

Apprehending an ambush – how to defend against ambush marketing

As Delhi counts down to the 2010 Commonwealth Games, excitement is building not only for the world-class sport on display, but also for the lucrative sponsorship deals. However, these could make the games an irresistible target for ambush marketers

By **Bisman Kaur**, Remfry & Sagar

Delhi is abuzz in the run-up to the Commonwealth Games, which are due to be held this October. Stadia and hotels are being readied, roads and metro lines are being extended, media campaigns have begun in earnest and a swanky airport terminal (the fifth largest in the world) is scheduled to open in July. The scale of the event and the abundance of talent it promises have made hosting the games a matter of special pride. And even after the curtain has fallen on the games, Delhi's facelift will serve its citizens well for years to come.

Behind the exciting build-up are billions of dollars in investment – the games' estimated budget (including non-sports-related infrastructure development) is in excess of US\$6.5 billion. Thus, come October, their success will be measured not only in terms of the sportsmanship on display, but also on the mega-buck sponsorship deals. Of course, official sponsors expect maximum exclusivity for their money. However, rivals too will be seeking to capitalise on the sporting extravaganza. Thus, as has happened in the case of every major sporting event in recent times, the scene will be ripe for so-called "ambush marketing".

The phenomenon of ambush marketing

Ambush marketing can be defined as a practice whereby a company, often a competitor, intrudes upon public attention surrounding an event, deflecting attention towards itself and away from the official sponsor.

Its evolution is linked to the extraordinary rise in the popularity of commercial sponsorships over the last two decades or so. The value of such sponsorships lies in the combination of the sponsor's exclusive right to connect with consumers while depriving competitors of an equal opportunity. By sponsoring an event that the target audience values highly, an official sponsor can greatly enhance its brand value. However, as sponsorships became more attractive, marketers' ability to enter into sponsorship contracts decreased as the cost of securing these and the level of competition for them increased. Ambush marketing thus arose when companies that could formerly associate themselves with high-profile events (eg, the Olympics) became excluded from official sponsorship deals, by way of either increased costs or category exclusivities.

Perhaps the first instance of ambush marketing occurred when Kodak lost sponsorship rights for the 1984 Olympic Games to Fuji. Undeterred, Kodak sponsored ABC network's broadcast of the games and became the "official film" of the US track team. Fuji exacted its revenge in 1988: this time Kodak secured worldwide category sponsorship while Fuji concentrated on an aggressive sponsorship of the US swimming team.

Brand owners have recourse to many different methods to trump a rival's sponsorship. Some are flagrant – the most obvious example being a company's unauthorised use of protected signs and

terms to suggest to the public that it is an official sponsor. However, most strategies are oblique and designed to circumvent the law. Common examples include sponsoring the broadcast of an event in place of the event itself or sponsoring a sub-category within an event, such as the national volleyball team. It may take the form of sponsoring an individual player – for instance, although Nike was the official clothing supplier for the Australian Olympic team in 2000, Ian Thorpe (Australia's champion swimmer) was individually sponsored by Adidas. What complicates matters in such cases is the fact that many individual (as well as team) sponsorships are entered into well before the bidding for event sponsorships commences.

Rivals may also choose to ambush an official sponsor through intense advertising during or around a sponsored event. Association with an event can also be created through proximity to or intrusion into venues where an event is being held. Some common ambush tactics include the following:

- Putting in place advertisements and flying branded blimps around venues – these are then seen by spectators and picked up by television coverage.
- Handing out free branded merchandise to spectators, which is then carried into venues.
- Running ads wishing teams “good luck” or “congratulations”.
- Using event tickets as prizes in consumer sweepstakes.

The Indian experience

In the Indian context, one campaign instantly springs to mind. The advertisements which monopolised attention during the 1996 International Cricket Council (ICC) World Cup were not those of official sponsor Coca-Cola, but those of its arch-rival Pepsi. Featuring star players from the Indian cricket team, the ads were accompanied by the cheeky catchphrase: “Pepsi – nothing official about it.”

In 2003 the ICC World Cup was held in South Africa. On this occasion Philips (a non-sponsor) ran a marketing campaign offering its customers the chance to win travel to South Africa and tickets to watch matches, thereby suggesting that it was associated with the event. However, the High Court of Delhi opined that Philips' campaign did not fall foul of the law.

The ICC's claims rested on its applications to register the trademark “ICC CRICKET WORLD CUP SOUTH AFRICA

2003” in India. On the basis of these, the ICC objected to Philips using the term “world cup” (eg, in slogans such as “Buy a Philips audio system – win a ticket to the World Cup”) and a pictorial representation of a ticket with an imaginary seat and gate number stating “Cricket World Cup 2003”. Philips argued, and the court agreed, that the words “world cup” are generic and are used in the context of several international sporting events, such as the FIFA World Cup and the Hockey FIH World Cup. Thus, their use is descriptive and not proprietary to the ICC. According to the court, the ICC's mark had not been misappropriated, confusion among the public was not established and thus a claim of passing-off was untenable.

The court went on to hold that although Philips' actions might draw the attention of the public towards the ICC event, nowhere had Philips claimed to be a sponsor. “Ambush marketing” is a phrase coined by marketing executives to describe opportunistic commercial exploitation of an event, but legally speaking, if a brand promotion does not involve deceit, it cannot be held to be unlawful.

The ICC also pleaded that Philips' ticket distribution scheme was reserved for sponsors and that in depriving sponsors of this exclusive right, Philips was preventing the ICC from fulfilling its contractual obligations. However, the court's preliminary ruling was once again in favour of Philips, on the ground that the ICC had failed to provide material evidence to show that Philips had notice of the terms and conditions set out in the contracts between the ICC and its sponsors.

In addition, the ICC contended that it owned publicity rights in all ICC events which had commercial value and that Philips was wrongfully exploiting the ICC's persona. This plea was also rejected because, in the court's opinion, non-living entities are not entitled to publicity right protection for an event.

Philips was not the only company that the ICC sought to restrain. Injunctions were sought against other entities running similar contests. However, relief was denied in all cases except one – which was on account of unauthorised use of the ICC's logo and consequent breach of copyright.

Based on this, it appears that existing law in India does not provide an ambushed entity or an event organiser with a ready remedy. Of course, if a campaign uses trademarks registered to a rival or the event organisers, an infringement action and/or a passing-off action may be brought under

the Trademarks Act 1999. Similarly, if copyright is encroached upon, the Copyright Act 1957 prescribes suitable remedies. However, given that most ambushers rely on suggested associations, these statutes may not apply.

The Code of Regulation for the Advertising Standards Council of India (a self-regulatory body) is also worth mentioning. However, while this seeks to curb misleading advertisements, most ambush campaigns are likely to fall under the purview of creative marketing.

In any event, one strategy to counter the threat of ambush campaigns is to secure trademark and copyright registrations for all marks, logos and images associated with an upcoming event in all active markets. FIFA is a body with an aggressive registration policy and in fact, during the last football World Cup, it was able to stop many entities in India from free-riding on its goodwill on the strength of its statutory rights.

A publicity campaign informing the public of an entity's rights, with the warning that strict action will be taken against misusers, can also act as a deterrent.

The Commonwealth Games Federation and the Organising Committee of the Delhi Games seem to have taken note of this. So far, trademark applications have been filed for various marks and logos including "COMMONWEALTH GAMES", "CGF", the bar (the official emblem), the host city logo and the lion mascot, as well as the domain name www.cwgdelhi2010.org. A cautionary notice has also been issued warning against unauthorised use.

Contractual obligations are the other means of controlling ambush marketing. For its part, the Commonwealth Games Federation imposes a number of requirements and restrictions on cities intending to host the games to ensure that sponsors enjoy the exclusivity they pay for. These are set out in the host city contract and various technical manuals (eg, on brand protection, broadcasting, image, ticketing and venue operations), and are bound to be reflected in the contracts between the organising committee of the Delhi Games and athletes, in-stadium spectators and broadcasters. Typically, such contracts limit rights to interact or associate commercially with competitors of official sponsors in and around stadia, and in some cases for a period of time surrounding the event.

Such restrictions often involve a clash between event, team and individual sponsorship contracts. For instance, the ICC's anti-ambush rules in connection with the 2003 World Cup nearly led to the Indian

cricket team boycotting the event. This was on account of the clash between the long-term sponsorship commitments of individual players and the exclusivity promised by the ICC to the official sponsors, which prohibited players from endorsing products that rivalled those of the official sponsors for a month before and after the tournament. A truce was finally arrived at by limiting the moratorium on personal endorsements to the duration of the event. However, the Board of Cricket Control in India had to accept liability for all damages that might have arisen from claims made by sponsors of the World Cup on account of the amended conditions.

The case for special legislation

Jerry Welsh, a leading authority on event and sponsorship marketing, has criticised the view that "competitors have a moral obligation to step back and allow an official sponsor to reap all the benefits from a special event". In his opinion, competitors have "not only a right, but an obligation to shareholders to take advantage of such events", and that all talk of unethical ambushing is "intellectual rubbish and posturing by people who are sloppy marketers". Given that such a mindset exists, as do gaps in existing laws to tackle ambush marketing, enhanced security for sponsors' investments is required. Loss of confidence in the exclusivity of rights would lead to a decline in the value of sponsorships, which in turn would erode a primary revenue stream for large events and put their very organisation in jeopardy.

Thus, it is becoming increasingly common for organisers of major sports events to require host cities to introduce specific legislative protection against ambush marketing. Special laws were enacted for both the 2000 Sydney Olympic Games and the 2008 Beijing Olympics. The 2006 Melbourne Commonwealth Games, the 2010 South Africa FIFA World Cup, the 2012 London Olympic and Paralympic Games and the 2014 Glasgow Commonwealth Games are other notable examples.

As an example, the Glasgow Commonwealth Games Bill creates, among other things, new criminal offences with stiff penalties for unauthorised advertising and outdoor trading within the vicinity of venues. It also gives enforcement officers enhanced powers to ensure compliance. This is in response to contractual requirements with the Commonwealth Games Federation to ensure clean venues where "all structures, facilities and areas

that are visible to spectators, accredited people and broadcast cameras, be free of commercials, advertising and other messages deemed inappropriate for the Commonwealth Games environment". Further, so as to balance the legitimate rights of traders, the bill envisages that all special restrictions will be time-bound – for instance, if one venue is to be in use only for two days, advertising and street vending curbs need be in place only for that limited time period.

However, this discussion would be incomplete without mentioning the potential excesses that special legislation might inadvertently sanction. For instance, while the London Olympic Games and Paralympic Games Act 2006 understandably prohibits unauthorised use of the marks "OLYMPIC", "OLYMPIAD" and the Olympic rings logo, banned words for the designated period also include "games", "medals", "gold", "silver", "bronze", "2012" and even "summer". This, in the opinion of many, will make it almost impossible for most companies to even acknowledge the Olympic Games without getting into trouble.

In the same context, any recommendation for *sui generis* legislation must be tempered by the fact that stringent anti-ambush laws may not withstand judicial scrutiny. Most jurisdictions regard advertisements as commercial free speech, and though the fundamental right to speech and expression may be subject to restrictions, such restrictions ought to be reasonable.

Conclusion

There is no black-and-white moral or ethical argument with regard to ambush marketing. In fact, event organisers must shoulder their part of the blame. Driven by the aim of maximising revenues, one too many sponsorship categories are usually sold, heightening the chance that rivals will both secure rights to the same event. The solution lies in transparent demarcation of sponsorship categories, apprising sponsors (as well as the public) in detail with regard to the degree of exclusivity purchased and selling sponsorships responsibly so as to avoid overlapping rights and expectations. Further, launching a programme to increase knowledge of ambush marketing among all sections of the population and to discredit alleged ambushers would go a long way towards tackling this issue.

In the end, whatever the means, inadequate protection of the interests of the sponsors of the Commonwealth Games will undoubtedly weaken India's chances of hosting large events in the future. A special law would be useful to bolster the image of a secure legal environment. However, if this legislation were too stringent and prone to abuse, it might affect small businesses adversely and stifle local entrepreneurship, thus damaging the value attached to hosting such an event. Specific legislation does seem to be in the offing, although finding an equilibrium with regard to the rights of all interested parties will be imperative, as will thoughtful implementation once such a law takes effect. **iam**



Bisman Kaur is a senior attorney with Remfry & Sagar. She holds degrees in history and law from the University of Delhi and joined the practice in 2002. Well-acquainted with all aspects relating to trademarks, Ms Kaur has particular expertise in the finer nuances of assignment and licensing. Given her wide experience, she provides strategic counsel to clients and has authored several articles on diverse aspects of trademark law and practice.

Bisman Kaur
Consultant
remfry-sagar@remfry.com
+91 124 280 6100

Remfry & Sagar
India
www.remfry.com