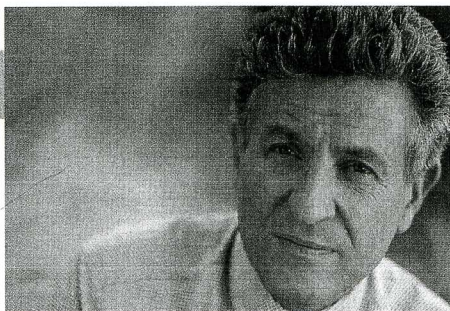


Sponsorship Under Attack by Ambush Marketing

by Dr Owen Dean



Sponsorship of events, sports teams, tours and the like has become a very popular and effective means of promoting brands and brand building. By means of a sponsorship, a brand holder associates his brand with an activity which enjoys and attracts public and media attention, thereby enhancing the reputation and public awareness of the brand. Vast sums of money are paid for sponsorship of events such as the Rugby World Cup, the Cricket World Cup, athletic tournaments and the like. Conversely, large events such as those mentioned are extremely costly to stage and run and without the funds derived from sponsorship many of them would not be viable. Accordingly, the public and the media can also benefit significantly from sponsored events. There are many events the staging of which are in the public interest but which could not take place if they cannot rely on sponsorships for their financing.

The Nature of Ambush Marketing

In the modern commercial world sponsorships are under increasing and serious threat on account of so-called "ambush marketing". Ambush marketing has been described as follows:

"Major events having publicity value have become important vehicles for the promotion and advertising of products and organisers of such events generally require a monetary payment for participation in the promotion value of the event. Such financial contributions

generally take the form of sponsorships. Typically a trader would pay sponsorship money to an event organiser in order to obtain exposure for his product at the event. This exposure could take the form of advertising hoardings or providing clothing for participants in the event and the like. Ambush marketing takes place when a trader seeks to utilise the publicity value of an event, for instance a major sports tournament or a concert, to gain a benefit from it despite not having any involvement or connection with that event and more particularly having made no financial contribution to entitle him to derive benefit from it." [Ambush Marketing by OH Dean published in the June 2000 edition of *De Rebus*]

Broadly speaking, ambush marketing can take essentially two forms, namely 'association' and 'intrusion'. 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 insignia of the event or insignia which are confusing similar to such insignia, and furthermore by misrepresenting to the public in some manner that the marketer or his brand is associated with the event. By means of 'intrusion' the ambush marketer does not seek to suggest a connection with the event but rather to give his own brand or other insignia exposure through the medium of the publicity attracted by the event and without the authorisation of the event organiser. In both forms of ambush marketing the marketer has the objective of using the event as a platform to promote his brand or product but without incurring the financial and other obligations of a sponsor.

Inadequacy of the Law

Until recently our law gave very little succour to event organisers and sponsors to prevent or

curtail ambush marketing. Nonetheless, there are some areas of the law which in a rather generalised manner may be of some assistance in counteracting ambush marketing but these remedies have proved in the past to be rather ineffective. By means of relying on a registered trade mark (for instance registering the symbol of an event in respect of entertainment services under the Trade Marks Act), the trade mark proprietor could restrain the use of that mark or a confusingly similar mark in relation to such services. Similarly, under the law of passing-off, if the symbol of an event can be shown to enjoy a substantial repute with the result that the use of that symbol, or a confusingly similar symbol, by another party causes members of the public to think that the goods or services in relation to which that other party uses the symbol in question are connected in the course of trade with the event or the event organiser, this misleading activity could be restrained. Under the law of copyright the unauthorised reproduction or adaptation of any substantial part of a logo, which qualifies as an artistic work under the Copyright Act, can be restrained. In certain circumstances, contractual restrictions can be placed on persons so as to restrain them from assisting or creating the potential for ambush marketing. The prohibition of the use of a mark (unless properly authorised) under the Merchandise Marks Act provides protection for that mark in a similar manner to registration under the Trade Marks Act.

The aforementioned measures, as well as other steps which events organisers might take to counteract ambush marketing, do not really eliminate ambush marketing and in practice it has been possible to circumvent such measures and derive undue benefit from events without being a sponsor. This was an unsatisfactory state of affairs particularly with South Africa hosting events like the Rugby World Cup and the Cricket World Cup and having made bids to host the Olympic Games and the Soccer World Cup. The ability of the laws of a country to adequately

counteract ambush marketing can play a role in the award of the hosting of such events.

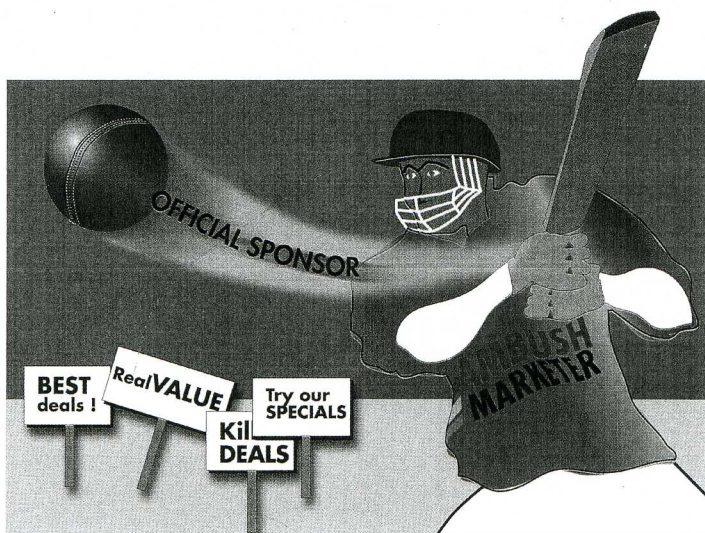
In the mid-1990's representations were made to the Government to pass legislation which would provide for a more effective means of coping with and eradicating ambush marketing. These gave rise to an amendment being made to the Trade Practices Act, 1976, and more specifically to the introduction of a new section 9(d) by means of Section 1 of the Trade Practices Amendment Act, 2001. The new provision is to the effect that a representation by a marketer which holds out, implies or suggests a contractual or other connection or association between that person and a sponsored event, or the person sponsoring the event, is rendered unlawful. Infringing against this provision is made a criminal offence punishable by imprisonment or by a fine or to both imprisonment and a fine.

While the new provision is an advance over the pre-existing law, it is concerned solely by ambush marketing by association. In broad terms, the provision makes it unlawful to suggest or imply that a marketer is a sponsor in some form of a sponsored event, when this is not the case. Its approach is similar to the remedy of passing-off which has been described above, and which has proved to be ineffectual. The provision does not cover ambush marketing by intrusion as none of the various forms of intrusion fall within its scope or ambit. Events organisers thus currently remain unprotected in respect of ambush marketing by intrusion, notwithstanding the new provision. In essence, therefore, the new provision does only half the job of protecting events and event organisers against ambush marketing.

Ambush Marketing by Intrusion

Ambush marketing by intrusion includes the following:

- Placing advertisements for a product on the outskirts of a stadium at which a sponsored sporting event is taking place;



- Causing an aeroplane towing an advertisement for a product to fly over a stadium at which a sponsored sports 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 a promotional competition making reference to a sponsored event;
- Causing a group or block of spectators attending a sponsored event to wear clothing promoting a product, which block of spectators would attract attention at the event and in televised renditions of the event; and
- Generally bringing a product or its promotion to the attention of people interested in a sponsored event but without suggesting or implying any form of sponsorship of the sponsored event.

Clearly then, there still remains considerable scope for would-be ambush marketers to ply their trade. Sponsorships are thus still extremely vulnerable to being undermined and to not achieving the intended benefit to which the sponsor is entitled. Uncontrolled ambush marketing by intrusion, and by other means, can

seriously undermine the attractiveness of sponsoring events and ultimately the viability of staging the events. This is a serious and undesirable state of affairs. South Africa is, however, not unique in this respect and countries throughout the world have been grappling with the problem of how to control or eradicate ambush marketing.

Prohibiting ambush marketing by intrusion is more far reaching than preventing ambush marketing by association. In the latter case the ambush marketer makes a misrepresentation to the public and the restraint placed on him curtails his deception of the public. Conduct of this nature is per se contrary to public policy. In the case of intrusion, however, no deception takes place and categorising the marketers conduct as being 'wrong' is more difficult. Before this can happen the conduct should be contrary to the public interest.

ASA Code of Conduct

In an effort to alleviate the problem of ambush marketing, the Advertising Standards Authority (ASA) has produced a Code of Conduct for sponsorships. This code, which seeks in effect to introduce self regulation into the sponsorship market, is a worthwhile measure and it ought to assist in eliminating some of the bad practices associated with sponsorships. However, to a large measure it concentrates its efforts on the activities of legitimate sponsors who are not the real culprits, and seeks to make their conduct conform with good order. It does not adequately address the issue of ambush marketing which it describes as follows:

"The attempt of an organisation, product, service or brand to create the impression of being an official sponsor of an event or activity by affiliating itself with that event or activity without having paid the sponsorship rights-fee or being a party to the sponsorship contract" [Paragraph 10.12 of the Code]

This Code of Conduct, like the recent amendment to the Trade Practices Act, focuses

entirely on ambush marketing by association and it overlooks or does not address the issue of ambush marketing by intrusion. The Code of Conduct thus suffers from the same shortcomings and deficiencies as the provision in the Trade Practices Act and indeed in the common law remedy of passing-off.

The ASA Code of Conduct sets up a mechanism for dealing with complaints against marketers for using unacceptable practices relating to sponsorship of events and wrongly making associations between brands and events or the organisers of events. A body set up by the ASA adjudicates on such complaints and the ASA can impose various sanctions such as an embargo on advertising by marketers or advertisers who are found to have transgressed the Code of Conduct until their offending conduct has ceased. In this respect the mechanisms under the ASA Code of Conduct are akin to the enforcement of rights under civil law litigation. Both these forms of enforcement have the disadvantage that they only come into play after the transgression has already taken place and therefore the 'damage' caused by the ambush marketing has already been incurred. By its very nature, ambush marketing is a short term form of promotional marketing and the fact that injunctions or prohibitions may ensue sometime after the transgression has taken place is often of little consequence or moment to the ambush marketer. His objective has already been achieved. What is necessary in order to counteract ambush marketing is that there must be a sufficient deterrent to inhibit the opportunist in advance from undertaking ambush marketing.

Criminalisation of Ambush Marketing

The best deterrent against ambush marketing is its criminalisation. Generally speaking, ambush marketers are substantial business enterprises which may be opportunistic but do not have a criminal intent and have a reluctance to be branded as criminals. The fact that an act of

ambush marketing might lead to criminal penalties being imposed upon the business, or perhaps even on its directors, is a consequence which would be taken seriously by most would-be ambush marketers. The opprobrium which a criminal conviction would bring upon such a business would be a serious disincentive to most businesses which are would-be ambush marketers. Accordingly, if the law is to really curtail ambush marketing it must make acting against the norm of acceptable conduct in the realm of ambush marketing a criminal offence.

In this connection, the recent amendment to the Trade Practices Act marks an important advance against the practice of ambush marketing. The effect of the relevant provision of the Trade Practices Act is to make ambush marketing by association a criminal offence. Amending the Trade Practices Act in this manner evidences an important policy decision or stance adopted by Government, namely that ambush marketing is considered from a policy point of view to be a commercial evil which warrants the imposition of criminal sanctions and penalties. For the Government's objective to be fully and properly achieved, however, this policy should be given further effect by making ambush marketing by intrusion a criminal offence.

Proposed Prohibition on Ambush Marketing by Intrusion

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 manners.

While conducting himself in a manner which is in principle lawful and regular, on his own land, an individual can nevertheless be found to be acting unlawfully vis-a-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 a hi-fi set 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. This principle of unlawful abuse of rights can be applied and adapted to the misuse of one's own brand or trade mark in advertising.

It is proposed that the prohibition of ambush marketing by intrusion should be founded on the principle of abuse of rights. The deliberate use of a brand – 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 primarily to achieve publicity for that brand and thereby to derive gratuitous promotional benefit from the event and in a situation which has the potential to jeopardise the staging of an event which is in the public interest, should be rendered unlawful. The manner of use, or more correctly misuse, of a brand which is here contemplated is use on, or in physical or other relationship to, goods, or in relation to the performance of services, or in promotional activities, which has an association with, or allude to, a particular event.

The event concerned would be a gathering of people or other happenings staged or shown in public that is likely to attract the attention of the public, to be newsworthy, or to achieve notoriety, and that is financed to a significant degree by commercial sponsorship. The staging of the particular event should be in the public interest and this has a bearing on the nature of the event. The particular event should be declared in advance as being an event which is in the public interest and which is subject to this form of protection, and this form of protection should be limited to an event so declared.

A prohibition of this nature would render unlawful deliberate attempts to perpetrate ambush marketing by intrusion, or by

association which are contrary to the public interest, and would make ambush marketing by intrusion comparable to ambush marketing by association in the eyes of the law. By limiting the application of this form of prohibition against ambush marketing to particular events which are in the public interest and which have been designated in advance, the restriction placed on the exercise of a marketer's normal rights in advertising his product would be kept to a minimum and would be confined to those types of events in respect of which public policy dictates that the rights of legitimate sponsors should not be subjected to interference and diminution. It is an acceptable principle in modern society and in a constitutional democracy that individual rights can in certain circumstances be subservient to the public interest.

Conclusion

Once it has been decided, as the Government has already done, that ambush marketing is not acceptable and should be prohibited, it is important that the problem should be addressed comprehensively and not only in part. Current legislation does not do the job properly and an important element and manifestation of ambush marketing has not been addressed by the legislature. Further legislature reform is necessary to give full and effective expression to the Government's policy decision to prohibit or preclude ambush marketing. The gap which currently allows ambush marketing by intrusion to pass through and thus to continue undermining the staging of popular sporting and other events financed by sponsorship must be closed. It is to be hoped that the Government will act swiftly and effectively in this regard. ■

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