



## *The Grass Roots - Sponsorship: The Problem of Ambush Marketing*

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Commercial sponsorship is big business. Since the watershed Los Angeles Olympic Games, the sponsorship fees to different sports properties associated with the Olympic Games, the FIFA World Cup, Formula One Grand Prix motor racing, and even the AFL or NRL have grown at geometric rates. The millions of dollars generated from corporate sponsorship are vital to the ongoing existence of many sports – both professional and semi-pro / amateur.

For a corporate sponsor, the rationale for including sponsorships in the marketing mix is to enhance consumer brand awareness and image. Sponsorship is an investment providing access to exploitable commercial properties which aim communication to particular market segments in a manner that may be more efficient and less costly than traditional advertising.

Activities that diminish the value of association with a sports property, event, exhibition or cause, become increasingly material to the owners of those properties (the controller of the commercial rights of the sports property, event, etc.) and potential / existing sponsors. Sponsors are keen to protect their investment dollar, and the owners of sports properties and other events are keen to have continued sponsorship of their properties. One activity, of increasing prevalence and concern to all parties is ambush marketing.

Ambush marketing refers to the practice of unauthorised association of names, brands and products with a sports property or event through various sorts of marketing activities. Companies sometimes invest millions of dollars to ensure exclusive sponsorship rights to a major event or prominent sports property, yet well known commentators point out that “ambush marketing tactics allow a company to associate with a major sports property without large-scale investment in securing sponsorship rights” (Tripodi & Sutherland, 2000, p.413).

Ambush marketing represents a substantial economic threat to a sponsor’s investment and may jeopardise the ability of sports property owners to attract future sponsorship. For example, shortly after the 1998 FIFA World Cup, Adidas announced a delay in the decision on whether to remain an official sponsor after 2002 until it could be assured that its sponsorship investment would be protected. However, before sports property owners and sponsors can take action to prevent ambush marketing or minimise the

effect of such strategies, parties must appreciate the contexts in which ambush marketing can arise.

### **Typical Ambush Marketing**

According to Tony Meenaghan (1994), the most common methods of ambush marketing are:

1. **Sponsoring the broadcast of the event.**  
The ‘ambusher’ sponsors the broadcast of the event, most obviously to take advantage of the large media audience. For example, Lion Nathan sponsored the Seven Network coverage of the 2001 AFL season to counteract the sponsorship of the league itself by Carlton & United Breweries.
2. **Sponsor subcategories related to the sports property / event.**  
The ambusher sponsors some lesser element associated with the primary event or sports property and exploits this association through aggressive promotional effort. In the case of the Olympic Games, consider the prominent advertising of Nike athletes at the 1992 Barcelona Olympic Games.
3. **Purchasing advertising time around replays of the competitor’s event.**  
The ambusher can deny a competitor the full benefits of their event sponsorship by buying advertising time in the slots around television replays of the event. This is an extension of the first strategy.
4. **Engage in major non-sponsorship promotions to coincide with the event.**  
The ambusher uses mainstream media advertising to achieve marketing communications objectives during the event.
5. **Other ambushing strategies.**  
Many ambushers have adopted other inventive strategies to suggest involvement with major events. Such strategies have included: use of unofficial merchandise; use of illustrations or photographs of places or buildings etc that are associated with an event in advertising as background to the ambusher’s product (see below); and unofficial corporate hospitality. The approach of Messages on Hold, which distributes t-shirts and placards to spectators who sit in view of camera at major sporting events – especially

AFL games in Perth – is a good example of a creative strategy which can maximise exposure while avoiding expensive sponsorship rights fees.

In many instances, ambushers will utilise a combination of the above methods. The subtlety and potential of ambush marketing could be seen during the period up to and including the Sydney 2000 Olympic Games. Ansett Australia invested between \$40 and \$50 million to become an official Team Millennium Olympic Partner. This was the second tier of sponsorship for Sydney 2000 underneath the long-running TOP (The Olympic Programme) category. Qantas still managed to associate itself with the Games, through sponsorship deals with sports events, individual sponsorship of high-profile Olympic athletes, and by advertising during television broadcasts of Olympic events.

Qantas sponsored the Olympic selection trials for the Australian swimming team. The trials were broadcast from the Olympic swimming pool and the broadcast featured the Qantas name and logo. Qantas also sponsored the Bledisloe Cup, which was held at Stadium Australia, the main Olympic stadium. The Qantas 'flying kangaroo' was formed on the arena during the Bledisloe Cup, and footage of this image featured prominently throughout its advertising campaign around the time of Sydney 2000. Through such activities, Qantas was able to establish an affiliation with two of the main Olympic arenas. More significantly, newspaper advertisements by Qantas featured a large photograph of sprinter Cathy Freeman, and the words "Sydney 2000, Olympic Games and the new millennium" and "The Spirit of Australia – Qantas".

Ansett Australia brought proceedings in the Federal Court for an injunction to prevent Qantas from undertaking ambush activities, claiming that the advertising campaigns of Qantas were aimed at undermining Ansett's sponsorship of the Games. The matter was settled out of court. I doubt that Qantas was obliged to make any concessions in the future.

### ***Protecting against Ambush Marketing***

Owners of sports properties and sponsors can adopt several practices to minimise ambushing. The primary protective step against ambush marketing is for event organisers to ensure that all intellectual property is effectively controlled. In particular, owners of sports properties must ensure that names and logos (including mascots and merchandise) are adequately protected via trade mark registrations. Ambushers which use trade marks without permission invite an infringement suit. Few ambushers are foolish enough to directly infringe on a registered trade mark. Interested readers can check the website of IP Australia <[www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)> for examples of prominent registered trade marks (it is important to bear in mind when checking the register that trade marks do exist at common law which are not registered).

Most emblems and logos will also be capable of copyright protection as original artistic work. However, claims to copyright ownership can be subject to challenge, for example, as to a work's ownership by a third party. A common misconception is that where a body commissions a third party designer to develop a logo, the copyright in that logo is automatically transferred when the designer is paid for the work. This is not the case. Unless there is a specific assignment of copyright, the copyright in the logo is owned by the designer. It is, therefore, important to both register trade marks and ensure that contracts with graphic designers and advertising agencies assign rights to any exploitable identifying mark which may be identified as relating to a sports property or event.

Importantly, the level of protection available may be less where an ambusher uses the title of the event or words associated with the event (e.g. 'The Champions League' as associated with the UEFA Club Championship). Such words are not usually protected by copyright, and will often be difficult to register as trade marks on the basis that they lack distinctiveness, unless there has been sufficient use. In response to this problem, governments of nations hosting major sporting events are enacting specific legislation to protect the logos and descriptive words relating to these events. For example, the Sydney 2000 Games (Indicia and Images) Protection Act 1996 (Cth) was specifically enacted by the Federal government to protect titles, logos and images associated with the Sydney 2000 Olympic Games.

A variety of other legal measures may be available. Australia and most jurisdictions possess passing off and unfair competition laws (see, for example, Trade Practices Act 1974 (Cth), ss.52 & 53) which offer some protection against situations where the goodwill (reputation) of an event is appropriated by the misrepresentation of an ambusher. It is worth noting that to imply without authority that one's product is associated with an event, irrespective of whether official logos etc. are used can amount to a misrepresentation, giving rise to a claim. Unfortunately for the owners of sports properties, such actions are complex and involve more expensive and onerous processes than pursuing trade mark or copyright infringements.

Although no Australian cases have yet to directly address the issue of ambush marketing, some have examined the use of athletes within the context of unfair competition. For example, Telstra Corporation Ltd used a photo of champion swimmer Kieren Perkins in a 1994 advertising campaign regarding the selection of a carrier for long distance and international calls. Telstra had not sought permission from Perkins to use the photo and allegedly gave the impression that Perkins supported the Telstra services. It was found on appeal in *Talmax Pty Ltd and Perkins v Telstra Corporation Ltd* that Telstra had engaged in misleading and deceptive conduct. It was restrained from using the advertising material. However, Perkins was only awarded \$15,000 as damages for loss of

opportunity to exploit commercial advantage and legal costs.

Event organisers must also ensure that the venue is delivered free of (competing) signage, advertising and promotions etc., whether it be on the stadium, in bars and eating areas, or in the airspace above. This 'environmental control' should attempt to deal with any ambush activity that may occur outside the stadium itself. Terms and conditions of admission should be drafted with ambush activity in mind: e.g. entry tickets should reserve the right of event organisers to refuse entry or eject offenders (Couchman & Harrington, 2001). Individuals should also be on hand in and around the stadium to look out for and deal with ambush activity.

When developing an 'anti-ambush strategy', event organisers must ensure that all affiliates and relevant stakeholders are aware of the strategy and are contractually bound to adhere to the strategy. Broadcasters should be contractually bound to offer official sponsors first rights to purchase broadcast advertising and telecast sponsorship rights and to veto advertising of sponsorship by competitors. Official licensees, such as suppliers and merchandisers, should be prevented from, either inadvertently or purposely providing official merchandise to ambushers, which may allow them to more easily imply official association with an event. It is important that all licence agreements contain preventative contractual provisions including:

- prohibitions against assignment of licensed rights;
- rights of prior approval over all licensees' promotional material;
- prohibitions on joint promotions connected with the event (except with other licensees);
- prohibitions against sub-licensing, sharing or assignment of rights;
- rights of first refusal to sponsors/suppliers to advertise in official publications; and
- prohibition on licensees advertising in pirate event publications (Couchman & Harrington).

The importance of protecting a sponsor in contract negotiation and the insertion of preventative contractual provisions was highlighted in the Canadian case *National Hockey League et al v Pepsi Cola Ltd*. This case concerned a passing off claim between the NHL and Pepsi Cola. The legal principles relating to passing off in Canada are similar to those in Australia.

The NHL reached a \$2.6 million agreement with Coca Cola Ltd, to designate its product as the official soft drink of the NHL. The agreement, however, did not give Coca Cola the right to advertise during broadcast of NHL games, which the NHL sold to Molson Breweries. The NHL failed to adequately protect Coca Cola's interest by neglecting to insert a clause in the Molson Breweries agreement prohibiting them from granting rights to Coca Cola's main competitors. Inevitably, Molson granted Pepsi Cola, Coke's main competitor, the right to advertise Pepsi soft drinks during NHL broadcasts.

Pepsi advertised its product by a means of a hockey contest. The NHL brought an action against Pepsi for misleading and deceptive conduct, claiming the advertising campaign was likely to mislead the public into thinking the NHL endorsed the contest. The action was unsuccessful. Litigation could have been prevented through adequate contract negotiation from the outset.

### Conclusion

It is important that the owners of sports properties and sponsors seek strategic legal advice when drafting sponsorship agreements. The days of sponsorship decisions being made on the basis of the managing director's favourite sport or football team are long gone. Corporations are using increasingly sophisticated criteria to measure the ROI of sponsorship programmes and protection from ambush marketing is, or should be, an important factor in the evaluation process. Event organisers and the owners of sports properties must respond with comprehensive ambush protection / minimisation strategies if they wish to maximise sponsorship revenue.

### References & Further Reading

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