

AMBUSH MARKETING- THE CONCEPT

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Abstract

Year 2015 is to witnessing ICC cricket World Cup and all of us are enjoying this mammoth event. Reliance , Espn , pepsi co, etc are the official sponsors for this event and they have spent a hefty amount in being one of the sponsors. In the same breeze of enthusiastic atmosphere, ZANDU (not an official sponsor) balm comes with an advertisement stating it to be official balm of players' relief in world cup. Yes, this is Ambush Marketing. "Ambush marketing" is a term which describes any unauthorized activity which attempts to associate a product, service or business without paying for the privilege. This can be done by running event related promotions, for example, giving away products which will hopefully be featured in press or television coverage; using advertising space in proximity to event grounds or official broadcast spots; and sponsoring individual teams and athletes rather than the event itself. Commercialization of sports magnetizes core IPR issues like Trademark, Copyright, Design, licensing and franchising etc. For now, being a very new terminology "ambush marketing" has no specific legislation in India and this paper serves the same reason to shed light upon ambush marketing and its nexus with IPR protection.

Keywords: Zandhu, ICC, Cricket, IPR, Ambush Marketing.

INTRODUCTION

With the business angle of sports growing by the day, dormant intellectual property rights (IPRs) vesting in almost every component of the sports industry are being tapped into and capitalized. IPRs are valuable assets that are used as marketing tools towards the branding of sporting games and connected events, sports clubs, teams, celebrity status etc. Marketing techniques are applied in creation, maintenance, popularization and sustenance of distinctive marks, logos and personalities, while copyrights vesting in brand and image creation etc. are protected to reap benefits on an exclusive basis considering the very nature of competition in sports. Various football clubs around the world are a perfect example of intellectual property brand capitalization. Manchester United, Real Madrid, Barcelona and Liverpool are a few examples of football clubs that have been developed and marketed as huge brands worth millions of dollars [1]. The organizers of popular games such as FIFA (football), PGA (golf), NBA (basketball), IPL (Cricket) and so on organize and manage the events, in such a manner that they are able to extract maximum value from others who want to exploit the marketing potential that the events offer.

As the expenses of turning into an official sponsor of a real sporting occasion have mushroomed over late years, sponsors progressively need to manage what has ended up known as ambush marketing. Ambush marketing happens when a brand tries to adventure the media consideration of a significant sporting occasion by uniting itself with the occasion without being an official sponsor, as such, without paying a sponsorship charge. Ambush marketing is evidently successful, and some marketing experts even laud it as the boldest and most imaginative type of advertising ever. Then again, Ambush marketing considerably undermines an event's integrity and also its capacity to pull in future sponsors. In this way, some contend, it debilitates to disintegrate the crucial income base of mega-sporting occasions, for example, the Soccer World Cup, Formula 1 Racing or the Olympic Games [2]. Whichever viewpoint one may take, the predominance of Ambush marketing brings up the issue of what lawful alternatives are accessible to coordinators and official sponsors of such occasions to keep Ambushers from "hitching a free ride" without making any financial commitment.

Indeed along these lines, ambush marketing is not a lawful idea. There is no hint of this English term in legitimate lexicons or different vocabularies. Actually, it is a declaration utilized by masters as a part of advertising systems. A certain Jerry Welsh who, in the 80s, was world marketing executive for American Express and as being what is indicated sponsored the national sports groups for the 1984 Olympic Games, cases to be the creator of the concept [3].

THE CONCEPT

The expression "ambush marketing" has existed following the 1984 recreations with the idea characterized and created in papers by American experts. Albeit numerous have tried to characterize it precisely they have all experienced the issue of its legitimacy. Some consider that it is an unlawful business acted by an organization attempting to make a relationship between its items and administrations and a media occasion, by and large a game, to draw a business advantage from the notoriety of this occasion, however without being the sponsor and without needing to acquire the smallest approval from the sponsor. The result is that, in the long haul, ambush marketing will lessen the estimation of the selective rights obtained at some expense by the official sponsors of the occasion [4]. This definition has satisfied the lawmakers in specific nations who, on the solicitation of the coordinators of games occasions, have fused it into their assortment of measures. Case in point, Italy unequivocally denied ambush marketing for the term of the 2006 Winter Games by characterizing it as "all exercises parallel to those of the elements officially approved by the organizer to acquire monetary gain".

Others consider that ambush marketing consists in making use of an opportunity to develop business in a way that is not prohibited on legal grounds. According to this approach there is nothing illegal about ambush marketing. This has been confirmed by certain court judgments. For instance, the Delhi high court in India has stated that the term "ambush marketing" is not part of the legal terminology and the practice does not in its own right constitutes unfair competition, does

not seek to mislead the public, but on the contrary is an instrument that uses the opportunity presented by an event to further its own commercial goals. In France, a recent judgment asserted that “sponsorship cannot deprive another economic player from basing its publicity on a sport provided it does not use the symbols or logos of the federation that organizes the event, nor the image. A sports event belongs to everyone because it constitutes part of current affairs and only its direct or televised showing can be the subject of specific rights acknowledged by article L.333-1 of the Code des Sports [Law on Sports]”.iv From a marketing standpoint, the “ambush” therefore consists in exploiting all unprotected business opportunities [5].

STRATEGIES

There are three elements that help distinguish sponsorship from patronage:

- 1) A sponsor makes a contribution in cash or kind -- which may or may not include services and expertise -- to an activity which in some measure is a leisure pursuit, either sport or within the broad definition of the arts;
- 2) the sponsored activity does not form part of the main commercial function of the sponsoring body (otherwise it would be straightforward promotion, rather than sponsorship) and 3) the sponsor expects a return in terms of publicity. Ambush Marketing can be divided into three broad categories:
 - a) Direct ambush marketing
 - b) Associative ambush marketing
 - c) Incidental ambush marketing

DIRECT AMBUSH MARKETING

It is an intentional use of symbols and trademarks associated with the mass event so as to give the consumers the wrong impression as to the actual sponsors of the event. Certain direct ambush marketing strategies are:

1. ***Predatory ambushing***: The direct ambushing of a market competitor, intentionally attacking a rival’s official sponsorship in an effort to gain market share, and to confuse consumers as to who is the official sponsor. For example, during the Heinekein, UEFA European championships, 2008, Heinekein in an effort to ambush Carlsberg’s official sponsorship, created marching band-style "Trom-pets" (drum hats) for Dutch fans on their way to Bern which also acted as drum, branded with the heinekein logo and name; company released advertisements featuring Dutch fans travelling to Switzerland, visiting official Oranje fans camping complex, and Heinekein marketing executives plotting ways to ambush the European Championship [6].
2. ***Coat tail ambushing***: the attempt by an organisation to directly associate itself with a property through legitimate link, without securing official event sponsor status. It refers to the unsolicited association of a company to an event. For example, in Beijing Summer Olympics, 2008, following Liu Xiang’s injury in the men’s 110m hurdles, Nike released a full page ad in the major Beijing newspaper featuring the image of the disconsolate Liu, a

Nike-endorsed athlete, and the tagline: "Love competition. Love risking your pride. Love winning it back. Love giving it everything you've got. Love the glory. Love the pain. Love the sport even when it breaks your heart".

3. **Property infringement ambushing:** The intentional use of protected intellectual property, including trademarked and copyrighted property such as logos, names, words and symbols, in a brand's marketing as a means of attaching itself in the eyes of consumers to a property or event. For example, in UEFA European Championships, 2008, betting company Unibet released a series of magazine advertisement in Polish magazine, Pitkanoza for online betting on the European Championship, explicitly featuring the words 'Euro 2008' and football in their advertising" brand.

ASSOCIATIVE AMBUSH MARKETING

The term itself is clear as it means intentional use of such terms or imagery which portrays that the company has links to the sport event or property, without making any reference to the official sponsorship. Such different types of associative strategies are:

- **Sponsor self-ambushing:** When the official sponsor creates the marketing communication beyond the scope of its sponsorship rights effectively ambushing the other official sponsors. During UEFA European Championship, 2008, the official sponsor Carlsberg extended its promotion beyond the sponsorship rights by giving away headbands to the fans during the tourney, sporting fake team-colour hair, it also gave T-Shirts to the fans visiting the brand's promotional Booth.
- **Distractive Ambushing:** Creating the distraction in or around the place of event, not having any association with the event, in order to gain the attention from the event's audience and thus promote the brand's product. For example, in The Open Championship, 2008, Bentley set up a line-up of the Bentley [7] cars outside Hill side Golf club which is adjacent to the Royal Birkdale, the host course of the Open, which attracted great attraction from the event audience [8].
- **Value Ambushing:** Making a direct reference to the event or property's theme or values to imply a link with the event in the mind of the consumers. For example, Puma, in the European Championship, 2008, in order to promote its football line used the tagline, June 2008: Together Everywhere, thus making a direct reference to the event being played that month [9].
- **Insurgent Ambushing:** use of surprise and aggressive promotion at an event with minimum investment in order to maximise the awareness and to distract the attention of the people from the official sponsors of the event and the event itself. For example, in 2008 French Open- Ronald Garros, K-Swiss ambushed the rivals Adidas and the clothing sponsor Lacoste by setting up a huge purple tennis ball on a crashed car on the major route to Ronald Garros.
- **Pre-emptive Ambushing:** When the official sponsor creates the marketing communication in order to usurp any possible ambush marketing campaigns of the rivals, thus prompting

the ambush activities and distracting the focus from any of the other official sponsors of the event. For example, in the European Championship, 2008, Adidas produced 16 inflatable footballers wearing the jersey of each country participating in the event with Adidas logo and stripes including those countries which were sponsored by Nike and Puma.

- **Parallel property ambushing:** The creation of a rival event or property to be run parallel to the main ambush target, associating the brand to the sport or the industry at the time of the event, thus capitalising on the main event's goodwill. For example, Nike organised a global contest "human race" in 24 countries around the world including Shanghai, where the Olympics, 2008 was taking place, which was continued for 7 days following the Olympics, and gathered a huge international marketing throughout Olympics centred around Nike and the marathon [10].

INCIDENTAL AMBUSH MARKETING

When the market communications of a company leads to such incidental ambushing of the official sponsors. It may be done in two ways:

1. ***Unintentional ambushing:*** when the consumers incorrectly identifies a non-sponsoring company as an official sponsor due to its previous association or due expectation of association with the event. For example, Speedo earned a considerable attention from media as result of success of swimmers wearing LZR racer swimsuits. This portrayed Speedo as official sponsor of the Beijing Games thus creating confusion in the market [11].
2. ***Saturation ambushing:*** a strategic increase in the marketing communication of a product through aggressive marketing in order to maximise the advertisement during the event by maximising available advertising before, during and after the event. For example, Lucozade, during the Beijing Olympics indulged into aggressive marketing of its products much above its standard marketing featuring athletes and a variety of sports significantly.

THE REASON

There are principally four reasons regarding why ambush marketing, despite being an intellectual property infringement has survived, as discussed below:

1. ***Most ambush marketing crusades are short-lived:*** Sporting occasions, for example, the world mug, super bowl, Olympics, and so on happen inside a brief time of time, moreover, enterprises' endeavors to ambush occasions generally happen inside an exceptionally restricted time period. For instance, where an enterprise utilizes an occasion which goes on for a few days, to market its items, it gets to be exceptionally troublesome for the occasion coordinators to practice their legitimate alternatives to shorten such action [12].
2. ***Existence of constrained case laws:*** Though laws exist which may have a general application to the issue of ambush marketing, just a modest bunch of cases have really advanced through the legal framework. This is especially valid for difficulties to ambush marketing utilizing [13] the hypothesis of misappropriation. Fights in court oblige much

time and exertion, thus far not very many promoters or sponsors have brought suits against ambush advertisers, case in point, and misappropriation of the group property.

3. ***Success of corporations in defending themselves:*** Corporations have been greatly adroit at shielding themselves from legitimate difficulties against ambush marketing. Case in point, on account of NHL v Pepsi Cola, Canada, the mainstream procedure of utilizing disclaimers, for example, 'the organization is not an official sponsor and has not paid to member with the occasion' was effective in helping Pepsi escape scot free. Additionally, since the two items were not comparative, Pepsi wriggled out of the affirmation of trademark encroachment and passing-off. The issue is that dependably no less than one state of any of the aforementioned cases or whatever other conceivably relevant cases stays unfulfilled in this manner prompting a fizzled activity by the petitioner.
4. ***Evasion of lawful response by event organizers:*** Affected parties regularly don't take legal help ,subsequent to there is a scarcity of case laws in regards to ambush marketing, and a court ruling for an ambushing organization could set a point of reference that could be utilized by every other organization actualizing an ambush fight. Associations behind sporting occasions are hesitant to sue because of dread of distancing the substantial partnerships, who albeit not present sponsors may need to sponsor the occasion in future. Also, the enterprises that are wronged by the demonstrations of ambush marketing by different organizations have depended on or will sooner or later of time resort to comparative means [14]. A more achievable technique for occasion sponsors as opposed to long fights in court would be to purchase up the advertising space encompassing the occasion stadia and exchange just to official sponsors; oblige stadia holders through contract arrangements to clear all advertising starting from the earliest stage its region in order to offer them just to official sponsors; go into contracts with significant media associations obliging them to offer first privileges of advertising in interims in shows of the occasion, to official sponsors and distributed media and open data packs to bring issues to light of the rights claimed by the occasion coordinator and the activity likely if those rights are encroached.

NEED OF LEGISLATION TO PREVENT AMBUSH MARKETING

Today the stakes in sports are much higher for example the broadcasting rights of the cricket world cup of 1996 was bought for an nominal amount of \$ 15 million but for 2011 and 2015 cricket world cup the amount increased up to \$ 1.1 billion ,the sponsors are very much concerned about their rights and interests although protection provided under trademarks act, competition law seems to be enough to deal with every situation of ambush marketing but in reality they are not enough and are not sufficient for each and every situation, lets again discuss the "nothing official about it" campaign by Pepsi it was more or less a spoof or parody on the official sponsor but in reality it was a smartly done act of ambush marketing, the point of determination remains whether any business/official association with the event is implied indirectly, even today a smartly done

act of spoof or parody like "nothing official about it" will not be attract the provisions provided to attract ambush marketing [15].

There is no doubt that the practice of ambush marketing is an unethical business practice [16], and the past two decades have shown how important it is to have more stringent intellectual property protection besides what is provided for in the current regime. While it may be argued that it is each corporation's free right to advertise during such international events which involve national pride, it is unjust to a corporation that enters into agreements with the event organizers and pays millions to acquire exclusive rights to advertise on the one hand and corporations that have not paid a single penny also enjoy the same benefits on the other hand xvii. It is only fair to put a cost on acquiring a right of association especially when the benefits accrued far exceed the initial cost. Another issue of concern to event organizers is that the practice of ambush marketing has jeopardized their ability to fund events due to their inability to retain top sponsors. Ambush marketing affects event organizers considerably and poses a substantial threat to their economic interests. Sponsorship costs for London Olympics that took place in 2012 was estimated to be £ 2 billion, which forms a substantial portion of the funds required to organize the event [17]. With such astronomical costs at stake, ambush marketing poses a huge threat of losing out on sponsorship resulting in an enormous dent on the budget.

While there are various acts of ambush marketing that come within the ambit of trademark, copyright infringements or passing off, they are not threatening, since they can be resolved through legal means. However, the other acts of ambush marketing which corporations resort to by circumventing the above mentioned IP protections, are the ones that are of major concern.

THE INDIAN PERSPECTIVE

Experiences from the past three decades have proven the fact that ambush marketing is unethical and how important is to have stringent intellectual property protection beside what is provided in for current regime [18]. At present, India has not enacted specific anti-ambush marketing laws and accordingly redress must be had to the Trade Marks Act, 1999, the Copyright Act, 1957, the Emblems and Names Act, 1950 and the common law notion of passing off.

THE COPYRIGHT ACT, 1957

The Copyright Act is a capable tool which provides a remedy in the limited set of instances of "ambush marketing" i.e. where logos or other original works of authorship are used without license by third parties. The Copyright Act, 1957 provides the owner of copyright privilege to enjoy the exclusive rights to reproduce, perform, publish adapt or translate, the copyrighted work and any such act undertaken without the license of the copyright owner would, generally, constitute copyright infringement. Now as per the Act infringement consist of two essential elements:

- There must be sufficient objective similarity b/w the infringing work and the copyright work,

- The infringing work must have been derived from the copyright work.

'Lay observer test' holds a prominent position in Indian context, this test is applied by Indian courts in order to evaluate the cases concerning alleged copyright infringement. The test relies on the belief that "if to the 'lay observer' it would not appear to be reproduction, there is no infringement of copyright in the works". In regard to "ambush marketing" the Delhi High Court in case of ICC Development V. Evergreen Service Station, recognized a limited role of copyright law in granting an injunction preventing the defendants from using the logo of "ICC World Cup 2003" consisting of black & white strips and the mascot "dazzler" holding these to be "artistic work" protected under section 2(c) of the copyright Act, 1957.

THE TRADEMARK ACT, 1999

The Trademark Act, 1999 provides that a trademark may be registered or unregistered, when the trademark is registered the registrant is granted certain privileges these are:

1. Title to mark established which enables the trademark owner to avoid proving his title against any infringement of the mark.
2. The exclusive right to use the registered trademark in relation to the goods or services in respect of which the trademark is registered
3. The right to obtain relief in respect of infringement of trademark.

What is necessary is that the applicant must be able to show 'distinctiveness' of such trademark which he sought to get registered. A trademark which is not of distinctive character or a trademark which is "deceptively similar" to an existing trademark will not be registered [19]. The key determinant in determining copyright infringement is "likelihood of confusion" in the mind of consumer. Whenever there is an instance of registered trademark infringement, the following element must be present:

1. Use of a registered trademark by a person other than its registered proprietor or registered user.
2. Use of either of the whole of the registered trademark or an adapted one by making a few additions or alterations.
3. The infringing trademark is identical or similar to the trademark already registered.
4. The likelihood of causing confusion on the part of public. Advertising of the registered trademark in such advertisement takes unfair advantage.
5. In the case of ICC Development V. Arvee Enterprises and Anr, it was said that for a plaintiff to find success in his claim, he must prove that there was "likelihood of confusion" in public mind that the defendants were sponsors or license of world cup. The defence of "nominative fort use" shall also be considered, the registrant of a trademark is not granted the right to limit the bonafide use by an unlicensed third party of his trademark to describe the character or quality of the trademarks registrant's good or services, so where a defendant uses a trademark to describe the plaintiffs product rather than its own , a fair use defence

is available provided that the product or service in question is not identifiable without using the trademark, that only so much of the marks are used as is reasonably necessary to identify the product or service and the defendant has not done anything that would suggest a sponsorship.

6. As per the trademark Act, 1999 nobody is entitled to institute any proceeding to prevent or to recover damages for the infringement of an unregistered trademark. But nevertheless the Act provides that nothing in the Act shall be deemed to affect the right of any person for passing off goods or services, as the goods of another person, as serves provided by another person or any available remedies. A passing-off action is thus maintainable under the law of law of tort or common law of right.

CONCLUSION

Ambush marketing is a questionable and occasionally contested issue. Brand managers are enticed to ambush market on the grounds that it is a generally modest method for drawing in shoppers to their items. Nonetheless, by ambush marketing, brand managers endanger the practicality of real sporting occasions. This and different reasons that have been talked about in the article, without a doubt warrant the need to administer to keep the act of ambush marketing. In the event that ambush advertisers are permitted to proceed unhindered, scarcely any motivator stays for official sponsors to pay the colossal sponsorship charges without which these occasions basically can't occur. On the other hand, ambush marketing can't be seen simply a marketing language or a business aggravation. It needs to be perceived in law to empower gatherings to bring the imperative activity against the individuals who confer the demonstration [20]. Unless a choice is taken by the courts or lawmaking body, ambush marketing will keep on prospering and examples will just increment. Notwithstanding, it is empowering that the Indian Judiciary has demonstrated a slant to punish or if nothing else injunct the individuals who enjoy this practice can be seen by a request passed by the Delhi High Court. There was additionally a proposal for a draft enactment which did not see the light of day. These can be seen as positive steps by the official and legal to make a move against those reveling intellectual property encroachments through ambush marketing.

The extent that whether ambush marketing is moral or basically savvy business practice stays questionable. Without authoritative procurements or points of reference, the part of ethical quality is frequently highlighted. Faultfinders call ambush marketing parasitic marketing, guaranteeing that organizations are deliberately searching for approaches to piggyback on their rivals' sponsorship of real occasions regardless of challenges from sponsors and occasion organizers.⁴² The ambusher that gives the impression of contribution without installment is just serving its own particular slender premium toward oneself and, in doing in this way, takes part in conduct that is hurtful to more noteworthy else's benefit of game. It is essential to not just keep up a zero-resistance policy towards ambush marketing, but create attention to this practice with the goal that outsiders are stopped from participating in such a practice. This demonstration of publicizing could be possible by distributed open data sheets that would incorporate what the official imprint is, and

so on consequently producing mindfulness about what would add up to a trademark, copyright or configuration encroachment would be as for that occasion.

An occasion of a global scale assumes an essential part in fortifying economies and games frameworks and advancing tourism, eventually affecting the financial development of a state and additionally relations with different states. Real occasions need sponsors on the grounds that they can't be held singularly with open expense cash. Sponsors do look for their pound of tissue in return for their commitment and are unrealistic to make the sponsorship responsibility unless they believe the organizer. On the off chance that the organizers' are not able to put to rest the risk of ambush marketing, it might drive sponsors off from such occasions in future. Prospective sponsors must have the capacity to trust the organizer and nature in which the occasion is held. To guarantee the sponsors security in this respect alone, unique enactment concentrating on particular occasions of national imperativeness is defended. The possible accomplishment of the law will reflect in the achievement of occasions secured and encouraging of an environment that advances numerous more comparative occasions in India. Essentially, if one is to accommodate the general population enthusiasm with cutoff points on opportunity and checks on inventiveness and development induced by a hostile to ambush marketing law, the secured occasion ought not lose the soul of the arranging in attempting to implement laws with hyper-specialized precision.

Likewise, the requirement for an enactment can't be over-underscored. Dependence on interchange guarantees under trademark or copyright encroachment, passing off, opposite disarray or out of line rivalry must be a stop-crevice game plan, not a changeless arrangement. The procurements in enactments passed in different nations, for example, the wide protest gave by the enactment of New Zealand, powers given to imperative services under the South African enactments and particular laws sanctioned in China, United Kingdom can be utilized as a benchmark to draft a unique enactment to control the threat. If not an extraordinary enactment, procurements for ambush marketing ought to be fused in the trademark and copyright enactments itself by changes. The case for enactment must be made on sound monetary grounds in people in general investment and in particular Indian connection.

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