



Global Advertising
Lawyers Alliance

AMBUSH MARKETING: A Global Legal Perspective





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“Ambush marketing.” A controversial marketing practice that pits non-sponsors against event producers, official sponsors, and other rights holders. Even though ambush marketing campaigns are quite prevalent, most countries do not, in fact, have specific legislation designed to address the practice. Some countries – such as Brazil, Russia, and the United Kingdom – adopted more specific legislation to guard against ambush marketing where the event owners (such as the International Olympic Committee and FIFA) have pushed for the enactment of highly-restrictive event-based legislation in order for a locality to obtain the rights to produce the event. Without specific rules governing most ambush marketing practices around the world, official sponsors, so-called “ambush marketers,” and the owners of events themselves must look to traditional intellectual property and unfair competition laws to determine what each party can and cannot do.

One reason ambush marketing may not be specifically outlawed is that it is hard to define. Is the use of generic imagery of a sport or entertainment event by a non-sponsor an “ambush” or even illegal? And should it be? Is a brand an “ambusher” of the Olympic Games or the FIFA World Cup even though it sponsored several national teams and individual players? These are critical questions that challenge the current legal frameworks around the world.

Ambush marketing is most often thought of in the context of sporting events, but it is certainly not limited to such field. Popular entertainment events, such as the Academy Awards in the United States, and major international events, such as royal weddings in the United Kingdom and Sweden, also generate a fair share of ambush marketing activity.

The practice of ambush marketing does not appear to be going away any time soon. As recent actions by the Canadian Olympic Committee and by the Brazilian Football Confederation show, ambush marketing and the enforcement against it is still a hot button issue.

This guide, which updates GALA’s 2011 edition, summarizes the rules governing ambush marketing in 52 countries. The guide addresses legal considerations, regulatory considerations, commercial considerations, and recent enforcement actions in the field of ambush marketing.

FOREWORD

Alex Kelham, Lewis Silkin

Ambush marketing can provoke widely varying views. For the rights holders whose financial model relies on granting *exclusive* sponsorship rights, ambush marketing is often seen as the enemy. It erodes their commercial revenues and thus damages the sport/event for which they are responsible. Brands tend to be labeled as either sponsor or ambusher, but the reality is many are slightly schizophrenic – one moment deploring competitors for ambushing events they are officially associated with, and the next minute running a campaign aligned with another property that they don't sponsor and seeing what they can get away with.

So is ambush marketing bad? Actually let's step back, what is ambush marketing?

Ambush marketing is notoriously difficult to define but it is helpful to distinguish between two core types of ambush marketing. The first is where the content of the advertisement creates a direct or indirect association with the property or the event. A direct association may be created by, in the most blatant situations, using the property or the event's logo or name, whereas an indirect association may be created through more generic references to the property or the event, for example by depicting the sport and country in which an event is being hosted together with using celebrities competing at the event. The use of tickets for an event in promotions without permission can also be used to create this type of "ambush by association".

The second core type of ambush marketing is "ambush by intrusion". This involves a brand seeking to get exposure during an event – either inside the stadia or within its vicinity, but often with the target of the brand being to be seen on broadcast coverage. In cases of ambush by intrusion, the "content" of the advertisement is likely to be brand-led and will not refer to or allude to the event itself. Indeed, successful ambush marketing campaigns have been undertaken where no or very minimal branding of the ambusher has been on display but through use of colours, shapes, or the acts of the intruding brand representatives, the brand is nevertheless identified and gets wide exposure. Perhaps the most famous recent example of this was the Bavaria beer girls who appeared in bright orange mini dresses in the spectator stands at Holland's first match of the 2010 FIFA World Cup in South Africa. Although the orange dresses had minimal branding on them, the dresses were associated with Bavaria through a television campaign in Holland. Bavaria gained huge PR exposure due to the actions of FIFA in dealing with the issue, as the ringleaders of the stadium stunt were arrested and charged with specially introduced ambush marketing offences under South African law.

Ambush marketing can come in other forms too. For example “opportunistic ambush” in which a brand takes advantage of a particular event. Zippo lighters did this to great effect when during the Sochi 2014 Winter Olympic torch relay someone was photographed relighting the Olympic torch with a Zippo lighter. “Internal ambush” can occur where a representative of the rights holder does something to promote a competitor of one of the official sponsors, usually inadvertently or by mistake.

When considering ambush marketing, it is also necessary to ask who is being ambushed? It may be an event, or a team, club or an individual athlete/player. And ambush does not just occur in a sporting context. All celebrities have “rights” that may be ambushed in one way or another and other major events like the Oscars or even a royal wedding can be ambushed by brands wishing to capitalise in the goodwill, excitement, and or cache of being associated with the event/person.

So, back to the original question: is ambush marketing a bad thing? Ambush by association is often creative and amusing and there is no doubt that it can be an inexpensive way to enhance a brand. Sounds good. However, from a rights holder’s perspective, ambush marketing cannibalises the value they have created and diverts potential sponsors away. After all, why would a brand sponsor an event if it could gain a similar level of association with the event for free?

As mentioned, the average member of public probably doesn’t understand the term “ambush marketing”. When they see an example of it, they may have a wry smile, but it is unlikely that they interrogate the advertisement or ask themselves whether the brand in question is a sponsor of the ambushed property. And this is why ambush can be so effective, and at the same time so damaging. The brand in question gains the benefit of an association, without paying the rights holder to do so, and without being seen to do anything wrong.

As you’ll see in this guidebook, traditional legal rights can be used to address many forms of ambush marketing. However, in most countries there is a lack of standard legal remedies which clearly prevent the more “clever” forms of ambush. This either helps or hinders whichever side of the ambush you are on. As sports properties have become more and more valuable, and the right to host major events becomes an increasingly competitive process, the prevalence of bespoke legal rights to address ambush marketing is increasing. Major events like the Olympic Games, FIFA World Cup and Commonwealth Games demand, as part of their bidding process, that host countries ensure their laws will address all forms

of ambush marketing. Some countries, such as South Africa and New Zealand, have future proofed the protection of major events which may come to their shores by introducing designated events legislation. This provides the framework for protecting against ambush marketing with the event simply needing to be identified by secondary legislation. I anticipate that this type of major event legislation will be an increasing trend.

Concerns are often raised about special ambush legislation preventing free speech and limiting the commercial opportunities for non-sponsor businesses (which, it is often pointed out, are contributing to the event via the taxes they pay to the funding host government). And there are regular complaints that rights holders enforce the legislation in heavy-handed ways which stifle the enjoyment of the event.

The purpose of this foreword is not to come down on either side of the argument. As lawyers our job is to advise on the laws that are in place and the impact of those laws on our clients' activities. Hopefully this guidebook will help you do this and provide a useful starting point whether you are advising a rights holder, a sponsor or indeed an ambushing brand.

Alex Kelham joined Lewis Silkin LLP in 2013 after having spent seven years leading the brand protection function for the organising committee of the London 2012 Olympic Games and Paralympic Games.



ARGENTINA



LEGAL CONSIDERATIONS

Argentina does not have a specific law addressing the issue of ambush marketing practices.

However, law 24.664 protects as trademarks all the Olympic symbols and the words that in an unequivocal manner describe the activities of the International Olympic Committee.

Moreover, there are some provisions in the Argentine Trademark law, Design Act, Unfair Competition Act, Article 10 of Paris Convention, as well as the provision of Article 953 of the Civil Code that can be used to attack or to stop the ambush marketing practices. Therefore, the actions of unfair competition, trademark and/or copyright infringement are the remedies available to sponsors and event organizers in those cases.

There is only one judicial precedent of ambush marketing case in Argentina. In that case, FIFA filed an injunction in order for the judge to oblige PEPSI to stop broadcasting an ad considered to be ambush marketing practice. Coca-Cola was at that time the official sponsor of the 2002 World Cup. The ad broadcasted by PEPSI during the 2002 World Cup showed famous professional soccer players playing a soccer game against a team composed of sumo players. In the ad, PEPSI did not mention or include the use of any word such as "World Cup" or any official trademark or symbol of FIFA, but it associated the PEPSI trademark with the 2002 World Cup. The Argentine judge granted an injunction to FIFA by which PEPSI was forced to stop broadcasting the ad until a final resolution was obtained. The judge considered that the ad would induce the consumers to believe that PEPSI was an official sponsor of the World Cup.

However, the case was settled by the parties. Therefore, there is no final decision in respect of ambush marketing practices in Argentina up to date.

In some countries like South Africa or Brazil where FIFA has forced them to promulgate a law protecting the ambush marketing practices in order to allow hosting the world cup, ambush practices can be stopped easily and in a short period of time. On the contrary, due to the lack of an specific regulation it is very difficult to stop indirect ambush marketing practices in Argentina in a effective way.

REGULATORY CONSIDERATIONS

Article 10 of the Self Regulation Code of the Council for self regulation advertising (CONARP) establishes that all ads must be truthful, avoid any confusion or exaggeration that affect the good faith of the consumers, or induce to the abuse of the consumers' truth or exploit the lack of culture, knowledge or experience of the consumers.

Although, this article does not address specifically the ambush marketing issue, it can be used to object a case related to ambush marketing practices. It is worth mentioning that CONARP has a strong reputation, and its proceeding to challenge and ad is used by most of the companies who play a relevant role in the advertising area.

COMMERCIAL CONSIDERATIONS

These are some ideas that the event organizers and/or sponsoring companies can use to prevent ambush marketing practices, namely:

From the event organizer's perspective:

- Protect its own IP rights by proper registration of trademarks and logos
- Pursue ambush marketers through cease and desist letter and lawsuits (seeking injunctive relief where available and/or required)
- Negotiate with broadcasters to avoid the purchasing of sub-category rights by competitors of official sponsors

- Control the venue and distribution of ambush marketing material

From the sponsor's perspective:

- Incorporate into the sponsorship agreement the event organizer's obligation to protect IP rights and its enforcement in case of infringement
- Secure exclusive television rights for event in the sponsor's own business category
- Secure endorsement with athletes



AUSTRALIA

LEGAL CONSIDERATIONS

There is currently no overarching legislation in Australia that deals with ambush marketing as a specific concept. However, Commonwealth and State legislation has been previously introduced that protects specific events such as the Olympics (in particular the 2000 Sydney Olympics) and the Australian Formula 1 Grand Prix. Such event based legislation has traditionally protected against unauthorised use of indicia associated with the particular event in an attempt to reduce ambush marketing and to protect sponsorships and prevent their devaluation. For the Sydney Olympics, the New South Wales State Government introduced legislation that prohibited unauthorised advertising (such as billboards, posters, signs) in and around Olympic venues, in the airspace above such venues (i.e. balloon advertising, sky writing and banners) and also in major thoroughfares. Similar legislation was put in place by the Victorian State Government in respect of the Melbourne 2006 Commonwealth Games and by the Queensland State Government in respect of the Gold Coast 2018 Commonwealth Games.

The Queensland State Government also administers the *Major Sports Facilities Act 2001 (QLD)* which prohibits advertising in the airspace or on a building or other structure that is within sight from a major sports facility during a 'declared period' for that facility unless the particular advertising is authorised. Permanent building signage and the usual markings on commercial aircraft are excluded from the operation of the Act. Similarly the Victorian State Government introduced the *Major Sporting Events Act 2009 (VIC)* and the Western Australian State Government introduced the *Major Events (Aerial Advertising) Act 2009 (WA)*. In addition to fines, there are also a range of civil remedies available under the legislation including injunctions and the right to sue for damages if the organizer of the particular event has suffered loss. The New South Wales State Government has also introduced the *Major Events Act 2009 (NSW)* which, unlike its Queensland and Victorian counterparts, applies to any event declared to be a major event, and not just sports related major events. The South Australia State Government has recently introduced the *Major Events Act 2013 (SA)* that not only prohibits unauthorised aerial advertising, but also specifically defines ambush marketing and prohibits it in relation to a major event.

In addition to the specific (albeit piecemeal) legislation noted, victims of ambush marketing can seek redress through the traditional tort of passing off. In addition s18 of the *Australian Consumer Law* (Schedule 2 of the *Competition and Consumer Act 2010*) prohibits a corporation from engaging in conduct that is misleading or deceptive or which is likely to mislead or deceive and s29 of the *Australian Consumer Law* prohibits a corporation from falsely representing that goods or services have a sponsorship that they do not have or that the corporation has a sponsorship, approval or affiliation that it does not have.

REGULATORY CONSIDERATIONS

The Australian Association of National Advertisers Code of Ethics ("Code") does not contain any specific provisions regarding ambush marketing. The Code also states at section 1.3 that "Advertisements shall not contain a misrepresentation which is likely to cause damage to the business or goodwill of a competitor". To our knowledge this provision has not been invoked in respect of ambush marketing to date.

COMMERCIAL CONSIDERATIONS

Event sponsors, assuming that they are not protected by the piecemeal legislation set out above (and depending upon the level of their sponsorship and their budget) need to consider measures to support and protect their investment. Such measures include strategically buying the relevant corresponding advertising space that is pertinent (i.e. if the event will be broadcast, the television advertising, along with the venue advertising) as well as placing contractual limitations on the resale or promotion of ticketing.

There are obvious ethical issues arising from ambush marketing that corporations may wish to consider. For example, ambush marketing can negatively affect other corporations' desire to sponsor an event which could result in the sponsored event being jeopardised. However, from a legal perspective, as long as its actions are legal, a corporation may find that, if done correctly, strategic ambush marketing can be an effective tool that achieves the required objectives from a smaller investment than the cost of traditional sponsorship. That said, as the *Major Events Act 2013 (SA)* demonstrates, the concept of ambush marketing is now being specifically defined and targeted in state legislation and with penalties carrying fines of up to AU\$250,000, strategic ambush marketing may no longer be a viable option.



AUSTRIA

LEGAL CONSIDERATIONS

There is currently no specific legislation in Austria relating directly to *ambush marketing*. Also with respect to the European Football Championships “Euro 2008” which took place in Austria and Switzerland, no specific regulation was put in force to particularly protect the official sponsors or to restrict advertising in the cities where the tournament took place. It is left up to event organizers to take measures to protect their official sponsors. As the term *ambush marketing* includes a wide variety of possible advertising strategies, there are some precautionary measures which event organizers may take in the interest of the official sponsors.

REGULATORY CONSIDERATIONS

Promotions and Advertising in Austria are regulated under the Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb). According to this Act, advertising must not offend against morality and decency in trade. Whether the rules of morality and decency in trade have been violated in a specific case is decided by the courts. Furthermore, advertising must not be misleading.

A further legal basis which might be of interest in connection with ambush marketing is the Trademark Act (Markenschutzgesetz). This Act protects trademark holders from third parties infringing their exclusive trademark rights. In cases in which the organizer is producing TV broadcasts the Intellectual Property Act will protect him from unauthorized distribution to the public (“public viewing”).

Some strategies of ambush marketing may be stopped and sanctioned with these acts. The event organizer may obtain trademark protection for important terms relating to a specific sports event. If a third party uses one of these terms without authorization, such use may infringe the rights of the trademark holders and may be pursued before court.

If the terms and conditions for sporting events which are applicable when obtaining entrance tickets, prohibits the ticket holders from commercial or promotional activity of any kind, this may provide some protection against ambush marketing. If, for example, an enterprise distributed a large number of T-shirts showing the enterprises brands to the visitors of a sporting event near the sport stadium with the intention that the ticket holders shall wear the t-shirt in the stadium, this could be qualified as unfair and illegal behaviour under the Act Against Unfair Competition.

The ticketing terms and conditions for the UEFA Euro 2008 contained such strict prohibition to use, possess or hold promotional or commercial objects and materials in the stadium.

COMMERCIAL CONSIDERATIONS

Practical precautionary measures in order to protect sponsors from ambush marketing of certain parties should particularly include the following:

- obtain trademark protection for the most important terms which are to be used for a specific sports event
- provide for tickets to be non-transferable
- include a strict prohibition on any kind of commercial and promotional activity of the ticket holders in the stadium
- arrange for a ban mile outside the stadium in order to stop ambush-marketing strategies in the forefront of a sports event.

RECENT ENFORCEMENTS

In 2008 the European Football Championships “Euro 2008” were held in Austria. In 2012 the Youth Olympic Winter Games took place in Innsbruck. Despite these major sporting events, no cases of “ambush marketing” were brought before the Austrian Supreme Court. Due to the lack of any legislative regulation and an established court practice, it still remains a kind of “grey area” where the line has to be drawn between legal and illegal ambush marketing activities.



BELGIUM

LEGAL CONSIDERATIONS

Belgium has no specific ambush marketing laws. It is broadly felt that no special event-specific protection through specific anti-ambush legislation is needed to protect sponsors of events. There are no umbrella statutes covering a group of events neither. Belgium has no exclusion zones around event venues, although local authorities can within particular limits enact local advertising limitations. Ambush marketing is not always or *per se* illegal. As an example, a group of supporters wearing clothes bearing trademarks of a party that is not an official sponsor will not automatically constitute a trademark infringement. Taking advantage of the spotlights of major media events is generally allowed within the limits of what is considered as an otherwise fair market/trade conduct.

Long existing examples of surfing on media events in the print media are so-called *top topical ads*. Topics such as particular holidays, Mothers' day, fairs or major events in society or news can validly be used by advertisers to make a variety of connections with and therewith obtain additional or special attention and attraction.

However, unauthorised commercial association with major events can under certain conditions be successfully countered. Event organisers and the official sponsors can, in case of ambushing of events by third parties, seek the traditional remedies both footed on intellectual property right protection and on fair market/trade practices. The most important counts of remedies are passing off, copyright infringement, trade mark infringement and unfair market practices consisting of misleading or comparative advertising which does not meet the legal requirements. Also tortuous liability generally can be invoked in certain circumstances to combat "guerrilla" advertising.

REGULATORY CONSIDERATIONS

The 2010 Belgian Market Trade Practices Act generally prohibits misleading and false advertisements. Advertisements that falsely suggest or imply official approval can be successfully attacked on the basis of these articles, i.a. in cases where ambush marketing leads to possible misleading with the products and services of an official sponsor (passing off). A catch-all provision in the Belgian Market Practices Act prohibits every act contrary to fair trade practices by which a seller hurts or tries to damage the professional interest of one or several other sellers. The notion covers acts exploiting the reputation of a seller without creating any confusion and without disparagement to his merits. Sometimes, an act may both be parasitic and deceptive. The theory of parasitic competition has been applied on all kinds of market practices.

Four detailed sets of rules govern broadcast advertisements, audio-visual sponsoring and product placement in Flanders, Wallonia, the Brussels Region and the German Community.

Self-regulation codes theoretically also provide for general rules under which ambush marketing can be countered. In practice, though, self-regulation vetting does not directly deal with conflicts between advertisers.

COMMERCIAL CONSIDERATIONS

Practical steps for event organisers and sponsors to prevent/limit ambush marketing:

- Event organisers to consider buying up all advertising space in the vicinity or contractually convene exclusivities with media, within the boundaries of competition law restrictions;
- Sponsors to contractually oblige event organisers to actively endorse the exclusivity with the sponsors and attack ambush marketers;
- Sponsors and event organisers to enable an environment of sponsor awareness towards the public;
- Register trade marks of logo, name, year and other images of events;
- Event organisers to liaise and work towards *ad hoc* legislation and event-limited subordinated rules in order to properly protect the events against otherwise hard to combat ambushing practices.

 BOLIVIA 

LEGAL CONSIDERATIONS

There is currently no specific legislation which prohibits and/or norms ambush marketing in Bolivia. It is important to note that *ambush marketing* is a fairly new term in Bolivia and thus jurisprudence and norms that regulate this matter are practically inexistent. Until the present date, we have no knowledge of cases where official sponsors of sporting events in Bolivia have presented any claim regarding ambush marketing. However, there are other types of events where ambush marketing practices have been objected, including the example detailed herein.

CASE

Every year, La Paz hosts the folkloric festival of *Señor del Gran Poder*, a cultural event in which dozens of people dance different types of native dances in the streets of La Paz for a distance of approximately five kilometers. This is an event that attracts thousands of local fans and tourists.

The event is officially sponsored by the biggest brewery of Bolivia which invests a considerable amount of resources in promotion and advertising. Last year, a small new brewery decided to promote another brand of beer on site. The official sponsor directly requested the organizer to evict the brewery's promoters from the site and requested the help of the Police to avoid the sale of the new beer. Due to the lack of norms and provisions regarding this aspect the intent of eviction was denied and the small brewery continued to sell its products throughout that day.

REGULATORY CONSIDERATIONS

Currently, there are no specific norms related to advertising, unfair competition or consumer protection which may be applied to ambush marketing cases. In the case that official sponsors or event organizers feel harmed through ambush marketing practices, they may seek relief through intellectual property protection or typical civil actions. Intellectual property provisions may apply in the event that trademark infringement exists.

COMMERCIAL CONSIDERATIONS

Recommendations for event organizers/sponsors to limit ambush marketing include:

- Registration of all the intellectual goods related to the event before the pertinent authority.
- The organizers and official sponsors of the events that take place in Bolivia that are directly affected by ambush marketing must seek the promulgation of a specific norm that regulate their rights as official sponsors. However, it is important to avoid that such norms do not limit constitutional rights such as freedom of commerce, freedom of work and freedom of expression.
- Organizers and official sponsors should impose obligations on media organizations to restrict advertising and promotion to official sponsors only.

 BRAZIL 

LEGAL CONSIDERATIONS

There is no specific legislation dealing with ambush marketing in Brazil. The provisions of the Industrial Property Law, the Consumer Protection Code, the general rules of the Civil Code and the Brazilian General WorldCup Law should be applied in order to evaluate the legitimacy of advertising actions conducted as “ambush marketing”.

The Industrial Property Law establishes in Articles 129 and 130 that exclusive rights over a trademark comprise any reference made in advertising and promotion, so using a registered or well-known sign related to a certain event in advertising or promotional activities by a third party could be viewed as direct infringement. Also, as established in Article 87 of Law no. 9,615/98 (“Lei Pelé”), denominations and symbols of sport entities, as well as the names or aliases of athletes, are legally protected and enforceable in Brazil without the need of any previous registration or recording proceeding. Ambush marketing may be also seen as unfair competition by means of “passing off” under the provisions of Article 195, III, of the Industrial Property Law and Article 10 *bis* (3) of the Paris Union Convention when, for example, the distribution of gifts, tickets and/or any material related to an event is able to mislead consumers into believing that there is a sponsorship or commercial agreement with the organizers. In view of the general unfair competition clause set forth in Article 209 of the Industrial Property Law, ambush marketing, depending on the factual circumstances, could be also restrained as a “free riding” practice due to unjust enrichment of the agent vis-à-vis the notoriety of the event arising from investments made by organizers, official sponsors and advertisers. Under the general provisions of the Civil Code, the ambush marketing practice may be hindered as *tortious interference* with exclusive agreements entered into by the organizers of the event with advertisers and sponsors thereof.

The General WorldCup Law was passed in June 2012 to regulate the 2014 FIFA World Cup. The General WorldCup Law provides that some requirements need to be taken into consideration while promoting any type of promotional activity in the location of the events where competitions will occur:

Article 11. The Union will cooperate with the States, the Federal District and the Municipalities that will host the events and the other competent authorities to ensure that FIFA and those authorized by FIFA will have the right to exclusively advertise their brands, distribute, sell, publicize perform or advertise products and services as well as other promotional activities or street sales in official places of competition related to the events, in their surroundings and major access streets.

§ 1 The limits of the areas of exclusivity related to the official places of competition will be promptly established by the competent authority taking into consideration the requirements of FIFA or any third party appointed by it, provided that the requirements of this Act are duly met and subject to the range of up to 2 km (two kilometers) around these official places of competition.

Additionally, the Brazilian World Cup General Law not only prohibits but also considers as a crime (i) ambush marketing by association and (ii) ambush marketing by intrusion, as provided below:

“Ambush Marketing by Association”. To disclose brands, products or services, in order to achieve economic benefit or advertising, through direct or indirect association with events or Official Symbols, without authorization from FIFA or the person specified by it, inducing others to believe that such marks products or services are approved, authorized or endorsed by FIFA:

Penalty - imprisonment of three (3) months to one (1) year or a fine. Single paragraph. The same penalty applies to those who, without authorization from FIFA or its designee, links the use of Tickets, invitations or any kind of authorization for access to the Events to advertising actions or commercial activity, in order to obtain economic advantage (article 32 of the Brazilian World Cup General Law).

“Ambush Marketing by Intrusion”. *Exposing brands, businesses, establishments, products, services or practice of promotional activity, not authorized by FIFA or person indicated by it, anyway attracting public attention in the occurrence of local events, in order to obtain economic or advertising benefit:*

Penalty - imprisonment of three (3) months to one (1) year or a fine (article 33 of the Brazilian World Cup General Law).

REGULATORY CONSIDERATIONS

The Brazilian Self-Regulation Advertising Council (“CONAR”) has once recommended the restraining of an ambush marketing action taken by Brahma in 1994 during friendly soccer matches of the Brazilian team prior to the FIFA World Cup Tournament of that year. Brahma paid some of the official players to make its famous advertising signal after each goal, in spite of Antarctica and Kaiser, who had acquired sponsorship agreements from the channels responsible for broadcasting the matches.

CONAR reprovved the advertising action and hence modified Article 31 of its Advertising Self-Regulation Code in order to include “free-riding” or “ambush” marketing actions as censurable practices, mainly when achieved (i) through artifices or deceit, (ii) without regular agreements entered into by the legitimate parties or (iii) without the approval of the broadcasting vehicle and titleholders involved.

COMMERCIAL CONSIDERATIONS

There is no doubt that ambush marketing may conflict with the interests of organizers, sponsors and official advertisers of the event.

It is also advisable to require from the broadcasters to limit advertising spots solely to official sponsors and advertisers of the event, as well as to acquire all billboard and advertising spaces available at the area of the event.

In most cases, sending a warning letter would be sufficient for refraining the ambush marketing practice. During the Pan American Games in Rio de Janeiro, the organizers notified more than 200 companies for advertisements related to the event and, in 90% of the cases, the practice was immediately restrained. There is no notice of ambush marketing that actually arrived to Court.



CANADA

LEGAL CONSIDERATIONS

Ambush marketing is not specifically regulated in Canada. The general legal remedies for violation of intellectual property rights (trade-mark and copyright infringement, as well as passing-off) are available, although they may be of limited benefit where ambush marketers have not blatantly infringed intellectual property rights. The provisions of the Competition Act relating to false and misleading advertising in a material respect are also available in dealing with ambush marketers.

Up to now, very few Canadian cases have addressed ambush marketing. The British Columbia Supreme Court dealt with the issue in a matter opposing the National Hockey League (NHL) and Pepsi-Cola Ltd. (Pepsi) (1990, 42 CPR. (3d) 390). In that case, the NHL sued Pepsi over its under-the-cap instant game entitled "Diet Pepsi \$4,000,000 Pro-Hockey Playoffs Pool" in which prizes were tied to the outcome of 1990 Stanley Cup Playoffs: the winning cap would identify the winning team of the Playoffs by city (not by team name or by use of trademarks), as well as by the number of games played to win. The action alleged passing-off and, trademark infringement and interference with economic relations. The Court found that the two latter grounds were unfounded. With respect to passing-off, the Court ruled that there was no evidence of consumer confusion and the use of a disclaimer by Pepsi in the advertisement (stating that the contest was neither associated with nor sponsored by the NHL or its members) was found to be a valid defense for Pepsi.

In 2007, in anticipation of the Vancouver 2010 Olympic Winter Games and all Olympic Games thereafter, the Canadian government introduced The Olympic and Paralympic Marks Act. The purpose of the legislation is to prevent ambush marketing in Olympic-specific contexts by restricting the type of promotion and advertising that can be done during prescribed periods. It provides that no person shall, in association with a trade-mark or other mark, promote, or otherwise direct public attention to their business, wares or services in a manner that misleads or is likely to mislead the public into believing that a person's business, wares or services are approved, authorized or endorsed by an Olympic organizing committee or that a business association between them exists. Courts will consider the expressions borrowed from the Olympic vocabulary, even common expressions like "medals", "Winter" and "Games".

In February 2014, the Canadian Olympic Committee ("COC") filed an injunction against clothing retailer, The North Face, in connection with a line of called the "2014 Villagewear Collection" that allegedly leverage Olympic marks in advertising, marketing, promotion and merchandising, as well as directly on some items. They also issued tickets to Olympic events as sweepstakes prizes. The claim alleged that the lines, and its marketing, intentionally mislead consumers to believe that The North Face was an official sponsor of the Canadian Olympic Team, that the collection was endorsed by the COC, and that sales would support the Canadian Olympic Team. The COC is seeking declarations that The North Face's conduct is contrary to the Olympic and Paralympics Marks Act, the Trade-marks Act, and the Competition Act, and injunctive relief. The defendant has strongly denied these claims in its statement of defense. At the time of writing, the matter remains before the courts.

COMMERCIAL CONSIDERATIONS

From the event organizer's perspective, there are a few practical ways to help prevent or reduce the risk of ambush marketing: these include taking appropriate measures to protect intellectual property rights through proper registration of trade-marks and logos, encouraging official sponsors to dissipate any potential confusion in the consumer's mind, pursuing ambush marketers through cease and desist orders and lawsuits (seeking injunctive relief where required), negotiating with broadcasters to avoid the purchasing of sub-category rights by competitors of their official sponsors as well as controlling the event venue and the distribution of ambush marketing materials (sponsor police).

From the sponsors' perspective, efforts should be made to formalize the event organizer's obligation to protect intellectual property rights (including the hiring of a sponsor police for the event) as well as its obligation to pursue ambush marketers; official sponsors should also attempt, to secure exclusive television rights for event in their own business category, to secure endorsements with athletes and to purchase advertising on billboards outside the venue.



CARIBBEAN



LEGAL AND REGULATORY CONSIDERATIONS

As no major world sports events have been hosted by any Commonwealth Caribbean country since the Cricket World Cup 2007, there is currently no legislation expressly prohibiting ambush marketing in these countries. Ambush marketing was addressed legislatively when the West Indies Cricket Board was granted the franchise by the International Cricket Council (ICC) to host Cricket World Cup 2007 (CWC 2007). The 9 Caribbean CWC 2007 host countries, namely Antigua, Barbados, Grenada, Guyana, Jamaica, St. Kitts, St. Vincent and the Grenadines, St Lucia, Trinidad & Tobago, were required to pass sunset legislation to address, among other things, ambush marketing by November 2006. The legislation sought generally to control advertising, protect the marks and indicia of the CWC 2007, establish clean venues for the event, and prohibit ambush marketing. After extensive national and regional debate eventually all the host countries passed the relevant legislation.

The laws, which were repealed June 30, 2007 after the CWC 2007 events, prohibited persons without written authorization of CWC 2007 from, for example, wilfully broadcasting, displaying, making, publishing or televising any advertisement, communication, statement, mark or image or authorising these or any other activity which (a) relates to or is connected with CWC 2007; (b) implies or suggests a contractual or other connection or association of that person with CWC 2007 or a person officially associated or involved in CWC 2007; and (c) is intended to (i) associate that person with CWC 2007 or exploit the publicity or goodwill of CWC 2007, in order for that person to gain a benefit of any kind; (ii) diminish the status of an official sponsor, official supplier, official broadcaster or other licensee with regard to CWC 2007; or (iii) imply that the person is an official sponsor, official supplier, official broadcaster or other licensee with regard to CWC 2007.

Notwithstanding this, proprietors and sponsors of major events can avail themselves of provisions under Trademarks, Consumer Protection and Fair Competition legislation in countries which have modern laws as well as the common law tort of Passing Off depending on the type of ambush marketing.

In Jamaica, for example, provisions of its Trade Marks Act (1999) amended 2001 and 2013, the Consumer Protection Act (2005) and the Fair Competition Act (1993) amended 2001 and the tort of passing off may be applicable where the activity involves the unauthorised use of a sign resembling, or in conjunction with, an existing trademark, or comparative advertising which is not in accordance with honest commercial practices or where the use of the mark or conduct of the trader is deliberately misleading.

The Consumer Protection Act empowers the Consumer Affairs Commission to conduct investigations into the conduct of providers and suppliers of services and goods as the case may be. Misleading and deceptive conduct and false representations which may involve the use of trademarks, trade names and geographical indications, in connection with goods and services can constitute offences under the Act. The Fair Competition Act provides remedies for certain anti-competitive practices which may involve the misleading use of trademarks, trade names and geographical indications.

In relation to passing off, Caribbean courts have been guided by the principles outlined in two UK decisions – *Erven Warninck BV v J Townend & Sons (Hull) Ltd* and *Reckitt & Colman Products Ltd v Borden* – which set out the essential factors to establish the tort. *Reckitt & Colman* outlined three criteria: (1) goodwill; (2) deception due to misrepresentation; and (3) actual or potential damage. *Erven Warninck* outlined five factors: (1) a misrepresentation; (2) made by a trader in the course of trade; (3) to prospective or ultimate customers of goods or services supplied by it; (4) which is calculated to, or may in a reasonably foreseeable way, injure the business or goodwill of another trader; and (5) which causes or is likely to cause actual damage to the business or goodwill of the trader by which the action is brought.

COMMERCIAL CONSIDERATIONS

In the absence of laws which expressly prohibit ambush marketing in all its forms, sponsors and event organizers have to use strong contractual obligations to safe-guard their investments.

When seeking sponsorship rights companies need to pay specific attention to the protection of their intellectual property, particularly their trademarks, and the provisions of the relevant sponsorship agreements, particularly in relation to exclusivity, event rules, indemnities and warranties by the event organizers.

Event organizers also have a responsibility and should seek to protect the venue and control advertising, endorsements and marketing through tight contracts with event participants (such as athletes or performers) as well as contracts with broadcasters and sponsors.

CHILE

LEGAL CONSIDERATIONS

Besides, the self-regulation system, which is not mandatory, there is currently no specific legislation in Chile which outlaws ambush marketing *per se*. Therefore, when event organisers and their official sponsors feel aggrieved by ambushing marketing, they have to go through the more traditional forms of intellectual property protection such as trademark or copyright infringement along with unfair competition norms. Although each case will turn on its own particular facts, the following are the main legal avenues in which event organisers and sponsors have to transit in order to protect themselves from free riding ambushers.

SELF-REGULATORY CONSIDERATIONS

The latest version of the Chilean Code of Advertising Ethics (the CCAE) which is administered by CONAR (Council for Self-regulating and Ethical Advertising) requires, among other things, that all advertisements must entail an instrument of fair competition in connection with products and services that by means of adequate information, enables consumers to choose freely. The CCAE also requires that advertising must comply with laws that are currently in force, as well as with the values, rights and principles recognized by Chile's Constitution. This Code also protects the goodwill or image acquired by a companies' trademark or marketing campaign, specifying the conditions for claiming an infringement, namely:

- The way of combining elements in advertising;
- Permanent presence in time of those elements and/or as a result of a significant investment;
- Recognition of identity and character of a mark by consumers.

Exceptionally, imitation is allowed when it is used as a deliberate and obvious creative resource, in the way of parody, citation and/or tribute, provided it does not denigrate or damage to the original creator of the trademark, or cause confusion among consumers.

Bearing in mind the aforementioned, any marketing ambusher could eventually be taken before CONAR, so that this Council can declare if ethical standards in regards to marketing have been breached or not. If a breach is detected then the ambusher must immediately cease to continue pursuing their campaign and if they do not comply with the latter, the victim of the ambush marketing is entitled to publish a copy of the entire ruling in a Chilean newspaper in order to create awareness of the ethical violation.

Even though CCAE provisions are of self regulatory nature, with no legal effect, and therefore non-binding, they are generally respected and its decisions could be used as a base for judicial actions.

UNFAIR COMPETITION LAW CONSIDERATIONS.

The Chile Unfair Competition Law No 20.169 defines unfair competition as any behaviour that conflicts with good faith (*bona fide*) and seeks to divert costumers in the market from one competitor to another, by illegitimate means. Likewise, the article 4 includes within the unfair competition conducts any "conduct which unduly takes advantage of another's reputation, inducing to confuse own goods, services, activities, distinctive signs or establishments with a third party's one. In this sense, even though ambush marketing is not specifically regulated by any Law in Chile, the mentioned law, provides norms that allows a company to pursue their rights.

Consequently, Law 20.169 enables companies to file civil actions against people or companies that takes advantage of their reputation or goodwill, and thus mislead consumers in the market, creating confusion regarding their goods, services, activities, trademarks or commercial establishments (trade dress). Therefore, if a party that is not a sponsor of an event decides to use ambush marketing, the organizer and/or the legitimate sponsor could indeed file a civil action for monetary compensation on grounds of unfair competition, and more specifically, on grounds of pursuing a misleading marketing campaign that breaches the standards set forth by Law 20.169.

TRADEMARK LAW CONSIDERATIONS.

According to our general law, any trademark owner is entitled to file a civil or criminal action against third parties which use identical or similar trademarks to its brand, for related products or services, where such use could mislead or confuse consumers. In those cases, torts are determined by the competent judge, depending on the way adopted.

COMMERCIAL CONSIDERATIONS

- Protect trademarks by proper registration way before the sport or cultural event is released.
- Create official trademark use guidelines for the sponsors, in order to identify more easily possible infringers.
- Promote clearly the name of the official sponsors in order to avoid confusion before the event takes place.
- In case of advising any intend of infringement, pursue potential ambush marketers through *cease and desist* letters and lawsuits. Do market research in order to learn from previous ambush market campaigns, and therefore, detect prior offenders.

RECENT ENFORCEMENTS

National Association of Professional Football ("NAPF") vs ABCDIN retail store: NAPF filed a complaint before CONAR against ABCDIN retail store, because this company showed a TV spot which contained some imitations of famous players of the Chilean Soccer Team (such as Arturo Vidal and Alexis Sanchez), wearing the official uniform, protected by trademarks and copyright. In this case, CONAR said that the National Soccer Team have a *goodwill* clearly identifiable with its Trademark, which explains the existence of a commercial interest in joining such identity. However, It should not be allowed that companies which are not authorized to take such *goodwill*, occupying it without consultation, thereby harming its owner and other companies that have received proper authorization.



COLOMBIA

LEGAL CONSIDERATIONS

We remain a country without specific regulation of *Ambush Marketing*. Until today, the “Law for the Unfair Competition and Commercial Restricted Practices” and the principle of good commercial faith, are the closest provisions to study and regulate the situation

For this reason, *Ambush Marketing* can still only be declared illegal if a plaintiff proves (i) that the act affects or might affect its economic interests by unfair competition, which will lead to the obligation of the infringing party to remove the noxious effects of its act and to compensate for the damages caused, or (ii) that the act is in conflict with the good commercial faith, which latter one will not be easily accepted by court.

In summary, companies in the Colombian jurisdiction are limitedly protected against acts of their competitors which are stipulated as *Ambush Marketing*.

REGULATORY CONSIDERATIONS

Besides the legislation mentioned above, a new Self Regulatory Colombian Code of Advertising (CONARP) is into force in Colombia since October 16, 2013. This Code aims to provide a regulatory system that will lead to the achievement of ethical behavior among the actors of the national advertising scene by stipulating principles and behaviors of respect for the veracity of the information, decency, honesty and the rights of consumers and competitors.

It mentions in particular the respect for privacy and image rights, intellectual property rights, environmental rights and the rights of consumers. With this latter one, it seems hence to attempt to create a mechanism against the behavior involved with *Ambush Marketing*.

Due to this Code, the Colombian companies and the consumers seem to obtain complementary protection against *Ambush Marketing* even though it has to be taken into account that the Code does not form any enforceable law, although advertisers tend to comply with its guidelines.

COMMERCIAL CONSIDERATIONS

As suggestions to avoid the use of Ambush Marketing by competitors, the following might be considered:

- Event organizers might consider using a ‘name and shame policy’. In the event such a policy is developed well the ambush marketers will rather harm the image of their company than profit from making a certain association. Nonetheless, some reticence is advisable in order to avoid extra publicity for the ambush marketers.
- A different sponsorship mentality might be considered. An event organizer should contract sponsors because of their values and their image rather than merely their financial opportunities. Besides, the contracted sponsors should be more proactive in avoiding *Ambush Marketing* via more original and enthusiastic ways of marketing their own products or services rather than ‘piggybacking’ on what the event organizer is organizing for them.



COSTA RICA



LEGAL CONSIDERATIONS

There is no specific legislation in Costa Rica related to Ambush Marketing. The following are the most common forms of ambush marketing found so far:

- Using tickets of an event as prizes for sweepstakes or other promotions.
- Sponsoring specific player(s) by a non-sponsor.
- Publishing ads wishing “good luck” or similar messages to a team.
- Giving away promotional items to fans assisting an event.
- Hosting events near official venues or concurrently with official games and happenings.

Specifically, some of these activities may potentially infringe laws regulating trademarks, copyrights, image rights, unfair competition and consumer protection. Whether they are caught by existing legislation, depends on the form in which they are carried out.

Up until now there has not been any known case against an ambusher. However, some related issues have been addressed by courts, such as exhaustion of rights and the fair use of third party trademarks, the use of a player’s personal image by a team’s sponsor (or by a non-sponsor). Additionally, there have been two relevant cases involving the sales of tickets: a) a preliminary investigation was initiated by the Consumer Protection Agency when prior to the Football World Cup in Germany 2006 FIFA announced its intention to invalidate tickets given away by non-sponsors in unauthorized sweepstakes (no formal case initiated); and b) Several travel agencies were fined for offering tickets to attend the World Cup in Brazil 2014, despite not being authorized by FIFA.

REGULATORY CONSIDERATIONS

The following legal principles established by Costa Rican legislation may apply to some forms of ambush marketing:

- Any form of advertising that creates confusion on the products or activities of advertiser or a competitor may be considered a form of unfair competition.
- Third party’s trademarks may be mentioned to describe a product or service, as long as this use is clearly in good faith and does not constitute any form of unfair competition.
- All goods, services or rights offered to consumers are implicitly guaranteed. Hence, advertiser is liable if he offers – for example – a ticket for an event that cannot be validated or used.

There are no provisions in the self-regulation code that deal with ambush marketing.

COMMERCIAL CONSIDERATIONS

In order to avoid legal problems related to ambush marketing, the following steps can be taken:

From the event organizer’s perspective:

- Attempt registration and protection of intangibles as wide as permitted by law.
- Make an objective assessment of the scope of the rights actually owned, to avoid over promising potential sponsors on the range of their rights.
- Exclude by contract with suppliers and others some activities that the Law does not forbid.
- Communicate clearly and widely all restrictions existing for the sale and purchase of tickets.
- Make clear communications on the identity of the official sponsors.
- Make sure that (and demand from) ambushers, that all their advertising is clear and conspicuous on the fact that they are not official sponsors.
- Enforce strongly all rights, to avoid creating incentives for non-compliance.

From the sponsor’s perspective:

- Make sure that the sponsored party holds sufficient rights to deliver the rights being offered.
- Secure the widest coverage that is reasonable and possible.
- Include in the contracts an obligation from the event’s organizer to enforce its IP rights.



CROATIA

LEGAL CONSIDERATIONS

Ambush marketing is not explicitly prohibited under Croatian law, nor are specific provisions referring to ambush marketing. As elsewhere, ambush marketing most frequently appears in connection with large events, both domestic and international. For domestic events, sponsors usually stipulate various restrictions, for instance that there would be no competitor's advertisements in a specific location or that only products of the official sponsor may be sold at that location. Competitors still find their way to associate with the event and the battle against that is not always quick and successful.

For that reason, the parties that are legitimately associated with a certain event try to expand the protection of their rights as much as possible, often through the registration of intellectual property rights. One example was a case involving the Croatian Football Federation. The CFF obtained a registration from the Croatian Intellectual Property Office of the national football team t-shirt. On the occasion of the 2006 FIFA World Cup the Croatian Football Federation tried to challenge the use of the t-shirt in public, particularly in the media. Advertising agencies, their clients, even the national television were approached with requests to stop the campaigns and to compensate the Croatian Football Federation for damages incurred by the allegedly unauthorized use of their protected rights. The public believed however that the use of the Croatian football team t-shirt should not be monopolized and that it should be free for use. Finally, the campaign of the CFF to fight ambush marketing on the occasion of the 2006 FIFA World Cup which initially was very ambitious, did not bring the results that they planned.

REGULATORY CONSIDERATIONS

Advertising and marketing in general is not regulated by a single act in Croatia. Instead provisions concerning advertising are contained in several regulations concerning trade, consumers' protection, media etc. The regulatory situation is the same with ambush marketing.

The Croatian Trade Act for example, under the provisions concerning unfair trade, bans comparative marketing if it creates confusion in the market. The Prohibited Advertising Act bans false advertising that could influence economic behavior of consumers. Ambush marketing could also be categorized under the provisions of the Media Act which prohibits false advertising, although those provisions as the ones previously mentioned are very general.

Although this could be used as a ground for a claim against ambush marketing, whether there are any chances to succeed in the procedure depends on a variety of elements and specific circumstances. Anyway, the result is generally not easily and quickly achievable.

COMMERCIAL CONSIDERATIONS

Due to the lack of an efficient regulatory framework concerning ambush marketing, the parties involved do their best to prevent it, especially through specific contractual provisions and IP rights registrations. At the same time however, they agree that a more efficient and direct protection of their rights is necessary. We therefore expect further legal developments in that respect soon.



DENMARK

LEGAL CONSIDERATIONS

Currently, there are no specific provisions covering the issue of ambush marketing. The main reason for this is probably that so far, it has not been a major issue in Denmark.

An issue of ambush marketing can and must be addressed through the general laws regulating intellectual property, competition and marketing, mainly the Danish Marketing Practices Act (DMPA) and the Danish Trademark Act (DTA).

The few big sports events in Denmark have all been very well branded by its sponsors and organizers. The biggest single sport event – the big cycling event Tour of Denmark – is sponsored by the national postal service, who has managed to brand its name – Post – as a part of name of the tour. Few other events – whether these are sports events or not – are big enough to attract any ambush marketers.

REGULATORY CONSIDERATIONS

The DMPA has provisions (section 1, 3 & 18) covering fair marketing practice, misleading advertising, derogation, misuse of others goodwill and the improper use of the characteristics of other businesses. Depending on the case it is most likely that an action against ambush marketing through the DMPA will be successful compared to other Danish Acts. Most activity not complying with the DMPA is connected to the possibility of legal sanctions such as issuing of a fine or in more serious cases even imprisonment. The DMPA also gives the possibility of issuing injunctions and rewarding compensation and damages. There is also the option that the Bailiff's Court quickly can suspend an infringing activity – including ambush marketing.

The DTA (section 4) and other intellectual property laws can be invoked as well. Naturally, the Bailiffs Court can assess any claims of this character as well, though it might be more difficult to prove ones rights based on these acts. The DMPA's requirements to the proprietor of the rights are in some cases not as high as the "core" intellectual property laws.

COMMERCIAL CONSIDERATIONS

- The sponsor of an event should ensure that the organizers of the events will be obliged to follow up on any issue of ambush marketing. In the event of disagreement of whether the activity is an infringement or not the sponsor shall reserve its rights to take action itself. If the sponsor is successful the event organizers should be contractually bound to cover any costs.
- The event organizers and the sponsors should ensure that the sponsoring of the event is sufficiently branded among the relevant target audience, in order to ensure that any ambushing will be recognized as such.

RECENT ENFORCEMENTS

The Danish Supreme Court has in the "NOMA-case" issued a very important decision about the use of third parties' trademarks in advertising. The Court found that the DMPA section 1 and 18 as well as the DTA section 4(2) had been violated since NOMA's well-known brand had been used in advertisements for a competition without the consent of NOMA. The Supreme Court did not expressly mention ambush marketing in its decision however the same legal considerations would probably apply in an ambush marketing case.



DOMINICAN REPUBLIC



LEGAL CONSIDERATIONS

There is currently no specific legislation in the Dominican Republic which outlaws ambush marketing *per se*.

As in many jurisdictions, Trademarks and Unfair Competition regulations can be taken into account to avoid ambush marketing.

REGULATORY CONSIDERATIONS

The advertising auto regulation code requires you to have a fair competition and that promotions should be legal, decent, honest and truthful. But it is very difficult to stop ambush marketing when there is no infringement to an IP right, or it acts in a clear unfair competition practice.

COMMERCIAL CONSIDERATIONS

In the Dominican Republic, some NON sponsors have used baseball games to enter into the stadium with strong promotions without taking into considerations the paying sponsors of the baseball tournament. Practical measures have to be taken especially by the promoters of the events.



ECUADOR



LEGAL CONSIDERATIONS

There is currently no specific law dealing with ambush marketing in Ecuador. However, the Market Power Control Law issued on 2011 includes as unfair competition acts, broadly, all sorts of acts of confusion, deception, imitation, and exploitation of another's reputation. Although ambush marketing is not particularly addressed by the law, it could be included as one of the acts deemed as unfair competition by way of case law, as the law defines said acts in a general manner.

Also, the Ecuadorian Intellectual Property Law has remedies for the violation of property rights, such as trademark and copyright infringement, which could be used as means to conduct ambush marketing campaigns.

Where applicable, we can employ the Consumer's protection and the Communications laws, which regulate anything related to misleading advertisement or advertisement that does not comply with the specific requirements of law. Also, they prohibit any comparative advertisement based on fraud or indiscriminate declarations.

In addition, since Ecuador is a member of the Andean Community of Nations, the Decision No. 486 is applicable. The Decision deals with all industrial property rights and their protection; also it establishes which acts and conducts constitute unfair competition or unjust exploitation of another's trademark reputation.

Acts of ambush marketing are not frequently litigated in Ecuador.

REGULATORY CONSIDERATIONS

The Market Power Control Law provides the administrative means to protect free trade practices and punish unfair competition acts that could hinder competition, such as ambush marketing practices. These means are held before the Superintendence for Market Power Control, thus due to its recent creation on late 2013, has not yet issued any resolutions that could shed light on the ambush marketing issue.

The Intellectual Property Law provides the means to protect intellectual property rights and competitors against unfair competition. This law states that any form of advertising that creates confusion on the products or activities of advertisers or a competitor may be considered a form of unfair competition.

The mentioned Andean Community Decision No. 486 is an international regulation applicable in Ecuador; therefore, it is also a valid mean to protect advertisers' rights regarding intellectual property infringements and against acts of unfair competition or unjust exploitation of another's trademark reputation.

COMMERCIAL CONSIDERATIONS

- Effectively protect intellectual property rights. For instance, the protection of trademarks throughout their registration before the campaign is released. As an example, the governing body on football worldwide (FIFA) aside from registering the FIFA WORLD CUP trademark and the specific trademarks identifying each world cup (trophy, mascot, logo with country name) has additionally applied for and registered on 2013 as a trademark the word "MUNDIAL" by itself (mondial: of or involving the whole world) in several classes, including that which covers sporting events in class 41.
- Be cautious when drafting sponsorship agreements. These agreements should protect effectively both the sponsor and the organiser of the event.
- Buy the relevant corresponding advertisement.
- Secure endorsement with celebrities such as athletes, actors, musicians, etc.

RECENT ENFORCEMENTS

There have not been any relevant recent enforcements regarding exploitation of another's reputation or trademark's reputations that could be considered as a case of ambush marketing, but with the recent creation of the Superintendence for Market Power Control, on late 2013, which now has several competences on this related fields we could expect some activity in this regard.



FINLAND

LEGAL AND REGULATORY CONSIDERATIONS

In Finland, there are no specific legal provisions to prohibit ambush marketing as such. However, depending on the circumstances in each individual case, ambush marketing may be regarded as unfair business practice.

According to the Unfair Business Practices Act (1061/78), fair business practice may not be violated nor may practices that are otherwise unfair to other entrepreneurs be used in business. The Government Bill for the Unfair Business Practices Act (HE 1978:114) states that the ICC International Code of Advertising Practice must be taken into account when interpreting what constitutes fair business practice on marketing communication, even though the ICC Code is not legally binding.

The ICC Code sets the baseline for assessment of ambush marketing. It requires, *inter alia*, that all marketing communication should be legal, decent, honest, and truthful. Furthermore, marketing communication should not make unjustifiable use of the name, initials, logo, and/or trademarks of another firm, company, or institution. Moreover, marketing communication should not in any way take undue advantage of another firm's, individual's, or institution's goodwill in its name, brands, or other intellectual property, or take advantage of the goodwill earned by other marketing campaigns without prior consent.

Unfair business practice may be prohibited by the Finnish Market Court which is a specialized Court handling, *inter alia*, all civil intellectual property (IP) infringement and marketing law matters as the Court of first instance. However, ambush marketing is rarely invoked in the Finnish legal practice and there is no established case law concerning ambush marketing.

Event organizers and their official sponsors may also seek to protect themselves from ambush marketers in some cases through trademark infringement or copyright infringement. In practice, claims concerning unfair business practices and trademark and/or copyright infringement may be handled in centralized proceedings with the Market Court.

In relation to the Trademarks Act (7/1964), ambush marketing may be considered as trademark infringement if, for example, the entrepreneur in breach exploits a registered trademark in the name of the event itself in its advertising. A reproduction of a logo created to represent the event may lead to copyright infringement by an ambush marketer under the Copyright Act (404/1961).

COMMERCIAL CONSIDERATIONS

Practical steps by which to prevent ambush marketing include, for example:

- Effectively protecting, via intellectual property rights, the principal visual identifiers of the event and controlling the disposition of such rights;
- Controlling access to the stadium grounds;
- Fully controlling advertising in the vicinity of the event. The official sponsors may impose contractual obligations on the event organizers to purchase all the advertising space nearby for resale to the official sponsors only;
- Through contractual arrangements obligating the media to grant advertising time only to the official sponsors during broadcasts and webcasts of the event; and
- Introducing campaigns to raise awareness of the official sponsors among the public.

RECENT ENFORCEMENTS

There is no established case law in Finland concerning ambush marketing.



While Ambush Marketing is generally associated with famous sport events, such as the Olympic Games or the Rugby World Cup, this phenomenon tends to take more and more forms including in the political domain, as businesses and their ad agencies come up with creative ideas.

LEGAL CONSIDERATION

There is no specific legislation in France which would outlaw Ambush Marketing *per se*. Therefore, the traditional tools are used:

- *Intellectual property*: notably copyright infringement or trademark infringement, even if, in certain cases, such ground cannot be used, insofar as trademark infringement implies the use of a trademark by a competing company, and the freedom of speech is protected. Moreover, one notes that registered trademarks are rarely imitated by ambush marketers in France.
- *Unfair competition and the other associated legal notions*: while unfair competition implies a competing relationship between the suffering party and the ambush marketer (which is not always the case), the notion of “*parasitism*” has been developed by French authors, and then applied by judges to sanction disloyal behaviors towards non-competitors. The parasitism is based on torts, which requires that the suffering party evidences (i) a fault (disloyal behavior consisting of the intention to promote its own commercial activity by freely, and without risks, benefiting from another party's efforts and investments), (ii) a prejudice (to damage somebody's reputation or image, customers' misappropriation, destabilization, appropriation of investments...) and (iii) a link between them.
- *Misleading advertising/unfair commercial practice*, where applicable.
- *Contract law* (between the owner of the rights on an event and any potential partners/sponsors): the way is to clearly define the scope of the rights granted and the guarantee offered by the grantor.
- *Violation of provisions of the Code du sport* and in particular of section 333-1 of such Code that grants to the sports federations and organizers of sports events the ownership of the commercial use of the sporting events and competitions that they organize. This provision was specifically codified in order to protect sports events organizers, since most ambush marketing operations take place in the context of sports events.
- *Section 9 of the Code civil* under which individuals have a right to the protection of their image. Under this Section, an individual has a right to oppose the commercial use of his image.

REGULATORY CONSIDERATIONS

The *Autorité de Régulation Professionnelle de la Publicité* (“ARPP” - advertising self-regulatory body) ensures that the Recommendations it issues be complied with by the advertisers, but there is no specific Recommendation on Ambush marketing. The ARPP therefore uses the general principles of good faith, true and honest advertising, etc. However, article 15 of the Advertising and Marketing Communication practice Consolidated ICC Code prohibits the exploitation of the goodwill of a company or an institution, and more specifically “*to take advantage of the goodwill earned by other marketing campaigns without prior consent*”.

COMMERCIAL CONSIDERATIONS

- The legal teams carefully draft the agreements (right granted, exclusivity or not, duration and territory of the grant);
- Monitoring of any ambush marketing event next to the stadium, but also in the stadium;
- Internet monitoring services provided by specialized companies;
- Work with the broadcasters (*diffuseurs*) to avoid any pirating/hacking: for instance, use of specific TV signals that cannot be modified...

ENFORCEMENT

Ambush marketing campaigns took various forms in the recent years in France.

Even if the *tribunal*¹ did not qualify as ambush marketing Ryanair's ad "*with Ryanair, everyone will be able to attend my wedding*" associated with a picture of Nicolas Sarkozy, the French president at the time, and Carla Bruni (who was not yet his wife or even engaged to him), and sanctioned such ad as a violation of Section 9 of the French civil code (the right to the protection of one's image), it was a form of ambush marketing operation. Ryanair was ordered to pay 60,000 € to C. Bruni and 1€ to N. Sarkozy.

Accordingly, when the *Cour d'Appel* of Paris² ordered SFR, the French telecommunication company, and its advertiser, to pay € 1 million to GAUMONT for parasitical practices³ as a result of the extensive display in France of an ad (posters, TV..) shortly after the release of movie the "Fifth Element" under which not only the actress of the movie was appearing but a clearly and direct reference to the movie was sought, it did not qualify the SFR behavior as an ambush marketing operation since the notion was not commonly used at the time; it was nonetheless a clear operation of ambush marketing. The very substantial and unusual amount of damages ordered against the advertiser and its advertising agency lie in particular with the fact that the ad campaign was very substantial, and that SFR and Publicis did not discontinue it after the decision of first instance.

In order to promote its AXE contest, the winner of which was to go into space, on February 6, 2013 UNILEVER had individuals disguised as astronauts attend a FRANCE/GERMANY soccer match in the VIP box, thereby drawing the attention of the TV cameramen. This was the reiteration of the first largely known ambush marketing operation initiated by DIM, the lingerie company who had female spectators attend the rugby FRANCE/IRELAND world cup match wearing lingerie in 2007.

While neither of the AXE or DIM marketing campaigns gave rise to court actions, this was not the case with an ad that FIAT published in L'EQUIPE, the French sports newspaper, in 2012. In this ad, the day after a FRANCE-ENGLAND rugby match, FIAT recalled the score of both teams, congratulated the team of ENGLAND and fixed a rendez-vous on March 9, 2012 to the French team for the next match between FRANCE and ITALY. The ad was signed "Italie 500" a prediction of the score and a reminder to the famous FIAT 500 car. The French *Fédération Française de Rugby* (FFR) filed a claim against FIAT on the basis of the violation of Section 333-1 of the French *Code du Sport* that gives the sports federations and organizers of sports events the ownership of the commercial use of the sports events and competitions that they organize, and on the basis of parasitical practices. The FFR lost on both counts in a very controversial decision of the *Cour d'Appel* of Paris⁴, confirming the decision of the first judges, even though most commentators agree that this was a clear case of violation of the provisions of Section 333-1 of the French *Code du Sport* and of parasitical practices.

Overall, uncertainty remains regarding courts cases concerning ambush marketing operations, where the operation is conducted in the context of an official sports or cultural event by an advertiser which is not an official sponsor. Communication in the context of such event is possible, but precautions need to be taken in order to avoid a claim for parasitical practices.

¹ Ord. Référé 5 février 2008, n°08/50947 and n°08/50939

² CA Paris, 4^{ème} ch. Section A, 8 septembre 2004, n°04/09673.

³ As well as € 750,000 € for copyright infringement, and € 1 million to L. Besson, the director, in compensation for the moral prejudice he suffered.

⁴ CA Paris, Pôle 5, ch.1, 12 décembre 2012, n°10/10996.



GERMANY

LEGAL CONSIDERATIONS

Germany has no specific legislation against ambush marketing per se. Whenever someone wants to prevent a third party from associating itself with a certain event, product or service without really having anything to do with it, any potential plaintiff will have to rely on the general laws relevant in the field of ambush marketing: The Trademark Act will apply in cases of trademark infringements; the Act against Unfair Competition will be a basis against deceptive advertising and misrepresentation, especially when someone creates the impression of being a sponsor of the event; the Copyright Act will apply where a protected work in the sense of the Copyright Act is reproduced or otherwise exploited or used.

The aforementioned legal means have proven sufficient to create a good balance between event organizers and its sponsors (brand owners) on one side and other advertisers, mostly smaller commercial entities and merchants, on the other side.

However, in 2004 Germany passed the Olympic Symbol Protection Act (Olympia-Schutzgesetz), providing protection of the Olympic Rings as well as the Olympic designations "Olympia", "Olympiade" and "olympisch" alone or in word combinations, including their corresponding words in other languages. Their use in commerce is illegal if the use creates danger of confusion as to source or where the use without due cause takes unfair advantage of or is detrimental to the Olympic Games or the Olympic movement. This applies also to similar designations. Only a mere descriptive use is permissible, e.g. relating to the city of Olympia or the ancient Greek Olympic games, or relating to participants of the Games or equipment actually used during the Games).

While some authors claim that a simple use without creating the impression of any association with the game organiser should not constitute a violation of the Act it is still unclear to what extent a simple use of the designations is allowed. This is because some appellate courts consider an association with the Olympic Games in advertising to be sufficient for a violation of the act. In recent cases the terms "Olympic discounts", "Olympic prices", "Olympia 2010" and "in anticipation of Vancouver 2010" have been prohibited. Therefore it is safe to say that any use of the designations bears a high risk of being prohibited by the courts.

REGULATORY CONSIDERATIONS

Regulatory bodies are only of a minor importance in Germany. A body can only impose sanctions if the statutes of the body provides for the members to be bound by the body's measures. Thus, sanctions imposed by regulatory bodies can only be imposed and enforced on a contractual basis.

COMMERCIAL CONSIDERATIONS

Several ways of action can be taken by event organizers and sponsors to protect their interests:

1. Registering relevant IP Rights before marketing the event or the products/services
2. Contractual means
 - Buy up advertising space (TV, billboards, newspapers etc.)
 - Oblige owners of event locations to hand over "clean sites and the domestic authority"
 - Buy the rights for flying the flag on public and private ground
 - Bind media organizations to restrict advertising to event organizers, official sponsors and brand owners only
 - Sponsors should ensure contractually that event organizers will take immediate action against any type of ambush marketing after such activity is brought to their attention
3. Ticketing: restrictions on sale and resale of tickets for advertising and promotions purposes
4. Action and reaction programs: Sponsor protection programs, anti-ambush marketing campaigns; partner recognition programs; ambush action teams



GREECE

LEGAL CONSIDERATIONS

Greek legislation does not include any law provisions prohibiting or dealing in specific with ambush marketing; with the exception of a not legally binding (self regulatory) guideline. Therefore, such issues would be dealt with primarily on a contractual basis. The extent of exclusivity a contract guarantees to an official sponsor determines the extent of his protection against ambush marketing: the stricter the terms of an agreement with regards to the rights of an event organizer to offer parts or spaces of the event to third parties for their marketing causes, the safer for an official sponsor. The most recent and characteristic examples one can point out relate to the Olympic Games of 2004 in Athens, and it is doubtful whether some of them exceed the limits of legitimacy. Before entering into the stadiums, spectators were asked to remove the labels from bottles of water they were carrying that were not of a specific brand of water which was one of the official sponsors of the Games. Other visitors, who wore T-shirts or jackets bearing logos or brand names of competitors of the official sponsor, in particular of sportswear, were asked either to remove the clothes or wear them inside out, in order to cover the competitors' brand names.

REGULATORY CONSIDERATIONS

At a self regulatory level, the Hellenic Code of Advertising & Communication Practice (Code of Conduct which conforms to the consolidated ICC Code of Advertising & Marketing Communication Practice) prohibits ambushing of sponsored properties (Chapter B- Sponsorships, article B4).

As stated above, there are no specific law provisions in Greece dealing with ambush marketing *per se*. In cases of ambush marketing, the following law provisions might be invoked:

- The Greek Consumer Protection Law (which implemented EU Directive 2005/29 on unfair commercial practices) includes provisions about misleading advertising/ misleading commercial practices which could relate to ambush marketing. For example, it is deemed as misleading practice a false claim by a trader that a product has been approved or authorized by a public or private body. Nevertheless, only the consumers (and not the official sponsor) are entitled to sue in case of such false claims.
- The affected official sponsor may raise a claim against the offender relying primarily on provisions of the Greek Law against Unfair Competition and perhaps of Trademark Law (if there is also a trademark infringement).
- Additionally, any breach of the contractual obligations by the event organizer, will lead the official sponsor to raise a claim against him, based on that contractual breach.
- With regards to the Olympic Games, there is special legislation (Law n. 2598/1998 as amended) protecting from any unauthorized use: the Olympic symbol (Olympic Rings), the terms "Olympic", "Olympiad", "Athens 2004", "Olympic Games-Athens 2004", "Olympic Games 2004", "Olympic Games-Greece" and any relative term as long as the emblems/ trademarks of the Hellenic Olympic Committee.

COMMERCIAL CONSIDERATIONS

In view of the abovementioned, it is advisable for the sponsors of an event to form the contractual obligations of the event organizers as strictly as possible, giving emphasis to the exclusivity of their sponsorship and limiting the possibility of the event organizer to let other competitors enter the event market. More specifically, one can consider some of the following:

- Official sponsors should ensure that they are granted the exclusive use of all advertising spaces connected to the relevant events
- Official sponsors should oblige the event organizers to contractually ensure that only the official sponsors can be advertised or otherwise related to broadcasts of the events, relevant press conferences etc.
- On the tickets for the event it should be expressly provided that visitors cannot bring any items to the stadiums bearing logos of competitors.

RECENT ENFORCEMENTS

In view of the fact that Greece has not recently hosted any major sporting event, there are no recent enforcements in the field of ambush marketing.



GUATEMALA



LEGAL CONSIDERATIONS

Guatemala does not have a specific legislation which regulates Ambush Marketing *per se*. Nevertheless, regulation exists implied in a variety of laws of ample scope which allows the penalization of disloyal acts that harm the commerce socially. We can identify such sources as follows: Commerce Code (decree 2-70), and the Industrial Property Law (decree 57-2000), which is intended to protect the trademarks and to establish sanctions related to disloyal competition, including all about trademarks. Besides, Guatemala has also ratified the Paris Convention (article 10bis), which regulates disloyal competition practices.

The above mentioned Guatemalan laws regulate the use of honest practices that commerce establishes for the entire commercial and industrial activity. Laws which should be respected by everyone.

In case of transgression of the respective norm, the request to the authority to declare the illegality of the acts carried out, legitimizes, and consequently obligates the removal of the noxious effects produced and compensation for damages.

Additionally, our commerce law regulates anything related to the advertising that misleads or does not comply with the comparative advertising requirements.

REGULATORY CONSIDERATIONS

The Commerce Code (decree 2-70) regulates that all acts or facts in opposition to the good commercial faith or to the normal and honest development of the mercantile activities, will be considered a disloyal act, therefore, unjust and prohibited competition.

The Industrial Property Law (decree 57-2000) regulates the protection, stimulus and promotion of the intellectual creativity that has application in the industrial and commercial fields, and anything related to the individual combat of the disloyal competition (all act in opposition to honest practices in all commercial and industrial activity); and simultaneously, regulates sanctions for those who infringe the content of this legal norm, for which we can make reference to the established regulation in the Penal Code (decree 1773).

COMMERCIAL CONSIDERATIONS

As suggestions to avoid the ambush marketing practice, we consider the following alternatives:

- Transparency in industrial and commercial activities, through the establishment of conditions of equality for market development, which require obligatory commercial policies settled in competitive campaigns where all participants must fulfil the principle of respect and commercial honesty.
- In general, to protect all the IP rights.
- We consider that it is important to have control over all advertising campaigns in the area near the events and on television, radio, etc.

HONDURAS

LEGAL CONSIDERATIONS

Honduras does not have a specific legislation that regulates Ambush Marketing. Although there isn't a specific legislation on this subject, the Honduran Commerce Code and the Industrial Property Law provide specific provisions allowing the penalization of acts that may harm the commerce socially, this being said, Ambush Marketing could be interpreted so as to be prohibited, since such practice is found to be an act of unfair competition.

As for advertising, the Consumer's Protection Law specifically expressly prohibits any advertising that may be wholly or partially false or misleading, or in any way be able to mislead, mislead or confuse consumers, under pain of a penalty by the correspondent authority.

Litigation of acts regarding Ambush Marketing are not common in Honduras.

REGULATORY CONSIDERATIONS

The Commerce Code provides that all activities contrary to good business practices, shall be deemed as unfair competition. Specifically, Article 425 of the Commercial Code provides a brief description of the acts considered as unfair competition.

The Industrial Property Law promotes the intellectual activity that has application in the industrial and commercial fields; it also provides that law against unfair competition protects all intellectual property rights by establishing sanctions for those who infringe said law.

COMMERCIAL CONSIDERATIONS

In order to avoid Ambush Marketing practices, it is essential to protect all Intellectual Property rights. As explained before, it is would be very difficult to eradicate Ambush Marketing as long as the specific legal mechanisms that prohibit such practice are not enacted.

RECENT ENFORCEMENTS

There are no recent enforcements in Honduras regarding Ambush Marketing.



INDIA

LEGAL & REGULATORY CONSIDERATIONS

In India there is no specific legislation dealing with Ambush Marketing *per se*. Although there are specific legislations like Trademarks Act, Copyright Act, Emblems and Names (Prevention of Improper Use) Act, Contract Act, Consumer Protection Act, Competition Act, etc. that deal with some forms of marketing that can effectively be termed as Ambush Marketing.

Recently, there have been several instances of ambush marketing in India especially during the Indian Premier League (IPL) in cricket as well as before the commencement of the Commonwealth Games in New Delhi. In one such instance during IPL6, PepsiCo had won the title sponsor bid for IPL-6 costing them Rs 400-crore for a five-year deal. To ambush the same, rival Coca-Cola had started talks to buy pouring rights for the nine IPL teams. In another instance, in IPL held in 2012, Parle Agro had launched IFL (Indian Food League) for their popular snacks brand Hippo. This campaign IFL (Indian Food League) was conceptualized and designed on the basis of IPL (Indian Premier League). The party in the present case had utilized event buzz very smartly. They utilized IPL association with their campaign to create awareness about their brand in community.

Ambush marketing has also been prevalent in Cricket World Cup events. International Cricket Council (ICC) demands Indian players for strict adherence to their ambush marketing clause, which states “*Any squad member that knowingly or unknowingly breaches the squad terms may face sanctions ranging from financial penalties through to being excluded from continued participation in the event*”. ICC's rules clearly state that players have to stop promoting companies and products not related to the World Cup before the event begins. In view of the said clause, Indian cricketer MS Dhoni had reportedly come under scanner of the ICC for breaching its ambush marketing clause for the cricket World Cup 2011 wherein Dhoni had been asked by the ICC to stop promoting and endorsing Sony and Aircel, which were the rivals of ICC's sponsors associated with the World Cup then.

Ambush marketing occurs mainly at two levels, first on site and second through media. In the case of on site ambush marketing the same can be controlled by the organizer of the event and in the case of ambush marketing through media, the organizer can take action only when there is use of a mark/logo of the event or it is misleading as to being an official sponsor of the event.

COMMERCIAL CONSIDERATIONS

Reasons for preventing/limiting ambush marketing are as follows:

1. Decrease in commercial value of the event
2. Unhealthy competitive environment
3. Withdrawal of sponsors from the event

There have been few judgements dealing with ambush marketing in India. In one such decision the Delhi High Court in *ICC Development (International) Ltd. v. Arvee Enterprises and Anr*, found the term ‘world cup’ a generic term and refused to take passing off action against the Philips Company and observed that offering tickets as prizes to the event without using the mark/logo of the event is not unlawful and further there cannot be a trademark on a generic word and fair use of the word is allowed under the Indian Trademarks Act. However, in another case of *ICC Development vs EGGS*, an injunction was granted against the defendant for misuse of the world cup logo only because there was a copyright infringement as the logo was held to be an artistic work under the Indian Copyright Act. In another recent case, the Delhi High Court in 2010 granted an ex-parte ad interim injunction order restraining the defendants from using the website www.commonwealthgamesdelhi2010.org as well as from using the Common Wealth Games logo and the mark or any other mark deceptively similar thereto amounting to passing off their goods or services as those of the plaintiff. These cases have set out to be a positive example of relief being granted against ambush marketers under Indian Laws despite the absence of a specific legislation.

Even after occurrence of specific instances of ambush marketing in the recent times, as described above, there has been no specific legislation to deal with the menace of ambush marketing in particular.

However the only relief the affected parties may seek could be in the form of Intellectual property law such as Trademark, Passing off, Copyright or Design rights and prove that there has been violation of some statutory provision. The following reliefs may be sought against ambush marketers:

- 1) **Passing Off**- This common law tort which prevents one person from misrepresenting his goods or services as of another, could be sought as a relief against ambush marketers in case of unregistered trademarks. In order to claim such relief, the event organizer needs to prove: a) his reputation or goodwill in reference to the event in question; b) the third party has made a misrepresentation by its marketing, leading the public to believe that there is a connection between the party and event organizer; c) the affected party has suffered or is likely to suffer damage as a result of this confusion.
- 2) **Trademark Infringement**- The infringement proceedings could be commenced against the ambush marketers in case the event organizers have registered trademark and similar mark is being used by an unauthorized sponsor.
- 3) **Copyright Infringement**- The remedy could be sought in case of unauthorized replication by a third party of a specific logo created in connection with a specific event.
- 4) **Registered Design Right Infringement**- The remedy could be sought in case of unauthorized replication or unauthorized 'dealing' in articles of a particular registered emblem or logo as design leading to infringement of such registered design.

In view of the increasing instances of breach by ambush marketers, there is a strong need for a specific legislation with a view to provide effective enforcement to counter Ambush Marketing.



IRELAND

LEGAL CONSIDERATIONS

There is no legislation in Ireland dealing specifically with ambush marketing. Where a sponsor or event organiser feels that they have been the victims of an “ambush” a trade mark infringement action or a passing off action can be used against the ambush marketer. The prospects of success in each case will hinge on the facts presented to the Court. The Gaelic Athletic Association (GAA), the governing council for the Irish sports of Gaelic football and hurling, asked the Irish Government in 2006 to consider the introduction of specific legislation however no progress has been made to date.

The Consumer Protection Act, 2007 contains a number of protections for consumers against advertisements which mislead and requires a Court to consider any industry codes when considering complaints under the Act. This is discussed further below.

REGULATORY CONSIDERATIONS

The Advertising Standards Authority of Ireland (ASAI) produces a Code on Advertising, Promotions and Direct Marketing which states that all marketing communications should be legal, decent, honest and truthful. It also states that marketing communications should not mislead or deceive consumers and finally that it should not exploit the goodwill of another marketing campaign. The Broadcasting Commission of Ireland Code of Practice contains similar clauses.

Provided the event organiser or sponsor proves that the ambush marketing was in breach of the Codes they can direct a complaint to either body or alternatively take legal action before the public courts under the Consumer Protection Act, 2007 against the ambush marketer and ask the Judge to have regard to the industry codes.

The GAA has adopted its own position and has amended its rule book so that sponsorship is no longer allowed on items of clothing, boots, and accessories or even on the players’ bodies following a number of high profile incidents involving individual player sponsorship.

COMMERCIAL CONSIDERATIONS

The best steps a sponsor or event organiser can take are to try and minimise any risk. They are to:

- Ensure they have effective licensing contracts in place for intellectual property and ancillary rights
- Register trade marks of the logo, name, year and any other images that will be used for the event
- Consider taking steps to restrict advertising in the vicinity of the event or what advertising space can be sold to which companies during the event
- If a sporting organisation, follow the GAA’s step and amend their rule book to prevent members of the organisation being approached by ambush marketers

RECENT ENFORCEMENTS

As there are no specific rules targeting ambush marketing, complaints tend to focus on other aspects of such campaigns often used to maximise the publicity.

Paddy Power “It’s Oscar Time” - 2014



A recent 2014 advertisement by betting company Paddy Power, released at the same time as the Oscar ceremony in the US, was to take place and which offered odds and special offers linked to the Oscar Pistorius murder trial in South Africa, was the subject of widespread complaint. It is being investigated by the ASAI in Ireland and has already been withdrawn in the UK.

Hunky Dory's – Proud Sponsors of Irish Rugby - 2010



In 2010 the above advertisement for a potato crisp company (part of a larger campaign on a similar theme) was the subject of much criticism from the ASAI and was withdrawn. However the Irish Rugby Football Union (IRFU) also sent a solicitors letter to the crisp company regarding the tagline “*proud sponsors of Irish rugby*”. It claimed the tagline was misleading and suggested it was a main sponsor or donor linked to the Irish national teams. In fact the company is a sponsor of a Division 3 amateur rugby team based outside Dublin but asserted that it was entitled to describe itself as a sponsor of Irish rugby in those circumstances. Ultimately the issue was taken no further as the campaign was withdrawn (but not before widespread publicity for the product as a result!). Interestingly the company ran a similar campaign in 2012 almost on the same basis but describing itself as a proud sponsor of Gaelic Football! Again it was the subject of ASAI complaints but the ambush marketing element has not been taken any further.

2012



ISRAEL

LEGAL CONSIDERATIONS

There is no Israeli legislation which specifically outlaws ambush marketing. However, it is possible to prevent/hinder ambush marketing on the basis of Intellectual Property and Intellectual Property related laws. The Trademark Ordinance may be very useful in ambush marketing cases, as it prohibits use of an identical or confusingly similar trademark to a registered mark. Additionally, passing off may be a useful tool. However, passing off is more difficult to prove in comparison to trademark infringement, as the plaintiff must establish:

- a. that he/she has acquired good will and reputation and
- b. consumers are associating the defendant's goods/services with the plaintiff.

Wrongful Interference, which is part of the Commercial Tort Law, may also form a basis for an ambush marketing case. As in passing off, wrongful interference can be difficult to prove. The Consumer Protection Law which extensively outlaws misleading consumers, may also be relied upon in ambush marketing cases.

Occasionally, plaintiffs will base their legal actions on the Unjust Enrichment Law. This law is designed to prevent defendants from gaining profit due to wrongful acts, which often, cannot be defined as Intellectual Property infringement. In other words, occasionally judges are confronted with situations whereby the defendants very cleverly commit acts which do not infringe "classic" IP rights. Nevertheless, it is clear that the defendant is taking advantage of the plaintiff's rights, which at times are hard to define. On the one hand, the Unjust Enrichment Law is the perfect law against "ambush marketers" who often, remain beyond the realm of IP, yet obviously enjoy the plaintiff's goodwill/brands/ideas/investment, etc. On the other hand, plaintiffs should be aware that obtaining a favourable judgement under the Unjust Enrichment Law is not an easy task. At present, many judgments are not clear and contradict one another. It seems the courts/judges have yet to set clear criteria for the establishment of "unjust enrichment" actions.

REGULATORY CONSIDERATIONS

Advertising on television is strictly regulated. The Second Television and Radio Authority Rules (Television Advertising Ethics) - 1994 and the Communication Rules (Bezek and Broadcasting) (Advertisements, Services and Sponsorship Broadcasting on designated Channels) - 2004, set specific rules and guidelines relating to advertisements broadcasted on television. The former Rules relate to private television stations (in contrast to state/national television) and the latter Rules relate to private television broadcasted through cable and satellite. Ambush marketing on television, may be in breach of the different rules designed to prevent misleading consumers.

COMMERCIAL CONSIDERATIONS

- In order to obtain trademark protection, which holds many advantages relating to other legal forms of protection, organisers/sponsors should consider registering the relevant trademarks **prior** to the sporting event. A trademark application which has not matured to registration prior to the event, holds little or no advantages.
- Official sponsorship should be noted in/on all relevant ads.
- Purchase as much advertising space as possible in the vicinity, its approaches, relevant bus/train stations, airports and on means of transportation leading to the vicinity.
- Contractually bind organisers to protect official sponsors by taking action against ambush marketers and prevent ambush marketing.



ITALY

LEGAL CONSIDERATIONS

Specific legislation:

Following a trend set by major international sports associations such as IOC, FIFA, UEFA for events with significant audiences, the Italian House approved a specific bill in order to grant suitable protection to the sponsors' financial support during 2006 Winter Olympics in Turin.

This event specific, temporary Regulation (Law no. 167 of August 17, 2005):

- Reserved the use of the Olympic symbols and signs – on an exclusivity basis – to a limited number of legal entities or specifically licensed companies (the Official Sponsors),
- Strictly banned any publication, commercial distribution and sales of products or services with distinctive signs likely to suggest the existence of a license, authorization or other forms of association with the event,
- Explicitly defined ambush marketing as *“activities parallel to those undertaken by economic or non-economic bodies authorized by the organizers of the sporting events, with the aim of making a profit”* and prohibited it as an illicit practice,
- Aside from traditional remedies, generally available for reacting to TM infringement, unfair competition and misleading advertising, offered:
- Administrative sanctions (fines) from Euro 1.000 up to Euro 100.000,
- Enforcement through Revenue Officers, State Police and other competent Legal Authorities,
- Potential seizure of all infringing products.

The Regulation remained in force for a sixteen-month period, starting in June 2005. After December 31st, 2006 'ambush marketing' had to consider only the obligations laid down in the Nairobi Treaty of September 26th, 1981 as well as the Italian Civil Code's provisions on unfair competition and a basic fairness principle, requiring all commercial communication to be transparent, honest, truthful, correct and not misleading.

In the light of the upcoming Expo 2015, scheduled in Milan from May throughout October, the Italian Parliament felt necessary relying again on an event specific protection with respect to TMs, logos, distinctive signs, symbols and colors characteristic for the Exhibition. Such protection will signs' and symbols' use and will be granted during the event and until December 31, 2015. According to Section 5/e of Law no. 71 of 2013, the competent State Departments are called to issue a specific Regulation with measures aimed at:

- Hindering unauthorized and illegitimate use of all distinctive signs associated with the Universal Exhibition Expo Milan 2015,
- Preventing both, 'parallel initiatives' as well as 'parasitic commercial activities' capable of making infringers gain visibility or undue economic profit (with a specific reference to practices commonly known as 'ambush marketing),
- Hitting offenders with fines from Euro 5.000 up to 250.000, unconditional of other traditional remedies eventually available.

The announced Ministerial Regulation will provide additional details on the measures deemed adequate for enforcing this protection.

There has also been an attempt to address the problem in a more general and conclusive way. A Bill is waiting in the Italian House for exam and discussion by the MPs. Such Bill intends to grant and protect Teams' and Sports Federations' immaterial rights on their distinctive signs (TMs, logos, denominations, symbols, colors and trophies) related to their typical activities as well as to their related commercial businesses, inclusive licensing and merchandising. Any unauthorized trademark registration of such distinctive signs would be strictly banned (being eventual, illicit registrations automatically void). No unauthorized or misleading third party affiliation with such protected assets would be allowed. Undue parallel or parasitic affiliation and any infringing third party commercial use of goods or services bearing (or promoted through) such distinctive signs or capable of causing likelihood of confusion, could be prosecuted. Save any other available reaction, infringement would be sanctioned by fines from Euro 10.000 up to 200.0000.

For some reasons this Bill is struggling to make it through the House.

Effectiveness: How did it work?

During the 2006 Olympic Winter Games, in addition to public enforcement authorities, special teams of "brand police" performed strict surveillance on all sports venues and their surroundings and as a result:

- Almost every logo/brand not referring to an official sponsors was covered,
- The competing teams received immediate warnings even for minor conduct of non-compliance,
- Reporters, while commenting on the competitions from their special newsstand, were asked to:
 - hide the logos on their laptops with black electrical tape,
 - strip logos from their beverage bottles, or
 - put them under the desk,
- Logos on porcelain in venues' restrooms were also tape covered,
- Owners of business premises featuring (even if used for many years) distinctive signs recalling the Games (e.g. Olympia Gym, Olympia Restaurant/Bar, a bakery offering an Olympia cake, etc.) were forced to take their brands and signs down or to cover them up temporarily.

COMMERCIAL CONSIDERATIONS:

So, a complete success? Not really. A big US company successfully managed to associate its brand with the Games by closing a deal with Italian Railways, months ahead of the event, which involved wrapping the trains bringing fans to the sports venues in its corporate logo. The company succeeded in setting up a moving billboard, as spectators approaching the sports venues ended up travelling on trains:

- Depicted all over with red and white bull's-eye logos
- Were greeted on board of the "Target Express" by young welcome teams,
- When leaving at stations connecting to Olympic locations, were provided with special, branded gadgets (wooden train whistles, small air horns, large foam gloves),
- Were greeted by slogans such as *"Target helps you express your passion. Get ready to make some noise!"*

The Organizing Committee of the Winter Games, though fuming about the smart move, decided to not take action, as the perspective for a success in court did not appear to be very high.

There is not much case law to be found, specifically dealing with issues of 'ambush marketing'.

Prior to the 2006 Turin Olympic Winter Games, an Italian apparel manufacturer approached the IP Section of a local Civil Court questioning TM registrations for terms such as 'The Olympic Store', 'Olympic Games', 'The Olympics' and the traditional five rings, symbolizing Olympic events. In the claimant's view, such symbols lacked of 'distinctive character' resulted in generic terms, part of common language, and – as far as the five rings were concerned – had only a 'decorative character'.

The Organizing Committee of the 2006 Games (TOROC) contested such claims as patently not grounded.

The Court of Venice (IP Section, judgment December 16, 2005) decided in favor of the defendant and dismissed all claims, stating that:

- the Olympic symbols have 'absolute distinctive character', specifically protected under the provisions of the Nairobi Treaty,
- the TM 'Olympic' (or TMs containing such term) had to be considered as 'famous', being out of question that worldwide the general public immediately associates the term with the Games,
- with respect to a 'famous trademark', right holders' protection may include a ban upon third parties to use identical or similar terms, even though there is no affinity among products and no likelihood of confusion occurs (being the only requirement for benefitting from the particular protection, infringer's capability to draw undue economic advantage from the association),
- in such case (of a famous TM) the fact that a symbol (the rings) has primarily a decorative character does not prevent the particular, strict protection, provided the similarity of the infringing sign is capable of misleading the public through an immediate association of the sign with the registered Trademark.

RECENT ENFORCEMENTS:

Back In June 2013, Harley Davidson celebrated its 110 years anniversary in Rome with a series of events over a four days period. To the purpose, a Harley Davidson village was set up in Ostia, a small town at the seaside close to Rome, in order to host approximately 100.000 HD fans expected to attend. In order to make the fans happy, a number of truly outstanding side events were organized, from concerts with famous rock bands to a blessing from Pope Francis on Saint Peter's Place. An Italian company, manufacturing and distributing tires, sought to take advantage of the HD event by placing several booths and a hospitality clubhouse nearby to the HD village. In addition the local company announced that it intended to participate to HD's celebration, was eager to offer bikers technical assistance as well as workshops both, product focused as well as on special riders' apparel (special tattoos on tire were also available). To no one's surprise, HD was not particularly happy about this initiative, accessed a local Court with a request for a preliminary injunction, which it actually obtained under an unfair competition perspective. Interestingly, the Court issued such injunction in the course of an urgency proceeding without even giving the defendant a chance to appear and to submit its arguments. The Court fixed a hearing for a date four days from the temporary injunction, on the closing day of the HD event. Since then, no additional press releases on the case occurred, which suggests that an out-of-court settlement was probably reached.

The lesson to bear in mind: despite strong opposition from event organizers and sponsors, ambushers never fall short of new ideas allowing them to successfully weasel around their attractive preys.



JAPAN

LEGAL & REGULATORY CONSIDERATIONS

There is no specific legislation in Japan directly relating to ambush marketing. The tactics used in ambush marketing, however, are generally already prohibited by the Trademark Act and the Unfair Competition Prevention Act in Japan.

Moreover, in anticipation of the Tokyo Olympic and Paralympic 2020, the Japan Olympic Committee and others are expected to be increasingly active in protecting marks, catch phrases and other Olympics related intellectual property, which may lead to greater enforcement in the coming years.

1. Trademark Infringement

If the techniques used in an ambush marketing campaign infringe on any trademarks, the owner of the trademark rights may request an injunction and claim damages under the Trademark Act (*Shōhyō-hō*; Act No. 127 of 1959).

2. Competition Law

Separately from the Trademark Act, the Unfair Competition Prevention Act (*Fusei kyōsō bōshi-hō*; "UCPA") applies to ambush marketing much more generally, in the ways described below.

(1) If an indication of goods or business (meaning a name, trade name, trademark, mark, container or packaging for goods which is connected with a person's operations, or any other indication of a person's goods or business used in relation to goods or services is "identical" or "confusingly similar" to the indication of a good or service that is "well-known", thereby causing "confusion" with the existing product or service, then it is prohibited as unfair competition under the UCPA.

In deciding whether certain marketing activities are prohibited under these provisions, each of the requirements below will be considered:

Is the existing indication "well-known"?

For the target indication to be recognized as "well-known" (and protected as such), it must have gained broad recognition in the Japanese market.

Is the ambush marketing indication "identical" or "confusingly similar"?

To answer this question, courts look to whether consumers and/or traders, under the particular set of circumstances of trade, would be likely to recognize two indications to be similar, as judged holistically, through impression, experience or psychological association and the like, based on their appearances, appellations or concepts.

Finally, is the indication used in the ambush marketing campaign likely to cause "confusion"?

To answer this question, courts look not only at whether consumers and/or traders are likely to confuse the two entities (i.e. the event organizer and the ambush trader) as one and the same, but ALSO whether or not consumers and/or traders might, while being aware that the two business entities are different, be caused to believe that the two entities may have some relationship, whether the relationship is a transaction-based relationship, economic, financial or organizational (which requires a far higher degree of recognition among consumers and/or traders than a "well-known" insignia).

(2) In addition, if the indication used in an ambush marketing campaign is "identical" or "confusingly similar" to a "famous" or "popular" indication used by another person or entity in relation to goods/services, then civil remedies are available against such activities regardless of whether the ambush marketing campaign indication is likely to cause "confusion". The test for whether the existing mark is a "famous" or "popular" mark is a much higher hurdle than that for being a "well-known" mark, but marks used in relation to an established global sporting event such as the Olympics might typically be a prime example.

COMMERCIAL CONSIDERATIONS

Where an event organizer believes that particular ambush marketing activities violate the UCPA, the organizer will generally send a cease-and-desist letter. As the ambush marketer is unlikely to cease the activities simply upon receiving such letter though, and the organizer will also consider seeking injunctive remedies and/or damages.

In practice, however, proving that a violation has occurred under the UCPA (i.e. meeting the requirements described above) is not a simple matter, and so it is advisable that event organizers properly file applications for trademark registration and design right (if any) registration, well in advance, with respect to all relevant marks and indications relating to the event.



KOREA

LEGAL CONSIDERATIONS

There are no specific laws, regulations, or current legislative discussions in Korea directly governing ambush marketing, which provide certain requirements and sanctions to be imposed in case of non-compliance thereof. Accordingly, the legality of ambush marketing and the protection of event organizers and their official sponsors can only be analyzed or reviewed under the relevant existing laws, such as the Trademark Act, the Design Protection Act, the Copyright Act, the Unfair Competition Prevention and Trade Secret Protection Act (“UCPA”), as well as the Monopoly Regulation and Fair Trade Act (“FTA”). In other words, a case-by-case analysis is required in order to determine whether an act of ambush marketing violates any of the above-listed laws in Korea, followed by an analysis on any relief (i.e., monetary and/or injunctive relief) which can be sought under applicable laws. Provided that the ways in which ambush marketing is done are to use certain marks, trademarks or designs for the purpose of giving consumers the impression of sponsorship (i.e., causing confusion to them), an in-depth analysis on the primary issue of whether an act of ambush marketing infringes upon trademark or design rights of another or violates the UCPA may be required.

REGULATORY CONSIDERATIONS

The Korean Fair Labelling and Advertising Act flatly prohibits false and exaggerating labelling and advertising that are likely to be deceptive and misleading to consumers. In addition, the Act on the Control of Outdoor Advertising, etc. imposes administrative or criminal sanctions against anyone who fails to obtain a valid authorization from or file a report with the relevant authorities in case he or she wishes to install outdoor advertisements, including a billboard or a banner, in certain selected areas, such as business districts. Therefore, it may also be necessary to review whether an act of ambush marketing can be found violations of under the above-mentioned regulations.

COMMERCIAL CONSIDERATIONS

- Under Korean law, registration is required for protection of trademarks, designs and exclusive license for designs. Recordation of exclusive trademark licenses with the Korean Intellectual Property Office (“KIPO”) is useful because such recordation enables the right-holders to easily prove their legal standing as exclusive licensees in case they want to bring legal actions against infringers (i.e., ambush marketers who infringe their trademark rights and design rights). [**K&C Note:** Please note that the Korean-U.S. FTA came into effect on March 15, 2012, and under the corresponding revised Trademark Act, an exclusive license no longer has to be recorded with the KIPO in order for it to be effective.] Hence, sponsors should check if the trademarks and designs have been validly registered by event organizers in connection with their goods or services, and if necessary, they should consider requesting event organizers to record them as exclusive licensees with the KIPO.
- Sponsors may consider requesting event organizers to monitor the activities of the ambush marketing, and further to take appropriate legal actions to impose civil and/or criminal sanctions on the ambush marketers.
- In case event organizers enter into contracts with broadcasting companies (e.g., television, satellite or Internet broadcasters, etc.), event organizers should consider imposing obligations on the broadcasting companies to restrict broadcasting of the ambush marketing advertisements before/after as well as during their broadcasts.
- Event organizers may consider announcing and enforcing restriction of visitors who wear or possess products which are used on ambush marketing advertisements from entering into the event site. The same restriction can be expressly stated in the ticket terms and conditions.
- In case there are a number of ambush marketers at the event site, considering the costs for and the effectiveness of taking legal actions against each and every marketer, event organizers and sponsors may consider taking actions against some selected marketers that are substantial in terms of their size.



LUXEMBOURG



LEGAL CONSIDERATIONS

For the time being, the Grand-Duchy of Luxembourg has not implemented any specific legislation prohibiting ambush marketing behaviour. However, several Luxembourg laws indirectly refer to concepts likely to apply to ambush marketing, namely:

- **Unfair competition and parasitism.** The law of 30 July 2002 on certain commercial practices, unfair competition and misleading advertising (the “**BtoB Unfair Practices Law**”) prohibits unfair competition which consists of depriving or trying to deprive a competitor of all or some of its clients, or of reducing or trying to reduce the competitive capacity of a competitor through an action which is contrary to fair and honest commercial practices or contrary to a contractual commitment. Unfair competition gives rise to civil liability under Article 1382 of the Luxembourg Civil Code.

In the context of unfair competition, Luxembourg case law applies the notion of “parasitic competition” (“*concurrence parasitaire*”), which covers most ambush marketing situations. Parasitic competition occurs when someone, without incurring any costs, follows in a third party’s wake in order to take advantage of its investments and reputation. Under certain circumstances, the parasitism may also occur and create liability under the general principles of civil liability even when there is no relation of competition.

- **Misleading advertising** is prohibited by both the Unfair Practices Law and the Consumer Code introduced by the law of 8 April 2011..
- **Intellectual property infringements.** The Benelux Convention on Intellectual Property and the Luxembourg law of 18 April 2004 on Copyrights, Neighbouring Rights and Databases, as amended, grant IP right holders the right to prevent third parties from using their protected rights for commercial gain.
- **If there is a partnership agreement,** contract law and especially contract law liability principles may also apply if ambush behaviour originates from one of the parties to a partner/sponsor agreement.

SELF-REGULATORY CONSIDERATIONS

The Ethical Code of Advertising (the “**Ethical Code**”) that was redacted by the “*Commission Luxembourgeoise pour l’Ethique en Publicité*” requires the advertising sector to comply with the legal restrictions relating to advertising and unfair competition. Those who have ratified the Ethical Code are also required to meet the terms of the ICC International Code of Advertising practices on marketing communication (“**the ICC Code**”). According to the ICC Code, any marketing communication should be compliant with the principles of fair competition. Moreover, a specific disposition was added in the ICC Code, in August 2011, to target ambush marketing as follow “*no party should seek to give the impression that it is a sponsor of any event or of media coverage of an event, sponsored or not, if it is not an official sponsor of the event or of media coverage*”. Even though the ICC Code is not legally binding, it gives a framework and a code of conduct, which should be respected.

RECENT ENFORCEMENTS

The Luxembourg Consumer Code was introduced by the law of 8 April 2011 in order to enhance the protection of consumers by codifying the existing legislation. Some specific provisions of this Code can be used to prevent ambush marketing techniques such as:

- Practices contrary to the requirements of professional diligence;
- Practices that may mislead consumers;
- Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.

Anyone breaching these provisions risks a fine from 251 to 120,000 euro and any clause contravening them will be null and void.

COMMERCIAL CONSIDERATIONS

Here are some tips to prevent ambush marketing:

Organisers may consider making use of a prevention strategy including for examples:

- Monitoring advertising in the vicinity of the event,
- Buying and reselling advertising spaces to official sponsors in the vicinity of the event,
- Registering any potential intellectual property rights (logos, slogans, etc.) before marketing an event or the products/services linked with the event,
- Requiring participating competitors not to display their own sponsors during the event,
- Reaching partnerships with social media players to help them prevent brands from using their social network for ambush marketing attempts.

Organiser and official sponsors may consider:

- Introducing campaigns relating to official sponsors to raise awareness of the public,
- Be proactive by systematically taking legal action against ambush marketers.



MALAYSIA



LEGAL CONSIDERATIONS

As of 20 March 2014, there have been no new laws, changes, amendments for specific protection against ambush marketing. There are no specific laws per se curtailing Ambush Marketing. An aggrieved party however has common rights and can still bring an action if his rights are infringed under trademark, common law tort of passing off, copyright or even bring an action if there is misrepresentation depending on the differing facts of each case. However, these alternative routes of action do not grant exclusive rights that can be infringed by “ambush marketing” to the sponsors of an event.

REGULATORY CONSIDERATIONS

As of 20 March 2014, there have been no new laws, changes, amendments for protection against ambush marketing based on Communications and Multimedia Act, Content Codes by The Communications and Content Forum of Malaysia, the Advertising Content Code of Malaysia, Regulations administered by the Malaysian Communications and Multimedia Commission (MCMC). The recurrence of ambush marketing renders it prudent for the advertising laws and codes such as the Communications and Multimedia Act, Content Codes by The Communications and Content Forum of Malaysia, the Advertising Content Code of Malaysia, Regulations administered by the Malaysian Communications and Multimedia Commission (MCMC) to be revamped. These Codes and Laws, necessitates all advertisements to be legal, decent, and honest conforming to the principles of fair competition and does not expressly provide legislation or codes specifically for Ambush Marketing (It can also be argued that Ambush Marketing can be brought under the ambit of unfair competition). The effect these have on advertisements is to bar content of statements or visual presentation, which directly or by implication is likely to mislead the consumers of the product advertised thereby gaining unfair advantage through advertisement. Since marketing products by ambush would indeed lead to unfair advantage, there could also be sanctions and deterrence by a sui-generis type of law.

COMMERCIAL CONSIDERATIONS

Malaysia has her share in hosting major events like the South East Asian (SEA) Games, Commonwealth games, Formula 1 Motor Sport and the like. Ambush Marketing is therefore very common during these events.

Practical steps for Event Organizers or Sponsors to consider curtailing Ambush Marketing will include:

- i. Official Sponsors may contractually bind event organizers to only sell advertising space to the sponsors only. Also, restrictions to what the participants (athletes, spectators) of these events wear and carry can be implemented. For example, the implementation of a spectator ticketing regulations to restrict what can be brought into the event vicinity.
- ii. Obligations should be imposed on the media to only allow advertising and promotional activities done by the official sponsors only.
- iii. In order for Event organizers to attract future sponsors, they should set a guarantee that they would take reasonable measures to prevent advertisers by way of ambush.
- iv. A penalty should be placed on Advertisers who practice unfair marketing strategies as a deterrent and this penalty charge should be a separate one from the damages under other acts of wrong doing.
- v. Increasing awareness in the public domain so the public will know who the actual sponsors are. For example, Coca Cola had a huge promotional impact by placing the special Olympic Rings on cans and bottles sold all over Malaysia to show their sponsorship of the Event in the lead up to and during the 2004 Athens Olympics



MEXICO

LEGAL CONSIDERATIONS

Any action taken against ambush marketing should be done to avoid the misappropriation or the capitalization by non-sponsors on the goodwill or popularity of an event and to repel any intentional confusion of the public that might lead it to believe that an ambush marketer is an official sponsor of an event. In Mexico, there are no specific legal provisions against ambush marketing, but the possibility of enforcing against it, can be achieved through legal means that are present in the fields of Intellectual Property Law and Consumer Law.

Thus, when a sponsor is affected by an ambush marketing act he or she could react against it by the following means:

- a) An unfair competition action in accordance with the Industrial Property Law when there is a risk of association of intellectual property rights through ambush marketing. The source of confusion is not required; the risk of association is enough to file an unfair competition action. The plaintiff's chances of success are greater if it has registered its mark and is well-known.
- b) By filing a penalty request in accordance with the Federal Consumer Protection Law when the ambush marketing act contains deceptive advertising.
- c) By filing a civil action against any tortuous interference with contract and prospective business advantage.
- d) By filing a civil action against the breach of exclusive agreements.

Nevertheless, the most effective way to prevent ambush marketing is through contractual limitations.

REGULATORY CONSIDERATIONS

In Mexico, the Code of Ethics for Advertisement of the National Commission of Self Regulation (CONAR) requires that the members' advertisements are truthful, not misleading and based on an ethical competition. Said principles prove broad enough to reject ambush marketing from an ethical point of view. Despite the limitations of the Code of Ethics conceived by a self-regulatory entity with no legal sanctions, the CONAR has been gaining strength with the related authorities, especially with the Federal Consumer Protection Agency (PROFECO) where their decisions can be considered as non-binding precedents in administrative resolutions.

COMMERCIAL CONSIDERATIONS

From the sponsor's perspective the most recommended tips to avoid ambush marketing are:

- a) Secure exclusive television rights for the event in the sponsor's own business category.
- b) Secure endorsements with athletes.
- c) Purchase advertising on billboards outside the venue.
- d) Address intellectual property rights in the sponsorship agreement (including sponsorship policy), and as the sponsor's obligations to pursue marketing.

The recommended tips to avoid ambush marketing from the organizer's perspective:

- a) Seek full protection of IP rights by registration of trade marks and service marks.
- b) Promote pro-active enforcement through cease and desist letters and lawsuits.
- c) Negotiate with broadcasters to avoid the purchase of subcategory rights by competitors of official sponsors.
- d) Seek control of venue and distribution of ambush marketing materials.
- e) Seek control of advertising in the airspace above the event venue.



NETHERLANDS



LEGAL CONSIDERATIONS

The Netherlands has no specific law that prohibits ambush marketing *per se*. Where such marketing involves using distinguishing signs related to the event, redress is generally sought through traditional forms of intellectual property protection: copyright law (Dutch Copyright Act) and trade mark law (Benelux Convention on Intellectual Property and Community Trade Mark Regulation). If IP rights are not at disposal in such instances, event organisers and official sponsors may rely on general tort law (passing off). More creative types of ambush marketing, not involving possible IP-infringements, may be combatted using unfair commercial practices legislation. For example, an advertisement that falsely suggests that a sponsorship relation exists between a company and an event may be challenged by competitors of the ambusher (f.e. official sponsors) and/or consumers based on Dutch Civil Code provisions regarding misleading advertising. Another (preventive) option is the use of contract law in relation to ticket sales. Several forms of ambush marketing may be prevented if the ticket terms and conditions state that the tickets cannot be used for commercial purposes without prior written approval. The terms and conditions can also set certain "house rules", outlawing ambush marketing at the event venue. These types of provisions serve to enable an event organiser to refuse access to the venue to visitors involved in ambush marketing schemes.

REGULATORY CONSIDERATIONS

The Netherlands has an extensive self-regulatory system relating to advertising. The Dutch Advertising Code contains a body of rules with which all advertising must comply. It is divided into a General Section and a Special Section (the Special Advertising Codes). The former stipulates, among other things, that advertisements may not be misleading or untrue. The Special Codes apply to advertising for specific products and services. There is no special provision in the Advertising Code stipulating that advertisements must not falsely suggest or imply sponsorship of an event.

Anyone who believes that an advertisement violates the Advertising Code may submit a complaint to the Advertising Code Committee. The Advertising Code Committee may allow or reject a complaint. In the former case the Committee makes a 'recommendation', which means that it recommends the advertiser to discontinue this way of advertising.

Despite its limitations as a self-regulatory system with no legal sanctions, the Dutch Advertising Code and the Advertising Code Committee prove to be quite effective. In 2012 96% of recommendations by the Advertising Code Committee were complied with.

COMMERCIAL CONSIDERATIONS

In the Netherlands we have a saying that often holds true in cases of ambush marketing: "sit still when you are being shaved". Official sponsors and event organisers should consider to avoid devoting attention to cases of one-off ambush marketing (f.e. one-time marketing stunts at an event venue). Resorting to legal action may create (even more) unwanted free publicity for the ambusher. Should the ambush marketing be of a more structural nature, countermeasures (legal and PR) should be considered. Save from the usual legal route, for official sponsors a sharp and humoristic marketing counterattack may be worth trying. An unorthodox but sympathetic tactic is likely to enhance positive associations with consumers and fits perfectly in the *sportsmanlike* spirit.

RECENT ENFORCEMENTS

The Dutch are strongly associated with the concept of ambush marketing due to the "Bavaria Babes"-case. During the FIFA World Cup in South-Africa in 2010, several Dutch women were arrested after wearing orange dresses during matches, that were provided to them by Dutch beer brewer Bavaria. Budweiser, official sponsor of the event, was not amused. In terms of marketing value, the Bavaria action was an enormous success.

Despite this Dutch example of ambush marketing, the case law on the subject in the Netherlands is scarce. In 2006 the Court of Appeal of Amsterdam handed down a judgment regarding typical orange shorts featuring the trade mark of (again) Bavaria.



These “Leeuwenhosen” were distributed for free to fans in huge numbers around the stadiums where the national football team played an exhibition game. The ambush marketing action was successfully countered by the Dutch football association KNVB. The Court of Appeal considered this form of advertising to be unlawful towards the KNVB, as it negatively affected the value of sponsorship agreements. The Court of Appeal also considered Bavaria’s action to be unlawful towards Heineken (the official sponsor of the event), as Heineken paid an extensive amount of money in order to be (exclusively) authorized to advertise in the stadium.



NEW ZEALAND



LEGAL CONSIDERATIONS

The Major Events Management Act 2007 (the “Act”) was introduced into New Zealand following the confirmation that New Zealand would host the Rugby World Cup in 2011 together with a number of other international sporting events. It was recognised that at that point it was the right time to consider specific legislation to deal with ambush marketing.

Prior to the commencement of the Act sponsors of marketing events had to rely on a number of separate pieces of legislation and common law rights to protect themselves from ambush marketing. This meant that there were often gaps in the protection afforded to sponsors. Sponsors became reluctant to spend significant amounts of their annual marketing budget on sponsorship, which might be ambushed. The Act, however, has sought to fill those gaps and provide sponsors and event organisers with a certain amount of protection around the investment a sponsor makes in a major event.

The Act does not afford every sponsor or sponsorship arrangement the right to protection from ambush marketing. An event organiser must first apply to have the event declared a “major event”. The relevant body will then consider matters including the number of participants, the number of spectators, the tourism opportunities for New Zealand, New Zealand’s international profile during the event, the level of professional management involved and required, and the level of international media coverage. This makes it clear that the Act will only operate to protect truly “major events” which feature on the international stage. Once declared a “major event”, sponsors of the event will be entitled to the protection afforded by the Act in relation to ambush marketing by “association” and “intrusion”.

Ambush marketing by association occurs where an advertiser (who is not a sponsor of the event) misleads the public into thinking that it is associated with the event. These actions are now prohibited by the Act. It is noteworthy that both the advertiser and the entity “who receives consideration for the placement or the location of the representation” will be caught by this prohibition.

Ambush marketing by intrusion is when an event is used to provide the ambush marketer’s brand with exposure or publicity to which it is not entitled. In general, this occurs when a non-sponsor marketer gains the attention of an audience who would not have gathered except for the major event. To deal with this type of ambush marketing the Act will allow a declaration to be made for “clean zones” and “clean transport routes” around major events the aim of which is to prevent unauthorised exploitation at the expense of event sponsors.

COMMERCIAL CONSIDERATIONS

One of the commercial drivers underlying the introduction of the Act was to ensure that New Zealand is a competitive and desirable location to hold international events. Without the introduction of the Act sponsors might have found the value of their sponsorship dollar seriously undermined and questioned the worth of sponsorship as a marketing tool. This could still happen, if an event organiser failed to take all necessary steps to ensure the event was declared a “major event” and that the scope and extent of any “clean zones” or “clean transport routes” accurately reflect the key locations and specific areas of concern. Sponsorship agreements will therefore continue to be fiercely negotiated and key points for sponsors will not only be the obligation on event organisers to obtain “major event” declarations and secure clean zones but also to make the conditions precedent.

RECENT ENFORCEMENTS

The Act provides for a variety of enforcement measures. These include civil remedies such as accounting for profit, damages and corrective advertising as well as criminal penalties. Enforcement Officers under the Act are also able to enforce various administrative remedies including formal warnings, and seizure or requiring that offending material be covered up.

There have only been a small number of enforcement actions that have been reported under the Act to date. These include a company and its director which were involved in the importation of counterfeit Rugby World Cup apparel. The actions resulted in a conviction of both the company and its director for the breach of sections 10 (no representation of associations with major event) and 13a (the importation of goods that breach section 10), resulting in a NZ\$20,000 fine each.



NICARAGUA



LEGAL CONSIDERATIONS

In Nicaragua there is no specific legislation related to ambush marketing. However, some of the common forms of ambush marketing – such as using tickets of an event as prizes for sweepstakes or other promotions – may potentially infringe laws regulating trademarks, copyrights, unfair competition and consumer protection. Furthermore, at present there has not been any known case against an ambusher.

REGULATORY CONSIDERATIONS

There is no self-regulation code currently in place in Nicaragua.

In addition to the regulation concerning IP and consumer protection, it is also worth mentioning that the **COMPETITION PROMOTION ACT (LAW No. 601)** defines unfair competition as: *any actions or conducts carried out by economic agents in the exercise of a commercial activity, which are contrary to honest uses and practices in commercial matters.*

COMMERCIAL CONSIDERATIONS

As recommendations to reduce the ambush marketing practice, we would recommend the following:

- As a general rule, protect all the IP rights.
- Keep an eye over advertising campaigns on newspapers, television and radio, etc.
- Pursue ambush marketers through cease and desist letters, and consider legal actions as well.
- When an ambush marketing campaign has been identified, the event organizer could consider issuing a press release to be shown in the local newspapers, in which said organizer announces its intention to invalidate tickets given away by non-sponsors (for example) and also mentions the name of the only party or parties authorized to run such sweepstakes (the sponsor).
- In Nicaragua, it is a usual practice for parties - interested in running marketing campaigns – to request an approval from the Consumer Protection Agency (“CPA”). Therefore, it is recommended to inform the CPA of the authorized parties that can run a marketing campaign in connection with a particular event.



NIGERIA

LEGAL CONSIDERATIONS

There is no specific law regulating Ambush Marketing in Nigeria. This may be due to the fact that there are not many instances of Ambush Marketing in Nigeria, thus the Law is still developing in that regard. Generally, Ambush Marketing is experienced during football tournaments in Nigeria. Given that Nigerians are great football fans and most of the population usually attend or tune in to watch football matches, big local companies (and some multinational companies with presence in Nigeria) tend to seize the opportunity presented by the event to organise certain advertising campaigns identifying their brands and associating same with the football tournament. Sometimes, the advertisements are subtle (for instance, encouraging or congratulatory publications to the national team), and other times, the campaigns are full blown competitions and or promotions with specified prizes for the winners. No matter the form Ambush Marketing may take, organisers and sponsors of events are not left with a lot of options – apart from the more established principles of trademark infringement/ passing off and other intellectual property infringement - through which they can enforce their exclusive rights and prevent non-partner entities from wrongly profiting from an event which they have not sponsored or acquired licensing rights to.

REGULATORY CONSIDERATIONS

As stated above, regulation and enforcement is usually achieved through the local intellectual property enforcement systems. For instance, the Trademarks Act Cap T13 Laws of the Federation of Nigeria 2004 (“the TMA”) prohibits the unauthorised use of a trademark belonging to another party or entity. The exclusive rights to use trademarks related to an event, where secured by the organisers and or sponsors of the event through registration will therefore be protected under the TMA. This position is applicable to Copyrights and other forms of intellectual property associated with an event.

Again, there are some pertinent provisions in the Nigerian Code of Advertising Practice made pursuant to the Advertising Practitioners’ (Registration, etc.) Act by the Advertising Practitioners Council of Nigeria (“the Council”) which could be relied on in prohibiting or restricting Ambush Marketing in Nigeria. In particular, Article 10 of the Code states that advertisements shall not contain any item which is in breach of Nigerian and international copyrights laws, or omit anything which the laws on intellectual property require. These provisions are enforceable by the Council and a breach of any of the provisions could result in heavy fines, reduction of scope of license, suspension and revocation of license among others.

COMMERCIAL CONSIDERATIONS

Some steps that can be taken by organisers and sponsors which have these exclusive official rights in an event include the following:

- Register all related trademarks and logos;
- Publicise the exclusive rights of the official sponsors of the event through massive media campaigns that clearly state that non-sponsors are prohibited from associating themselves with the event or related IPRs;
- Work with the media in prohibiting infringement
- Publish rules and regulations governing the event. For instance FIFA usually publishes the rules and regulations governing its various tournaments clearly stating the rights of its partners or sponsor organisations.

RECENT ENFORCEMENTS

There are no known enforcements against Ambush Marketing in Nigeria. This may be due to various reasons such as the associated costs of litigation, brief duration of events which result in Ambush Marketing (and likewise the usually brief duration of the infringement) as well as prompt and proactive steps taken by local legal counsel. In our experience, most Ambush Marketing cases are settled out of court or not pursued especially after the event is over. Usually, enforcement is restricted to making public disclaimers or issuing cease and desist letters and or notices.

For instance, the Nigeria Football Federation (“NFF”) has published several disclaimers in the papers to the effect that only partners and sponsors of the Federation can use the name of the Super Eagles in advertisements, campaigns, promotions and such mentions relating to the team’s participation in the Africa Cup of Nations tournament as well as other similar events and requesting ambush marketers to desist from doing so. Thereafter, the infringing advertisements were pulled off or ceased to be broadcast without any further information to the public.



NORWAY

LEGAL CONSIDERATIONS

In Norway the Marketing Control Act of 2009 (MCA) regulates marketing practice among businesses and towards consumers. Under MCA ambush marketing will first be considered illegal being in conflict with good business practice among businesses or as being unfair or misleading towards consumers. There are no specific provisions regarding ambush marketing.

The highlight of ambush marketing in Norway was under the Winter Olympic Games in Lillehammer in 1994, and there were also some examples of ambush marketing during the World Championship in skiing in Oslo in 2011.

To prevent illegal use of sporting events and other cultural events in Norway, the organizers have often registered the event as a trademark. Examples of events that have chosen to protect the event by registering the name and symbols as trademarks are the World Championship in skiing in 2011, The Arctic Race, The Arctic Challenge, and Norseman Extreme Triathlon.

REGULATORY CONSIDERATIONS

In addition to the general provisions in the MCA, the Broadcasting Act and Regulations have special provisions regarding advertising and sponsorships. Ambush marketing is however not expressly regulated.

As of today we are not familiar with any regulatory planned changes making ambush marketing expressly illegal. Ambush marketing will be covered by the general provisions regarding good business practice among businesses and unfair and misleading business practice towards consumers.

COMMERCIAL CONSIDERATION

There are several commercial considerations that event organizers may consider in Norway to prevent ambush marketing. The considerations are as follows:

- Event organizers should consider registering the event name, symbols and logos as trademarks.
- Event organizers should consider imposing obligations on media to restrict advertising and promotion in connection with broadcasts and web casts to official sponsors only.
- Sponsors should ensure that event organizers are contractually bound to take action against ambush marketers within a set period of time after such activity is brought to their attention.
- Event organizers and sponsors may wish to consider increasing official sponsor awareness campaigns so that the public know which sponsors are official.
- The ticket terms and conditions should expressly state that tickets are non-transferable and cannot be used for advertising, sales promotion or any other commercial purpose without the prior written approval of the event organizer.
- Event organizers may consider imposing obligations on the athletes that other individual sponsors may not use the athletes in advertising in the event period.

RECENT ENFORCEMENTS

We are not aware of any recent enforcements regarding ambush marketing. There have been some examples of traders illegally associating them selves with sporting events, but to our knowledge these cases has been settled directly between the event organizers and the trader.



PANAMA



LEGAL CONSIDERATIONS

There is no specific legislation outlawing ambush marketing. Also, there have been no specific laws enacted to prevent unauthorized commercial association with a specific event.

Even though there is no specific legislation covering ambush marketing, general provisions regarding lawful competition could be interpreted so as to prohibit ambush marketing, in as much such practice is found to be an act of unfair competition as per applicable laws.

As per Law No. 5 of 2007, the following are considered unfair competition practices:

- (i) Any intentional and willful act which is capable of creating confusion, by any means, in detriment to the business, products, services and commercial or industrial activity of a competitor.
- (ii) Any false claim in the exercise of a commercial activity capable of discrediting the business, products, services and commercial or industrial activity of a competitor.
- (iii) Any fraudulent act by a competitor which can deviate, for its own benefit or that of a third party, the clientele of a commercial or industrial establishment.

An injunction can be obtained to stop the unfair competition acts of a competitor. Also, Law No. 5 of 2007 expressly allows the aggrieved party to recover damages from the competitor.

There is no recent case law on the matter.

REGULATORY CONSIDERATIONS

As a general rule, for the case of radio and TV, there is no prior approval by the regulator of the content of the advertisements aired. As per Decree Law No. 189 of 1999, Radio and TV stations can decide as to the airing of advertisements, but are responsible for taking measures to prevent advertisements which violate advertising laws from airing. Although it is not entirely clear, this provision seems to refer to those adverts which violate laws regarding advertising of tobacco, alcohol or which are subliminal.

COMMERCIAL CONSIDERATIONS

We have not identified any provisions which would limit the ability of the official sponsor of an event to contractually take steps to protect itself against ambush marketing.

RECENT ENFORCEMENTS

With the upcoming FIFA World Cup, authorities from Panama's Gaming Board have been cautioned by legal representatives of FIFA that they will take legal actions against those who promote activities and prizes related to the event (trips to Brazil, tickets to the games, etc) with no authorized sponsorship. The Gaming Board has no legal obligation to deny authorization to those promotions, however, they are advising companies to avoid making direct reference to the World Cup in order to prevent legal actions.



PARAGUAY

LEGAL CONSIDERATIONS

There are no specific rules addressing ambush marketing in Paraguay. The issue would thus be approached through the legal and regulatory provisions contained in the laws addressing commercial practices and consumer defense where applicable, and the principles contained in the Self-Regulatory Code of Advertising.

Law 1034/83 “On Business Persons”, which sets down general rules on trade practices and on unfair competition, prohibits the use, directly or indirectly, of any means that are contrary to the principles of professional ethics that may cause harm to a competitor.

Law 1334/98 “On the Defense of Consumers and Users”, which establishes rules for consumer protection and defense, prohibits any type of advertising that may be deemed misleading, and also prohibits comparative advertising where it is based on fraud or general and indiscriminate declarations. Individuals and consumer associations may present claims before the Ministry of Industry and Commerce or municipalities. Upon a party’s request, judges may order precautionary measures seeking to prevent breach of provisions contained in the law.

REGULATORY CONSIDERATIONS

The Code of Advertising, which is the self-regulatory instrument of the advertising industry, contains the general rule that any advertising should hold to the principles of truthfulness, loyalty, decency, honesty, legality, fair competition and reliability. Comparative advertising is allowed, provided that, among other things, it does not infringe third party’s rights.

COMMERCIAL CONSIDERATIONS

- Advertisers should ensure that agreements with event organizers contain measures to protect against ambush marketing; i.e. establish an exclusive zone for advertisers within which no unauthorized advertising/marketing may be operated (signs, leaflets, speech).
- Event organizers should ensure that agreements are in place with municipalities for use of public space or with neighboring privately owned space to prevent use by ambush marketers. Such space may then be sold to authorized advertisers.
- Event organizers should establish adequate protection of intellectual property related to the event for eventual enforcement against ambush marketers.



POLAND

LEGAL CONSIDERATIONS

Polish legislation as to date provides no specific regulations regarding ambush marketing. However, there are certain legal regulations that shall be considered in such cases:

1. *Act on Unfair Competition* – provides definition of notions such as ‘unfair competition’ – ‘the act of unfair competition shall be an activity contrary to law or good practices, which threatens or infringes the interest of another entrepreneur or customer’ e.g. dissemination of untrue or misleading information about one’s own or another entrepreneur or enterprise in order to benefit from it or to cause damage shall be considered an act of unfair competition and ‘unfair advertisement’ – ‘advertisement contrary to law or good manners’ The latter may of course encompass ambush marketing. Misleading advertising as well as statements encouraging the purchase of products or services, creating the impression of neutral information are also forbidden.
2. *Industrial Property Law* – provides protection against use of identical or similar trade marks for identical or similar goods or services if such use may lead to confusion among consumers in case of similar trade marks and broader protection of renowned trademarks that is not limited to identical or similar goods or services and does not depend on risk of confusion.
3. *Copyright Act* – penalizes illegal use of a sponsor's logo. However, copyrights may not be registered in Poland and therefore formal protection can not be guaranteed in advance.
4. *Act on Combating Unfair Commercial Practices* - prevents unfair practices in interest of consumers and penalizes practices contrary to good customs that significantly distort, or may distort, the economic behavior of average consumers.

In 2008, a Committee for Protection of Rights was created as a body advising the Minister of Sports in relation to organization of Euro 2012 games in Poland and Ukraine. The Committee proposed measures to prevent ambush marketing during Euro 2012, including a draft law regarding protection of rights during sports events. However, the works were discontinued and no changes in law were eventually implemented.

REGULATORY CONSIDERATIONS

The Code of Ethics In Advertising (CEA) is a self-regulatory system providing sanctions that can be imposed by regulatory body – Advertising Ethics Committee only on contractual basis. The CEA regulates all aspects of advertising communication in relation to various media and requires that adverts are not misleading, prevents the adverts to be unethical or dishonest.

COMMERCIAL CONSIDERATIONS

Official sponsors and organizers of events should:

- Conduct a precise research of the area where the event is to take place, searching for all existing and possible places of advertisement area and reserve for themselves all available space in the vicinity of events;
- Ensure clear confirmation of the brand sponsoring the event, possibly by advertising campaigns prior to the event;
- Ensure that there is no separate brand connected with key players of the event, VIPs or other participants, which could create an impression of link between the event, the referred person and specific brand and bring all the necessary action against unlawful use or application for registration of trademarks;
- Prepare specific rules of conduct for advertiser preventing ambush marketing activity.

RECENT ENFORCEMENTS

Although recent EURO 2012 tournament was accompanied by marketing practices which could be considered as ambush marketing, we are not aware of any successful enforcement against such practices.

One particularly interesting attempt to combat such practices was undertaken a few days before the games, when UEFA tried to obtain a preliminary injunction against a beer manufacturer who conducted extensive advertising by referring to "Fifth stadium" where no ticket is needed and where friends meet to watch the games and drink the advertised beer (the games were organized in four official stadiums). The claims of UEFA were based on EU trademark law (EURO 2012 and POLAND UKRAINE 2012 are registered community trademarks) and on *the Act on Unfair Competition* (parasitic competition). However, the motion was dismissed. The court deemed that infringement was not sufficiently substantiated. In respect to claims of parasitic competition, the court held that a reasonable consumer is aware of sponsorship relations resulting in use of UEFA trademarks and the defendant's use of "5 stadium" designation as indirect reference to the championship is not misleading. The attempts to ensure exclusiveness of commercialization of the event by UEFA and official sponsors require more in-depth analysis than preliminary proceedings and may distort market balance and infringe public interest. Therefore, in a free-market economy, UEFA cannot prohibit other business from activities in relation to the championship, in particular since the needs of sports fans are reflected in such offers. The court concluded that the promotional activities are not ambush marketing and UEFA cannot restrict other business from referring to football, sports fans, match or stadium which are elements grounded in social and commercial consciousness.



PORTUGAL

LEGAL CONSIDERATIONS

There is currently no specific legislation in Portugal which outlaws ambush marketing *per se*, although specific legislation has been brought into force to prevent unauthorised commercial association with the final stage of the European Football Championship of 2004 (Euro 2004) - Decree-Law 86/2004 of April 17th and also with the European Under – 21 Tournament 2006 - Law-Decree Nr. 84-A/2006, of May 19th, both establishing fines for non compliance with the limitations imposed by these diplomas. 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 trade mark infringement, unfair competition, copyright infringement and breach of contract (usually associated with ticket terms and conditions). Although each case will turn on its own particular facts, these are the main ways in which event organisers have sought to protect themselves (some more successfully than others!) from ambushers in Portugal.

REGULATORY CONSIDERATIONS

The Portuguese Code of Advertising requires, among other things, that all adverts are legal, decent, honest (not misleading) and truthful. Paragraph G of Article 16 of the Advertising Code on comparative advertising expressly provides that advertisements must not take undue advantage of the reputation of a trademark, trade name or other distinctive sign of a competitor. The violation of this command may imply the payment of a fine ranging from €1.745, 80 up to €3.741,00 in the case of a person and from €3.491,60 up to € 44.891,80 in case of a collective entity. Negligence is punishable. Additional sanctions may be applied, such as seizure of objects used in the advertising; temporary interdiction, up to a maximum of two years of the advertising activity; Article 40 of the Advertising Code also determines the possibility, in certain cases, of cautionary interim measures of termination or prohibition of advertising, regardless of loss or real damage and independently of intention or negligence.

Unfair competition as prohibited by Article 317 of the Industrial Property Code also prevents any action susceptible of creating confusion with another company's establishment, products or services or non authorized claims with the purposes of benefiting from credit or reputation of a competitors name, establishment or trademark. The violation of this command may imply the payment of a fine ranging from €750,00 up to €7.500,00 in the case of a person and from €3.000,00 up to €30.000,00 in case of a collective entity.

COMMERCIAL CONSIDERATIONS

Practical steps for event organisers/sponsors to consider to prevent/limit ambush marketing include:

- Event organisers should consider imposing obligations on media organisations to restrict advertising and promotion during broadcasts/webcasts to official sponsors only.
- Event organisers may wish to buy up all the billboards and other advertising space in the vicinity of the event and then resell to official sponsors only. Sponsors may wish to contractually oblige event organisers to do so.
- Sponsors should ensure that event organisers are contractually bound to take action against ambushers within a set period of time after such activity is brought to their attention.
- Event organisers and sponsors may wish to consider mounting official sponsor awareness campaigns so that the public know which sponsors are official.
- The ticket terms and conditions should expressly state that tickets are non-transferable and cannot be used for advertising, sales promotion or any other commercial purposes without the prior written approval of the event organiser.



ROMANIA



LEGAL CONSIDERATIONS

Ambush marketing is the name given by an event organizer to a marketing campaign which takes place around the event, benefits from the public exposure, but does not involve payment of a sponsorship fee to the event organizers.

For most events of any significance, one brand will pay to become the exclusive and official sponsor of the event in a particular category or categories. This exclusivity creates a problem for one or several other brands. Consequently, in some cases, those other brands find ways to promote themselves in connection with the same event, without paying the sponsorship fee.

Two basic types of ambush activities must be distinguished: *i.e.* “direct” and “indirect” ambush activities.

The following activities may be included in the first category of direct infringement: false claims to official sponsorship by a non-sponsor; intentional unauthorized use of protected intellectual property, such as logos of teams, symbols, etc.; attempts by a brand to illegitimately associate itself with an event with the intent to confuse consumers and gain market share from the competing official sponsors, etc.

In the case of indirect ambush marketing, however, the behavior is more subtle and it does not necessarily represent an unlawful practice or breach of copyright law; it is rather a matter of ethics.

Such indirect ambush may consist, for example, in setting up a promotional presence near an event, which, even without making specific reference to the event itself, benefits from the borrowed spotlight. Another example is the use of marginal imagery or terminology not protected by intellectual-property laws to create the illusion of a connection to an event or to a well-known brand.

REGULATORY CONSIDERATIONS

In the case of direct ambush marketing, the legal remedies exist and were successfully used in the past. In this respect, in Romania, there are clear regulations that prevent and sanction infringements on intellectual property and anti-competitive behavior.

On the other hand, indirect ambush marketing is more of a gray area to which legal protection is not easily available.

For this reason, in Romania, indirect ambush marketing is analyzed under the broad umbrella of the general ethic principles set out by the advertising law. Such law establishes that commercial behavior and announcements have to be decent, fair, and created in the spirit of social responsibility. Therefore, concealed, deceiving, subliminal advertising is prohibited, being considered a minor offence. Also, comparative advertising is prohibited if it creates confusion on the market between the advertiser and a competitor or between their trademarks, trade names or other distinctive marks, or if a benefit is incorrectly derived from the good name of a trademark or from other distinctive marks of a competitor. All such practices are deemed as minor offences and punished accordingly.

Also, according to the Romanian Code of Advertising Practice, the communication must not violate the industrial and intellectual property rights, such as: patents, verbal or combined trademarks, commercial slogans, industrial designs and models, brand names, copyrights, name or communication campaign of another firm, company or institution, etc., or use elements that clearly identify other brands or products.

In addition, the communication made by an advertiser with regard to a product, brand or another element of communication identifiable with a third party is permitted only based on an agreement between the parties, which will include the prior consent of the trademark holder.

COMMERCIAL CONSIDERATIONS

In practice, it is difficult to eradicate the ambush marketing activities and such difficulty may hinder the efficiency of the promotional efforts of the official sponsors.

According to FIFA's representatives, if the rights of the authorized stakeholders are not protected and the exclusivity is not respected, there is a risk that events will fail to attract the necessary sponsorship.

A modality to limit the ambush marketing may consist in hardening the conditions set out by the event organizers. For example, organizers may establish an area surrounding the event location within which certain commercial restrictions are applicable. In this manner, it would be easier to identify the commercial entities trying to take undeserved advantage of the publicity generated by the event.

Also, the organizers may restrict the access to the location where the events take place for the persons who, in order to benefit from the exposure, wear clothing or display items such as flags and banners bearing the marks of companies not involved in the events.

It is also up to the organizers to reduce/limit the advertising space during the performance of the event and to make such advertising space available only for the official sponsor.

At the same time, the official sponsor should be assured of the organizer's possibility to take action against the marketing ambusher.

RECENT ENFORCEMENTS

We did not identify any recent decisions issued by the Romanian courts regarding ambush marketing.

Most cases consist of infringements perpetrated by small companies that do not understand or are not aware of the prejudice that ambush marketing may cause. Such cases are usually settled without major difficulties outside courts.



RUSSIA

LEGAL CONSIDERATIONS

Currently there is no specific legislation outlawing ambush marketing in Russia except for activity during the 2017 FIFA Confederations Cup and 2018 FIFA World Cup.

A specific law has been enacted in order to prevent unauthorised commercial association with the 2017 FIFA Confederations Cup or the 2018 FIFA World Cup which shall be held in Russia (Federal Law № 108-FZ dated June 07, 2013).

The above mentioned Law is meant to protect official sponsors of the sports events from ambush marketing practices. For example, misleading behaviour, in particular creating a false impression that a commodity manufacturer or an advertiser is associated with the 2017 FIFA Confederations Cup or the 2018 FIFA World Cup, including as a sponsor, shall be deemed inaccurate advertising and/or unfair competition and shall entail the consequences provided for by the antimonopoly legislation of the Russian Federation, i.e. substantial fine amounts of which depend on the offender's turnover, or advertising legislation of the Russian Federation, i.e. substantial fine capped at RUR 500 000 (approx. USD 14 000).

During the XXII Winter Olympic Games and Paralympic Games conducted in Winter 2014 in the town of Sochi there was in force the Federal Law № 310-FZ dated December 1, 2007 in Russia which provided for prohibition of unauthorised commercial association with the Games.

With respect to other events, when their organisers or sponsors felt aggrieved by the ambush marketing of third parties, general ban on unfair and untrue advertising may be used in such cases.

REGULATORY CONSIDERATIONS

The Federal Law on Advertising (No. 38-FZ of March 13, 2006) prohibits unfair and untruthful adverts and promotions, and generally determines what kind of advertisement shall be deemed unfair and untruthful. However not much ambush marketing tools might be recognized by Russian law as untrue or unfair.

Some aggressive ambush marketing tools may be recognized as unfair competition acts under the Federal Law "On Protection of competition" (N. 135-FZ of July 26, 2006).

The Regulator, Federal Antimonopoly Service of the Russian Federation, is entitled to initiate investigations against unfair marketing itself or under third party claims, and imposes fines.

COMMERCIAL CONSIDERATIONS

When planning and implementing an advertising campaign it is advisory to undertake the following steps:

- To conduct preliminary analysis of the ambush-marketing opportunities, develop mechanism to combat drawn in a contract with the organizer and the third parties involved in the project;
- To create an anti-ambush-team (including lawyers) who could track the ambush-marketing and if necessary respond quickly;
- To take care in advance to register all relevant trademarks and domains; refrain from using unregistered logos;
- All celebrities involved in your adverts and their families, if possible, should be bound with obligations not to participate in promotions of competitors.



SINGAPORE

LEGAL CONSIDERATIONS

There is no overarching legislation governing ambush marketing in Singapore. Be that as it may, an aggrieved party may resort to more traditional civil and criminal remedies, including but not limited to trade mark infringement, copyright infringement, and registered design infringement. In addition, an aggrieved sponsor may also seek remedy under the tort of passing off.

REGULATORY CONSIDERATIONS

The advertising sector in Singapore is self-regulating. The Advertising Standards Authority of Singapore ('ASAS') oversees and regulates advertising activities in Singapore, and relies on a system of guidance and voluntary compliance. The Singapore Code of Advertising Practice ('Code'), which is administered by the ASAS, sets out the basic framework for regulation. The Code applies to advertisements which appear in any form or media. While there is no express stipulation in the Code, governing ambush marketing, the following principle needs to be borne in mind: All advertisements should confirm to the principles of fair competition generally accepted in business, including, non-denigration, non-exploitation of goodwill, and non-imitation.

Consequences of breach of any of the provisions of the Code

Complaints can be made to the ASAS that an advert doesn't comply with the SCAP. The Code consider complaints and publicise their rulings, meaning the most likely 'sanction' include: a direction to withdraw/ amend an offending advert; trading sanctions; and negative PR arising from an adverse ruling being published. The ASAS' rulings are not legally binding but, where the advertiser fails to amend its advertising, the ASAS can contact media/ publishers to request that they do not carry those, or similar, advertisements.

COMMERCIAL CONSIDERATIONS

Singapore has her share in hosting major events like the Youth Olympic Games, the Singapore Formula 1 Grand Prix, the World Netball Championships, the International Table Tennis Federation Women's World Cup, the Men's Junior Hockey World Cup, the Singapore Open Golf Championship, and the Singapore Marathon. Examples of an ideal marriage of sporting and commercial interests include the Barclays Singapore Open, the HSBC Women's Championship and the Standard Chartered Singapore Marathon. However, ambush marketing is quite ubiquitous during events of the said magnitude.

Practical approach to be adopted by organizers/ sponsors in circumventing ambush marketing

- Official sponsors may contractually bind event organizers to only sell advertising space (including but not limited to ad space in the stadia and in the vicinity, as well as ad space on other media) to the sponsors only.
- Event organizers should be made obliged (i.e. contractually bound) to curb ambush marketing. Unless this is done, it would serve as a disincentive for any potential sponsor to invest a significant amount in sponsoring the events.
- Obligations ought to be imposed on the media to permit advertising and promotional activities to be carried out by the official sponsors only, while ensuring that these obligations do not tantamount to anti-competitive practices.
- Make sporting governing bodies stakeholders, thereby incentivising them to crackdown on ambush marketers.
- Ensure that the participants agree to be bound (at least morally, if it is not legally permissible), to take deliberate steps to prevent ambush marketing.
- Ensure that adequate protection for IP rights, including but not limited to trade mark rights, are secured well within the dates of the events.



SOUTH AFRICA



LEGAL CONSIDERATIONS

There are two pieces of legislation prohibiting ambush marketing in South Africa.

Firstly, Section 15A of the Merchandise Marks Act 17 of 1941 deals with the abuse of a trade mark in relation to a “protected event”. Section 15A(1) holds that: *“the Minister may, after investigation and proper consultation and subject to such conditions as may be appropriate in the circumstances, by notice in the Gazette designate an event as a protected event...”*.

There are certain requirements for an event to be designated a protected event and the protection is only for a limited period. For the period during which an event is protected, Section 15A (2) holds that: *“no person may use a trade mark in relation to such an event in a manner which is calculated to achieve publicity for that trade mark and thereby to derive special promotional benefit from the event, without the prior authority of the organiser of such an event”*. This would include any visual or audible use of a trade mark which in any way, directly or indirectly is intended to be brought into association with or to allude to any event. This is fairly widely worded and is intended to bring to book those parties who commit ambush marketing “by intrusion”. Contravention of this provision is a criminal offence.

By way of example, the 2010 FIFA Soccer World Cup, which was hosted in South Africa in 2010, was designated as a protected event under the Merchandise Marks Act. The effect of section 15A of the Merchandise Marks Act has been confirmed by the High Court in Pretoria. In October 2009, judgement was handed down in the Pretoria High Court against Metcash Trading Africa (Pty) Limited, a well-known South African retailer, which had been selling lollipops branded “2010 pops”. The packaging of the product bore soccer balls and partial depictions of the South African flag. Although there was no direct reference to the 2010 Soccer World Cup event, the court held that Metcash had intended for its lollipops to be associated with the event and had also intended to derive special promotional benefit from the event. The court held that such conduct is unlawful and falls foul of the relevant section of the Merchandise Marks Act. Metcash was accordingly restrained from competing unlawfully with FIFA by contravening the Merchandise Marks Act. It was also ordered to pay FIFA’s legal costs.

Secondly, Section 29(b)(iv) of the Consumer Protection Act of 2008 states that a producer, importer, distributor, retailer or service provider, must not market any goods or services in fraudulent/misleading/deceptive manner, including with respect to sponsorship of the event. This replaces the previous Section 9 of the Trade Practices Act which was similarly worded and caters for ambush marketing by association.

REGULATORY CONSIDERATIONS

The Advertising Standards Authority of South Africa at Article 11 of its Sponsorship Code deals with unacceptable sponsorship practices.

Clause 11.1, headed Ambush Marketing, lists a number of ambush strategies which are unacceptable and prohibited under the Sponsorship Code. These prohibited strategies include media strategies, usage of athletes/sports persons, performers/artists, supporting sport federations and bodies, sales promotions before and during an event, corporate hospitality, sponsors ambushing sponsors and event “airspace”.

If advertising is found to be in contravention of the Sponsorship Code, the Advertising Standards Authority will order that such advertising be withdrawn within the deadlines set out in the Procedural Guide to the Code of Advertising Practice.

COMMERCIAL CONSIDERATIONS

As mentioned above, the 2010 FIFA World Cup was hosted by South Africa in 2010. Traders and advertisers were cautioned to take into account FIFA’s published guidelines, at: http://www.fifa.com/mm/document/afmarketing/marketing/2010_fifa_public_guidelines_11135.pdf. These guidelines essentially set out details about FIFA’s Official Marks and how they should and should not be used by traders and advertisers.

RECENT ENFORCEMENTS

Most recently, the Minister of Trade & Industry designated the 2013 Africa Cup of Nations (AFCON 2013), which took place in South Africa in early 2013, as a “protected event” in terms of the Merchandise Marks Act as mentioned above. However, surprisingly, there seem to have been no instances of major ambush marketing and no enforcement of the legislation seems to have been necessary.

SPAIN

LEGAL CONSIDERATIONS

Ambush marketing is a relatively new phenomenon in Spain. Spain has no specific provisions regarding ambush marketing. Currently, there hardly exists any legislation in relation to this matter.

There is, however, a resolution of a self-regulatory private body called “Autocontrol de la Publicidad”, issued in 1998, in which charges of ambush marketing were made, although eventually rejected by this body. In this case, the Jury had to deal with a complaint filed by the company ISL Marketing AG against Burger King. In the context of the 1998 Football World Cup in France, the complainant claimed that the issuing of vouchers by Burger King as prize for some customers to attend a match of the World Cup amounted to an unfair way to benefit from a third party’s reputation, as Burger King tried to associate its business with the World Cup without being one of the sponsors. The Jury ruled that since no distinguishing sign or registered trademark had been used by Burger King, but just a mere generic reference to the World Cup of France 1998, Burger King had taken no benefit from the World Cup’s reputation. In addition, the Jury found that there was no exclusive right over the expression “World Cup of France 1998”. This Resolution shows that, as long as there is no reproduction of a third party’s property sign, logo, expression, or trademark, the unfair nature of practices such as that implemented by Burger King is very difficult to prove in court.

REGULATORY CONSIDERATIONS

The fact that ambush marketing has not been contested in Spain could explain why there is no specific legislation on this practice. To the best of our knowledge, there are no plans to enact specific regulation. Nonetheless, the current Spanish legal order provides a body of legislation which could be used against ambush marketing and eventually preventing these types of practices from happening, such as:

- a) Trademark Act,
- b) Intellectual Property Act,
- c) General Advertising Act,
- d) Unfair Competition Act and
- e) Competition Act

Most ambush marketing campaigns are subtly evading an infringement of the existing law, so usually they do not violate registered or protected trademarks, copyrights, unfair competition or advertising regulations. In this case there is no possibility to prohibit or punish ambush marketing as it is not in principle prohibited under Spanish law.

COMMERCIAL CONSIDERATIONS

From our point of view it is therefore quite difficult to totally impede ambush marketing in Spain. To limit the possibilities of ambush marketing one could think of:

- Reserving advertising spaces in the surroundings, especially at the entries of the event exclusively for the sponsor.
- All documents or publicity material in relation to the event should state the exclusive sponsors.
- Reacting to any ambush marketing campaign by taking legal action or by informing the public.
- Provisions in the Terms & Conditions that apply to tickets sales for the sport event prohibiting ambush marketing activities



SWEDEN

LEGAL CONSIDERATIONS

In Sweden there is no specific legislation regulating ambush marketing as such and therefore event organizers and their official sponsors feeling aggrieved by ambush marketing conducted by third parties are referred to seeking remedy via claims of trademark infringement, copyright infringement or claims of unfair marketing practices, such as passing off. Even though interim relief is possible, none of these ways of seeking remedy is however particularly well suited for tackling ambush marketing.

REGULATORY CONSIDERATIONS

The Swedish Marketing Practices Act (MPA) requires that marketing is in accordance with good marketing practice and that marketing also otherwise is fair towards consumers and traders. Marketing must also not be misleading. Advertisers are furthermore required to provide all material information surrounding an offer or promotion and there are specific provisions on comparative advertising. The Swedish Consumer Ombudsman, competitors and certain consumer groups can bring enforcement proceedings under the MPA when an above mentioned criterion is violated. In case of trademark and/or copyright infringements remedy is normally sought based on the Swedish Trademarks Act (TA) and the Swedish Copyright Act (CA) respectively. Also these acts can bring enforcement proceedings.

COMMERCIAL CONSIDERATIONS

- Event functionaries should be informed on ambush marketing and of whom the official sponsors are so that they can identify and act upon ambush marketing attempts.
- The official sponsors should be aware that the price for being an official sponsor may comprise more than just the fee for becoming an official sponsor. The official sponsors may need to buy each and every available advertising space in order to diminish the risk of ambush marketing.
- Sponsors should ensure that event organizers are contractually bound to take action against ambush marketers within a set period of time after such activity is brought to their attention. In order for such actions to be of practical value they may need to be coordinated with relevant authorities. For instance, during the European Championship in Athletics, held in Gothenburg, Sweden (2006) the Office for City Planning (sw. stadsbyggnadskontoret) cooperated with the Swedish Enforcement Agency (sw. Kronofogden) in order to create new routines of how to prevent ambush marketing. For example, a special task force with the responsibility to remove tapestries with content constituting ambush marketing was created.
- Media organizations should be requested not to allow ambush marketing and to restrict advertising in broadcasts to official's sponsors only.
- Event organizers should consider imposing obligations on media organizations to restrict advertising and promotion during broadcasts/webcasts to official sponsors only.
- Event organizers may wish to buy up all the billboard and other advertising space in the vicinity of the event and then resell to official sponsors only. An official sponsors should consider to contractually bind event organizers to do so.
- Event organizers and sponsors may wish to consider mounting official sponsor awareness campaigns so that the public know which sponsors are official.
- The ticket terms and conditions should expressly state that tickets are non-transferable and cannot be used for advertising, sales promotion or any other commercial purposes without the prior written approval of the event organizer.

RECENT ENFORCEMENTS

As far as we know there are no recent enforcements in courts but here are two recent examples.

Ambushing the Swedish royalties

During 2013 an online dating service providers, marketed to people who are already in a relationship, used references to the Swedish monarch in it advertising. Given that the press, TV and outdoor marketing providers had declined access to advertising space, the company used trucks which showed the ads. The ads consisted of pictures of the Swedish queen and Princess Madeleine's husband, Chris O'Neil, where the queen urged O'Neil "no to commit the same mistake as her husband, but use the dating for a discrete affair". This was insinuation referring to the Swedish monarch's purported infidelity. According to reports in the media the royal family considered taking the matter to court, but as fast as is known no legal action has been initiated.

MAX v. the UEFA

In 2009 Sweden hosted the European Championships in football for players under 21 years of age. One of the cities thought to host games during these championships was Borås. Borås has a relatively new football arena (Borås Arena), in which commercial actors rent premises. One of the companies renting premises in the arena is the Swedish hamburger restaurant MAX. The problem, for MAX, was that a competing hamburger company is one of the Union of European Football Association's (UEFA) main sponsors. The UEFA would only allow official sponsors to be present during the championships, and therefore demanded that MAX shut down during the four days in question and also that MAX covered its sign-boards. MAX refused to do so, claiming it had a viable lease entitling it to carry out business also on the days in question. The UEFA then threatened to not have the game in question played at Borås Arena, but instead have it played at an alternative location. Facing this threat MAX withdrew because it did not want to deprive the people of Borås the pleasures of the event. The situation caused quite a lot of discussion, in media as well as around the water cooler. Eventually MAX decided to conduct an on-line survey together with a regional newspaper, the survey was to show the general public's view on whether MAX should bow to UEFA's demands, or carry on its business as usual. 93 % of the persons partaking in the survey voted for MAX carrying on as usual. MAX decided to follow the result of the survey, and hence refused to close down. The UEFA therefore chose to have the game played at an alternative location.



SWITZERLAND



LEGAL CONSIDERATIONS

Swiss law does not generally prohibit “ambush marketing”. Event organizers, participants and official sponsors (collectively the “Rights Holders”) may rely on Swiss copyright, trademark, and unfair competition laws to prevent certain practices by which the ambush marketer seeks to associate itself with a particular event. In addition, Rights Holders may derive rights and remedies from the legal protection of a business name or domain name or from contractual arrangements.

The Rights Holders’ logos, official songs or videos, and broadcasts of the event normally are copyright works. They encompass the requisite individual character, a creative spark. By contrast, event names are not as such copyrightable. They may be eligible for trademark protection. Event organizers commonly register event names and logos as word marks and, respectively, figurative marks or combined as word and figurative marks. Yet copyright and trademark protection will rarely serve as means to stop all types of ambush marketing. Free riders do not usually copy the official logos of the Rights Holders. Even where free riders use the registered word mark of the event or other trademarks or the business names of the Rights Holders, they typically do not use the Right Holders’ trademarks as a source identifier for their own products or services. Instead, ambush marketers use other and sometimes very subtle means to create – in the minds of the consumers – an association with the event.

It is noteworthy that to prevail on an infringement claim under the Swiss Trademark Act the plaintiff needs to establish likelihood of confusion as to the origin of products and services. A likelihood of confusion as to common affiliation or sponsorship does not amount to trademark infringement, but may be actionable under the Swiss Unfair Competition Act (UCA) as an unfair or deceptive trade practice. The UCA does not prohibit mere free riding on the commercial value of an event. But false or deceptive statements in advertisements or promotional campaigns about the ambush marketer’s affiliation with the event organizer or status as an official sponsor or partner are prohibited by the UCA. Relevant remedies offered by the UCA (and the Swiss Civil Procedure Code) are injunctions enjoining ambush marketers from the unfair or deceptive trade practice or removing infringing material. Other available remedies are damages (lost profits, unjust enrichment) and criminal sanctions (fines, imprisonment, impoundment and dissolution). Yet these other remedies are of little help where fast protection is warranted. On an alternative route, the Swiss Commission for Fairness in Advertising (SCF), a self-regulatory body, hears complaints alleging that an advertisement or promotional campaign infringed the SCF’s principles of fairness in commercial communication. Yet the SCF issues declaratory decisions only.

COMMERCIAL CONSIDERATIONS

Contractual arrangements tend to be more efficient in restricting ambush marketing. Event organizers may buy up all advertising space in and around the venue as well as in the media of its partners, or require that lessors of venues and media partners do not accept advertisements or promotions by the official sponsor’s competitors. In addition, event organizers should seek to bind potential ambush marketers contractually. E.g., they may make an offer of event tickets or meet-and-greets for the partner’s customers or employees with artists or athletes subject to adherence by the ambush marketer to the event organizer’s marketing restrictions. Swiss contract law offers the remedy of specific performance. Also, the threat of liquidated damages may effectively secure that partners adhere to the limitations on marketing that their respective agreement with the event organizer provides.



TURKEY

LEGAL CONSIDERATIONS

In Turkey, there is no specific law on ambush marketing but the provisions regarding the ambush marketing can be found within several basic codes in Turkey namely the Turkish Code of Obligations, the Turkish Commercial Code and the Consumer Protection Law.

Under the referred laws, three conditions should be met in order to deem ambush marketing as illegal, that a relationship should exist between the parasite marketer and the organisation in which he is not a sponsor; this relationship should be unfair/in a way to take unfair benefit from the other party's name, product, reputation etc. or misleading; and there should be the possibility of damage for the official sponsor.

Parasite marketer shall confront legal sanctions based on unfair competition rules set forth in Art. 54 et seq. of the Turkish Commercial Code. Turkish advertisement legislations, in this respect, especially the Consumer Protection Law proscribes deceptive and misleading advertisements; consequently, parasite marketers are likely to be exposed to the Consumer Act's sanctions too.

REGULATORY CONSIDERATIONS

There are two general methods in order challenge against the illegal ambush marketing:

A. Legal Arrangements:

Unfair Competition Regulations: Whilst parasite marketing always infringes unfair competition rules, ambush marketing is generally a grey area since it can not be deemed illegal in every situation. Parasite marketing usually arises from advertisements and consequently brings about unfair competition, according to the Turkish Commercial Code. Once unfair competition has been determined, a sponsor becomes entitled to require the abrogation of the wrongful acts and the compensation of the damages occurred.

Advertisement Regulations: The ambush marketing strategy may be evaluated as misleading the consumer, as it implements a relation with the organization while there is none. Also, such act as being against the Turkish Olympic Games Act would violate the advertising regulations as they prescribe all advertisements to be in conformity with the laws. In addition to this it may be alleged that the ambush marketing acts infringe the relevant provisions of Regulation on Procedures and Principles of Commercial Advertisement and Announcements set forth against activities to gain unfair benefits from another's commercial reputation.

According to the new Consumer Protection Law numbered 6502 which will enter into force by 28.05.2013; unfair commercial practices are legally defined and sanctioned under the Turkish law. Thus aggressive and misleading practices will be deemed as unfair commercial practice and will be subject to sanctions as an unfair commercial practice.

Intellectual Property Regulations: Provisions regarding the trademark law may be taken into consideration in order to prevent ambush marketing activities. Where a non-sponsor enterprise uses the sponsor's or sponsored organization's logos, trademarks without any permission it may be evaluated as trademark infringement under the Decree Law numbered 556 on Protection of the Trademarks. However trademark law protection may not be sufficient in every case since the sponsor's trademarks are not directly used in ambush marketing strategy instead a connection is generally established between the organization and the non-sponsor's trademarks by making reference thereto. Apart from this, Turkish Olympic Games Act obliges permission for use of Olympics' name, logo and trademarks in any commercial communication.

B. Contractual Provisions

Contractual Provisions: Sponsorship agreements facilitate sponsors to reach a target audience and support sponsored companies to meet expenses. However, in most cases, ambush marketers not only preclude the sponsor's connection in patches but also in some cases, they are instead perceived as sponsor. Hence contractual provisions seem to be vital in protecting sponsors before any competitor

action taken. For instance, the place where the organization is held can be bowdlerized from the competitor's advertising campaign.

License Agreement Provisions: Intangible rights, in this respect the rights over the trademarks, names, even slogans of the organization may be transferred to the sponsor for the fulfilment of the promoting performance arising from the sponsorship agreement through a license agreement. Accordingly, the sponsor, by relying on such license agreement would have the competence to impede ambush marketer against unfair use of such intangible rights arising from the organization.

RECENT ENFORCEMENTS

Not being within a specific big event like the World Cup, we can give two outstanding examples observed in Turkey recently which are advertisements in the way of ambush marketing:

- 1- You will see that next to the Garanti Bank branch, there is a billboard for another bank which is Yapı Kredi Bank with the slogan "Automatic Turkish Money". These two banks are two leading banks in Turkey.



- 2- You will see that next to Mavi Jeans Store –which is very famous jeans brand in Turkey and also well known globally- there is another textile store named "bordo" which means "claret red". As "mavi" means "blue", the other store preferred to use a brand which is indeed a name of a color like mavi and opened its store just next to Mavi Jeans's store. You will also see that they use the claret red background in the signboard just like Mavi Jeans uses blue background in its signboard.





UNITED KINGDOM



LEGAL CONSIDERATIONS

There is currently no specific legislation in the United Kingdom which outlaws ambush marketing *per se*, although specific legislation has been brought into force to prevent unauthorised commercial use of Olympic and Paralympic marks and terminology via the *Olympic Symbol (Protection) Act 1995*. Legislation was also introduced to prevent ambush marketing for the 2012 London Olympic Games in particular via *The London Olympic Games and Paralympic Games Act 2006* which is no longer in force. A similar Scottish Act prevents ambush marketing in relation to the Glasgow 2014 Commonwealth Games (*The Glasgow Commonwealth Games Act 2008*) and has been applied more generally throughout the UK via an Order. The rights under this Act will expire at the end of 2014.

Provisions in these special event-specific laws address unauthorised commercial associations with the event and unauthorised advertising in and in the vicinity of venues (regardless of the content of the advert). These laws have strong deterrent effect. The courts had no cases come before them in respect of the London Olympic Association Right created by the 2006 Act, and we are not aware of any cases being brought by the Glasgow 2014 organising committee in respect of its rights under the 2008 Act.

Event organisers that do not benefit from such bespoke legislation have to, where they feel aggrieved by Ambush marketing, seek redress through the more traditional forms of intellectual property protection such as trade mark infringement, passing off or copyright infringement. Although each case will turn on its own particular facts, these are the main ways in which event organisers seek to protect themselves (some more successfully than others!) from ambushers in the UK.

REGULATORY CONSIDERATIONS

The British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code) (relating to non-broadcast advertisements) requires, among other things, that all adverts are legal, decent, honest and truthful.

The equivalent Codes relating to broadcast advertisements, the Television Advertising Standards Code and the Radio Advertising Standards Code, have similar provisions requiring that advertisements are not misleading and the Radio Code, in particular, expressly provides that advertisements must not falsely suggest or imply official approval for a product.

Despite its limitations as a self-regulatory system with no legal sanctions, the CAP Code is backed up by the Control of Misleading Advertising Regulations 1988, which can apply to advertisements that mislead or do not comply with the comparative advertising requirements. The OFT can bring enforcement proceedings where an advertisement is misleading within the terms of the Regulations.

COMMERCIAL CONSIDERATIONS

Practical steps for event organisers/sponsors to consider to prevent/limit ambush marketing include:

- Event organisers should consider imposing obligations on media organisations to restrict advertising and promotion during broadcasts/webcasts to official sponsors only.
- Event organisers may wish to buy up, or seek options over all the billboard and other advertising space in the vicinity of the event and then offer these to official sponsors only. Indeed, sponsors may wish to contractually oblige event organisers to do so.
- Sponsors should ensure that event organisers are contractually bound to liaise with sponsor where there is an ambush in their product category and, where appropriate, to take action against ambush marketers.
- Event organisers and sponsors may wish to consider mounting official sponsor awareness campaigns so that the public know who the official sponsors are. Ensuring businesses and their advisors (lawyers, advertising agencies etc) understand the legal rights in place, and the reason why they need to prevent ambush marketing, is also likely to be important.
- The ticket terms and conditions should expressly state that tickets are non-transferable and cannot be used for advertising, sales promotion or any other commercial purposes without the prior written approval of the event organiser. They should also prevent unauthorised advertising within the

- stadia, and relevant event staff should be briefed to be alert to, and trained on how to deal with, in-stadia ambush.
- The organisers should consider the need to control the ability of businesses which supply products and services to the event (but who are not sponsors) to promote their involvement. Contractual restrictions may be appropriate but should be balanced against the potential negative PR of being seen to 'gag' local businesses.

RECENT ENFORCEMENTS

As mentioned above no action was taken through the courts in respect of the London 2012 Olympic Games. Several interesting cases gained some press coverage but were resolved without formal legal action:

- Beats by Dre provided free headphones en masse to many athletes competing at the Games. There was no obligation on the athletes to use the headphones (they did not have endorsement deals with Beats by Dre) but inevitably many were seen worn by athletes at the events. As the headphones were in the colours of national flags, they stood out, giving the brand significant exposure;
- Paddy Power (the betting company) ran an advertisement on billboards and a newspaper in London stating "Official sponsor of the largest athletics event in London this year! There you go, we said it. (*Ahem, London France that is*)" They had sponsored the inaugural egg and spoon race in a town also called London in France.

Paddy Power also erected a giant sign bearing their name in a field behind the first tee at the 2010 Ryder Cup in Wales. An injunction was successfully sought to have this removed on the basis it was in breach of planning laws.



UNITED STATES



LEGAL CONSIDERATIONS

There is no overarching legislation against “ambush marketing” as a whole, but rights holders (herein, “Properties”) can use a patchwork of federal and state laws to combat ambush marketing. First, Properties can bring a trademark infringement claim under the Lanham Trademark Act for the unauthorized use of a Property’s registered trademarks (however, such a claim is unlikely to be available as ambush marketers are often savvy enough not to use the official trademarks or other intellectual property rights of a Property). Properties can also bring unfair competition claims for false association, false authorization, or false advertising under a different section of the Lanham Trademark Act (all such claims under the Lanham Trademark Act involve claims of confusing or misleading the public) and can further bring unfair competition claims or right of publicity claims under similar state laws. Finally, in the case of unauthorized use of event tickets, Properties can bring a claim against ambush marketers for breach of contract. Additionally, the U.S. Olympic Committee may enforce the protection of the Olympic and Amateur Sports Act against uses of certain Olympic trademarks without the need to prove a likelihood of confusion (which separates it from standard Properties); rather, it just needs to prove is that a defendant used those specific Olympic marks for a commercial purpose without its authorization.

Although there are claims available for Properties, there is a reluctance to take legal action against ambush marketers, for a number of reasons. Ambush marketers have increasingly launched more sophisticated campaigns that blur the lines between legal marketing activity and marketing that constitutes trademark infringement or false association. Because ambushers rarely use the actual trademarks of the Property, a pure trademark infringement claim is often unavailable, thus leaving the ambush campaign in a legal gray area. Also, many ambush campaigns last only for a short period of time, which makes the time and cost of litigation to prevent such a campaign prohibitive. Further, ambush marketers can take the simple step of including a disclaimer in their marketing campaigns, and while not foolproof, there is some judicial support around the use of disclaimers as a valid defense. Because litigation can bring uncertain results, is very costly, and the ambush marketer may welcome the extra publicity that it receives, Properties are hesitant to sue over ambush marketing (although Properties will regularly send out cease and desist letters or otherwise “name and shame” the ambushers in the media).

RECENT ENFORCEMENTS

In December 2009, NBA great Michael Jordan sued two Chicago-area grocery stores for placing advertisements in a Sports Illustrated commemorative issue celebrating Jordan’s induction into the Basketball Hall of Fame where such advertisements offered congratulations to Jordan and featured his name, his #23 jersey number from his playing career, and images of basketball shoes meant to resemble his branded “Air Jordans.” Both advertisements tied the congratulatory message into marketing slogans for each grocery store. Jordan brought claims for, among other things, violations of his right of publicity under Illinois state law, trademark infringement, false endorsement, and deceptive business practices. In one of the cases, the initial judicial decision found that the advertisement was not commercial speech because it did not mention a product or service, but the federal court of appeals reversed, finding that the benefit of the brand awareness or loyalty and enhancing the grocery store brand in the minds of consumers makes an ad congratulating a famous athlete a “promotional device for the advertiser.” As a result, Jordan may continue to pursue his claims to compensation for the benefit the advertiser derived from congratulating him and may also seek to prove that the advertisement caused a likelihood of confusion that Jordan was a sponsor of the grocery store or endorsed its products and services.

Although lawsuits targeting ambush marketing campaigns are risky, there have nevertheless been a few circumstances where a Property successfully sued an “ambush marketer” over the wrongful taking of the Property’s intellectual property or goodwill. Such successful cases have involved unofficial use of the Properties’ actual trademarks or Properties’ colors and other indicia in addition to similar looking logos or marks. For example, in December 2011, the NFL’s Oakland Raiders sued the Nation’s hamburger chain based on trademark infringement and trademark dilution grounds for posting a

massive billboard outside of the Raiders' home stadium using the phrase "Raid A Nation" and changing its hamburger logo to one with an eye patch due to the similarity of the Raiders' RAIDER NATION and eye patch pirate trademarks. The case settled shortly after the lawsuit was filed and the billboard was taken down.

COMMERCIAL CONSIDERATIONS

Because ambush marketing often lies in a legal grey area, there are other preventative steps that a Property can take without resorting to litigation, including:

The Purchase of All Advertising Space and Media Time: In order to control the marketing messages near an event location, the Property can purchase all advertising space around and near the venues where the events will take place. The Property could then offer such advertising space to official sponsors, or at least not offer it to competing sponsors. Additionally, if the Property has control over advertising during the broadcast, it could require that no advertising competitive to that of its official sponsors be shown during the coverage of the event, or require that the broadcaster give a right of first refusal for the purchase of advertising time to the Property's official sponsors. The Property itself could even purchase all of the broadcasting advertising space and offer it to its official sponsors.

Require Event Host Locations To Establish "Clean Zones": Properties should work with the governments of event host locations to establish a "clean zone" near the location of the event leading up to and during the time of the event, which can be enforced through either specific local ordinances establishing such "clean zones" or a combination of counterfeiting, vending/permit, or trespassing laws.

Maintain Strict Control Over Event Ticketing: By maintaining strict control over event tickets, Properties can prevent non-sponsors from using tickets as promotional prizes or giveaways. Properties can do so by using ticket license language prohibiting such unauthorized uses.

Public Relations Activities: Properties can create a public education campaign to emphasize the relationship between the sponsorship fees paid to the Property and how such fees benefit the event and the participating athletes.

In addition to having the Property protect against ambush marketing, the sponsor itself can protect its exclusive rights from ambush campaigns. Such ways include buying up assets outside of the sponsor's official rights to supplement the association between the sponsor and the Property, purchasing product or service category exclusivity from the broadcaster of the event, or securing endorsements from athletes related to the Property, although all of these are expensive propositions.

Perhaps most importantly, sponsors should come up with creative marketing campaigns to out-market the potential ambushers. There may be no airtight way to prevent ambushing, so sponsors should leverage their official assets (such as marketing rights, rights to the Property's trademarks and logos, access to tickets and VIP events, etc.) to maintain control of the sponsorship and maximize the value of their investment. With strong marketing activation and creativity, consumers should remember the sponsor's campaign and not that of an ambush marketer.



URUGUAY

LEGAL & REGULATORY CONSIDERATIONS

Although ambush marketing is a sensitive and current subject in the advertising environment, even more now when a competition as important as the Football World Cup is around the corner, there is no specific law or statute within the Uruguayan jurisdiction that specifically regulates practices related to ambush marketing, as is the case in most jurisdictions around the world.

Notwithstanding the above, there are some regulations that may be used in order to protect a company's or organization's rights in case of ambush marketing practices. Uruguayan law on trademarks (Law 17.011) protects as such all International Olympic Committee's symbols, and declares that no registration on the latter shall be granted, since the request for said registration would be deemed absolutely null. Furthermore, in a broad view of the intellectual property regulation, it could be construed that any practice of ambush marketing could be considered as a violation of the Intellectual Property rights, as long as the steps to protect such intellectual property were followed.

Moreover, Uruguay ratified the Paris Convention and subsequently internalized it by passing a law approving it (Law 140910). The latter Convention regulates in its Article 10 bis unfair competition practices, indicating amongst the practices considered to be unfair any act capable to create confusion on the products or activities of a competitor.

As a final point, in the past years advertisers have entered the road of self regulation, creating the CONARP, a self regulatory private body. Although CONARP's Code of Ethics only applies to the companies that adhere to it, companies party to AUDAP (Uruguayan Association of Advertising Agencies) and to the Uruguayan Chamber of Advertisers are encouraged to adhere to the same. The aforementioned Code of Ethics regulates, among other aspects, the use of another company's name, logos, etc. for the users benefit prohibiting said practice, as well as the protection of intellectual property.

As regards to case law, a few years ago an Appeals Court ruled against *Banco Santander de Uruguay* for the use of an Olympic Athlete's name. The case was funded on a congratulatory sign posted in a highway when Olympic Cyclist Milton Wynants was arriving to his hometown in Paysandú, after winning a silver medal in the Sydney Olympics. The sign congratulated the cyclist, but included the logo of the Bank, which had not agreed with the athlete on the link of the latter with the Bank. As a consequence of said situation, the Court came to the conclusion that there was a use of the athlete's name without his authorization and for promotional purposes, hence, the Bank was obliged to pay a considerable amount of money to the athlete.

COMMERCIAL CONSIDERATIONS

So as to avoid ambush marketing, there are some practices that can be put in place, as follows:

- Effectively protect all the IP rights by complying with the necessary registrations before the relevant government agencies
- Drafting agreements between sponsors and events' organizers that clearly state the prohibition to negotiate any other sponsorship rights with other competitor companies, providing fines in case of infringements.
- Pursuing companies engaging in ambush marketing practices through lawsuits and/or claims before the local advertising self-regulation entity.
- Controlling the venue and distribution of ambush marketing material.

RECENT ENFORCEMENTS

Concerning recent enforcements related to the upcoming Football World Cup, it is worthy to be remarked that the government agencies in charge of authorizing promotions and sweepstakes (Directorate General Trade and Municipality of Montevideo) that offer as the prize anything related to the World Cup (tickets for the matches, travel packages to attend the games, etc.) do not approve the execution of the same if the organizer is not a FIFA approved sponsor.



VENEZUELA



LEGAL CONSIDERATIONS

As in many of other countries, in Venezuela there are no specific laws which regulate “ambush marketing” activities.

Consequently, according to our legislation this conduct could be repressed when it involves an infringement to exclusive rights (i.e. endorsement or sponsorship agreements), Intellectual Property Rights infringement, unfair competition practice, or, on specific circumstances, as a conduct that could deceive consumers or affect the marketplace.

The first assumption would proceed in the case of the use of a distinctive sign from third parties without the respective authorization, which will constitute a trademark infringement according to the dispositions of the Industrial Property Law. Also this situation will be applicable in case of the unauthorized use of a work protected by Copyright, or a product protected by a Related Rights.

The second option and possibly the more suitable, since the ambushers usually are very careful in avoiding Intellectual Property infringements, is attacking the activity as an unfair competition act, regulated by the Law for Promoting and Protecting Free Competition.

This Law expressly forbids the development of any kind of commercial policies oriented to eliminate competitors through unfair competition. Specifically this Law prohibits the promotion of products and services based on false declarations, as well as the product and/or services simulation. Same considerations would apply in the event the Consumer Protection Agency considers that the advertising from a non-sponsor of the event is misleading to the consumers, to the extent they are confused as to who the real sponsor(s) of the activity. However, in this last scenario the affected party must convince the public authorities to the damage of Venezuelan consumers, for them to take action on behalf of “public interest”, and not protecting individual rights.

SELF- REGULATORY BODIES

The National Advertisers Association (ANDA) Ethical’s Code establishes the general prohibition of any advertising constituting an unfair competition act, by means of the attribution of certifications or qualities to products and services that they do not actually have.

This Code specifically establishes that all advertising must respect Intellectual Property rights, and that have to be avoided in all cases, the disloyal imitation that could lead the consumers to confusion in respect of the products and/or services. Unfortunately, this code and arbitration procedure, is only applicable to company members of ANDA.

COMMERCIAL/PRACTICAL CONSIDERATIONS

Some of the considerations for minimizing the ambush marketing activities would be:

- Carefully draft sponsorship agreements in order to assure the protection both of the sponsor as well as the organizers of the event;
- The sponsor should try to cover all types of advertising media, in order to minimize the possibility for the ambushers to take advantage of the events;
- Sponsors should work together in major campaigns to make it clear to consumers who the official sponsors are, bearing in mind that all matters related to consumer protection are considered to be public interest, opening the door for more cooperation .



ZIMBABWE



LEGAL CONSIDERATIONS

There is no specific law regarding prevention or prohibition of ambush marketing in Zimbabwe. Despite this fact, however, aggrieved persons, such as, sponsors and organizers of an event may seek redress through use of laws related to intellectual property, including but not limited to, Trademark, Industrial Designs, Copyright and Competition Acts. In addition to statutory law, there are common law remedies, particularly passing off.

REGULATORY CONSIDERATIONS

There are no specific regulations governing the ambush marketing problem. However, the Advertising Standards Association, Code of Standards [ASA], a self-regulatory body, has a broad provisions which requires that advertisements must be legal, decent, honest and truthful, and must conform to the Advertising Media Association's Code of Standards [ADMA]. Moreover, Zimbabwe are serious soccer and cricket fans and the organizers of these events are often FIFA and Cricket Associations of Zimbabwe. They would be able to take action in prevention and enforcement of rights through their rules.

COMMERCIAL CONSIDERATIONS

Since the concept of ambush marketing is somewhat new in Zimbabwe, it would behove sponsor and event organizers to undertake the necessary steps prior to the event to protect their intellectual property through registration and to alert the AS of the potential problems and issues. Both organizers and sponsors need to consider provisions and clearly define obligations in the agreement for protection of intellectual property rights and the steps to be taken in the event of ambush marketing.

RECENT ENFORCEMENTS

At present there are no cases related to ambush marketing in Zimbabwe.



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For specific advice on any particular aspect, please contact the relevant legal counsel in the appropriate jurisdiction.