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## Is ambush marketing dead?

### The rising power of major events holders and an analysis of present laws, and regulations protecting modern day sponsors

By Marina Palomba, Partner, Reed Smith

Does a rugby post and the words “support English rugby” imply that Fullers was an official sponsor of the English rugby team? The Advertising Standards Agency thought not and did not uphold a complaint by The Rugby Football Union<sup>1</sup>. However the situation in the UK and across the world is such that almost any association with a major event by non sponsors is bound to breach one law or regulation or another.

The simple truth is governments across the world want to attract major sporting events to their countries and they will bend to almost any demand by the event holders for new and more restrictive legislation to stop activities known as ‘ambush marketing’. While brand owners, who often pay vast sums for the privilege of being official sponsors, of course need protection from ambush marketing, there is an argument that the present state of affairs has gone too far. With the upcoming **World Cup and the 2012 Olympics** the topic of ambush marketing and sponsorship is of interest to many and brands need to be careful, whether official sponsors or not. Even the Australian Olympic team was ordered by the IOC, (The International Olympic Committee), to tear down a large Boxing Kangaroo flag at the Winter Olympics athletes’ village in Vancouver, which allegedly breached the IOC rules, demonstrating just how zealous the IOC can be.<sup>2</sup>

Joe Thomas, in an article for Marketing Magazine, also recently highlighted the dangers of ambush marketing and opportunities for brands during the World Cup<sup>3</sup> while adding his wise words of warning that looking second rate is another risk, particularly for smaller FMCG brands with no developed connection with the event.

### What is ambush marketing and where can you draw the line between this and genuine guerilla tactics?

Ambush marketing is an attempt by a brand owner to associate itself either directly or indirectly with an event, or celebrity, or team, without their sanction, without paying usual licensing fees or sponsorship money and thereby also potentially depriving the official sponsors of commercial value derived from their official sponsor designation.<sup>4</sup>

Guerrilla marketing<sup>5</sup> and tactical marketing are legitimate forms of advertising and sales promotions that maybe unconventional and which are intended to get maximum results from minimal resources. Some would argue they are a means for smaller businesses to compete against the large multi national companies who are able to afford official sponsorship status of major events.

The difficulty is deciding where such activity crosses the line and becomes ambush marketing likely to infringe the various laws and regulations now protecting nearly all major event holders and their sponsors. In New Zealand, in an attempt to lure major events to the country, the government introduced The Major Events Management Act (MEMA) in 2007 to provide protection for organisers and sponsors of any major international events being held in New Zealand. Its aim is to prevent ambush marketing by both protecting the use of key event emblems and words, and providing ‘clean zones’ around stadia where unauthorised advertising is prohibited.

It is inevitably necessary therefore to consider some imminent specific events and the protective legislation those events have, as well as existing laws of copyright, trade mark and passing off or equivalent actions around the world.

1. ASA Adjudication 1 July 2009  
 2. Rule 32 Olympic Charter  
 3. “Avoiding the Red Card” Joe Thomas, Marketing Magazine 28th April 2010  
 4. Similar definitions: D Shani and S Sandler: *Ambush marketing: Is confusion to blame for the flickering of the flame?* T Meenaghan: *Ambush marketing: Corporate strategy and consumer reaction*; McKelvey/Grady *Ambush Marketing: The Legal Battleground for Sport Marketers*.  
 5. *Guerrilla Marketing: Secrets for Making Big Profits from Your Small Business* Jay Conrad Levinson

**FIFA<sup>6</sup> World Cup – South Africa 2010**

It's difficult to overstate the boundless protection South Africa and FIFA have introduced to protect official sponsors of the World Cup. The championship is the largest single sporting event in the world, a football extravaganza estimated to be watched by 36 million people world wide and worth \$32 million of sponsorship sales, from second tier sponsors not including official partners. The total marketing revenue raised for the 2010 World Cup was alleged to have reached £1.6 billion two years before the event, easily exceeding any amount previously obtained. After the 2006 World Cup in Germany the German Football Association and League shared a net profit of Euro 56.6 million.<sup>7</sup>

A top sponsor needs to spend \$100 million each in sponsorship and matched advertising, arguably leaving out in the cold any normal or national business. It is though therefore understandable that a dim view is taken of any company exploiting the event without contributing.

South Africa's government has committed over \$1.7 billion to cup-related infrastructure projects and over \$100 million to tourism-related investments, along with \$60 million toward security. Some estimate the World Cup will generate close to \$1.3 billion in direct spending and 160,000 new jobs.

In the 2006 FIFA World Cup there were reports of 3300 rights infringement spread across 84 countries. There is expectation that 2010 will be a record year despite the tightening of laws and regulations. Nike is expected to try and upstage adidas, which is one of the official sponsors for the World Cup.

Perhaps one of the most famous ambush marketing took place during the 2006 World Cup, when Dutch brewery Bavaria supplied orange lederhosen to fans before the match in support of the Dutch team. FIFA took the view that this was unauthorised promotional activity and could confuse consumers into thinking that the brand was an official sponsor (in fact, Budweiser was). It asked the fans to remove their lederhosen before entering the stadium. The sight of over 1,000 Dutch fans cheering their team to victory in their underwear ultimately generated more press inches and television coverage than Bavaria could ever have hoped for.

Stringent regulations are in place in South Africa surrounding the sponsorship of the World Cup but legislation in other countries is not so extreme. FIFA has for a long time wished for an "association right" similar to that granted by the UK government to the Olympics, Paralympics and Commonwealth Games (see below) but it has no such right in the UK or indeed most of the rest of the world. The FIFA Marketing Guide<sup>8</sup> attempts to dissuade would be marketers from associating themselves with the World Cup but one brand undaunted by FIFA restrictions is Nike. During the last World Cup in Germany, Nike launched a global campaign titled "Joga Bonito" (play beautifully) and made no direct links with the World Cup but still generated a huge amount of media coverage. The brand will be directing its marketing efforts to the South African townships to encourage player skills during this year's event. Nike state that its campaigns may be relevant to football but that it is not piggybacking on the World Cup.

Carlsberg is not an official sponsor but is another brand planning to launch an integrated multi media campaign using football imagery. Any brand seeking to associate itself with the event though ought to take extreme care<sup>9</sup> or it may well fall foul of national laws, copyright, trade mark laws, and pursuant to the UK law of passing off. South African airline Kulula has been ordered to pull its advertisement as the "unofficial national carrier of the you know what".<sup>10</sup> That is not to say linking your brand to the World Cup can not be achieved if care is taken, and even FIFA has acknowledged that it has no "association" right in the UK, unlike the Olympics, Paralympics and Commonwealth Games in 2014.

There is also a huge opportunity for brands to hold events unconnected with football for consumers who have no interest in the event, especially those aimed at the female focused products and services. What such advertisers and marketers must however avoid is any reference to the World Cup in such a way that infringes any FIFA rights.

**Olympic and Paralympic Games 2012**

With the Vancouver Winter Olympics over, all eyes are turning to the London Olympics which will be held in the summer of 2012. Businesses will undoubtedly be keen to become involved in the surge in excitement surrounding this great event, but there are several serious difficulties which advertisers, brand owners, advertising agencies and PR companies, big and small, face if they wish to run a campaign or undertake any event in any way tied into the Olympics. This

6. Fédération Internationale de Football Association

7. "HM Treasury - Hosting the World Cup: A Feasibility Study". February, 2007. [http://www.hm-treasury.gov.uk/d/world\\_cup\\_feasibility.pdf](http://www.hm-treasury.gov.uk/d/world_cup_feasibility.pdf)

8. FIFA Guide to marketers and World Cup 2010 [http://www.fifa.com/mm/53/42/06/2010\\_fifa\\_public\\_guidelines\\_en\\_260908.pdf](http://www.fifa.com/mm/53/42/06/2010_fifa_public_guidelines_en_260908.pdf)

9. See Reed Smith Ad Guide to FIFA World Cup Marketing

10.FIFA March 2010 relied on a breach of SA law on unauthorized association with the event.

is so, despite the fact that the organisers are loudly calling for businesses to help generate that excitement and to sponsor individual teams and athletes.

The Olympics, after all, is big business, with £790m of the IOC's £2.25bn marketing revenue from the last four years coming from corporate sponsorship. The London Organising Committee of the Olympic Games, LOCOG, needed approximately £500 million of its operating budget to come from sponsorship at national level.

The Olympic and Paralympic Games also has a clean venue policy which means even official sponsors have limited rights. Sponsors have primary rights to advertise during commercial television breaks and on prime sites, over which LOCOG has pre-option rights, around the main areas. Non-sponsor street vending and advertising around the Olympic sites is not permitted. Given the Olympic Games will be broadcast on the BBC, broadcast advertising is also limited.

So all this investment and all these restrictions mean official sponsors must utilize every available opportunity to get value from their investment as official sponsors. It inevitably means they will, and expect LOCOG to, vigorously clamp down on any ambush marketing.

Any advertiser seeking to associate itself in any way with the Games should take legal advice before doing so. The Games symbols are themselves the most protected brands in the world.<sup>11</sup> In addition the marks are registered trade marks, the designs and mascots are protected by copyright and above all the Games have the unique and controversial protection of an "association right"<sup>12</sup> which came into force 6 years before the Games and will last until December 2012. This means no business can associate itself with the Games unless it is an official sponsor or it has the sanction of LOCOG. The 2005 Act sets out a list of certain words, used in some cases by themselves and in some cases in combination with other words, which would be taken into account by courts as suggestive of an association. These words include seemingly innocuous combinations such as "summer 2012" or "London 2012" and may well catch some advertisers out.<sup>13</sup>

The London Olympic Association Right was introduced to try and stop some of the unofficial activities seen at previous Games.

Even in recent times official sponsors have been upstaged by the antics of non sponsors. Usain Bolt held up his Puma shoes not once but three times in Beijing on winning 100, 200m and 4x100m races. Adidas was of course the main sportswear sponsors, as indeed it is for 2012<sup>14</sup>. In Vancouver Ocean Spray Cranberry cocktails were handed free to commuters as part of a promotion during the winter Olympics. The only problem was that Coca Cola is the official beverage sponsor of the Games. The Royal bank of Canada was also an official sponsor of the latest winter Olympics but that did not stop the Bank of Nova Scotia from launching a navigational mobile application to help people get round the Games and was twice warned about ambush marketing tactics.

The Subway restaurant chain defended its advertising campaign featuring swimmer Michael Phelps against a warning from the IOC this January 2010 prior to the Winter Olympics about associating itself with the Olympics without contributing. IOC said that ambush marketers "*cheat the Games, cheat the athletes and cheat the fans*"<sup>15</sup>. Indeed there is a lesson for advertisers to note that being branded an ambush marketer may back fire and harm the reputation of the brand.

However all is not lost for the small businesses, Little Chef has secured the right to retain the name of its Olympic breakfast during the 2012 Games! LOCOG had originally objected to the use on the Little Chef menu.

The problem is that, as demonstrated by a survey undertaken on behalf of the Chartered Institute of Marketing, 43% of marketers had no understanding of the London Olympic and Paralympic Act governing marketing activities and only one in eight of the survey said they had any decent knowledge of the legislation.<sup>16</sup> The survey was carried out in 2008 and one can only hope awareness has improved, otherwise LOCOG is going to be busy racing after those either purposely or naively flouting the rules in the run up to the Games.

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11. The logo is also protected by two separate Acts of Parliament: the Olympic Symbol (Protection) Act 1995 (the 1995 Act) and the London Olympics Act 2005 (the 2005 Act). The trademark rights belong to the International Olympic Committee (IOC), but are enforced in the UK by the British Olympic Association (BOA) and, from now until the end of 2012, by the London Organising Committee for the Olympic Games (LOCOG).

12. The 2005 Olympic and Paralympic Act, created a new intellectual property right: the London Olympic Association Right (LOAR)

13. LOCOG guidance notes on advertising and the rights which LOCOG has acquired under the 2005 Act are available at the following links: <http://www.london2012.com/about/our-brand/using-the-brand.php> Fuller versions are also available at <http://www.london2012.com/documents/brand-guidelines/statutory-marketing-rights.pdf> and <http://www.london2012.com/documents/brand-guidelines/guidelines-for-business-use.pdf>

14. World wide partners of London Olympics 2012 at <http://www.london2012.com/about-us/the-people-delivering-the-games/international-and-uk-partners/index.php>

15. Gerhard Heiberg, an IOC member from Norway and the chairman of the IOC Marketing Commission 29.01.10

16. CIM, Chartered Institute of Marketing Survey by IPSOS Mori 2008

**Other events and legislative creep**

All major event holders want to offer sponsors the most comprehensive protection possible from creative ambush marketing tactics. Countries want to attract investment and big events to their shores. Thus, despite the UK government indicating during the passage of the Olympic Act through parliament that only the Olympic and Paralympic Games would be entitled to an “association right”, we find the Commonwealth Games<sup>17</sup> has also been awarded such protection, even though it does not have the clean venue policy of the Olympics.

New Zealand introduced its Major Events legislation in 2007 which grants any major event holder protective rights if it chooses to hold an event in New Zealand.<sup>18</sup> This sort of horizontal creep is worrying. A prime example of such creep in restrictive legislation was witnessed first hand by the author of this article during the passage of the Olympics and Paralympics Games Act in the UK. Because the general opinion was that the Sydney Olympics had struck a good balance on the issue of ambush marketing, so the argument was that London needed the same or slightly enhanced rights that Sydney provided in its legislation. Those therefore demanding for the changes to UK law had merely to argue that the Australian laws were the norm, and UK deviation from that alleged norm had to be entirely justified. The onus ought to have been the other way round with those calling for change to justify the introduction of new restrictions.

Exactly the same thing happened with the winter Olympics in Canada. When Canada won the right to hold the Games in Vancouver there was no requirement to introduce new protective legislation on ambush marketing but because the UK introduced its Olympic Act Canada was then forced by the IOC to do likewise.

As if this is not worrying enough there is then what one might call vertical creep, where one event holder is awarded additional protection and so another demands the same rights. The Olympics is arguably a unique and special clean venue event that deserves additional rights but if FIFA, International Cricket Council, the Commonwealth Games, perhaps the National mini golf association, all get such rights the question arises as to whether local businesses really gain any benefit from the events. The author is not exaggerating such creep. In 2007 the World Swimming Championships were held in Melbourne and more legislation<sup>19</sup> was passed to ensure it had the same protection as the Commonwealth Games. Then Portugal introduced controversial legislation for the Euro 2004 and did the same for the under 21s tournament<sup>20</sup>. Now shortly after Rio de Janeiro being selected as the winner of the 2016 Olympic Games, Brazil has introduced its Olympic legislation<sup>21</sup>, again with specific rules to protect ambush marketing and guess what, more rules envisaged for the soccer World Cup in 2014.

**Conclusion, Caution needed**

There is a perception that no event can now be successfully held without draconian protections against so called ambush marketing. This has led to International federations being able to demand rights even after countries have been awarded the right to host the event in question. There is an argument, which host countries appear to be ignoring, that these often private and highly profitable businesses<sup>22</sup> are changing the intellectual property laws of host nations to protect the event holders investment and profits. The IOC between 2005 and 2008 generated US\$ 5,450,000,000 of which it claims to have kept 10%, still a staggering US\$54,450,000.00<sup>23</sup>. In 1998 the IOC instituted a number of reforms after a corruption scandal that rocked its international reputation and it is a more transparent organization that it was. Nevertheless the IOC chairman, Jacques Rogge earns an undisclosed sum<sup>25</sup> and other organizations are not nearly as open to scrutiny.

The more protection and powers event holders obtain the more of course they can demand by way of sponsorship fees. One has only to consider the increase in host nation sponsorship costs for the Olympics over the past few summer Games from, US\$ 426 million in Atlanta in 1996 to US\$ 1,218 million in Beijing 2008. So while of course the cost of holding these events has inevitably increased, the sums required to become official sponsors have rocketed.

The concern is that while it is legitimate to prevent determined and skilled multi national companies from ambush marketing and unfairly piggy backing on major events without

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17. Glasgow Commonwealth Games Act 2008  
 18. Major Events Management Act 2007  
 19. World Swimming Championships Act 2004  
 20. Law Decree 84 2006  
 21. Olympic Act (Law 12, 035/09 October 1, 2009)  
 22. The IOC claims to distribute over 90% of its revenues to organisations throughout the Olympic Movement to support the staging of the Olympic Games and to promote the worldwide development of sport and retains less than 10% for the operational and administrative costs of governing the Olympic Movement. The IOC is based in Switzerland and no  
 23. IOC Fact File [http://www.olympic.org/Documents/fact\\_file\\_2010.pdf](http://www.olympic.org/Documents/fact_file_2010.pdf)  
 24. Juan Antonio Samaranch asked for US\$350,000 annual salary as honorary Life President of the IOC, this was refused. Lord Coe is paid £357,000 for overseeing the London Games by LOCOG and chief executive Paul Deighton is in line for a £1million windfall if he delivers successful Games  
 25. IOC Fact File [http://www.olympic.org/Documents/fact\\_file\\_2010.pdf](http://www.olympic.org/Documents/fact_file_2010.pdf)

contributing, such legislation also restricts local business, legitimate small traders and journalists and the public. Like most laws there is a fine balance between protecting rights holders and allowing free and fair competition. No small business for example will ever be able to afford the sums required to be an official sponsor of a major sporting event.

There is a concern that laws preventing ambush marketing are being introduced too quickly and without proper consideration, with one country or sport trying to out do another. If international standards could be agreed perhaps more draconian laws can be avoided and the creep stopped and radical enforcement of rights tempered. Even Wimbledon Tennis organisers, keen to protect their multi million pound deals with sponsors, allegedly ordered security guards to impound anything not sporting approved branding. The problem is that this sort of over reaction alienates the public and can lead to reputational damage for official sponsors who are then seen as too high handed and dictatorial. Ordering the local Olympic Cab Service to remove its branding, when individuals and businesses have had to fork out personally for holding the Games, is not going to go down well with Londoners. LOCOG will need to take a balanced approach to the London Games.

What is certain is that the rules will not stop inventive marketers as well as the uninformed, from seeking to exploit major sporting events, but it seems the days of creative, often humorous ambush marketing, may be dead. One hopes not, there is room for official sponsors and inventive advertisers to benefit from major events.

Commentators on the Beijing Games have suggested that the majority of the Chinese had no idea which companies were official sponsors or not, despite truly draconian efforts by the Chinese authorities to prevent ambush marketing in Beijing. Consumers in the UK, Europe and USA are unlikely though to be easily fooled by the antics of ambush marketers. If no implied endorsement is made authorities will hopefully take a light touch approach to enforcing the regulations during the Olympics. Undoubtedly LOCOG and FIFA will concentrate efforts on serious offenders. Such ambush advertisers need to be aware that sanctions can be fines, claims for compensation, wasted advertising costs and above all damage to reputation if branded as a business unfairly exploiting a major event without fairly contributing.

It has certainly been an olympic task to collate all the anti ambush marketing laws and regulations, and it seems now it is the ambush marketers who are the prey.

**For advice on marketing and the World Cup 2010 and Olympics 2012 please see the Reed Smith Ad Guides or call the Reed Smith Advertising Compliance Team.**

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Client Alert 10-097

May 2010

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