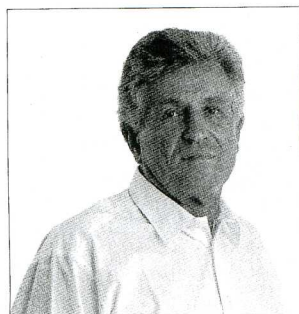


Ambush Marketing – Virtue or Vice?



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Imagine you're having a party. You invite heaps of brilliant, interesting people having relevance to your business which you are promoting. Imagine on the night of your party your archrival arrives, with all his friends. Imagine watching in awe as the freeloader takes credit for your expense and effort. Now imagine that party just cost you \$65 million.

At the 1998 World Cup, over 250,000 people visited Nike's "People's Republic of Football", opened by the Brazilian Football Team, featuring interactive games, merchandise and soccer skills areas. Miniature cars emblazoned with Nike logos and filled with Nike players roamed the streets, offering free clinics. Advertising hoardings were everywhere. Six competing teams wore the Nike 'Swoosh'.

Nike generated a 32 percent sponsor recognition rate. Adidas, as the Official Sponsor, achieved only three percent more (Sport+ Market study, 1998). Over two-thirds of the British consumer failed to recognise or misidentified the official World Cup sponsors (Marketing Week July 1998). Is this savvy marketing or unethical business practice that confuses the consumer?

For those finding themselves on the working end of an ambush marketing campaign, the real question is one of ethics. Is ambush marketing an ethical business practice? Is it even lawful?

Ambush Marketing

So, what is ambush marketing? Ambush marketing – a term often hissed in industry circles – occurs when one brand pays to become an official sponsor of an event (most often sporting) and another competing brand quite simply ambushes their sponsorship by claiming association with the event, without paying the

sponsorship fee and, more frustratingly, perhaps without breaking any laws. Their aim is to give the consumers the impression that they are actually sponsors, or that they are somehow connected to the event.

Ambush/guerrilla/parasitic marketing (all rather pejorative names for Associative marketing) is as undeniably effective as it is damaging, attracting consumers at the expense of competitors, all the while undermining an event's integrity and, most importantly, its ability to attract future sponsors.

The Legal Perspective

From a legal perspective, broadly speaking, ambush marketing can essentially take two forms, namely: 'Association' and 'Intrusion'.

Ambush marketing by Association

By means of 'association' the ambush marketer misleads the public into thinking that he is an authorised sponsor or contributor associated with the event. This can be done by using the graphic devices of the event, or devices which are confusingly similar, and furthermore by misrepresenting to the public in some manner that the marketer or his brand are associated with the event.

Ambush marketing by Intrusion

By means of 'intrusion' the ambush marketer does not seek to suggest a connection with the event but rather to give his own brand exposure through the medium of the publicity attracted by the event and without the authorisation of the event organiser.

Ambush marketing by intrusion includes:

- Placing product advertisements on the outskirts of a stadium at which

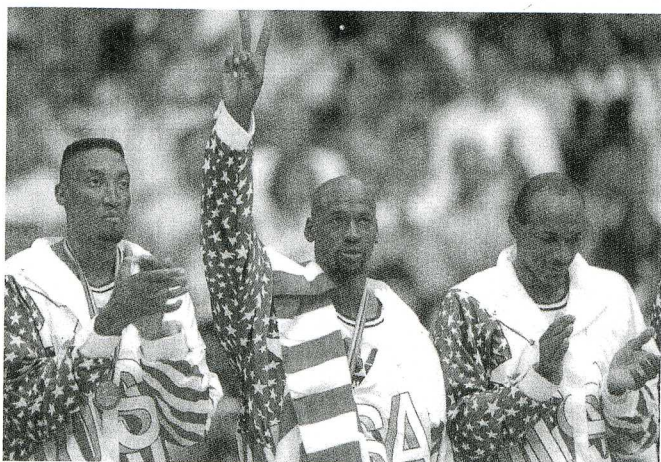
a sponsored sporting event is taking place.

- Causing an aeroplane towing a product advertisement to fly over a stadium at which a sponsored event is taking place.
- Running advertisements making reference to a sponsored sporting event, without suggesting that the advertiser is a sponsor of the event.
- Running promotional competitions making reference to a sponsored event.

Ambushing Strategies

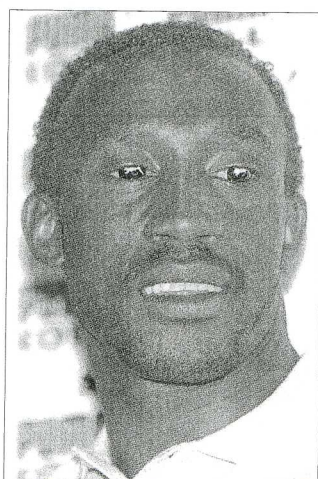
Common ambush strategies include:

- **Sponsoring media coverage of an event**
 - The so-called "ambusher" sponsors certain media coverage of an event and gains access to the media audience. At the 1984 Los Angeles Olympics, while Fuji was a worldwide sponsor of the Olympics, its competitor, Kodak, became sponsor of ABC television's broadcasts of the games and official film supplier to the US Track team.
- **Sponsoring a sub-category within an event and exploiting the investment aggressively**
 - The ambusher contracts to sponsor some lesser category within the overall event and proceeds to exploit this association with large-scale promotions. At the Sydney 2000 Games, Qantas sponsored both pre-Olympic meets and the Olympic selection trials for the Australian swimming team. The trials were broadcast from the Olympic swimming pool and the broadcast featured the Qantas name and logo. From this, one might reasonably assume that Qantas was able to establish a link between itself, the "Olympic" pool and the Australian Olympic swim team.



- Planning advertising that coincides with the sponsored event
- Themed advertising: The ambusher implies association with the event by using televised footage and images related to the event. Telecom New Zealand published an advertisement that featured the word "ring" positioned and coloured so as to equate to the relative positioning and colouring of the rings of the Olympic symbol.
- The ambusher seeks to purchase advertising time in the slots around television relays of a sponsored event. This is less prevalent now as broadcasters in many countries will either offer the sponsor first option or refuse to allow directly competing advertising in slots around televised events.
- Imaginative ambush strategies
 - Many ambushers have created highly imaginative strategies to associate with particular events:
 - When SteinLager, a brewing company, was an official worldwide sponsor of the 1991 Rugby World Cup in Britain, competitor, Fosters, ran an ad campaign around the

ring ring ring
ring ring



theme "Swing Low, Sweet Carry-out". ("Swing Low, Sweet Chariot" being the anthem of the English Rugby team).

- In 1996, soft drinks giant, Coca-Cola, paid a fortune to officially sponsor the Cricket World Cup. Rival Pepsi promptly launched a massive advertising blitz based on the catch-line: Nothing Official About It. The Pepsi campaign captured the public's imagination and took on the dimensions of a national slogan, while 'official' sponsor Coca-Cola, lost out.
- Reebok was one of the official sponsors of the Barcelona Olympic Games in 1992. When the US basketball 'Dream Team' went up to the podium to receive their gold medal, two of its most famous players, Michael Jordan and Charles Barkley, who had sponsor contracts with Nike, covered the Reebok logo of their tracksuits with the US flag.
- Reebok was also an official sponsor at the Atlanta 1996 Games, and were not pleased when British 100m runner, Linford Christie, appeared at a press conference wearing contact lenses with the highly recognisable Puma logo in the centre of each lens.

Ambush Marketing in context

At around \$60 million a pop for major international sponsorship, plus the entitled alignment to that which they stand for, one can imagine that those who pay to become official sponsors expect and often receive considerable financial benefit from the recognition attached to being a sponsor. As an official sponsor, these companies also expect exclusivity and organisers are adamant that it be both granted and preserved for fear of losing sponsorship dollars. In return for their sponsorship investments, corporations gain exclusive legal access to the public profile and positive values associated with the various

sporting events. They expect to have exclusivity in the use of the official marks, logos and other designations, be given unique advertising and promotional opportunities, on-site concessions/franchise and product sales together with the right to describe themselves as the official sponsors of such events in their marketing and promotional campaigns. Without this exclusivity and prestige, the value of the sponsorship is inevitably diminished.

Ambush marketing is most prevalent when the stakes are highest. And the stakes are never higher than at galactic sporting events such as the FIFA World Cup and the Olympics – the hands down, undisputed, two most mammoth events on modern earth. With audiences into the billions, the sponsorship yield from the 1992 Olympics was estimated at US\$ 700 million, while the yield from the 1998 World Cup scored a whopping US\$ 29 billion!

The success of an international sporting event for a host city/country is determined not only by the sporting success of the event, but also by its impact on the economic health of the city. Income for these events is primarily generated from corporate sponsorship, the sales of television rights and ticket sales.

It is critical, therefore, that all sources of revenue be maximised. Failing to do so can result in financial disaster for any city charged with hosting one of the world's most significant sporting events.

But the truth of the matter is, that when buying a sponsorship package, the sponsor is not only buying the tangibles of the event in terms of banners, advertising, clothing, etc. the sponsor is also buying the right to the perception of the event. Because everything we see, everything we

choose and everything we believe is based on perception. So, in turn, this makes sponsorship not merely a claim to media platforms, but a claim to perception. This subliminal communication is one of the reasons that make major events so attractive, and therefore needs to be protected as much as any tangible association.

Contenders for ambush marketing may argue that, in buying a sponsorship a company buys only that specific event. In sponsoring, the company does not purchase the rights to all avenues leading to the public's awareness of a property, and neither does it buy the rights to the entire consumer 'mind space'.

The 'mind space' here refers to the various associations – ideas, images, and events – that occur in the consumers' minds when they think of the sponsored space. This thematic space is not created by anyone, hence no one owns it. This is all very well, but when a company exploits a specific thematic space concurrently with a particular event, they are doing so with the deliberate intention of misleading the public. For example, BMW's ad "The Spirit of Performance" is a great ad that no-one will associate with anything other than BMW. If, however, the same ad ran in conjunction with the IOC's ad "Share the Spirit" and Audi was the official sponsor, one may question the intent of the ad. Each sponsorship property or vehicle has certain associated images in the consumer's mind that transfer to the sponsor. For example, using the thematic space of cricket at any other time other than at the time of the Cricket World Cup doesn't have the same effect – and marketers know that!

The Legal Situation

Prior to 2003 our law gave some

succour to event organisers and sponsors to prevent or curtail ambush marketing through the traditional avenues of:

- Trade Marks Act 194 of 1993
- Passing-off
- Copyright Act
- Merchandise Marks Act 17 of 1941
- The Trade Practices Amendment Act of 2001 – In terms of this section a representation by a marketer who holds out, implies, or suggests a contractual connection or association between him and a sponsored event, or the person sponsoring the event, is rendered unlawful and infringing against this provision is a criminal offence.

The above legal measures are really concerned solely with ambush marketing by association and they do not cover ambush marketing by intrusion. There was thus a considerable loophole which ambush marketers could exploit.

Challenging ambush marketing by intrusion

The problem of ambush marketing by intrusion is not unique to South Africa, but the South African legislature has perhaps pioneered the way to eradicating this form of ambush marketing. By means of the Merchandise Marks Amendment Act 61 of 2002, which introduced a new section into the Act, the South African legislature has introduced the concept of acting unlawfully by abusing the right to use a trade mark. This novel approach is an extension of the common-law principle of abuse of rights.

Generally speaking, a marketer who promotes his own legitimate product acts lawfully and within the norms of acceptable business practice. However, in the same way that the law recognises

that an individual can abuse his rights and thereby act unlawfully, so too ought a marketer to be reigned in from marketing his brand in certain abusive ways.

Under the common law, for example, while conducting himself on his own land in a manner which is lawful in principle, an individual can nevertheless be found to be acting unlawfully, vis-à-vis his neighbour, if he causes an undue nuisance to that neighbour. For instance, it is generally lawful for a person to play recorded music on his own property; but if he plays the music at such a high volume that he unreasonably disturbs his neighbour's right to enjoy peace and quiet on his own property, playing music in this manner can be unlawful.

The deliberate use of a marketer's own legitimate brand in relation to a sponsored event, without the authority of the event organiser, in a manner which is calculated to achieve publicity for that brand and thereby to derive gratuitous promotional benefit from the event, is rendered unlawful.

Abuse of a trade mark in relation to an event

For the sake of convenience we shall refer to the above section of the Merchandise Marks Act as the 'trade mark abuse provision'. For facilitation reasons, this section defines an event as, 'any exhibition, show, or competition of a sporting, recreational or entertainment nature which is held in public, has the potential to attract the attention of the public or to be newsworthy, and is financed or subsidised by commercial sponsorship'. An event includes any broadcast of the foregoing.

A 'protected event' means an event which has been designated as such by the Minister of Trade and Industry in

terms of the trade mark abuse provision. The Minister of Trade and Industry may, after investigation and proper consultation, designate an event as a protected event by means of a notice in the Government Gazette. The notice must stipulate the date with effect from which the protection commences and on which it terminates.

While an event is a protected event it is unlawful to use a trade mark in relation to that event in a manner which is calculated to achieve publicity for that trade mark and thereby to derive special promotional benefit for it from the event without obtaining prior authority of the organiser of the event. The concept of 'use of a trade mark' includes any visual representation, or any audible reproduction, of the trade mark in relation to goods or in relation to the rendering of services, or using that mark in promotional activities in any way which, directly or indirectly, is intended to be brought into association with or to allude to an event. Anyone who offends against the trade mark abuse provision commits a criminal offence and the normal penalties provided for in the Merchandise Marks Act apply to such an offence.

Analysis of the trade mark abuse provision

An event organiser who wishes to avail himself of the provision must, in anticipation of the forthcoming event, make representations to the Minister of Trade and Industry to persuade him to designate the forthcoming event as a protected event. No provision is made for the automatic protection of an event. If the Minister is satisfied, he must publish a notice in the Government Gazette designating the event as a protected event and giving the terms and duration of protection. Anything outside the protected time period

would be deemed lawful so ambush marketers can go wild, but would become suddenly unlawful once the Minister publicises his notice and the term commences.

The 2010 FIFA World Cup, to be held in South Africa, will have a profound impact on many sectors within the country. For this reason, the Minister of Trade and Industry has designated this event as a protected event in Government Gazette No. 1259 of 17 November 2005. Spoor & Fisher, representing FIFA in Intellectual property matters, have already applied for the registration of the official logo and other trade marks, and will be protecting associated sponsorships by utilising the Merchandise Marks Act and Trade Marks Acts. Prospective ambush marketers for 2010 beware!

The trade mark abuse provision prevents any unauthorised use of a trade mark, even a registered trade mark by the registered proprietor within the scope of his registration, without authorisation by the event organiser. The criterion for the prohibition is that the trade mark is used to gain publicity and promotional benefit from the event, by the proprietor, his suppliers and agencies and anyone else who uses it for any promotional benefit. A casual spectator who unwittingly wears a branded T-shirt to the event should hopefully be absolved...

Prohibited use of a trade mark is not limited to what happens at the stadium or other venues where the event takes place but can occur in any activities which can relate to the event. This would include in-store promotions, running competitions in the media, and promotional and advertising activities in general.

The provision was in force during the 2003 Cricket World Cup held in

South Africa and instances of ambush marketing taking place were at a minimum. No instances of proceedings being instituted under the provision are known, but perhaps the greatest merit of the provision is its deterrent value.

Other legal remedies

In addition to the measures mentioned above, namely the Trade Marks Act, passing off, Copyright Act and the Merchandise Marks Act, there are several other areas of the law which can assist event organisers and sponsors in controlling ambush marketing through association, but not necessarily through intrusion. None of them provide a complete answer and it is generally preferable that a combination of them should be utilised.

Dealing With Ambush Marketing

It is not just up to the law to prevent ambush marketing – it's up to everyone involved! Viable steps include:

- Determining the parameters of legal and ethical marketing activities.
- Marketers and their agencies staying within the boundaries of legal and ethical marketing practices.
- The tightening up of sponsorship agreements.
- Consideration by sports managers of the extensive effects of individual sponsorship agreements in a more global arena.
- The continued evolution of the law to protect everyone involved.
- Effective exploitation of the marketing platform by sponsors, i.e. if you're going to rest on your laurels, you are handing your competitor a golden ambush opportunity!

The reality of ambush marketing is such that laws alone may well prove inadequate for responding to ingenious

marketing strategies. Organisers of events must develop an overall strategy, which includes both legal and practical initiatives for dealing with the issue of ambush marketing.

Repercussions Of Ambush Marketing

Although it remains unclear if ambush marketing is in fact having as much of a negative impact on sponsorship investment as critics would have us believe, the evidence is there, e.g. Shortly after the 1998 World Cup, Adidas announced that it would delay a decision on whether to remain an official sponsor after 2002 unless it could be assured that its investment dollars would be better protected. Adidas has been ambushed several times by competitor Nike.

In a symbiotic relationship, sponsorship programmes reinforce the event movement in three basic ways: They provide valuable financial resources; sponsors provide vital technical support for the organisation and staging of the event and the general operations of the event; and they help to promote the event ideals, by heightening public awareness of the event and increasing support for the athletes.

If companies aren't aggressive in promoting their sponsorships, then maybe they deserve to be ambushed. Sponsors should dominate all of the event communications, above-the-line, below-the-line, through-the-line, over-the-line, between the lines. Blitz the town where the event is to be held, buy up all the billboards. Make sure everyone knows that you are the sponsor. Do this and the ambusher looks like a bit player.

And a word of caution for the wannabe ambusher: with the

amendment of the Merchandise Marks Act to outlaw ambush marketing by intrusion, South African law is much better equipped to curtail ambush marketing than most other countries. The result is that many activities could be conducted with impunity in previous host countries of major events will fall foul of our law and be unlawful. Relying on past precedents of successful ambush marketing in other countries could be disastrous with the forthcoming Soccer World Cup in mind!

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For more information visit www.spoor.com