- rights of first refusal for sponsors/suppliers to advertise in official publications;
- prohibition on licensees advertising in pirate event publications as designated by the licensor;
- requirement for licensees to use official corporate hospitality facilities only;
- re-prohibition on licensees selling or distributing ticket allocations other than to employees and bona fide guests of licensees.

Sports federations, teams, clubs, individuals

Quite clearly, the endorsement by individual athletes and teams of particular products is an entirely legitimate activity. However, when such sponsorships or endorsements conflict with the 'global' marketing programme of an event, problems can arise. Avoiding this conflict will depend upon the relative bargaining positions of the parties and the constitutional and financial structure of the event. However, event owners should always seek to enter some form of contractual arrangement by way of a participation agreement. Ideally, it will contain reasonable restrictions on the commercial activities of the participants where they are in conflict with the commercial programme of the event. Clearly this involves a fine balancing act, and involves:

- restrictions on participants wearing certain branded clothing/footwear;

- restrictions on reselling or transferring tickets;
- prohibitions on allowing names, images or likenesses to be used for advertising relating to or using imagery associated with the event without the event owner's consent;
- obligations on participants to use specific products and services of official sponsors/suppliers, where relevant; and
- requiring attendance at workshops to manage and co-ordinate the anti-ambush programme.

(d) Setting the monitoring and enforcement policy

A well-run anti-infringement programme will need to consider engaging the following elements (among others) to help monitor for infringements and enforce rights:

- Engaging the services of a specialist rights compliance and Internet monitoring company. There a number of such outfits who employ sophisticated tracking technologies and databases to identify infringements, log evidence, assign actions for dealing with infringements and manage cases.
- Issue standing instructions to teams of external lawyers in key territories to take action against certain infringers.
- Engage the services of local authorities, police officers and trading standards officers to help keep pirate merchants and ticket touts off the streets.
- Briefing sponsors and other commercial partners of their obligations to report infringements and support infringement actions.

A Positive PR and Media Strategy

Major event owners should insist on support from the whole network of organisations and businesses, which have some form of involvement with the event, to assist in identifying and dealing with ambush marketing, and to educate the public at large as to the problem.

This “network” will include the “commercial partners” as well as bodies that one might not automatically identify as being directly involved - such as advertising agencies, media buyers, the press, important retail outlets, local government and trading standards departments.

It is an extremely useful exercise to alert the whole range of participants in this network to the issue of ambush marketing, to the fact that the event organiser has a defined and active strategy to deal with it, and to the relevant participants' role in supporting this strategy.

One word of warning in regard to the publicising of ambush activity - the event owner and its agents must be aware of the laws relating to trade libel, injurious falsehood and interference with contracts when citing individual cases to the press or indeed any third party, including contractors e.g. suppliers or distributors of ambush products, to avoid risking liability for the resulting loss to ambushers.

An event owner has to be very sure of its legal position before it publicly attacks individual ambushers for example through press conferences or the publication of “blacklists”.

Conclusions

The general trend is that organisers, sponsors and official licensees are becoming more and more protective of their rights. As we have seen, in some cases they are also receiving government assistance in the form of new legislation. However, there remain limits to the extent of the control that rights holders can exert and merchandisers and suppliers who are well advised will always exploit the gaps in the armoury of rights and measures available to rights holders.

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