



**LEGAL MEASURES FOR AMBUSH MARKETING IN
THAILAND**

BY

MR. NATTAKORN TAMKAEW

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS
IN BUSINESS LAWS (ENGLISH PROGRAM)**

FACULTY OF LAW

THAMMASAT UNIVERSITY

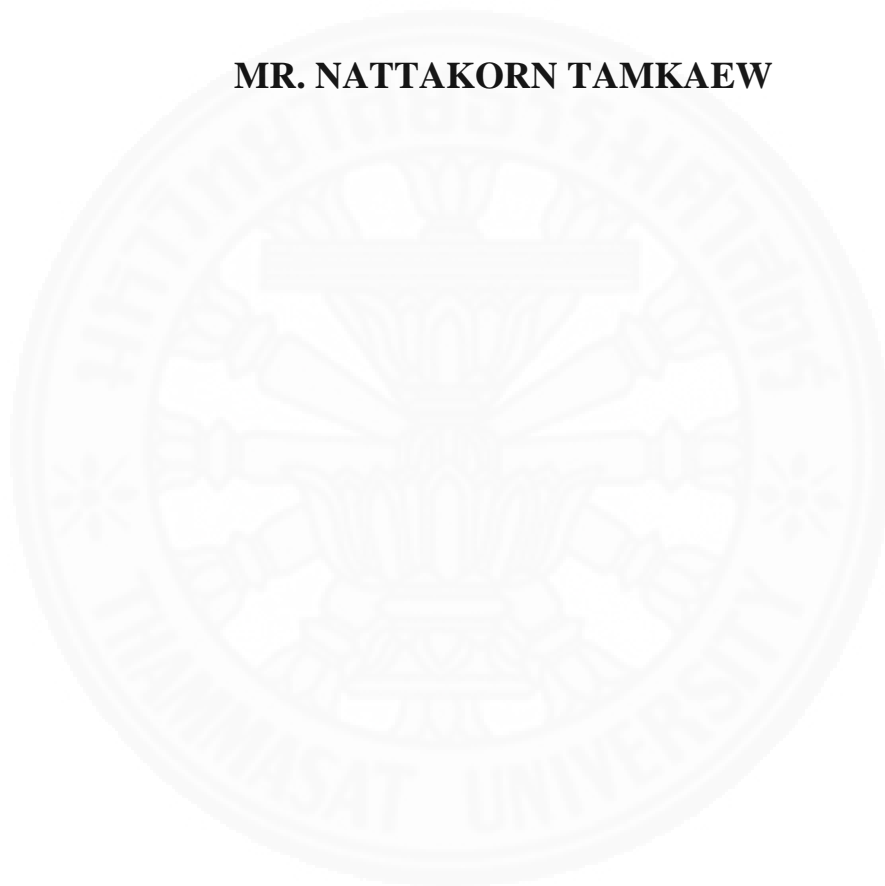
ACADEMIC YEAR 2015

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ENTITLED

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was approved as partial fulfillment of the requirements for
the degree of Master of Laws in Business Laws (English Program)

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Chairman



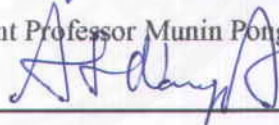
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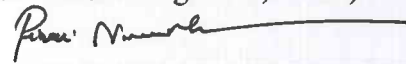
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ABSTRACT

Ambush marketing comprises a broad range of marketing operations by business organizations seeking affiliation with an event without bearing any financial burden of sponsorship. Although the ethical topics related to ambush marketing are still controversial, it clearly causes disadvantages to the sponsorship business by deflecting public attention to its advantage in order obtain benefits associated with sponsorship, and devaluing the sponsorship relationship between official sponsors and organizing committees. It is reasonable that this marketing practice should be regulated under an appropriately designed legal framework.

Many attempts have been made in other countries to combat ambush marketing. The United States of America and the United Kingdom have introduced event-specific legislation to guard against ambush marketing for the Olympic Games, as requested by the International Olympic Committee. New Zealand and South Africa have provided protection for any events considered 'major event' with an umbrella legislation which is not specifically designed for the Olympic Games or any other single event.

In Thailand, although there are some legal grounds that make it possible to formulate a claim against ambush marketing, such as trademark infringement, civil

passing off, and basic tort claims as well as consumer protection law, it appears that such existing laws are insufficient to deal with this controversial marketing activity due to various non-infringing techniques of ambush marketing.

Consequently, a single piece of new legislation should be enacted. Business relationships between event organizers and official sponsors must be protected while achieving a balance among the rights of sponsors, property owners, and other affected parties. Therefore, ambush marketing legislation should focus on clear-cut definition, declaration of the protected event, and legal protection for ambush marketing by way of association and intrusion, time limitations, and exceptions of violation.

Keywords: Ambush marketing, Sponsorship, Trademark law, Passing off, Law of tort, Consumer protection law.

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LIST OF ABBREVIATIONS

Symbols/Abbreviations	Terms
AP	Associated Press
ASA	Advertising Standards Authority
B.E.	Buddhist Era
CAP Code	The Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing
FA	Football Association
FIFA	The Fédération Internationale de Football Association
INS	International News Services
IOC	The international Olympic Committee
LOAR	London Olympics Association Right
LOCOG	The London Organizing Committee of the Olympic and Paralympic Games
MEMA	The Major Events Management Act 2007
OAR	Olympic Association Right
OASA	The Olympic and Amateur Sport Act
OFT	The Office of Fair Trading
UK	The United Kingdom
US	The United States of America
USOC	The United States Olympic Committee

CHAPTER 1

INTRODUCTION

1.1 Background and Issues

Commercial companies have various ways of acquiring customers in order to build up their businesses, for example, through direct mail, broadcast media, telemarketing, and other more spontaneous referrals (i.e. word-of-mouth customer acquisition). Amongst all the marketing activities, commercial sponsorship represents one of the most significant marketing developments over recent decades and has become prevalent in society.

Commercial sponsorship is where a commercial business provides a subsidy or financial support to a program or project in exchange for the opportunity to create brand awareness or recognition. In exchange for financial support, a commercial business may use brand names or insignias of a program or project with specific acknowledgement that they have provided a subsidy in its advertising in order to create brand awareness or recognition among public consumers.¹ In essence, it is a bilateral agreement that endeavors to provide mutual and equitable benefits for both concerned parties. As sponsorship marketing is the easiest and most affordable way for businesses to establish brand awareness among customers,² particularly in highly anticipated events such as the Olympic Games, FIFA World Cup or Academy Awards, companies are willing to provide financial support to that particular event in order to become an official sponsor as well as to receive exclusive rights to utilize insignias, names, and other property rights belonging to that particular event in press releases, marketing, advertising and promotional materials to advertise their products or services. It seems reasonable for the official event sponsors to expect that they

¹ “*Corporate Sponsorship*”, <http://www.investopedia.com/terms/c/corporate-sponsorship.asp> (accessed July 24, 2015)

² Drew Hendricks, “*How to Boost Your Small Business Through a Sponsorship*”, <http://www.inc.com/drew-hendricks/how-to-boost-your-small-business-through-a-sponsorship.html> (accessed July 24, 2015)

could associate themselves with the event to the exclusion of their non-sponsor rivals in return for the sponsoring amount that they have paid. However, ambush marketing may prevent the financial support provider from obtaining the benefit of being an official sponsor and has become an effective marketing tactic for rival companies who are seeking a way to associate themselves with the event without the event organizer's official authorization or endorsement.³

Imagine the following fictitious scenario: Adidas is an official event sponsor of the FIFA World Cup 2014 in Brazil because it has paid millions of dollars to the Fédération Internationale de Football Association (FIFA). Nike, which does not sponsor FIFA, decides to take advantage of the popularity of this highly anticipated event by associating itself with the event without authorization from the event organization. Nike uses billboards for commercials where it states: "Nike, the number one sportswear for your big match" around the game venues prior to and during the event. It also distributes flags with its logo to the event spectators and establishes its sport village around the event venue. Nike hires Lionel Messi, a top-ranked football player, to show his undershirt displaying Nike's logo on his goal celebration. Thus, many may have understandably mistaken Nike as the official sponsor of the 2014 FIFA World Cup. From the abovementioned marketing activities of Nike, it seems obvious that Nike has engaged in ambush marketing in order to ambush Adidas's sponsorship rights.

Ambush marketing is an attempt to gain benefits from the popularity and goodwill of a particular occurrence by way of establishing an association between oneself and the event, without explicit authorization from the event organizer and without spending any requisite fees to be an official sponsor.⁴ It is sometimes called "parasite marketing" since the value and quality of the sponsorship opportunity and the efficacious message of the official sponsor are reduced and devalued by this

³ Stephen Townley, Dan Harrington & Nicholas Couchman, "*The Legal and practical prevention of ambush marketing in sport*", 15 **Psychology and Marketing** 333, 338 (1998).

⁴ Steve Mckelvey & John Grady, "*Ambush Marketing: The Legal Battleground for Sport Marketers*", 21 **WTR Ent. & Sports Law** 8, 9 (2004).

marketing activity.⁵ The effect may be that companies no longer take an interest in supporting such events. If that is so, the major event organizer will lack financial assistance in order to organize the event because commercial companies are not willing to make an investment in something from which they cannot take any benefit.⁶ Ambush marketing is not limited to sporting events in spite of the fact that it is frequently considered in the context of major global sporting competitions such as the FIFA World Cup and Olympic Games. This kind of marketing activity may also take place in major international events such as royal marriage ceremonies in Sweden and the United Kingdom, or well-known entertainment festivities such as the Oscars Awards in the United States.⁷

Ambush marketing has attracted much debate amongst marketing scholars. Some researchers argue that it is an unethical and illegitimate marketing activity because it devalues the sponsorship between the event and official sponsor⁸ and sometimes misleads consumers into believing that ambushers are actually providing a sponsorship fee to the event and acting as an official sponsor.⁹ As a consequence, the event will not be able to attract other potential sponsors. Other researchers take the completely opposite view stating that it is not illegal because it is the natural result of healthy competition. Scholars who are in favor of ambush marketing argue that it is just a creative marketing strategy which does not infringe the rights of event organizers, especially intellectual property rights.¹⁰ Moreover, from the supporters' point of view, it is just a creative marketing strategy that tries to obtain consumers'

⁵ Tony Meenaghan, "Ambush Marketing: A Threat to Corporate Sponsorship", 38 **Sloan Management Review** 103, 109 (1996).

⁶ Philip Johnson, **Ambush Marketing and Brand Protection: Law and Practice** 3 (2nd ed. 2011).

⁷ The Global Advertising Lawyers Alliance, **Ambush Marketing: A Global Legal Perspective** 13 (2014).

⁸ Information Resources Management Association, **Marketing and Consumer Behavior: Concepts, Methodologies, Tools, and Application** 102 (2014).

⁹ Gabriela Bodden, "Ambush Marketing and Trademark Infringement in the Caribbean", <http://www.lexology.com/library/detail.aspx?g=2098fdec-cd56-4d4f-9a86-9dbc6cf549ad> (accessed December 5, 2015)

¹⁰ Jerry C. Welsh, "Ambush Marketing: What it is, What it isn't", http://welshmktg.com/WMA_ambushmktg.pdf (accessed June 19, 2015)

attention¹¹ as well as creating and extending free markets.¹² Although the ethical topics related to ambush marketing are still controversial amongst business scholars, it certainly causes some disadvantages to the sponsorship business as it affects the business relationship between the organizer and its sponsor by obtaining customers' attention without bearing any of the financial burden of sponsorships. Consequently, ambush marketing will make commercial businesses reluctant to provide financial support in terms of sponsorship revenue to the event since the advantages of being an official sponsor are regularly weakened by the action of ambushing companies.¹³

In spite of not having any specifically designed legislation or legal measures to handle ambush marketing in Thailand, there are some legal grounds which could allow a claim of ambush marketing to be made. In the Trademark Act B.E. 2534, a trademark infringement claim and the law of passing off are the applicable existing laws.¹⁴ However, a trademark infringement claim can be used only in some circumstances since the ambusher is normally aware how to avoid trademark infringement. This means that the event organizer and official sponsors face difficulties identifying or taking legal action against such marketing activities. Moreover, the short lifecycle of the event may cause difficulties to the owner of an unregistered mark in establishing the actual use of its trademark in order to enjoy the passing off protection under the Trademark Act of Thailand.

The event organizers may pursue a basic tort provision under the Civil and Commercial Code of Thailand against unauthorized usage of the event's mark in ambushing activities if such unauthorized use is believed to be an abuse of their

¹¹ Denise Doust, "*The Ethics of Ambush Marketing*",

<http://fulltext.ausport.gov.au/fulltext/1997/cjism/v1n3/doust.html> (accessed on June 19, 2015)

¹² Jason K. Schmitz, "*Ambush Marketing the Off Field Competition at the Olympic Games*", 3 **Nw. J. Tech. & Intell. Prop.** 203, 208 (2005).

¹³ Zaman Kala, "*Ambush Marketing in the Context of the 2012 London Olympic Games*", Master's Thesis, University of Central Lancashire (2012) 9.

¹⁴ Siraprapha Rungpry, "*Dealing with Ambush Marketing*", <http://www.asiaiplaw.com/article/41/747/> (accessed October 21, 2015)

rights.¹⁵ However, it would be very difficult for the trademark owner to identify the ambusher's unlawful act since many ambushing strategies are not obviously outlawed in Thailand and the use of tort claim is not well developed in the field of ambush marketing.¹⁶

Furthermore, although Thai consumer protection law may represent an alternative way for organizing bodies and official sponsors of the event to counter ambush marketing, it is not specifically designed for this phenomenon and may not be effective enough to cover all subtle strategies of ambush marketing. Thus, it is reasonable to conclude that the existing laws in Thailand are not sufficiently designed to deal with ambush marketing.

Some countries such as New Zealand, South Africa, the United Kingdom, and the United States of America have introduced specific legislations to control ambushing activities in sponsorship business. This may imply that the benefits that each of the countries takes from providing legal controls to ambush marketing is worthwhile enough. By the abovementioned movements of other countries and the benefit of legal measures for ambush marketing, the existing applicable laws in Thailand need to be analyzed in order to determine whether current laws have achieved to enhance sponsorship investment in Thailand.

1.2 Hypothesis

Although there are some legal grounds that make it possible to formulate a claim against ambush marketing, such as trademark infringement claim, civil passing off, basic tort claim and consumer protection law, it appears that such existing laws are insufficient and ineffective to deal with ambush marketing in Thailand due to various non-infringing techniques of ambush marketing. Ambush marketers have

¹⁵ Somboon Earterasarn & Clemence Gautier, "Protection of Major Sports Events and associated commercial activities through Trademarks and other IPR", <https://www.aippi.org/download/committees/210/GR210thailand.pdf> (accessed October 14, 2015)

¹⁶ *Id.*

taken great care in the planning and execution of their ambushing strategies to avoid violations. An absence of the definition of ambush marketing in the existing Thai laws is also problematic. This makes Thai legal practitioners face difficulties determining what marketing activity should be controlled. Hence, it seems that the existing legal frameworks in Thailand are inadequate to solve the issues caused by ambush marketing. Therefore, specific legal measures to handle this activity are required so as to enhance sponsorship investment in Thailand and increase the opportunity for Thailand to qualify as a host country for a major world event.

1.3 Objectives of the Study

1. To study the characteristics and various practices of ambush marketing.
2. To analyze whether ambush marketing can be categorized as an unethical practice or just a creative marketing activity.
3. To study and analyze the law and regulations which govern ambush marketing in the selected countries.
4. To study and analyze the existing Thai legal measures which are applicable to deal with ambush marketing in Thailand.
5. To seek appropriate and effective solutions for ambush marketing in Thailand as a potential instrument that supports Thailand in enhancing sponsorship investment.

1.4 Scope of the Study

This thesis studies the issues around ambush marketing, focusing on the existing Thai laws such as the intellectual property law, civil and commercial code, and consumer protection law as the relevant laws that could be used to deal with this kind of phenomenon. It also studies legal measures for ambush marketing in other countries by comparing them with existing Thai law. The content will begin with the background of ambush marketing and some various practices of ambush marketing. It

will also discuss the ethical issues of ambush marketing to determine whether it is unethical or merely a creative marketing strategy. In order to find appropriate solutions for ambush marketing in Thailand, this thesis will include a comparative study between the legal measures in selected countries and Thailand.

1.5 Methodology

This thesis will conduct a comparative study on legal measures for ambush marketing using the documentary research method. The study will research and accumulate the information by studying textbooks, articles, journals, periodicals, scholar's opinions, international and domestic related laws, and other relevant documents in order to find appropriate and effective solutions for ambush marketing in Thailand.

1.6 Expected Results

1. To provide the relevant information of ambush marketing including its characteristics and strategies to better understand the issue and its related problems.
2. To identify the ethical characteristics of ambush marketing – whether it is an unethical and immoral practice or just a creative marketing activity.
3. To understand the law and regulations which govern ambush marketing in the selected countries.
4. To provide a thorough understanding of the regulations and legal measures for ambush marketing in Thailand.
5. To anticipate an appropriate and effective legal solution that can be effectively utilized to deal with the problems of ambush marketing in Thailand.

CHAPTER 2

AMBUSH MARKETING AND RELATED ISSUES

Commercial sponsorship is visible everywhere and has become one of the most significant marketing activities for social connectivity over recent decades. Sponsorship is a good way of shaping a consumer's attitude towards, and creating brand awareness for, the sponsor. Under a sponsorship contract, a sponsored event offers exclusivity rights to a sponsor in exchange for financial resources. The competitors of the official sponsors will not be allowed to connect with the event and consumer groups affiliated with the event. In turn, several strategies of ambush marketing are used as marketing tactics by non-sponsors to seek low-cost association with the event. It is hotly-debated whether this marketing practice is immoral or simply an imaginative marketing practice.

This chapter describes the overall background of ambush marketing by providing its history, definitions, types, various strategies, and impact on all stakeholders including national governing bodies. The ethical question of ambush marketing will also be discussed.

2.1 Historical Background of Ambush Marketing

The 1984 Los Angeles Olympic Games was the event where ambush marketing as a concept first emerged.¹⁷ Those Games generated a surplus of some 250 million US dollars and became one of the most successful athletic festivals due to the restructuring of the sponsorship platform which had been implemented by the International Olympic Committee (IOC) and the organizers of the Games in the early

¹⁷ James Emmett, "*Rise of the Pseudo-Sponsors: A History of Ambush Marketing*", http://www.sportspromedia.com/notes_and_insights/rise_of_the_pseudo-sponsors_a_history_of_ambush_marketing (accessed March 9, 2016)

1980s.¹⁸ Prior to the 1984 Games, any commercial companies willing to provide financial support to Olympic Games had been allowed to associate themselves with the event as an official sponsor. This created a great number of official sponsors of the Games.¹⁹ This policy had reached a critical stage at the 1976 Montreal Olympics where there were 628 official sponsors. However, the IOC received only 7 million US dollars from their official sponsors.²⁰ The financial failure of the 1976 Montreal Olympics Games made many cities reluctant to apply to host the Olympic Games. It made the IOC and organizing committees realize that even if this policy provided sponsorship revenues for the Games, it also resulted in a reduction of the marketing value of the Olympic brand.²¹ Instead of allowing any sponsor to associate themselves with the event on an official basis and receive a small sum of money, it would be more monetarily advantageous to have fewer official sponsors but provide them with greater value and exclusivity in exchange for a bigger amount of sponsorship revenue.

The restructured sponsorship platform brought about category exclusivity and commercial rights parceling in sponsorship. This played an important role in sponsorship growth. The Los Angeles Games committee wished to make the sponsors feel that their investment had been worthwhile. The organizing committee decided to receive funding mainly from sponsorship and television rights.²² By the time of the Los Angeles Games, only ten sponsors were accepted on an official basis and they were charged a large amount of money for the exclusive right to use the Olympic brand throughout the world. Ticket sales and sponsorship took in huge amounts of income for the Games. Sponsors made 123 million US dollars and ticket sales brought about 140 million US dollars. Television rights also helped to fund a huge proportion of the event and marked the beginning of the prominent place of television rights in

¹⁸ *Id.*

¹⁹ James Jackson, “*How the Montreal Olympic Games Shaped the Future of Sponsorship*”, <https://jamesjackson129.wordpress.com/2013/04/09/how-the-montreal-olympic-games-shaped-the-future-of-sponsorship/> (accessed March 9, 2016)

²⁰ *Id.*

²¹ Simon Chadwick & Nicholas Burton, “*Ambush Marketing in Sport: An Assessment of Implications and Management Strategies*”, 3 **The CIBS working paper series 1**, (2008).

²² Jackson, *supra* note 19.

global sporting events. The American Broadcasting Company paid 225 million US dollars to the Los Angeles Organizing Committee for the television rights to the Games. Furthermore, the European Broadcasting Union also signed an agreement for as much as 19.8 million US dollars for the television rights.²³

The future of commercial sponsorship was completely shaped by the financial success of the Los Angeles Games. Since then, the IOC and the organizing committee have provided sponsorship programs with ‘impressive associative and branding potential, unsurpassed visibility, and invaluable category exclusivity’.²⁴ Category exclusivity – which is defined as “the right of a sponsor to be the only company within its product or service category associated with the property or event”²⁵ – has become one of the most valuable considerations for sponsors. Potential sponsors are likely to sign up to a sponsorship program when category exclusivity is guaranteed because it serves to exclude their competitors from the sponsored property and event. However, although the exclusivity seems to be able to limit the competitors’ access to the consumer group affiliated with a certain property or event, the exclusivity usually does not extend throughout a property. This is because a potential partner purchases only the specific event in activating a sponsorship program. The commercial company does not buy the rights to all avenues leading to the social recognition of the occurrence, and neither does it acquire the rights to the whole consumer mind space in which the sponsorship is resident.²⁶ This exclusivity creates a challenge to the competitors of the official sponsors who are not able to legitimately capitalize on the event due to the exclusivity policy. Given the above, then, the ambushers have reason to seek alternative ways to associate their products or services with the thematic space that is not covered by an exclusivity right. The first ambushing attempt took place at the 1984 Los Angeles Olympic Games where Kodak ambushed Fuji’s official

²³ Jackson, *supra* note 19.

²⁴ Florian Schwab, “FIFA’s trademark tactics”, 3 **World Trademark Review** 6, 7 (2006).

²⁵ Carrie Urban Kapraun, “Fun With Category Exclusivity”, <http://www.sponsorship.com/About-IEG/Sponsorship-Blogs/Carrie-Urban-Kapraun/July-2009/Fun-with-Category-Exclusivity.aspx> (accessed March 9, 2016)

²⁶ Pranav P. Deolekar, “Ambush Marketing”, http://www.indianmba.com/Occasional_Papers/OP14/op14.html (accessed March 10, 2016)

exclusivity right by providing support to the USA Track and Field team and television broadcasters of the event.²⁷ Non-sponsors attempted to associate their product or service with the event by various methods such as sponsoring a subcategory of the event or the event's broadcast, establishing advertising activities surrounding the event venue, and other creative advertising strategies that coincided with the event without paying for it. That being said, ambush marketing can provide some benefits to an official sponsor at a relatively low cost.²⁸

Therefore, where the restructuring of the corporate sponsorship programs might have been designed to increase, and also succeeded in increasing, income for the events by providing greater value in sponsorship and category exclusivity for the sponsors, it concurrently established a gateway for official sponsors' competitors who were seeking to capitalize on the event as they were unable to do so in a legitimate manner.

2.2 Definition and Characteristics of Sponsorship and Ambush Marketing

2.2.1 Sponsorship

Since ambush marketing is intimately related to sponsorship, it is useful to analyze the concept of sponsorship before exploring the background and definition of ambush marketing. Sponsorship is globally used by commercial companies as an effective means to establish, strengthen, or change brand image. The growth and importance of commercial sponsorship is clear from the total volume of sponsorship investment worldwide, which has increased from 37.9 billion US dollars in 2007 to 60.2 billion US dollars in 2016.

²⁷ Stephen Frawley & Daryl Adair, **Managing the Football World Cup 1982-1983** (2014).

²⁸ *Id.*

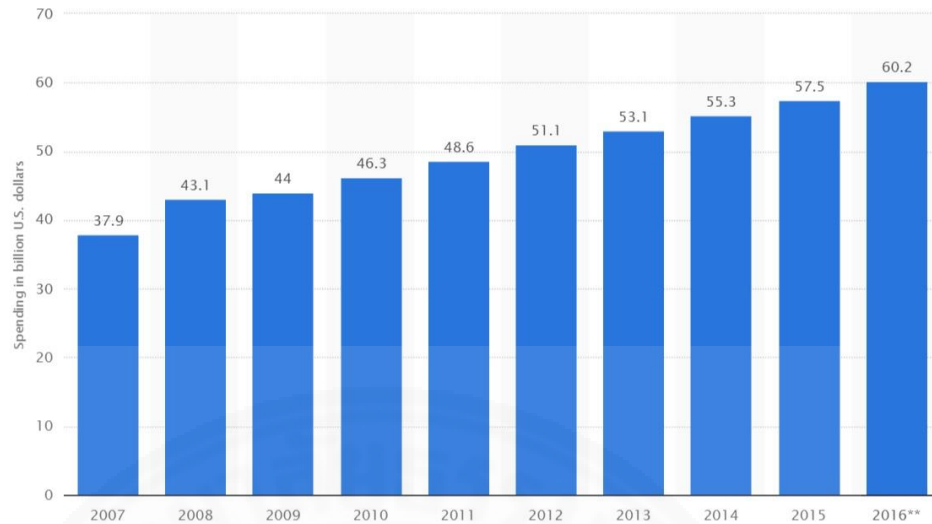


Figure 2.1: Global Sponsorship Spending from 2007-2016²⁹

Corporate sponsorship is a business relationship between the sponsor who provides funding and financial resources, and the event that offers association and sponsorship rights that can be utilized for a business advantage in exchange.³⁰ By providing funds and resources to the event, the sponsor expects to increase audience connectivity and establish brand awareness through associating themselves with the event to the exclusion of their competitors. Multinational companies spend large amounts of money on annual sponsorship fees in order to receive exclusive marketing rights for a particular event.

However, product exclusivity as a sponsorship advantage could be used as a tool by a non-sponsor to debilitate its competitor's official sponsorship by virtue of ambush marketing.

²⁹ "Global Sponsorship Spending from 2007-2016 (in billion US dollars)",

<http://www.statista.com/statistics/196864/global-sponsorship-spending-since-2007/> (accessed February 27, 2016).

³⁰ Steve Sleight, **Sponsorship: What it is and how to use it** 20 (1989).

2.2.2 Ambush Marketing

There is no single definition that is acknowledged as definitive although many efforts have been made by researchers to do so. The selected definitions proposed by scholars are as follows:

*“Ambush marketing is a planned effort by an organization to associate itself indirectly with an event in order to gain at least some of the recognition and benefits that are associated with being an official sponsor”*³¹

*“Ambush marketing is the practice whereby another company, often a competitor, intrudes upon public attention surrounding the event, thereby deflecting attention toward themselves and away from the sponsor”*³²

*“Ambush marketing is a company’s intentional effort to weaken or ambush its competitor’s official sponsorship. It does this by engaging in promotions or advertising that trade off the event or property’s goodwill and reputation, and that seeks to confuse the buying public as to which company really holds the official sponsorship rights”*³³

*“Ambush marketing is a technique where an advertiser – not accredited by the organizers of an event – tries to deflect public attention surrounding an event to his advantage, using marketing techniques, in order gain some of the benefits associated with sponsorship”*³⁴

³¹ Dennis M. Sandler & David Shani, “Olympic Sponsorship vs. Ambush Marketing: Who Gets the Gold?”, 29 **Journal of Advertising Research** 9, 11 (1989).

³² Tony Meenaghan, “Point of View: Ambush Marketing: Immoral or Imaginative Practice?”, 34 **Journal of Advertising Research** 77, 79 (1994).

³³ Steve McKelvey, “Sans Legal Restraint, No Stopping Brash, Creative Ambush Marketers”, 35 **Brandweek** 20, (1994).

³⁴ Stephan Fuchs, “Le pseudo-parrainage: une autre façon de faire du parrainage?”, 30 **Decisions Marketing**, 31, 31 (2003).

*“Ambush marketing can be defined as a technique where an advertiser who does not hold official sponsorship rights, notably for an event, tries to make the public believe the contrary”*³⁵

The cited definitions collectively describe ambush marketing as a broad range of marketing operations of those business organizations who seek to affiliate themselves with an event without bearing any of the financial burden of sponsorships.³⁶ The term ‘ambush marketing’ is used in both a narrow and broad sense.³⁷ Ambush marketing in a narrow sense alludes to the intentional efforts of a non-official sponsor to elaborately trick consumers into believing that they are an actual sponsor of the event, thus weakening or attacking a true sponsor’s official association.³⁸ Ambush marketing in the narrow sense therefore generally violates intellectual property laws. It is also said to contravene trade practice laws such as unfair competition.³⁹

In the broader sense, ambush marketing is considered as a non-official sponsor’s attempt to benefit from the fame, goodwill, and widespread acceptance of a particular event by establishing an association without the explicit consent or authorization of the right holder.⁴⁰ In contrast to the narrow sense of the term, ambush marketing in the broader sense covers numerous marketing actions which do not involve making untrue representations concerning sponsorship or counterfeiting or the illegal use of intellectual property rights. Besides, it may even include the utilization of rights that have been lawfully obtained at considerable cost.⁴¹ Sponsoring a subcategory of an event such as an individual athlete or participating team, sponsoring

³⁵ Björn Walliser, **Le parrainage: sponsoring et mécénat** 3 (2006).

³⁶ วิเลิศ ภูริวัชร, **MARKETING is all around!** 94 (2553) (Vilert Puriwat, **MARKETING is all around!** 94 (2000)).

³⁷ Schmitz, *supra* note 12.

³⁸ *Id.*

³⁹ Australian Government, IP Australia, and Department of Communications, Information Technology and the Arts, **Ambush marketing Legislation Review: Prepared for IP Australia and the Department of Communications, Information Technology and the Arts (DCITA)** 13 (2007).

⁴⁰ McKelvey & Grady, *supra* note 4.

⁴¹ Australian Government *et al.*, *supra* note 39, at 14.

the event's broadcast, establishing advertising activities surrounding the event venue, and other imaginative advertising strategies that coincide with the event clearly represent a broader form of ambush marketing.

Some scholars are of the view that ambush marketing, guerrilla marketing, and parasite marketing do have something in common as they feed off the goodwill and value of the event while someone else is providing all the source materials to nourish the event.⁴² It is viewed as giving ambush marketers the advantages of commercial association without the responsibility of providing any sponsorship revenues to the event. It is unfair to event organizers who ought to be able to take all revenue deriving from their own event.⁴³ It is also claimed to be unjust to the official sponsor as it diminishes the value of the sponsorship because of misrepresentation as to who is the actual sponsor of the event, as well as weakening the official sponsor's marketing exertions.⁴⁴

With regard to its ethical characteristics, ambush marketing is a marketing practice whose ethics have been questioned by some. Ambush marketing has divided scholars over the 30 years of its existence. On the one hand, there is a considerable amount of literature that defines ambush marketing as a deliberate attempt to ambush or weaken a competitor's official sponsorship.⁴⁵ On the other hand, there are those who think that the word 'ambush' is too pejorative and this activity should instead be viewed as a legitimate competitive marketing practice.⁴⁶ In determining the strengths of each view, the three major approaches in normative ethics⁴⁷ – utilitarianism, deontological ethics, and virtue ethics – can be applied to this controversy. As these

⁴² Pratika Mishra & Saurabh Mishra, "The legal perspective of ambush marketing: an arm length study in Indian scenario", 4 *IJBIT* 128, 128 (April 2011- September 2011).

⁴³ Australian Government *et al.*, *supra* note 39, at 8.

⁴⁴ *Id.*

⁴⁵ McKelvey & Grady, *supra* note 4.

⁴⁶ Janet Hoek & Philip Gendall, "Ambush marketing: more than just a commercial irritant?", 1 *Entertainment Law* 72, 73 (2002).

⁴⁷ "จริยศาสตร์เชิงคุณธรรม", <http://www.philospedia.net/virtueethics.html> (สืบค้นเมื่อวันที่ 16 ตุลาคม 2558) ("Virtue Ethics", <http://www.philospedia.net/virtueethics.html> (accessed October 16, 2015))

three philosophical theories are conceptually different, it might be advantageous to approach the discussion by applying the different perspectives separately. If the study can provide the uniform outcome on utilizing these three conceptually different theories, this might present a clear answer to this ethical debate.

(a) Utilitarianism

In general, utilitarianism or consequentialism describes an ethical philosophy according to which the rightness or wrongness of an action is judged by its consequences.⁴⁸ This means that the morally correct course of action consists in the greatest good for the greatest number. In other words, the act is morally right only if it provides the greatest utility to the majority of those involved.⁴⁹

With respect to the ambusher, the result from their marketing activity should be considered immoral since their activity only seeks to profit themselves⁵⁰ rather than the majority of those involved. It does not benefit the event organizer and official sponsor who are the majority involved in the market. That is to say, ambush marketing is definitely harmful to the sponsors and the event organizer. It is true that ambush marketers do not promote the greatest good for the greatest number, and it seems the ambusher is not concerned about the negative effect of the ambush marketing which could impact other parties.⁵¹ Moreover, ambushing can undermine the goodwill associated with the event since it causes confusion among consumers as to who is the actual sponsor of the event. Therefore, considering it from a utilitarian perspective, ambush marketing is unethical.

⁴⁸ “Utilitarianism”, <http://dictionary.reference.com/browse/utilitarianism> (accessed October 16, 2015)

⁴⁹ Gerd Nufer, **Ambush Marketing in Sport: Theory and the Practice** 88 (2013).

⁵⁰ Kala, *supra* note 13, at 17.

⁵¹ *Id.*

(b) Deontological Ethics

Deontological ethics or duty-based ethics stands in basic contrast to utilitarianism. In this philosophy, action is more important than consequences.⁵² The morality of an action will be evaluated by the intention of the actor rather than the consequences of the action. As ambush marketing's main objective is to deliberately persuade or deceive the public into accepting they are a legitimate sponsor of the event, and either obtain the advantages associated with being an official sponsor or devalue its competitor's official sponsorship,⁵³ the intention of the ambusher is clearly to deceive. From this point of view, ambush marketing cannot be considered an ethical business practice.

One more interpretation of deontological ethics was proposed by Meenaghan in 1996. In his view, the ambusher might have a moral duty to pursue overall company objectives by way of endeavoring to obtain a competitive benefit as well as to maximize profit and shareholder value.⁵⁴ In the event that the company cannot afford official sponsorship, their duty to stockholders demands that ambush marketing is undertaken.⁵⁵ However, in spite of the fact that managers have a duty to achieve the company's objectives, marketing activity that attempts to establish an unauthorized association with an event that it has not provided financial support for cannot be categorized under moral business practices. The intention to mislead is both immoral and unethical.⁵⁶

(c) Virtue Ethics

Virtue ethics is one of the three major approaches in normative ethics which takes a very different approach from utilitarianism and deontological ethics. Unlike the abovementioned ethical frameworks, virtue ethics places the focus neither on the

⁵² "Deontological ethics", <http://britannica.com/topic/deontological-ethics> (accessed October 16, 2015)

⁵³ Sandler & Shani, *supra* note 31.

⁵⁴ Meenaghan, *supra* note 5.

⁵⁵ *Id.*

⁵⁶ Kala, *supra* note 13, at 20.

consequences nor on the intentions of actions but rather on the role of one's character and the virtues that one's character embodies.⁵⁷ The theory is founded on the hypothesis that individuals and organizations usually try to do better and to behave virtuously.⁵⁸

Ambush marketing has the potential to mislead consumers into thinking that ambusher companies are the official sponsors of an event. Therefore, this kind of phenomenon separates itself from accepted virtues and has a counterproductive effect.⁵⁹ In accordance with this ethical framework, ambush marketing is viewed as a negative behavior due to the fact that it potentially causes a misunderstanding on the part of consumers.

However, some scholars, such as O'Sullivan and Murphy, suggest that, in terms of the basic principles of virtue ethics, the actions of event organizers should also be criticized. Due to the very high sponsorship fees, event organizers such as FIFA and the IOC should be recognized as a contributing factor to the overall surge in ambush marketing.⁶⁰ This theory challenges the potential sponsors to rethink the actions of event organizers.

In summary, the three conceptually different approaches have delivered negative results on the equity issue of ambush marketing. It clearly helps in replying to the ethical discussion of the phenomenon that ambush marketing is unethical, according to the ethical theory perspective. Therefore, ambush marketing should be controlled under an appropriate regulation.

2.3 Types of Ambush Marketing

⁵⁷ "Virtue Ethics", <http://plato.stanford.edu/entries/ethics-virtue/> (accessed October 16, 2015)

⁵⁸ Nufer, *supra* note 49, at 89.

⁵⁹ *Id.*

⁶⁰ Paul O'Sullivan & Patrick Murphy, "Ambush Marketing: The Ethical Issues", 15 **Psychology & Marketing** 349, 363 (July 1998).

It is extensively acknowledged that ambush marketing can be categorized into two types; ambush marketing by way of “association” and “intrusion”.⁶¹

2.3.1 Ambush Marketing by Association

An association can be exploited by ambush marketers in order to create confusion and deceive consumers into believing that they actually contribute to the sponsorship revenue of the event and that they are an officially authorized sponsor. This can be achieved by utilizing the emblem of the event or an emblem which is confusingly similar to the actual event’s emblem.

Ambush marketing by way of association can also be done by persuading consumers in some way that the ambusher or its brand is connected with the event.⁶² This occurred before and during the FIFA World Cup 2014 in which Coca-Cola had an exclusivity right in the beverage category of the event. Some of the most famous footballers including Lionel Messi, Sergio Agüero, Jack Wilshere, and David Luiz were recruited for its ‘Live for Now’ campaign and had their picture on the packaging of Pepsi’s products which created an implied association between Pepsi and the FIFA World Cup 2014.⁶³ There are various other strategies to ambush an event by way of association such as using symbolic images or words relating to the event in advertising, sponsoring athletes individually instead of the event, and distributing free tickets or event souvenirs, such as free shirts or caps, in an advertising campaign.

⁶¹ Philip Johnson, **Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event** 7 (2008).

⁶² Dean Crow & Janet Hoek, “*Ambush Marketing: A Critical Review and Some Practical Advice*”, http://iimkbltn-dev.massey.ac.nz/V14/MB_V14_A1_Crow.pdf (accessed October 20, 2015)

⁶³ “*Ambush Marketing Threat to Global Sponsors!*”, <http://www.guruinabottle.com/ambush-marketing-threat-to-global-sponsors/> (accessed March 11, 2016)



Figure 2.2: Pepsi’s associative ambush marketing in FIFA World Cup 2014⁶⁴

2.3.2 Ambush Marketing by Intrusion

Intrusive ambush marketing is when the ambushing companies cunningly use the environment of the event to show their trademark or brand name and simultaneously create brand awareness and recognition by virtue of the media reporting or broadcasting of the event when they are not entitled to do so.⁶⁵ The most famous instance of this was probably the presence of the Bavaria Beer girls at the FIFA World Cup 2010. Bavaria Beer ambushed Budweiser’s official sponsorship during the Netherlands match against Denmark in the 2010 FIFA World Cup by sending 36 women wearing orange dresses that looked suspiciously similar to the sales promotion items given away with purchases of Bavaria beer to the stadium. The consequent media interest and feedback of FIFA’s treatment of the incident brought about an enormous boost in the international profile of Bavaria Beer.⁶⁶

⁶⁴ *Id.*

⁶⁵ Bodden, *supra* note 9.

⁶⁶ “Ambush Marketing Case Study: successfully leveraging high-profile events to raise brand profile”, <http://acervo-digital.espm.br/cases/306395.pdf> (accessed December 5, 2015)



Figure 2.3: Bavaria’s intrusive ambush marketing in FIFA World Cup 2010⁶⁷

2.4 Ambush Marketing Strategies

Generally, non-sponsors’ ambush marketing strategies may be classified as follows:

2.4.1 Ambushing Strategies Equivalent to Piracy

Ambushing strategies equivalent to piracy are activities that obviously constitute infringements of the property rights in an event, for example, a non-sponsor may simply utilize a registered event’s trademark on merchandise without explicit authorization, or falsely pretend to be an official supporter of a particular event.⁶⁸

One of the most notable US examples is the case of *MasterCard International Inc. v. Sprint Communications Co. L.P.*⁶⁹ In this case, MasterCard had signed an exclusive agreement with the organizing committee of the 1994 FIFA World Cup to

⁶⁷ “World Cup 2010: Women Arrested Over ‘Ambush Marketing’ Freed on Bail”, <http://www.theguardian.com/football/2010/jun/16/fifa-world-cup-ambush-marketing> (accessed March 12, 2016)

⁶⁸ Rukmani Seth, “Ambush Marketing – Need for legislation in India”, 15 **Journal of Intellectual Property Rights** 455, 456 (November 2010).

⁶⁹ *Master Card International v. Sprint Communications Co.*, 23 F.3d 397 (2d. Cir. 1994)

be the sole legitimate sponsor in the credit card category for the event. Accordingly, it acquired the exclusive right to use the 1994 World Cup trademarks on all its card-based payment and account access devices. Sprint entered into a similar agreement and manufactured telephone calling cards which bore the 1994 World Cup trademarks. Having found out about Sprint's marketing activities, MasterCard brought a suit against Sprint for false advertising under Section 43(a) of the Lanham Act. The United States District Court held that:

“Sprint wishes to use the World Cup marks to convey to the world the false impression that its use of the marks on calling cards is officially sanctioned by the World Cup organization. Clearly, that is not the case, and MasterCard, which has the exclusive right to use the mark for such purposes, is entitled to enjoin this deceptive use.”

Consequently, the District Court prohibited Sprint from distributing telephone calling cards with “World Cup ’94” trademarks in any other manner that was in conflict with MasterCard's exclusive right.

Considering this ambushing strategy in the context of traditional legal protections, it is considered illegal and normally has a clear-cut remedy under the law. Therefore, instead of engaging in ambushing strategies equivalent to piracy, non-sponsors are knowledgeable and usually utilize their creativity to develop more subtle strategies of ambush marketing for which legal remedies are less clear-cut.

2.4.2 Subtle Ambushing Strategies

In order to avoid legal efforts to control ambush marketing, the ambush marketers do not regularly use the trademark of an official sponsor but rather use other ambushing strategies to display their own trademark or create an implied association with the event. The following are some of the subtle ambush marketing strategies which are frequently utilized by ambush marketers in order to devalue their competitor's sponsorship.

2.4.2.1 Sponsoring the Broadcast of the Event

An ambushing company may reach the public by virtue of sponsoring some media coverage elements of the event. This strategy enables a marketer to access a greater audience than the on-site audience and to exploit an absolutely lawful sponsorship opportunity. The *Fuji vs. Kodak* case in the 1984 Los Angeles Olympics represents perhaps the most celebrated case of a legal ambush.⁷⁰ Fuji was the global sponsor for the 1984 Olympic Games in Los Angeles. However, Kodak announced itself as a sponsor of ABC's television broadcast of the event and became the provider of the official film of the US track team.⁷¹

2.4.2.2 Sponsoring Subcategories within the Event

In this, the ambusher sponsors some minor element within the overall event at an obviously lesser investment cost and proceeds to aggressively exploit this association through major promotional efforts.⁷² An instance of this marketing tactic occurred with Fuji and Kodak during the 1988 Seoul Olympic Games. Kodak was the official global sponsor of the Games but Fuji organized a counter-campaign, investing its valuable sponsorship money in support of the US swimming team. This approach enabled Fuji to create a commercial connection with the Olympics at a relatively lower expense.⁷³

2.4.2.3 Engaging in Advertising that Coincides with the Sponsored Event

A commercial company that wants to prevent its competitor from enjoying the full advantages of its sponsorship rights may acquire advertising time that coincides

⁷⁰ Tony Meenaghan, "Ambush Marketing: Corporate Strategy and Consumer Reaction", 15 *Psychology & Marketing* 305, 310-311 (July 1998).

⁷¹ *Id.*

⁷² Sudipta Bhattacharjee & Ganesh Rao, "Tackling Ambush Marketing: The Need for Regulation and Analysing the Present Legislative and Contractual Effort", 9 *Sport in Society* 128, 129 (January 2006).

⁷³ Meenaghan, *supra* note 70, at 311.

with the event in order to represent themselves as a sponsor.⁷⁴ There are two main types of advertising which are widely employed to perform such an ambush marketing strategy: themed advertising and traditional advertising.

(1) Themed Advertising

Themed advertising can be defined as creative advertising on the theme of the event in question. One remarkable themed advertising approach is celebrity advertising using major figures from the event. This strategy profits the famous person instead of the event. For instance, in the midst of the 1992 Winter Olympic Games in which McDonald's was official sponsor of the US team's involvement in the Olympic Games, Kristi Yamaguchi, a US Olympic gold medalist, was contracted by Wendy's restaurant chain to feature in its promotional advertising.⁷⁵

Additionally, themed advertising can also be carried out by the utilization of broadcast footage, pictures, or words that have an implied association with the event.⁷⁶ For example, the utilization of words such as "Athens 2004", "Games City", "gold medal", "sponsorship" or images such as torches and laurel wreathes during the Games will create a connection with the Athens Games.⁷⁷

(2) Traditional Advertising

Commercial companies may engage in ambush marketing through traditional advertising and promotion. It might be considered ambush marketing when a non-sponsor indirectly associates itself with the event by acquiring advertising in the time slots around the media coverage of the targeted event.⁷⁸ This approach was utilized to good effect in the past but is no longer frequently used since most broadcast providers

⁷⁴ Bhattacharjee & Rao, *supra* note 72.

⁷⁵ Meenaghan, *supra* note 5.

⁷⁶ Meenaghan, *supra* note 70, at 311.

⁷⁷ Lingling Wei, "Legal regulation of ambush marketing: Where is the base?", <http://www.epip.eu/conferences/epip06/papers/Parallel%20Session%20Papers/WEI%20Lingling.pdf> (accessed October 20, 2015)

⁷⁸ Meenaghan, *supra* note 70, at 312.

usually receive a request from the event organizer not to sell media time to the official sponsor's competitors.⁷⁹

2.4.2.4 Performing Advertising Activities Around the Event Venue

Performing advertising activities at locations around the event venue is one of the most effective ways to unofficially create a connection with the sponsored event. This usually takes the form of billboards showing the promotional commercials and establishing a merchandising booth and store around the venues prior to and during the event. The sale of products around the event is also an attractive and useful way for companies to build up their brand recognition together with selling their products.

2.4.2.5 Other Imaginative Ambushing Strategies

Other than the various common ambushing strategies as mentioned above, the ambushers have utilized their innovative and creative capabilities to develop highly imaginative ambushing strategies to connect themselves with particular occurrences. For instance, commercial companies may set up competitions in order to send consumers to the event venue or strategic locations in the host country during the time of event,⁸⁰ or give away spectator passes in promotions or contests.

2.5 Effects of Ambush Marketing

2.5.1 Economic Effects

Unsurprisingly, ambush marketing is viewed as harmful to both official sponsors and event owners⁸¹ as it undermines the business relationship between official sponsors and organizer by gaining a benefit from consumers without paying

⁷⁹ "The IOC Police", <http://adage.com/article/news/ioc-police/88305/> (accessed October 9, 2015)

⁸⁰ Bhattacharjee & Rao, *supra* note 72.

⁸¹ Meenaghan, *supra* note 70, at 305.

any sponsorship fee. For event owners, the value of event property rights is indirectly reduced by ambush marketing.⁸² Sponsoring companies may lose interest in providing funds to support the event as non-sponsors can obtain similar benefits at lower cost. Consequently, the major event organizers will lose sponsorship revenues⁸³ with which to host spectacular events.⁸⁴ This can potentially result in the discontinuance of events that lack adequate financial support.⁸⁵

From an official sponsor's perspective, ambush marketing is typically considered detrimental as it enables an ambusher to associate itself with an event without bearing a financial burden.⁸⁶ The great impact of ambush marketing on the official sponsors is the devaluation of their exclusivity right. It creates consumer confusion by deflecting attention toward themselves and denying the legitimate sponsor clear recognition in their role as official sponsor.⁸⁷ There is literature which shows that, in many cases, ambushers are recognized more by the consumers than the official sponsors.⁸⁸ Therefore, sponsoring companies usually have a negative view of ambush marketing.

Successful ambush marketing campaigns may also harm consumers of the event, especially sporting events. A reduction in sponsorship revenues may drive organizing committees to find other ways to get financial support. For instance, the event organizers may offer pay-per-view television broadcasts instead of free-to-air telecasts.⁸⁹

⁸² Gerlinde Berger-Walliser, et al., "Bavarian Blondes Don't Need a Visa: A Comparative Law Analysis of Ambush Marketing", 21 *Tulane Journal of International and Comparative Law* 1, 5 (Winter 2012).

⁸³ Matthew J. Mitten, *Sports Law in the United States* 191 (2011).

⁸⁴ Johnson, *supra* note 6.

⁸⁵ Mitten, *supra* note 83.

⁸⁶ Meenaghan, *supra* note 70, at 310.

⁸⁷ *Id.*

⁸⁸ Sandler & Shani, *supra* note 31, at 13.

⁸⁹ Mitten, *supra* note 83.

In addition to the abovementioned stakeholders in the market, ambush marketing also affects the business environment at both the national and international level. Strong legal protection for ambush marketing is one of the factors that attracts sponsorship investment into a country. The country that fails to secure goodwill and value of event property rights of the event holder may not be able to attract further professional investment. For example, the country that is not able to provide effective legislation against ambush marketing may lose the opportunity to be a host country for major global events such as the Olympic Games and FIFA World Cup.⁹⁰ This means it may lose the opportunity to derive infrastructure legacy, increase tourism, enhance its reputation, and receive other economic benefits of being a host country which can be felt for years after the Games. Hence, the national governing bodies have a duty to provide appropriate legal measures for ambush marketing in order to enhance sponsorship investment and assure sponsoring companies that their expected benefits will not be threatened by ambushing activities.

2.5.2 Legal Effects

Although ambushing activity is inconsistent with rectitude and sometimes considered an unethical or immoral practice, in most cases ambush marketing strategies are not clearly outlawed. Notwithstanding the fact that the sponsor's right of exclusivity and the value of the sponsorship contract are frequently undermined by this marketing tactic, ambush marketing, from a legal point of view, is controversial and rarely attracts litigation because its well-planned strategies usually circumvent intellectual property laws, and there is no specific legislation to preclude or draw the boundaries of ambushing activities. This results in difficulties for interested people to identify the ambusher's unlawful act since many ambushing strategies are not illegal by law. An absence of traditional legal remedies or judicial definition and sanctions creates legal gaps or grey areas that become the ambushers' playground.⁹¹

⁹⁰ Teresa Scassa, "Ambush Marketing Legislation to Protect Olympic Sponsor: A step too far in the name of brand protection?", 25 **Journal of Sport Management** 354, 365 (2011).

⁹¹ Herguner Bilgen Ozeke, "Ambush marketing: A Marketing Practice That Catches Legislators Off Guard",

In conclusion, the effects of ambush marketing greatly devalue legitimate sponsorship. Potential outcomes are that commercial companies may not be willing to provide their valuable financial support to the event, or even become disenchanted with the incompetence of national governing bodies to guarantee the exclusive advantages which they expected to derive from their sponsorship contract.⁹²



<https://www.mondaq.com/turkey/x/210908/advertising+marketing+branding/Ambush+Marketing+A+Marketing+Practice+That+Catches+Legislators+Off+Guard> (accessed October 23, 2015)

⁹² O'Sullivan & Murphy, *supra* note 60, at 355.

CHAPTER 3

LEGAL MEASURES FOR AMBUSH MARKETING IN SELECTED COUNTRIES

This chapter focuses on legal approaches to the control of ambush marketing in the following countries: the United States of America where the original forms of protection such as intellectual property and unfair competition law are generally applied to the phenomenon; the United Kingdom where the threat of ambush marketing was countered by the enactment of special event-specific laws such as the London Olympic Games and Paralympic Act and the Olympic Symbol (Protection) Act; South Africa where designated event legislation was enacted to specifically guard against ambush marketing; and New Zealand which introduced specific legislation such as the Major Events Management Act 2007 to deal with ambush marketing in general.

3.1 The United States of America

3.1.1 Background and Overview

Although there is currently no specific legislation regarding ambush marketing in the United States of America,⁹³ right holders and official sponsors can legally challenge ambushing activities using legal protections provided by both statutory and common law.⁹⁴ The protections and remedies provided by Sections 32(1) and 43(a) of the Lanham Act are those most often invoked for false advertising and unauthorized use of an event's registered trademark.⁹⁵ Moreover, a company or organization can also challenge ambush marketing by common law, such as through unfair competition

⁹³ The Global Advertising Lawyers Alliance, *supra* note 7, at 158.

⁹⁴ Lori L. Bean, "Ambush Marketing: Sports sponsorship confusion and the Lanham Act", 75 **Boston University Law Review** 1099,1109 (1995).

⁹⁵ The Global Advertising Lawyers Alliance, *supra* note 7, at 159.

or misappropriation of the goodwill and reputation of the event, organization, or official sponsorship.⁹⁶ Additionally, the United States Olympic Committee (USOC) could enforce the protection found in the Olympic and Amateur Sports Act against unauthorized use of certain Olympic trademarks in order to guard against ambushing activities in the Olympic Games.

3.1.2 Legal Measures for Ambush Marketing in the United States of America

3.1.2.1 Intellectual Property Protection

The first approach comes under a primary federal trademark statute such as the Lanham Act.⁹⁷ The United States of America extended the Lanham Act to govern the protection of trademarks including false association and misleading advertising.⁹⁸ Section 32(1)⁹⁹ of the Lanham Act prescribes the protection against unauthorized use of a registered trademark as follows:

“Remedies; infringement; innocent infringement by printers and publishers

(1) Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements

⁹⁶ Bean, *supra* note 94 at, 1110.

⁹⁷ The Lanham Act, 15 U.S.C. § § 1051-1141 (2006)

⁹⁸ Berger-Walliser, *et al.*, *supra* note 82, at 10.

⁹⁹ 15 U.S.C. § 1114

intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive.”

The commercial utilization of any reproduction, counterfeit, copy, or colorable imitation of a registered mark that is likely to cause confusion, mistake, or deception is strictly prohibited. However, in most ambush marketing situations, an ambusher is smart enough not to use the official trademarks but rather circuitously associate itself with the event. And even though it actually uses a mark, it is most likely unregistered.¹⁰⁰ Therefore, in most cases, the cases relevant to ambush marketing in the United States will place the focus on Section 43(a)¹⁰¹ which provides that:

“False designations of origin, false descriptions, and dilution forbidden

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of

¹⁰⁰ Bean, *supra* note 94, at 1110.

¹⁰¹ 15 U.S.C. § 1125

his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term any person includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.

(3) In a civil action for trade dress infringement under this Act for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.”

Section 43(a) of this Act codifies the facts that give rise to the right of action on behalf of the person whose trademark is not officially registered in the State, and also provides protection against persons making false representations or engaging in unfair competition, even in a case that does not involve trademarked goods or services.¹⁰² Therefore, this provision provides protection against likely confusion as to source or sponsorship, and protection against deception regarding characteristics and quality of goods.¹⁰³ Nevertheless, in order to be successful in a false advertising claim under this Act, the plaintiff has the burden of showing that the defendant’s activities are likely to create confusion among consumers.¹⁰⁴ In conclusion, under the current

¹⁰² Bean, *supra* note 94, at 1111.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1114.

law, ambush marketing is illegal only when a likelihood of consumer confusion is established.

The Lanham Act has limited application to most ambush marketing activities since it is easily circumvented. Such a claim is unlikely to be available as ambushers are smart enough to avoid using the official trademark or other intellectual property right of the event. Thus, a pure trademark infringement claim is often unavailable. Moreover, it is difficult for a plaintiff to prove consumer confusion as a consequence of ambush marketing. There is consumer behavior research which shows that consumers lack knowledge about the different levels of sponsorship and the rights associated with the various sponsors.¹⁰⁵ Consumers appear to place little emphasis on the industry of the ambushing company. The sponsorship targets tend to perceive as an official sponsor the brand whose television commercial they viewed most recently in the context of the event. Therefore, it seems difficult to prove that it is the ambushing which creates confusion.

In *Federation International De Football v. Nike, Inc.*,¹⁰⁶ the plaintiff, FIFA, alleged that Nike was not an official sponsor of the women's soccer World Cup 2003 and not authorized to use FIFA's mark, and that therefore its usage of 'USA 03' is infringing and illegally interfered with its official sponsorship contracts. The court refused to preliminarily enjoin Nike's use of 'USA 03' to advertise and sell various products in connection with its sponsorship of the US Women's National Soccer Team due to the fact that FIFA had not shown a substantial likelihood of consumer confusion for the usage of 'USA 03'. The court held that:

"...Nike's preexisting and entirely legitimate relationship with the Women's World Cup provides an important context for its use of the disputed marks. For there can be little doubt, in light of the success that the United States women enjoyed in the 1999 World Cup, that the team and the event are already linked in the public mind. As

¹⁰⁵ David Shani & Dennis M. Sandler, "Ambush Marketing: Is Confusion To Blame for the Flickering of the Flame?", 15 *Psychology & Marketing* 367, 367 (1998).

¹⁰⁶ *Federation International De Football v. Nike, Inc.*, 285 F. Supp. 2d 64 (D.D.C. 2003)

such, Nike's careful use of a mark that might be affiliated with both is not necessarily an indication of bad faith, but instead of savvy marketing..."

3.1.2.2 Common Law

In the context of common law, an event organization or official sponsor can also challenge ambush marketing with unfair competition. Unfair competition is an umbrella category for all causes of action arising out of business conduct that is contrary to honest commercial practice and good conscience.¹⁰⁷ The misappropriation doctrine is one of the bodies of unfair competition law which operates against another person trying to reap some of the benefits which it has not sown, by misappropriating the value of the products or services.¹⁰⁸ Accordingly, it seems the misappropriation doctrine could be applicable to protect an event's property and to combat ambush marketing.

The common law doctrine of misappropriation was initiated in the Supreme Court opinion, *International News Services v. Associated Press*. Associated Press (AP) brought a suit arguing that International News Services (INS) copied AP news from bulletin boards and preliminary outlines of AP's newspapers, and sold it to customers. The Supreme Court held that there was unfair competition by INS, since the news was transmitted for a commercial purpose. INS was misappropriating AP's quasi property interest in the news it collected and misrepresenting it as their own. The court granted the relief AP was seeking.¹⁰⁹

Under common law theories, an ambush marketer could be accused of adopting unfair business practices even without misusing a trademark or creating consumer confusion. However, the ambushing activities usually do not rise to the level of fraud, misrepresentation, or otherwise misleading practices which are

¹⁰⁷ "Texas Unfair Competition", <http://www.ffllp.com/texas-unfair-competition/> (accessed on November 20, 2015)

¹⁰⁸ Michelle L. Spaulding, "The doctrine of Misappropriation", <http://cyber.law.harvard.edu/metaschool/fisher/linking/doctrine/> (accessed on November 20, 2015)

¹⁰⁹ *International News Service v. Associated Press*, 248 U.S. 215 (1918)

generally required for a successful cause of action for unfair business practices.¹¹⁰ In fact, interpretations of the common law right are different among the states and, in some states, the law related to unfair business practices has been traditionally apprehended. It requires the plaintiffs to show that false and deceptive practices have damaged their goodwill and other intangible assets.¹¹¹ Therefore, ambushing activities are difficult to oppose due to the fact that it is hard to show harm in a traditional legal sense. This has left ambush marketing in a legal grey area.

3.1.2.3 Event-Specific Legislation

In addition to the abovementioned legal measures, there is federal legislation that specifically protects Olympic related marks, symbols, and words as the exclusive property of the USOC. The Olympic and Amateur Sport Act (OASA), an amendment to the previous Amateur Sports Act of 1978, grants privileged status to the USOC. The USOC is given the exclusive right to control the usage of Olympics' properties such as trademarks, symbols, and words, regardless of whether their unauthorized use creates a likelihood of consumer confusion.¹¹² The unauthorized use of certain Olympic trademarks and mottos are also prohibited by the Act. Under this Act, the unauthorized user shall be subjected to civil actions and remedies.

In spite of this, the Federal District Court of Colorado held in *U.S. Olympic Comm. v. American Media, Inc.*¹¹³ that the OASA does not prevent all unauthorized uses of the Olympic marks. The court observed that although the OASA grants additional protections to common law and the Lanham Act, the language and scope of the Act must be narrowly construed. For instance, the media may report about Olympic sports competition, which would include use of the word 'Olympic' and Olympic marks in news reporting.

¹¹⁰ Berger-Walliser, *et al.*, *supra* note 82, at 15.

¹¹¹ *Id.*

¹¹² Mitten, *supra* note 83, at 190.

¹¹³ *U.S. Olympic Comm. v. American Media, Inc.*, 156 F. Supp. 2d 1200, 1209 (D. Col. 2001)

In an attempt to combat ambush marketing by way of intrusion, temporary rules such as a clean zone ordinance were repeatedly put in place by the host cities of the Super Bowl.¹¹⁴ However, the clean zone ordinance is controversial since it is arguable that ambush advertising regulations can inhibit freedom of speech.¹¹⁵

3.2 The United Kingdom

3.2.1 Background and Overview

Currently, there is no specific legislation in the United Kingdom which prohibits ambush marketing in general, although special event-specific legislation such as The Olympic Symbol (Protection) Act 1995 and the London Olympic Games and Paralympic Games Act 2006, which is no longer in force, were enacted to guard against unauthorized commercial association with the London Olympic Games 2012.¹¹⁶ Thus, the event organizers and their official sponsors, where they feel exhausted by ambushing activities, have generally challenged ambush marketing using the traditional forms of intellectual property protection such as trademark infringement and passing off. Other legal frameworks in the United Kingdom such as advertising standards and consumer protection regulations may also be invoked as legal measures to combat ambush marketing.¹¹⁷

¹¹⁴ “*Ambush Marketing and Clean Zone Ordinances for the Super Bowl*”, <http://www.uspatent.com/tag/clean-zone-ordinance/> (accessed November 21, 2015)

¹¹⁵ Ozeke, *supra* note 91.

¹¹⁶ The Global Advertising Lawyers Alliance, *supra* note 7, at 154.

¹¹⁷ *Id.*

3.2.2 Legal Measures for Ambush Marketing in the United Kingdom

3.2.2.1 Intellectual Property Protection

(1) Trademark Infringement Claim

In the context of ambush marketing, it is possible for the organizing committee of the event to register its logos or signs as a trademark in order to enable themselves and other licensees to use the mark in the course of trade. Trademark infringement claims consequently become one of traditional legal grounds for organizing bodies of the event and its sponsors to combat those who have not received authorization to use the mark in association with the event.¹¹⁸

The starting point for analysis of the effectiveness of the UK trademark law in the context of ambush marketing is exploring the prohibitions on the usage of the registered trademarks of others. Section 10 of the Trademark Act 1994 offsets out the infringement of a registered trademark as follows:

“(1) A person infringes a registered trade mark if he uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.

(2) A person infringes a registered trade mark if he uses in the course of trade a sign where because—

(a) the sign is identical with the trade mark and is used in relation to goods or services similar to those for which the trade mark is registered, or

(b) the sign is similar to the trade mark and is used in relation to goods or services identical with or similar to those for which the trade mark is registered,

¹¹⁸ Johnson, *supra* note 61.

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the trade mark.

(3) A person infringes a registered trade mark if he uses in the course of trade a sign which —

(a) is identical with or similar to the trade mark, and

(b) is used in relation to goods or services which are not similar to those for which the trade mark is registered,

where the trade mark has a reputation in the United Kingdom and the use of the sign, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

(4) For the purposes of this section a person uses a sign if, in particular, he—

(a) affixes it to goods or the packaging thereof;

(b) offers or exposes goods for sale, puts them on the market or stocks them for those purposes under the sign, or offers or supplies services under the sign;

(c) imports or exports goods under the sign; or

(d) uses the sign on business papers or in advertising.

(5) A person who applies a registered trade mark to material intended to be used for labelling or packaging goods, as a business paper, or for advertising goods or services, shall be treated as a party to any use of the material which infringes the registered trade mark if when he applied the mark he knew or had reason to believe that the application of the mark was not duly authorized by the proprietor or a licensee.

(6) Nothing in the preceding provisions of this section shall be construed as preventing the use of a registered trade mark by any person for the purpose of

identifying goods or services as those of the proprietor or a licensee. But any such use otherwise than in accordance with honest practices in industrial or commercial matters shall be treated as infringing the registered trade mark if the use without due cause takes unfair advantage of, or is detrimental to, the distinctive character or repute of the trade mark.”

The foregoing provisions demonstrate that a trademark infringement claim appears to be an adequate way of dealing with ambush marketing, especially in situations where a mark which is similar or identical to the event’s registered mark is used in relation to similar or identical goods and services. For instance, in the situations where the marks, logos, or any other graphically indicated signs of the UK Football Association (FA) that it has successfully registered as trademarks, it could file a lawsuit against ambushers who use these without permission in a way that may create misunderstanding among the public over who is the actual legitimate proprietor of the trademarks.

However, as it has been noted, distinctiveness is one of the essential requirements of the registrability of a trademark, and the majority of event trademarks are somewhat lacking in distinctiveness. For instance, the Federation International de Football Association (FIFA) was trying to register the words “WORLD CUP 2006, GERMANY 2006 and WM 2006” as the trademark but these were rejected due to an absence of distinctiveness.¹¹⁹ Accordingly, Ferrero, the chocolate company, could also use those words on their packaging and successfully ambush an official sponsor’s right.¹²⁰ Therefore, it has been noted that the trademarks of major events may potentially face difficulties in the objection process of the trademark registration due to the fact that the registration process is somewhat burdensome.

¹¹⁹ Martina Vivlund, “Event Marks: Trademark Abuse or Necessary Form of Protection in View of Ambush Marketing?”, 1 LSEU 8, 12 (2012).

¹²⁰ *Id.*

Besides, a trademark is only infringed if such a mark is utilized in the course of trade.¹²¹ This is because the distinctiveness, possibility of confusion, and similar degree of the mark are needed to be considered as the key factors of infringement by the court.¹²² However, in practice, especially in sporting events, non-sponsors frequently offer free merchandise in conducting their ambushing strategies. For example, while Nike was not a legitimate sponsor of the 1996 Atlanta Olympics, and was not authorized to create any association with the event, it established a sports complex around the event venue and distributed the flags with Nike-esque markings to the participants of the games.¹²³ The foregoing campaign effectively deceived the public so that they mistakenly accepted that Nike was the legitimate sponsor. This ambushing activity did not fall under trademark protection since such marketing activities were not conducted in the course of trade as all merchandise was distributed for free.

Furthermore, there are several ambushing strategies that could easily circumvent trademark protection, for example, themed advertising; engaging in advertising that corresponds with the targeted incident; or intrusive ambushing strategies. The ambusher may not always use the protected mark in its advertising. A classic example took place at the 1984 Olympic Games. Although the legitimate sponsor of the games was Fuji Films, Kodak, its competitor, intentionally purchased an advertisement time slot which coincided with the event in order to interfere with the sponsorship right of Fuji Films. As a consequence, many viewers mistakenly concluded that Kodak was the legitimate sponsor.¹²⁴

¹²¹ See Section 10(3) of the Trademark Act 1994

¹²² Anita Moorman & Christopher Greenwell, "Consumer attitude of Deception and the Legality of Ambush Marketing Practices", 15 **J. Legal Aspects of Sports** 183, 196 (2005).

¹²³ Ian McDonnell & Malcolm Moir, **Event Sponsorship** 196 (2013).

¹²⁴ Rashad Yazdanifard & Ashreen Shahira Binti Mohd Aslam, "Ambush Marketing: Are Sponsors Really Sponsoring?", http://www.researchgate.net/profile/Ashreen_Shahira/publication/265729251_Ambush_Marketing_Are_Sponsors_Really_Sponsoring/links/541a51f40cf2218008bfad7a.pdf (accessed October 20, 2015)

(2) Passing Off

Passing off is a principle in common law which has arisen out of the judge-made law system. Passing off prevents one marketer from misrepresenting its goods or services by claiming that it has some connection or affiliation with some other; it also prevents a marketer from claiming goods or services are some other goods and services.¹²⁵ Passing off therefore represents another area of intellectual property law that might be an effective protection for the event and its legitimate sponsor. However, in order to be successful in a passing off claim, the following criteria must be proven before the court: the existence of goodwill, misrepresentation, and damage to goodwill.¹²⁶ Hence, to bring an action on the ground of passing off, the right holder needs to present all of the following: reputation or goodwill has been established in the event in the course of examination; the other has made an untrue representation causing the customers to believe that its supplied goods are those of the right holder; and the event organizer or official sponsor has suffered or is likely to suffer damage.

Although the law of passing off could be one of the legal mechanisms invoked to confront ambush marketing in the UK, there are some limitations that could lead to the failure of a general passing off claim in relation to ambush marketing. The element of actual damages is the first limitation of utilizing passing off as the basis of a claim against ambush marketing. In terms of damages, the claimant needs to show that there is at least some damage to the goodwill enjoyed by the claimant. The event's organizer or official sponsor may face a problem using passing off against ambush marketing because the goodwill of a claimant has not always been damaged. This is because the ambusher always uses its own logos or words in the ambush instead of directly using the event's mark.¹²⁷

The disclaimer statement is the second limitation of utilizing passing off as the basis of a claim against ambush marketing. In *Arsenal Football Club Plc. v. Matthew*

¹²⁵ "Passing off", <https://duhaime.org/LegalDictionary/P/PassingOff.aspx> (accessed October 24, 2015)

¹²⁶ *Id.*

¹²⁷ Johnson, *supra* note 61, at 55.

Reed, Arsenal Football Club had an exclusive right over the word “Arsenal” as a registered trademark. However, Arsenal labeled merchandise that explicitly displayed the “Unofficial” label on the products had been sold by Matthew Reed.¹²⁸ Thereafter, Arsenal Football Club brought a legal action against Reed. The court held that the products, by way of demonstrating a disclaimer statement, were not likely to cause confusion about their origin to the public. There was no trademark infringement to the intellectual property rights of Arsenal Football Club.¹²⁹ A disclaimer statement can therefore be considered as a comfortable way to circumvent the passing off claim for the ambusher.

3.2.2.2 Advertising Standards

The United Kingdom’s advertising regulatory standards, the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code), can also be invoked as a legal measure to combat ambush marketing. It requires that all advertisements in the UK must be lawful, proper, true and honest.¹³⁰ The CAP Code also prohibits advertisers from taking unfair advantage of a competitor’s trademark and requires them to hold evidence as to the genuineness of any endorsements.¹³¹

In spite of the fact that advertising standards are a self-regulatory system with no legal sanctions, the CAP Code is supported by the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations.¹³² The Advertising Standards Authority (ASA) is authorized to ask advertisers who fail to comply with the CAP Code to change or withdraw any

¹²⁸ David Needle, **Business in Context: An Introduction to Business and Its Environment** 432 (5th ed. 2010).

¹²⁹ *Id.*

¹³⁰ Clause 1.1 of the CAP code provides

“[M]arketing communications should be legal, decent, honest and truthful.”

¹³¹ Mark Smith, “*Rugby World Cup 2015: Ambush Marketing Risk*”, <http://franchiseandcommerciallawblog.fieldfisher.com/2015/rugby-world-cup-2015-ambush-marketing-risks> (accessed November 24, 2015)

¹³² Pauline Dore, “*Ambush Marketing in The UK*”, <http://uk.practicallaw.com/5-505-4306#a249320> (accessed November 25, 2015)

advertises that deceive or are contrary to the comparative advertising requirements. If there is an ASA ruling but such illegal advertising still keeps on showing up in the media, the Office of Fair Trading (OFT) may seek a court injunction against them under the terms of the abovementioned regulations.¹³³

3.2.2.3 Consumer Protection Regulations

The Consumer Protection from Unfair Trading Regulations 2008 contains many legal grounds that could potentially be used for attacking ambush marketing. Section 5 of this sets out the nature of a misleading action as follows:

“(1) A commercial practice is a misleading action if it satisfies the conditions in either paragraph (2) or paragraph (3).

(2) A commercial practice satisfies the conditions of this paragraph—

(a) if it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and

(b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

(3) A commercial practice satisfies the conditions of this paragraph if—

(a) it concerns any marketing of a product (including comparative advertising) which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor; or

(b) it concerns any failure by a trader to comply with a commitment contained in a code of conduct which the trader has undertaken to comply with, if—

¹³³ *Id.*

(i) the trader indicates in a commercial practice that he is bound by that code of conduct, and

(ii) the commitment is firm and capable of being verified and is not aspirational,

and it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise, taking account of its factual context and of all its features and circumstances...”

In summary, there are regulations that prohibit misleading actions, including marketing practices which are composed of incorrect information, those which contain factually correct information but which is likely to mislead consumers, and those that create confusion with a competitor’s distinguishing marks.¹³⁴ These legal grounds might be invoked by interested parties to oppose ambushing activities that contain the abovementioned misleading actions.

3.2.2.4 Event-Specific Legislations

Event organizing committees of sporting events in particular have experienced problems confining the variety of ambushing activities within the scope of the traditional forms of intellectual property protection. Due to this, they have, in recent years, required the host country of the event to enact an effective anti-ambush marketing legislation.¹³⁵ Given the above fact, the UK government passed The Olympic Symbol (Protection) Act 1995 and the London Olympic Games and Paralympic Games Act 2006.

(1) The Olympic Symbol (Protection) Act of 1995

Under the Olympic Symbol (Protection) Act 1995, the proprietor of the right is given an Olympics Association Right (OAR) which is an exclusive right related to

¹³⁴ The Global Advertising Lawyers Alliance, *supra* note 7, at 154.

¹³⁵ *Id.*

the utilization of the Olympic motto, the Olympic insignia, and the protected words.¹³⁶

The proprietor of the right is entitled to preclude unauthorized commercial usage of a representation of the Olympic insignia, Olympic slogan, or a protected phrase, or anything confusingly similar to that Olympic insignia, Olympic slogan, or a protected phrase as to be likely to establish an implied association in the public mind. Section 3 of the Olympic Symbol (Protection) Act 1995 provides legal provisions regarding infringement of the OAR as follows:

“(1) A person infringes the Olympics association right if in the course of trade he uses—

(a) a representation of the Olympic symbol, the Olympic motto or a protected word, or

(b) a representation of something so similar to the Olympic symbol or the Olympic motto as to be likely to create in the public mind an association with it, or a word so similar to a protected word as to be likely to create in the public mind an association with the Olympic Games or the Olympic movement

(in this Act referred to as a controlled representation).

(2) For the purposes of this section, a person uses a controlled representation if, in particular, he—

(a) affixes it to goods or the packaging thereof,

(b) incorporates it in a flag or banner,

(c) offers or exposes for sale, puts on the market or stocks for those purposes goods which bear it or whose packaging bears it,

¹³⁶ Section 2(1) of the Olympic Symbol (Protection) Act 1995 provides

“[T]he Olympics association right shall confer exclusive rights in relation to the use of the Olympic symbol, the Olympic motto and the protected words”

(d) imports or exports goods which bear it or whose packaging bears it,

(e) offers or supplies services under a sign which consists of or contains it, or

(f) uses it on business papers or in advertising.”

Moreover, there are still a number of exceptions where the act is not deemed a violation of the OAR, according to Section 4 of the Olympic Symbol (Protection) Act 1995. For example, allowing usage of the controlled representation as long as such use is not ordinarily to establish a commercial connection with the Olympic Games or Olympic movement, or with a quality ordinarily associated with the Olympic Games or Olympic movement, allowing usage of the controlled representation in a context which is not likely to suggest an association between a person, product or service, or allowing usage of the controlled representation for the purpose of parliamentary or judicial proceedings, or Royal Commission or statutory inquiry.

Infringement of the OAR creates various criminal offences.¹³⁷ A marketer who utilizes in an unauthorized way the controlled representation with a view to obtaining a commercial benefit for himself or another, or with the intention to prevent others from benefiting shall be guilty of an offence. Infringement of the OAR also empowers the right holder to file a lawsuit against such infringement and enjoy all the regular remedies such as damages, injunctions, accounts or otherwise which are available for a property right infringement claim.¹³⁸

¹³⁷ Dore, *supra* note 132.

¹³⁸ Section 6 of the Olympic Symbol (Protection) Act 1995 provides

“(1) An infringement of the Olympics association right shall be actionable by the proprietor,
 (2) In an action for infringement, all such relief by way of damages, injunctions, accounts or otherwise shall be available to the proprietor as is available in respect of the infringement of a property right.”

**(2) The London Olympic Games and Paralympic Games Act
2006**

In response to the problem of ambush marketing in the context of major sport events such as the Olympic Games, the IOC has required the host country to provide sufficient protection against this marketing activity. For the London Olympics 2012, this was in the form of the London Olympic Games and Paralympic Games Act 2006. Paragraph 1(1) in Schedule 4 of this Act establishes the principle and definition of the London Olympics Association Right as follows:

“(1) There shall be a right, to be known as the London Olympics association right, which shall confer exclusive rights in relation to the use of any representation (of any kind) in a manner likely to suggest to the public that there is an association between the London Olympics and—

(a) goods or services, or

(b) a person who provides goods or services.”

According to the abovementioned provision, the London Olympic Games and Paralympic Games Act 2006 creates the London Olympics Association Right (LOAR), which is an exclusive right related to the utilization of any verbal or visual representation in a method likely to suggest to consumers that there is a commercial connection between the London Olympics 2012 and goods or services, or the person making the representation.

Under this Act, the London Organizing Committee of the Olympic and Paralympic Games (LOCOG) was the proprietor of the LOAR and received the exclusive right to establish a commercial connection with the London Games; it was also given the authority to grant authorizations to utilize a London Representation.¹³⁹ This Act states further that the commercial use of certain combinations of words, including “Games”, “2012”, “Two Thousand and Twelve”, “Twenty Twelve”,

¹³⁹ Warren L. Phelops, “*Unauthorised Association with the London Olympics*”,

<http://www.klgates.com/unauthorised-association-with-the-london-olympics-08-01-2005/> (accessed April 22, 2016)

“Gold”, “Silver”, “Bronze”, “Medals”, “Sponsor”, “London” and “Summer”, in advertising by a non-sponsor could establish a presumption of being likely to create an implied association in the public mind.¹⁴⁰ Therefore, in the event that the foregoing protected combination of words is utilized in the commercial activity of a person who is not officially authorized, the alleged infringer shall have the burden to prove that there is no infringement of the LOAR.

3.3 New Zealand

3.3.1 Background and Overview

As the sponsorship investments in major global events significantly increased in New Zealand, the New Zealand government introduced the Major Events Management Act 2007 (MEMA) in order to ensure that major events in New Zealand would be effectively organized without disruption, and to provide event organizers and official sponsors with a certain amount of protection around the investment that official sponsors make in a major event. Unlike the event-specific legislation in the UK, this Act can be used on multiple occurrences for any events that have been announced by the New Zealand authorities as major events. There have been many events that have been given the status of ‘major event’ and organized under the MEMA, for example, the 2008 FIFA Under-17 Women’s Football World Cup, the 2010 ICC Under-19 Cricket World Cup, the 2011 Rugby World Cup, and the 2015 FIFA Under-20 World Cup.¹⁴¹ MEMA includes criminal enforcement measures and civil remedies such as corrective advertising and damages in order to ensure the effective enforcement of ambush marketing. Therefore, it is considered the strongest legislation to prevent ambush marketing in New Zealand.

¹⁴⁰ See paragraph 3(3) and (4) in Schedule 4 of The London Olympic Games and Paralympic Games Act 2006

¹⁴¹ “*Protection From Ambush Marketing*”, <http://www.majorevents.govt.nz/major-events-management-act-2007/protection-from-ambush-marketing> (accessed April 13, 2016)

3.3.2 Legal Measures for Ambush Marketing in New Zealand

MEMA is the only specific legislation especially designed to deal with ambush marketing in New Zealand. The Act provides safeguards for any events at an international level that are held in New Zealand and are declared to be ‘major events’ by the Governor-General.¹⁴² Its objective is to secure the highest advantages from the major event for New Zealand citizens, to ensure the proper organization of major events, and to prevent unauthorized marketable utilizations at the expense of either a legitimate sponsor of a major event or an organizing committee of a major event.¹⁴³ Essentially, it aims to protect organizers of major events and their official sponsors from illegal and immoral exploitation by third parties who are not legitimately associated with an event with ‘major’ status. MEMA precludes non-sponsors of any major event from advertising or otherwise promoting their goods and services in a manner that misleads the public into perceiving that they are an authorized sponsor or contributor associated with the event. A contravention of the Act establishes an offence which carries a maximum penalty of 150,000 NZ dollars.¹⁴⁴ Notwithstanding the ambush protection measures, the Act also contains provisions regarding use of special Olympic and Commonwealth Games marks and insignia, ticket scalping, pitch invasion, and missile-throwing.¹⁴⁵ There are three essential principles of the MEMA which are the declaration of a major event, the protection of ambush marketing by association and the protection of ambush marketing by intrusion.

(a) Declaration of Major Event

In order to enjoy protection under the MEMA, an event organizer must initially have its event declared a “major event”. Section 7 of the MEMA sets out how to do this as follows:

¹⁴² *Id.*

¹⁴³ “*Major Events Management Act 2007*”, <http://www.majorevents.govt.nz/major-events-management-act-2007> (accessed April 13, 2016)

¹⁴⁴ Sam Mcivor, “*Rugby World Cup 2011 and the Major Events Management*”, <http://www.wynnwilliams.co.nz/wynnwilliams/media/Articles/Rugby-World-Cup-2011-Major-Events-Management-Act-2007.pdf> (accessed April 13, 2016)

¹⁴⁵ *Id.*

“7 Declaration of major event

(1) The Governor-General may, by Order in Council made on the recommendation of the Economic Development Minister after consultation with the Commerce Minister and the Sports Minister, declare that an event is a major event.

(2) An Order in Council under subsection (1) must identify the major event and the major event organiser.

(3) The Economic Development Minister may only make a recommendation if—

(a) an event organiser has applied for an event to be declared to be a major event under this Act; and

(b) the event activities will take place, at least in part, in New Zealand; and

(c) the Minister is satisfied that the event organiser has the capacity and the intention to—

(i) successfully and professionally stage and manage the event; and

(ii) use all practicable measures available under the existing law to prevent unauthorised commercial exploitation of the major event and to protect its intellectual property and other legal rights (including, for example, registering relevant trade marks).

(4) Before making a recommendation, the Economic Development Minister must take into account whether the event will—

(a) attract a large number of international participants or spectators and therefore generate significant tourism opportunities for New Zealand;

(b) significantly raise New Zealand’s international profile:

(c) require a high level of professional management and co-ordination:

(d) attract significant sponsorship and international media coverage:

(e) attract large numbers of New Zealanders as participants or spectators:

(f) offer substantial sporting, cultural, social, economic, or other benefits for New Zealand or New Zealanders.”

In summary, before declaring a major event, the Economic Development Minister will take the following matters into account: the number of spectators, the number of participants, the required and involved level of professional management, the tourism opportunities for New Zealand, global reputation of New Zealand during the event, and the level of international media coverage.¹⁴⁶ An event shall be considered and declared a ‘major event’ only if it is able to create valuable long-term and short-term economic, cultural and social advantages to New Zealand, and if it is able to create valuable international media coverage in markets of interest for business and tourism opportunities.¹⁴⁷

¹⁴⁶ Wilson Harle, “*Ambush Marketing Law in the Year of Rugby*”,

<http://www.wilsonharle.com/assets/Ambush-Marketing-Law-MEMA-June-final-.pdf> (accessed April 13, 2016)

¹⁴⁷ *Id.*

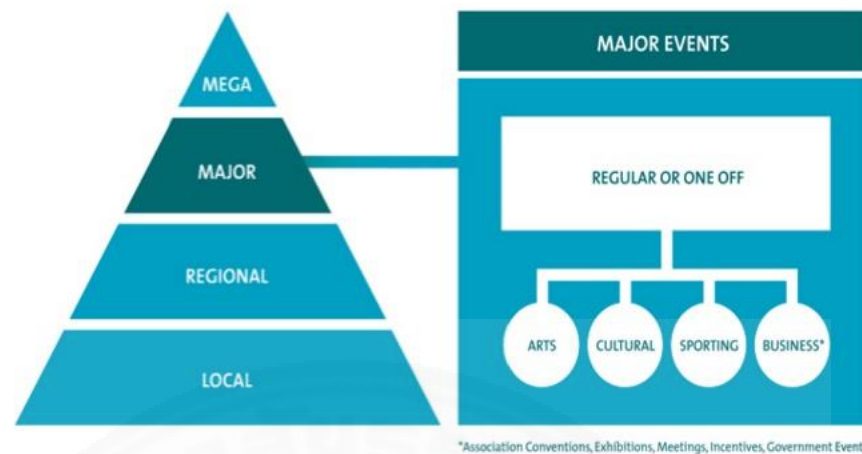


Figure 3.1: Diagram showing the characteristics of a major event from the New Zealand government’s perspective¹⁴⁸

Once the event has been declared a major event, it will be entitled to protection against ambush marketing either by way of “association” or “intrusion” for the declared protection period.

(b) Protection for Ambush Marketing by Association

To deal with ambush marketing by way of association, the MEMA grants an exclusive right to establish a commercial association with the declared major event to the official sponsors, and prescribes the prohibition of unauthorized representation of association with a major event under Section 10. This states that:

“10 No representation of association with major event

(1) No person may, during a major event’s protection period, make any representation in a way likely to suggest to a reasonable person that there is an association between the major event and—

(a) goods or services; or

¹⁴⁸ “Definition”, <http://www.majorevents.govt.nz/new-zealand-major-events/definition> (accessed April 13, 2016)

(b) a brand of goods or services; or

(c) a person who provides goods or services.

(2) In subsection (1), a person who makes a representation includes a person who—

(a) pays for, commissions, or authorizes the representation; or

(b) receives consideration for the placement or the location of the representation.”

The MEMA prohibits any unauthorized representations which are likely to imply to the public that there is a commercial connection between the major event and its brand, its goods or services, or a person who provides such goods or services.¹⁴⁹ According to Section 4 of the Act, it further defines the act of association as “a relationship of connection, whether direct or implied, such as an approval, authorization, sponsorship, or commercial arrangement and includes offering, giving away, or selling a ticket to a major event activity in connection with the promotion of goods or services.”

Moreover, contravention of the MEMA is not easily overcome by using the word “unofficial” or “unauthorized” together with the major event emblems or words.¹⁵⁰ Section 11 of the Act provides the presumption for the court in the event that a major event’s emblems or words are utilized as follows:

“11 Presumption if major event emblems or words are used

(1) The court may presume that a representation is in breach of section 10 if it includes any of the following:

(a) a major event emblem; or

¹⁴⁹ Mcivor, *supra* note 144.

¹⁵⁰ *Id.*

(b) a major event word or major event words; or

(c) a representation that so closely resembles a major event emblem, a major event word, or major event words as to be likely to deceive or confuse a reasonable person.

(2) Subsection (1) applies even if the representation is qualified by words like unauthorized or unofficial, or other words that are intended to defeat the purpose of section 10.”

The abovementioned provision empowers the court to assume that the act of representing is prohibited if it is composed of a major event insignia or words, or any representations that closely resemble a major event insignia or words as to be likely to mislead or deceive the public. In respect of the potential use of a disclaimer statement regarding a lack of official sponsorship, even in the case that the representation is explicitly declared by statements such as “unauthorized” or “unofficial”, or any other words that are aimed to circumvent the legal efforts to control unauthorized association, the presumption under Section 11 is also applied.¹⁵¹

However, there are a number of exceptions to infringement under this Act. For example, the representation with written authorization from an event organizer; the representation which is made for continuing to carry out its ordinary activities by an existing company; or the representation which is made in order to report information, news, review, or a criticism in a magazine or newspaper, or by approach of radio, internet, film, television or any other ways of reporting.¹⁵²

(c) Protection for Ambush Marketing by Intrusion

In addition to the protection for ambush marketing by way of association which has been legislated under this Act, the protection for ambush marketing by way of intrusion is also provided. As the main marketing tactic of intrusive ambushing is to use the environment of the event to show their trademark or brand name and

¹⁵¹ *Id.*

¹⁵² *See* Section 12 of the Major Event Management Act 2007

simultaneously create brand awareness and recognition by virtue of the media reporting or broadcasting of the event, the MEMA then prevents intrusive ambush marketing by the declaration of clean zones, clean transport routes, and clean periods. This principle is prescribed under Section 16 of the Act:

“16 Declaration of clean zones, clean transport routes, and clean periods

(1) By notice in the Gazette, the Economic Development Minister may declare, in relation to a major event, either or both of the following:

(a) clean zones, and the clean periods that relate to those clean zones:

(b) clean transport routes, and the clean periods that relate to those clean transport routes.

(2) Before issuing a notice, the Economic Development Minister must take into account the extent to which, in relation to the major event, clean zones or clean transport routes, and clean periods, are required in order to—

(a) obtain maximum benefits for New Zealanders:

(b) prevent unauthorized commercial exploitation at the expense of either a major event organiser or a major event sponsor.

(3) A notice under subsection (1) may declare an area as a clean zone for a clean period only to the extent that—

(a) the area consists of—

(i) the venue of a major event activity; and

(ii) areas that are directly proximate to the area in subparagraph (i) (for example, the adjacent footpath, road, or other thoroughfare); and

(iii) areas that are otherwise necessary to enable the major event activity to occur; and

(b) the area does not consist of excluded land or buildings; and

(c) a major event activity is performed in the area during that clean period, although the clean period may include times before and after the major event activity that are reasonable in the circumstances.

(4) A notice under subsection (1) may declare an area as a clean transport route for a clean period only to the extent that the area—

(a) extends no more than 5 kilometres from the closest point of the boundary of a clean zone; and

(b) consists of, or is directly proximate to, either—

(i) a motorway or State highway (as those terms are defined in section 2(1) of the Government Roading Powers Act 1989); or

(ii) a railway line (as that term is defined in section 2(1) of the New Zealand Railways Corporation Act 1981); and

(c) does not consist of excluded land or buildings; and

(d) is likely to be used by a substantial number of people to travel to or from a clean zone (the relevant clean zone) during that clean period, although the clean period may include times before and after the clean period for the relevant clean zone that are reasonable in the circumstances.

(5) In this section, excluded land or buildings means private land and private buildings, whether or not surrounded by other land that is declared to be part of a clean zone or a clean transport route; but does not include—

(a) billboards; or

(b) the venue of a major event activity; or

(c) land the public ordinarily has access to (for example, a railway station or a venue's car park)."

The MEMA enables the Economic Development Minister to declare a “clean zone” surrounding event venues, and “clean transport routes” including expressways, state main roads, or railroads which are 5 kilometers or less from the declared clean zone and appear to be utilized by a considerable amount of people or spectators to travel to and from the declared clean zone. Street trading and advertising are strictly prohibited within these areas unless the necessary authorization is given.¹⁵³ For example, a non-sponsor is not allowed to establish its advertising billboard around the event venue without explicit authorization. Also, giving spectators banners, flags, or other articles advertising its products or services to people who are travelling to the event venue are considered to be advertising within the clean zone and are in contravention of the MEMA.¹⁵⁴

However, not all advertising is restricted. The MEMA provides a number of exceptions, the most notable of which allows businesses to carry on their ordinary activities.¹⁵⁵ This will be examined according to matters of fact and degree in each case. For instance, if a non-sponsor has been conducting its advertising or promoting activity in the place within the clean zone or clean transport route for many years and has not fundamentally changed its advertisement, it seems that the exception will be applied.¹⁵⁶

3.3.3 Recent enforcement

To date, there have only been a few legal enforcements under the MEMA. The enforcement against CL NZ Trading Company Limited and its director Terry Lung Chan for importation of counterfeit Rugby World Cup 2011 garments was the first legal prosecution under this Act.¹⁵⁷ The company and its director were accused of

¹⁵³ Mcivor, *supra* note 144.

¹⁵⁴ *Id.*

¹⁵⁵ See Section 22 of the Major Event Management Act 2007

¹⁵⁶ Mcivor, *supra* note 144.

¹⁵⁷ “*Major Event Management Act: All Black (and White) or Gray?*”,

<http://www.chapmantripp.com/publications/Pages/Major-Events-Management-Act-All-black-and-white-or-grey.aspx> (accessed November 25, 2015)

importing more than 1,000 fake Rugby World Cup t-shirts. The actions resulted in a conviction of the defendants for making a representation in a way that was likely to suggest to a reasonable person that there was an association between the event and their goods, and importing such goods into New Zealand. Consequently, the defendants were fined 20,000 NZ dollars each. The prosecution against CL NZ Trading Company Limited represents the extreme edge of ambush marketing under the MEMA.¹⁵⁸

3.4 The Republic of South Africa

3.4.1 Background and Overview

Like New Zealand, the Republic of South Africa has also introduced 'designated events legislation' to secure the protection of events held in their country.¹⁵⁹ Prior to 2003, there was no specific legislation to prohibit ambush marketing in South Africa.¹⁶⁰ The law gave some relief to official sponsors and organizers of an event to forestall or diminish ambush marketing by relying on traditional intellectual property protection such as a registered trademark, the law of passing off, and copyright. Under the trademark law, the proprietor of a registered mark could inhibit the usage of such a mark or a confusingly similar mark in relation to such goods or services. Under the law of passing off, a marketer is restrained from misrepresenting its goods or services as having some commercial connection or affiliation with the event or the event organizer. Likewise, under the copyright law, the unauthorized adaptation or reproduction of any substantial part of an event's symbol, which is considered to be an artistic work under the Copyright Act, can be restrained.

¹⁵⁸ *Id.*

¹⁵⁹ The Global Advertising Lawyers Alliance, *supra* note 7, at 17.

¹⁶⁰ Owen Dean, "Ambush Marketing and Protected Events", **DE REBUS** 20, 20 (2003).

The abovementioned legal frameworks are actually concerned solely with the situation where the ambusher utilizes the event's branding in their ambushing activities. They do not cover the situation where the ambusher subtly utilizes the environment of the event to display its own trademark or brand name and simultaneously creates brand awareness and recognition through the media coverage of the event.¹⁶¹ In other words, the traditional legal protections do not cover intrusive ambush marketing. Most businesses try to cunningly establish a connection in the course of trade with a major event without actually utilizing the protected event's trademark or symbol. They do not regularly use the trademark of an official sponsor but rather use their own trademark in ambushing strategies. It seems this subtle ambush marketing strategy catches the event organizers and its official sponsors off guard. This made event organizers feel that the existing traditional protection was not enough and put pressure on South Africa to take further steps to protect event organizers and its official sponsors from ambush marketing.¹⁶²

South Africa then introduced two additional pieces of legislation, which are the Merchandise Marks Act and the South Africa's Consumer Protection Act, in order to specifically safeguard against ambush marketing in their country.¹⁶³

3.4.2 Legal Measures for Ambush Marketing in the Republic of South Africa

3.4.2.1 The Merchandise Marks Act

The first legal approach towards ambush marketing in the Republic of South Africa came under Section 15A of the Merchandise Marks Act 17 of 1941 which was added to the Act by Section 2 of Act 61 of 2002. This provision provides legal protection against an abuse of a trademark in relation to a protected event:

“15A Abuse of trade mark in relation to event

¹⁶¹ *Id.*

¹⁶² Lauren Frizelle, “*Afcon 2013: Ambush Marketing*”, <http://documents.lexology.com/1e19ffd6-cb71-4aa8-b383-5439b373982a.pdf> (accessed May 13, 2016)

¹⁶³ *Id.*

- (1) (a) *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 and in that notice stipulate the date-*
- (i) *with effect from which the protection commences; and*
 - (ii) *on which the protection ends, which date may not be later than one month after the completion or termination of the event.*
- (b) *The Minister may not designate an event as a protected event unless the staging of the event is in the public interest and the Minister is satisfied that the organisers have created sufficient opportunities for small businesses and in particular those of the previously disadvantaged communities.*
- (2) *For the period during which an event is protected, no person may use a trade mark in relation to such 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 event.*
- (3) *For the purposes of subsection (2), the use of a trade mark includes-*
- (a) *any visual representation of the trade mark upon or in relation to goods or in relation to the rendering of services;*
 - (b) *any audible reproduction of the trade mark in relation to goods or the rendering of services; or*
 - (c) *the use of the trade mark in promotional activities,*
- which in any way, directly or indirectly, is intended to be brought into association with or to allude to an event.*

- (4) *Any person who contravenes subsection (2) shall be guilty of an offence.*
- (5) *For the purposes of this section 'trade mark' includes a mark."*

The trademark abuse provision operates on the basis of 'designated event legislation'.¹⁶⁴ This provision comes into action when an event has been designated as a 'protected event' by the Minister of Trade and Industry of the Republic of South Africa. No provision is made for automatic protection of any event.¹⁶⁵ An event organizer who desires to operate its event with this protection has to make an application to the Minister of Trade and Industry so that the Minister designates its event as a protected event. The Minister will declare an event as a protected event only if staging of the event is in the public interest and the organizing committees of the event have established adequate commercial or other beneficial opportunities for minor businesses and other disadvantaged sectors to benefit from the event. An event is defined by this Act as "*any exhibition, show, or competition of a sporting, recreational or entertainment nature, including any broadcast of the foregoing, which is held in public and likely to attract the attention of the public or to be newsworthy, and is financed or subsidized by commercial sponsorship*".¹⁶⁶ Once the event has been designated as a protected event through a notice in the Government Gazette, it will be entitled to enjoy the protection against ambush marketing under Section 15A for a limited protection period.

This trademark abuse provision prohibits the unauthorized use of a trademark in a manner that is likely to achieve publicity and accordingly acquire commercial advantage from the event. The significant matter of this provision is that, during the protection period, a legitimate proprietor of a registered trademark can be prohibited from using its own trademark in relation to the event without explicit authorization of

¹⁶⁴ Coenraad Visser, "*The Soccer World Cup 2010: Special Event and Ambush Marketing Protection in South Africa*", 11 **Intellectual Property Law and Policy** 567, 568 (2010).

¹⁶⁵ *Id.*

¹⁶⁶ *See* Section 1 of the Merchandise Mark Act 17 of 1941

the event's organizer.¹⁶⁷ This provision initiates the legal protection for ambush marketing by intrusion. The ambusher cannot utilize the environment of the event to show its own trademark or brand name in order to create brand awareness and recognition through the media coverage of the event. Furthermore, the prohibition is not limited to what happens at the arena or other venue where the incident takes place but it can affect any commercial activities which are in relation to the incident. This would include media commercials, in-store promotions, and general advertising activities.¹⁶⁸

Another legal approach applicable for ambush marketing under the Merchandise Marks Act is affiliated with Section 15 which states that:

“15 Use of certain marks may be prohibited

- (1) *The Minister may, after such investigation as he or she may think fit, by notice in the Gazette, prohibit either absolutely or conditionally the use of-*
 - (a) *the National Flag, or any former National Flag, of the Republic; or*
 - (b) *any mark, word, letter or figure or any arrangement or combination thereof, in connection with any trade, business, profession, occupation or event, or in connection with a trade mark, mark or trade description applied to goods.*
- (2) *The Minister may, if he is satisfied that the circumstances require it, by notice in the Gazette, withdraw, amend or qualify any notice issued in terms of subsection (1).*
- (3) *Any person who contravenes any such absolute prohibition or fails to comply with any condition prescribed in any such notice shall be guilty of an offence.”*

¹⁶⁷ Visser, *supra* note 164, at 569.

¹⁶⁸ Dean, *supra* note 160.

The Minister of Trade and Industry may hypothetically or unconditionally prohibit the usage of any letter, word, figure, or mark, in any arrangement or combination thereof, in association with any trade, business, occupation, or event. According to the statute, this provision is not limited to any class of services or goods. Moreover, this is not limited to the usage of a letter, word, figure, or mark as a trademark.¹⁶⁹ This provision is extensively worded and caters for those parties that operate ambushing activities by way of association.¹⁷⁰

3.4.2.2 The Consumer Protection Act

In terms of the Consumer Protection Act of 2008, the legal provision applicable for ambush marketing comes under Section 29, which provides that:

“A producer, importer, distributor, retailer or service provider must not market any goods or services—

(a) in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in section 41; or

(b) in a manner that is misleading, fraudulent or deceptive in any way, including in respect of—

(i) the nature, properties, advantages or uses of the goods or services;

(ii) the manner in or conditions on which those goods or services may be supplied;

(iii) the price at which the goods may be supplied, or the existence of, or relationship of the price to, any previous price or competitor’s price for comparable or similar goods or services;

(iv) the sponsoring of any event; or

¹⁶⁹ Visser, *supra* note 164, at 569.

¹⁷⁰ *Id.*

(v) any other material aspect of the goods or services.”

According to the abovementioned statute, a commercial business shall not market any goods or services, with regard to the sponsoring of any event, in a misleading, fraudulent or deceptive manner. No one is able to establish an implied association with the event and deceive the consumers into perceiving that it is an official sponsor by utilizing any letter, word, figure, or symbol. This provision is considered another legal measure applicable to ambush marketing by association.¹⁷¹

3.4.3 Recent enforcement

The designated event legislation under Section 15A of the Merchandise Marks Act has been tested by the High Court of South Africa in *FIFA v. Metcash Trading Africa (Pty) Ltd.*¹⁷² FIFA is the organizer of the international football tournament officially called FIFA World Cup which will be held in South Africa in 2010 and has its event designated as a protected event under the Merchandise Marks Act by Government Gazette Notice 28877 of 25 May 2006. During the protected period, Metcash Trading Africa (Pty) Limited had been marketing their products named “2010 pops” with the picture of footballs and partial portrayals of the South African ensign in their packaging. Even though Metcash Trading Africa (Pty) Limited made no direct allusion to the 2010 World Cup event, the Pretoria High Court held that it had the intention of associating their products with the event and simultaneously deriving commercial advantage from FIFA World Cup 2010. The High Court of South Africa further held that such conduct obviously contravenes the legal provision of the Merchandise Marks Act and makes it guilty of an offence. Accordingly, Metcash Trading Africa is suppressed from contending unlawfully with FIFA by violating Section 15A of the Merchandise Marks Act.

¹⁷¹ The Global Advertising Lawyers Alliance, *supra* note 7, at 138.

¹⁷² *Federation International de Football Association (FIFA) v. Metcash Trading Africa (Pty) Ltd* (53304/07) [2009] ZAGPPHC 123

CHAPTER 4

LEGAL MEASURES FOR AMBUSH MARKETING IN THAILAND AND THE ANALYSIS OF LEGAL PROBLEMS

Due to the growth of sponsorship investment in Thailand, activating ambush marketing strategies in commercial activities has increased over time among Thai entrepreneurs. This marketing phenomenon might have a negative impact on sponsorship investment in Thailand because its general characteristic is to create misunderstanding and confusion in the public as to the legitimate sponsor. This devalues the business relationship between official sponsors and the organizing committee of the event by gaining a commercial benefit similar to the official sponsors without bearing any of the financial burden of sponsorships. Many attempts have been made in other countries to combat this controversial marketing activity. Some countries such as United States of America and the United Kingdom have introduced event-specific legislation in order to guard against ambush marketing in Olympic Games, as requested by the IOC. While countries such as New Zealand and South Africa have provided the protection of any occurrences which are considered ‘major event’ in their country by introducing an ‘umbrella’ legislation which does not provide anti-ambushing protection specifically for Olympic Games or any other single event.¹⁷³ In Thailand, there is no legislation that provides particular protection against ambush marketing. Therefore, traditional forms of legislation such as the Trademark Act, the Civil and Commercial Code, and the Consumer Protection Act appear to be applicable legal mechanisms with which a claim against ambushing activities could potentially be made.

This chapter will study the applicable legal measures for ambush marketing in Thailand and analyze whether these existing legal measures are adequate in the area of ambush marketing. A comparative study of the legal measures in the selected countries and the applicable legal measures in Thailand will also be provided in order

¹⁷³ The Global Advertising Lawyers Alliance, *supra* note 7, at 17.

to select the appropriate and effective legal measures for ambush marketing activities in the context of Thailand.

4.1 Overview of Ambush Marketing in Thailand

In Thailand, ambush marketing is considered a novel and effective marketing technique amongst businesses, especially when national or international events are taking place. Commercial companies have realized the benefits of capitalizing on the flood of consumer spending and profitable advertising opportunities associated with highly anticipated events. Thai entrepreneurs have therefore been engaging in a number of different ambushing strategies in order to associate themselves with events which they have not supported financially. Through ambush marketing activities, Thai entrepreneurs are able to access consumers and spectators of international events and simultaneously derive some of the benefits of official sponsors at relatively low cost.

Examples of ambush marketing activities in Thailand are numerous. For instance, during the FIFA World Cup 2006, Tasto's potato chips were being sold in Thailand with the image of a ball with Adidas-esque markings and boasted of its original German sausage flavor.¹⁷⁴ Tasto also organized contests to send its consumers to Germany where the tournament was being held.¹⁷⁵ The abovementioned marketing strategies created an implied association between FIFA and Tasto in spite of the fact that Tasto was not an official sponsor of the FIFA World Cup 2006. Consequently, some consumers perceived that Tasto was actually a legitimate sponsor of the event.

¹⁷⁴ Newley Purnell, "World Cup Ambush Marketing: Thai Style", <http://newley.com/2006/05/29/world-cup-ambush-marketing-thai-style/> (accessed November 16, 2015)

¹⁷⁵ ผู้จัดการออนไลน์, "เทส โศตอกย้ำเจ้าตำรับไส้กรอกเยอรมัน ปลดอยโปรโมชันเค้กรับฟุตบอลโลก 2006", <http://www.manager.co.th/iBizChannel/ViewNews.aspx?NewsID=9490000062808> (สืบค้นเมื่อวันที่ 11 พฤศจิกายน 2558) (Manager Online, "Tasto emphasizes its initiator of German sausage by offering promotional campaign to entertain FIFA World Cup 2006", <http://www.manager.co.th/iBizChannel/ViewNews.aspx?NewsID=9490000062808> (accessed November 11, 2015)).

Tan Passakornnatee – the CEO of ICHITAN Group Public Company Limited – also successfully employed ambush marketing in order to trade on the popularity of the 2012 Summer Olympics. He engaged with this marketing technique by offering 10 million baht to Kaeo Pongprayoon, a Thai amateur boxer who won a silver medal at the 2012 London Olympic Games, as a huge cash injection.¹⁷⁶ By doing so, Tan successfully created an implied association between ICHITAN and the London Olympics, and ensured his own products branded “ICHITAN” became extensively recognized amongst Thai consumers. This marketing tactic provided him with some of the marketing advantages enjoyed by official sponsors at a comparatively low cost.

Ambush marketing certainly causes some problems to sponsorship investment in Thailand because it can harm the business relationship of an official sponsor and an event organizer. Thus, strong legal protection against ambush marketing needs to be in place since it will not only enhance business environment, particularly sponsorship investment, but also increase the opportunity for Thailand to qualify as a host country for major international events such as Olympic Games and the FIFA World Cup. This would increase tourism, enhance its reputation, and bring in other macroeconomic benefits to the country.

4.2 Legal Measures Applicable to Ambush Marketing in Thailand

At present, there is no legislation that provides specific protection against ambush marketing in Thailand. Furthermore, the allowable scope of event-based marketing has not yet been tested by the Supreme Court of Thailand, and there is neither firm guidance nor concrete rules in this area.¹⁷⁷ However, there are some legal grounds that could be used to formulate a claim against unaffiliated companies which seek to confuse the public as to which company actually owns official sponsorship

¹⁷⁶ สมชาติ ตีลาไกรสร, “กรณีศึกษา: ต้น อิชิตัน – ศิลปะการชกมวยจีน”,

<https://somchartlee.wordpress.com/2012/09/07/ichitan/> (สืบค้นเมื่อวันที่ 16 พฤศจิกายน 2558) (Somchart Leelakraisorn, “Case Study: Tan Ichitan – Ambush Marketing”, <https://somchartlee.wordpress.com/2012/09/07/ichitan/> (accessed November 16, 2015)).

¹⁷⁷ Rungpry, *supra* note 14.

rights for a famous proprietary event. These legal grounds are a trademark infringement claim and civil passing off as the original structures of intellectual property protection, a basic tort claim, and the provision of consumer protection against advertising.

4.2.1 The Trademark Act of Thailand B.E. 2534

4.2.1.1 Legal Provisions Applicable to Ambush Marketing

(1) Trademark Infringement

To exploit an unauthorized association with an event in order to mislead the public into believing that they are an authorized sponsor or contributor associated with it, non-official sponsors may use the trademark of the event or trademarks which are confusingly similar to it. Therefore, a trademark infringement claim could be one of the main legal frameworks that could be invoked for combating ambushing activities in Thailand.¹⁷⁸ Unauthorized use of the registered trademark of an event by non-official sponsors is strictly prohibited by Section 44 of the Trademark Act of Thailand B.E. 2534. This states that:

“Subject to Sections 27 and 68, a person who is registered as the owner of a trademark shall have the exclusive right to use it for the goods for which it is registered.”

This Act gives an owner of a registered trademark the exclusive right to use such a registered mark for the goods for which it is registered, and excludes any person which uses a trademark that is similar or identical to the registered mark.¹⁷⁹ Furthermore, an owner of a registered trademark is entitled by law to license the rights to another person to use such a registered trademark for all or some of the goods or services for which the trademark is registered.¹⁸⁰ Therefore, any usage of the

¹⁷⁸ *Id.*

¹⁷⁹ ไชยศ เหมะราชตะ, ลักษณะของกฎหมายทรัพย์สินทางปัญญา 328 (พิมพ์ครั้งที่ 9, 2555) (Chaiyos Hemarajata, **The Nature of Intellectual Property Law** 328 (9th ed. 2012)).

¹⁸⁰ *Id.*

protected trademarks in connection with goods or services which have been registered, without permission, shall be deemed as trademark infringement. Further, counterfeit and imitation of a registered trademark as well as various acts of commercial dealing in such counterfeited or imitated marks are consecutively criminalized under Sections 108,¹⁸¹ 109,¹⁸² and 110¹⁸³ of the Trademark Act of Thailand.

One may argue that, at least in the case of counterfeit by virtue of Section 108 of the Trademark Act, the statute does not require that there be substantial likelihood of consumer confusion with regard to the source of the goods in order for an infringement of an exclusive right granted to the proprietor of a protected trademark.¹⁸⁴ That is to say, the utilization of the protected trademark in connection with goods or services that has been registered, without permission, absolutely results in a trademark infringement, according to the statutory language. However, in practice, likelihood of consumer confusion is routinely considered by Thai courts as a key element in trademark infringement cases.¹⁸⁵ In conclusion, the court may still take

¹⁸¹ Section 108 of the Trademark Act of Thailand B.E. 2534 provides

“[A]ny person who counterfeits a trademark, service mark, certification mark or collective mark registered in Thailand by another person shall be liable to imprisonment not exceeding four years or a fine of not exceeding four hundred thousand baht or both.”

¹⁸² Section 109 of the Trademark Act of Thailand B.E. 2534 provides

“[A]ny person who imitates a trademark, service mark, certification mark or collective mark registered in the Kingdom by another person in order to mislead the public into believing that it is the trademark, service mark, certification mark or collective mark of such other person shall be liable to imprisonment not exceeding two years or a fine of not exceeding two hundred thousand baht or both.”

¹⁸³ Section 110 of the Trademark Act of Thailand B.E. 2534 provides

“[A]ny person who:

(1) imports, distributes, offers for distribution or has in possession for distribution goods bearing a counterfeit trademark, service mark, certification mark or collective mark under Section 108 or an imitation trademark, service mark, certification mark or collective mark under Section 109; or

(2) gives or offers a service under a counterfeit service mark, certification mark or collective mark under Section 108 or an imitation service mark, certification mark or collective mark under Section 109, shall be liable to the penalties provided in those Sections.”

¹⁸⁴ Rungpry, *supra* note 14.

¹⁸⁵ Supreme Court’s Decision No. 6991/2542: The plaintiff filed a claim against the defendant on the ground that the defendant had used the imitation of plaintiff’s trademark in order to cause confusion in the origin of the goods to the public consumers.

into account whether the unauthorized use of the registered mark may mislead or cause confusion among consumers, even though it is not explicitly required by the trademark statute.

Moreover, according to Section 46 of the Trademark Act of Thailand, the owner of a registered trademark is also entitled to bring a lawsuit against the infringer. In addition, Section 116 of the Trademark Act gives a permanent injunction to the trademark owner to stop or refrain from committing forgery or imitation.

(2) Passing Off

A passing off claim could also be another legal framework for event organizers or official sponsors to handle ambush marketing issues, especially in the case that the event's trademark is not officially registered, or it is not registered in connection with relevant classification that grants an action ground for bringing a lawsuit under the Trademark Act of Thailand.¹⁸⁶

In Thailand, the principle of passing off is stipulated in Section 46 paragraph 2 of the Trademark Act of Thailand B.E. 2534, which states that:

“no person shall be entitled to bring legal proceedings to prevent, or to recover damages for, the infringement of an unregistered trademark.

The provisions of this section shall not affect the right of the owner of an unregistered trademark to bring legal proceedings against any person for passing off goods as those of the owner of the trademark.”

Although the owners of an unregistered trademark are not entitled to bring a suit and claim compensation for trademark infringement like an owner of a registered trademark can, they are still entitled to prosecute another person who is passing off goods as their own.¹⁸⁷ According to the statute, passing off can be defined as an action that creates confusion among the public, encouraging them to believe that the goods

¹⁸⁶ Earterasun & Gautier, *supra* note 15, at 4.

¹⁸⁷ เหมะรัชตะ (Hemarajata), *supra* note 179, at 340.

of the infringer are related in some way to the goods of the trademark owner. Passing off also includes the act of selling goods by way of using trademark of others in order to deceive the buyer as to the origin source, nature, quality or quantity.¹⁸⁸

In order for the owner of an unregistered trademark to be afforded the legal protection for passing off under the Trademark Act of Thailand, such an owner has to establish that he has legal rights in the mark and such unauthorized use of the mark is done with a view to abusing his rights.¹⁸⁹ In order to obtain legal protection against passing off, the claim has to meet the following criteria:¹⁹⁰

- a. The goods of the trademark owner must have acquired a reputation amongst public consumers so that it is a motivation for the infringer to commit passing off;
- b. The defendant intentionally mislead the consumers into believing that its goods or services are those of the plaintiff's by not to expressly disclosing that the goods belong to him; and
- c. The plaintiff's claim must expressly allege that the defendant passed off his products.

From the abovementioned criteria, it can be noted that actual use is one of the substantial elements of passing off. The mark must have actually been launched into the market prior to the unauthorized use of the infringer in order for the mark to gain its reputation among consumers. In other words, actual use of the trademark is a significant element of proof of its reputation.

¹⁸⁸ *Id.*

¹⁸⁹ Earterasun & Gautier, *supra* note 15, at 4.

¹⁹⁰ เหมะรัชตะ (Hemarajata), *supra* note 179, at 341.

4.2.1.2 Critical Analysis of the Trademark Act of Thailand B.E. 2534 in the Context of Ambush Marketing

(1) Trademark Infringement

Although trademark infringement under the Thai Trademark Act B.E. 2534 may be applied as a legal ground for claims against some ambushing strategies which are considered as infringements of the intellectual property rights of event organizers or official sponsors, trademark infringement cannot be used in the circumstance that non-sponsors have used their creative competencies to utilize unprotected generic words or images that may be associated with a particular event.¹⁹¹ Trademark infringement claim is definitely not able to be used as a basis for claims against intrusive ambush marketing and some marketing strategies in the area of association ambush marketing such as themed advertising.

(2) Passing Off

There are some disadvantages to using passing off under the Trademark Act of Thailand as a basis for claims against ambush marketing. Since actual use of the mark is one of the essential criteria to establish civil action on a passing off basis, it is rather burdensome to the trademark owner to establish the actual use of its trademark if the event only has a short lifecycle. Moreover, it is necessary to note that unregistered rights shall receive less protection compared to registered rights.¹⁹² Therefore, Thai courts tend to adopt a very conservative approach and subject the owner of an unregistered mark to strict proof. In a passing off claim, the owner of the unregistered mark has to prove the legal rights over the mark, a requirement which is much more burdensome than the owner of the registered mark who only needs to prove that the mark of the infringer is similar or deceptively confusing.¹⁹³

¹⁹¹ Rungpry, *supra* note 14.

¹⁹² *Id.*

¹⁹³ *Id.*

In conclusion, although the Trademark Act of Thailand may perhaps be applied as a legal ground for claims against ambush marketing, most ambushing activities seem to be permissible under the traditional provision of trademark infringement and passing off.

4.2.2 The Civil and Commercial Code of Thailand

4.2.2.1 Legal Provisions Applicable to Ambush Marketing

Aside from the traditional protection of trademark infringement and passing off under the Trademark Act, the general provision of the law of tort which comes under Section 420 of the Civil and Commercial Code could be one of the applicable legal grounds for event organizers and official sponsors to use to counter ambush marketing in Thailand. The event organizers and official sponsors are allowed to bring a civil lawsuit seeking monetary compensation against the unauthorized use of an event's legitimate properties under this provision. This states that:

“A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore.”

This provision provides a general outline of the wrongful act under the Civil and Commercial Code of Thailand.¹⁹⁴ According to the statute, an injured person who brings a suit on the basis of a tort claim needs to prove the following criteria before the court:¹⁹⁵

- a. The defendant committed unlawful act;
- b. The wrongful act was willfully or negligently committed; and
- c. The plaintiff was actually injured.

¹⁹⁴ เพ็ง เพ็งนิติ, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยละเมิด ความรับผิดทางละเมิดของเจ้าหน้าที่ และกฎหมายอื่นที่เกี่ยวข้อง 10 (พิมพ์ครั้งที่ 6, 2552) (Peng Pengniti, **Description of the Civil Code of Thailand: The Act of Tort, Tort Liability by Officer and Other Related Laws** 10 (6th ed. 2009)).

¹⁹⁵ *Id.*

Considering Section 420 of the Civil and Commercial Code in the context of ambush marketing, if non-sponsors use an event's properties, such as marks or emblems, and establish a commercial connection with the event without the consent of the owner of the event's properties, non-sponsors may be said to commit a wrongful act under this provision and may be bound to compensate for their fault. In using this provision as a legal ground for combating ambush marketers, the proprietor of an event's properties would have to prove that he or she has legal rights over these, and such unauthorized use of the event's property right is considered harmful to his or her legitimate rights.¹⁹⁶

In addition to the abovementioned provision, event organizers and their official sponsors could possibly also pursue a civil action against ambushers based on Section 421 of the Civil and Commercial Code, which reads:

“The exercise of a right which can only have the purpose of causing injury to another person is unlawful.”

Under the provision of an abuse of a right, although the person has his or her legitimate right to do something, the exercise of his or her right could be considered unlawful if its sole intention is to cause injury to another person. The exercise of a right which is considered unlawful under this provision shall be considered an unlawful act under Section 420.¹⁹⁷ Considering the provision of abuse of right in the context of ambush marketing, although the ambushers have their lawful right to use their own trademark or brand name in their commercial activity, the exercise of their right could be considered an abuse of a right if it is proved that they have the intention to ambush and devalue the sponsorship relationship of the event organizers and their official sponsors.

¹⁹⁶ Earterasaron & Gautier, *supra* note 15, at 4.

¹⁹⁷ สนันท์กรณ (จำปี) โสคติพันธุ์, คำอธิบายกฎหมายลักษณะละเมิด การจัดการงานนอกสั่ง ลากมิดวไรด์ 74 (พิมพ์ครั้งที่ 2, 2552) (Sanunkorn (Jumpee) Sothibundhu, **Description of the Law of Tort, Management of Affairs Without Mandate, and Undue Enrichment** 74 (2nd ed. 2009)).

4.2.2.2 Critical Analysis of the Civil and Commercial Code of Thailand in the Context of Ambush Marketing

Since an “unlawful act” of a violator is considered one of the essential criteria to constitute an action on the basis of tort under Section 420 of the Civil and Commercial Code, an injured person may face difficulties in proving an unlawful act of an ambusher due to the fact that many ambushing strategies are not obviously outlawed in Thailand. In other words, it is difficult to charge ambushers with a wrongful act when they use their own creativity to develop more subtle strategies of ambush marketing and do nothing with the event’s property right.

Furthermore, although a civil action against ambush marketing could possibly also be formulated under Section 421, this provision has yet to be used in the context of ambush marketing.¹⁹⁸ This provision is worded in general terms and is not specifically designed to be an appropriate legal measure for ambush marketing in Thailand; this leaves room for this provision to be interpreted in the area of this marketing practice. Moreover, there is no precedent for using a basic torts provision as a legal basis for ambush marketing to rely on. Therefore, it is very hard to foresee how Thai courts may react to the tort claim for ambush marketing. All this uncertainty cannot be regarded as strong and sufficient legal protection as far as the sponsorship investor is concerned.

4.2.3 The Consumer Protection Act of Thailand

4.2.3.1 Legal Provisions Applicable to Ambush Marketing

Since consumer protection law represents one of the applicable legal frameworks for controlling ambush marketing in some countries, such as the United Kingdom and South Africa, it would be beneficial to examine whether the Thai consumer protection law is suitable for ambush marketing in Thailand and whether it could be the legal ground for an organizing committee and official sponsors of an event to combat this unethical marketing activity. Moreover, because ambushing

¹⁹⁸ Rungpry, *supra* note 14.

strategies are mostly exercised by, and in connection with, advertisements, the provision of consumer protection against advertising by virtue of Section 22 of the Consumer Protection Act of Thailand B.E. 2522 shall be taken into account. This states that:

“An advertisement may not contain a statement which is unfair to consumers or which may cause adverse effect to the society as a whole; that is, notwithstanding such statement concerns with the origin, condition, quality or description of goods or services as well as the delivery, procurement or use of goods or services.

The following statements shall be regarded as those which are unfair to consumers or may cause adverse effect to the society as a whole:

(1) Statement which is false or exaggerated;

(2) Statement which will cause misunderstanding in the essential elements concerning goods or services, notwithstanding it is based on or refers to any technical report, statistics or anything which is false or exaggerated;

(3) Statement which is directly or indirectly encouraging the commission of an unlawful or immoral act, or which adversely affects the national culture;

(4) Statement which will cause disunity or adversely affects the unity among the public;

(5) Other statements as prescribed in the Ministerial Regulation.

A statement used in the advertisement which an ordinary person knows that it is not possible to be true is not prohibited for use in the advertisement under (1).”

According to the abovementioned provision, one is prohibited from advertising a statement that is unfair to public consumers, which includes deceptive statement and any other statements that creates misunderstanding in the substantial

elements in regard to goods or services.¹⁹⁹ Conceptually, a deceptive statement or deceptive advertising is an advertisement that indicates a false statement and concurrently affects the purchasing behavior of consumers to their detriment.²⁰⁰ The advertisement may sometimes be considered to contain a misstatement itself. However, an advertisement which is not false in itself but whose perception establishes a misleading impression may also be considered deceptive.²⁰¹ In other words, an advertisement that indirectly causes consumers to misinterpret it could be considered a false statement under Section 22 paragraph 2(1) of the Consumer Protection Act.

Organizers and official sponsors of an event may potentially refer to this provision to oppose an ambush marketer in the event that its advertisement consists of an incorrect or deceptive statement which misleads the consumer into perceiving that the ambusher is an official sponsor of the event.

4.2.3.2 Critical Analysis of the Consumer Protection Law in the Context of Ambush Marketing

Considering this provision in the context of an ambushing activity, although the provision prohibits an advertisement that contains a deceptive statement and any other statements that create a misunderstanding about the substantial elements in regard to goods or services, it does not clearly prohibit a misleading or deceptive statement with regard to the sponsoring of any event. This provision merely prohibits any deceptive statement that is concerned with “*the origin, condition, quality or description of goods or services as well as the delivery, procurement or use of goods or services*”. This is because the Act is not specifically designed for potential ambush marketing cases in Thailand. Therefore, there is still room for uncertainty over interpretation of this provision as to whether “a deceptive statement with regard to the

¹⁹⁹ สุขุม สุภนิตช์, คำอธิบายกฎหมายคุ้มครองผู้บริโภค 171 (พิมพ์ครั้งที่ 8, 2556) (Susom Supanit, **Description of Consumer Protection Law** 171 (8th ed. 2013)).

²⁰⁰ David A. Aaker & George S. Day, **Consumerism: Search for the Consumer Interest** 241 (4th ed. 1982).

²⁰¹ สุขุม สุภนิตช์ (Supanit), *supra* note 199.

sponsoring of an event” can be covered under this legal provision since Thai consumer protection law is not well developed in the area of ambush marketing in Thailand.

The lack of a clear-cut definition of ambush marketing is also one of the significant problems in using the existing Thai laws as a basis for ambush marketing cases in Thailand. There seems to be an absence of a statutory and judicial definition of ambush marketing in Thai laws. The definition of ambush marketing needs to be clearly provided in the law. In essence, there should be clarity as to what is defined as ambush marketing, and what type thereof should be declared illegal marketing practices. Providing a definition and the scope of this marketing strategy will help in the protection of events and its official sponsor. Therefore, specific legislation needs to be enacted in Thailand in order to protect the commercial relationship between an event organizer and an official sponsor.

4.3 Comparative Study of the US, the UK, New Zealand, South Africa and Thai Laws Regarding Ambush Marketing

4.3.1 Legal Measures to Prevent Ambush Marketing by way of Association

New Zealand, South Africa and the UK have specific legislations dealing with ambush marketing. They have created many provisions prohibiting any unauthorized representations that are likely to mislead the public into thinking that there is a commercial connection between an event and an ambusher. The MEMA prohibits any commercial use of words, emblems, and concepts implying association with events which have been specifically declared as major events by the government of New Zealand, without permission from the event organizers. South Africa has also introduced a trademark abuse provision which operates on the basis of designated event legislation in order to prohibit the unauthorized use of a trademark in the manner that is likely to achieve publicity and accordingly acquire commercial advantage from the event. Likewise, the Olympic Symbol (Protection) Act and the

London Olympic Games and Paralympic Games Act give the exclusive right to some specific authorities in the UK to create a commercial association with the Olympic Games.

In the United States, although there is no specific legislation to handle ambush marketing in a general context, the event organizers and official sponsors can legally challenge ambushing activities using legal protections provided by the common law doctrine of misappropriation and the Lanham Act which seems applicable to combat false association. However, one may argue that it may not be possible to pass judgment on all ambushing activities as being illegal due to the fact that most ambushers always find a way not to use the protected trademark for their unauthorized association. Moreover, in an effort to protect the property right of Olympic Games, there is an event specific legislation in the form of OASA which grants the USOC the exclusive right to control the use of Olympics' properties such as trademarks, symbols, and words.

In Thailand, the applicable laws do not have a provision which is specifically designed for combating ambush marketing. In terms of ambush marketing by association, although the original structures of intellectual property safeguarding, basic tort claims, and the provision of consumer protection against advertising seem to be the applicable legal mechanisms that the event organizers and its official sponsors may utilize to challenge ambush marketing, the foregoing legal frameworks are inadequate remedies since they are not applicable when the ambusher does nothing with the protected marks, and some have yet to be used in the field of ambush marketing. Therefore, it is fair to conclude that the Thai laws are insufficient to protect the sponsorship relationship.

4.3.2 Legal measures to prevent ambush marketing by way of intrusion

In New Zealand, the MEMA has provided the ability for a clean zone to be established in and around venues for the purpose of enforcing advertising rules and keeping event sites clean of any references to businesses that are not official sponsors

of an event. Likewise, some cities in the United States have enacted temporary rules such as clean zone ordinances to combat intrusive ambush marketing.

South Africa also has a legal measure to prevent ambush marketing by way of intrusion as the protection under the Merchandise Mark Act is not merely limited to what happens at the arena or other venue where the incident takes place but it can affect any commercial activities which are in relation to the incident. It is reasonable to assume that the Act effectively prevents an ambusher from using the environment of an event to display their trademark or brand name without explicit authorization.

In contrast, in Thailand, Thai laws do not have any provisions regarding 'clean zones' or 'clean transport routes' to prevent intrusive ambush marketing. Therefore, the sponsorship relationship between an event organizer and its official sponsor is easily devalued in Thailand through intrusive ambush marketing. The situation in Thailand has left ambush marketing in a legal gray area.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Ambush marketing has become more popular in the business of sponsorship due to the fact that it is the most effective way to seek low-cost association with, and derive benefit from, an event. The morality of this marketing phenomenon is debatable. According to the ethical theory perspective, ambush marketing is an unethical and immoral marketing practice. It certainly causes some disadvantages to major event businesses due to the fact that it devalues the business relationship between official sponsors and organizers by benefiting from consumers without paying for the privilege. Therefore, this marketing practice should be regulated under appropriately designed legal frameworks.

In an attempt to provide satisfactory protection for the commercial relationship between an event organizer and its official sponsors, many countries such as the United States of America, the United Kingdom, New Zealand, and the Republic of South Africa have applied a number of legal measures against ambush marketing. In the United States of America and the United Kingdom, although the original forms of protection such as intellectual property protection, unfair competition law, and the law of passing off can generally be applied to the phenomenon, they have also introduced some “event-specific legislations” such as the Olympic and Amateur Sports Act in the United States of America, and The Olympic Symbol (Protection) Act 1995 and the London Olympic Games and Paralympic Games Act 2006 in the United Kingdom. These event-specific legislations were introduced due to the intense competition to become the host for the Olympic Games. The protection of sponsors’ and event organizers’ rights have been extended well beyond traditional forms of protection such as intellectual property protection. That being said, these event-specific legislations were specifically designed to protect the commercial relationship between the IOC and its official sponsors from ambush marketing in the United States of America and the United Kingdom.

In the Republic of South Africa and New Zealand, designated events legislation has been introduced as an effective legal measure to combat ambush marketing. New Zealand enacted the Major Events Management Act 2007 in an attempt to ensure that major events in New Zealand were effectively organized without disruption from ambush marketing, and to provide event organizers and official sponsors with a certain amount of protection around their investment. Likewise, the Republic of South Africa also introduced designated event legislation by virtue of Section 15A of the Merchandise Mark Act to guarantee the protection of events which may be held in their country. This form of protection can be used on multiple occurrences for any events that have been announced by the authorities as protected events. These designated event legislations have proved to be effective measures to guard against ambush marketing either through an intrusive or associative strategy.

Having studied the possibility of applying Thai legal provisions such as the Trademark Act, the Civil and Commercial Code, and the Consumer Protection Act to ambush marketing, it is clear that protection against ambush marketing cannot be effectively achieved by existing Thai legal provisions either:

1. The trademark infringement claim by virtue of the Trademark Act of Thailand B.E. 2534, although it demonstrates that a trademark infringement claim seems to be adequate to deal with some ambushing strategies where a mark which is similar or identical to the event's registered mark is utilized in relation to similar or identical goods and services, it has limited application to most creative ambush marketing activities since a protected event's trademark is not always used in well-planned ambushing activities. Moreover, the provision does not cover the situation where the event's trademark is not officially registered in Thailand. The provision seems to be ineffective to guard against ambush marketing, especially for intrusive marketing in which the non-sponsors use their own trademark or brand name in the ambushing activity.

2. The passing off claim under the Trademark Act of Thailand B.E. 2534, even though the provision gives protection to the unregistered trademark of the event

and is likely to provide a broader scope of protection against ambush marketing, it is still problematic to apply this provision to ambush marketing in Thailand due to the fact that the short lifecycle of events may cause difficulties in establishing the actual use of an unregistered trademark in order to enjoy the passing off protection by virtue of this provision.

3. As for the basic torts provision under the Civil and Commercial Code of Thailand, event organizers and their official sponsors may face difficulties in proving an unlawful act of the ambusher due to the fact that many ambushing strategies are not clearly outlawed in Thailand. Furthermore, even though a civil action against ambush marketing could possibly also be formulated under Section 421, it still leaves rooms for varying interpretations of the provision since this provision is not specifically designed to deal with ambush marketing nor well-developed in this area.

4. The Consumer Protection Act – despite inclusion of suitable concepts for the protection against ambush marketing such as the prohibition of deceptive advertising, this provision only prohibits the misleading advertisement which is concerned with the origin, condition, quality or description of goods or services as well as the delivery, procurement or use of goods or services. It seems the provision cannot be applied to the misleading advertisement with regard to the sponsoring of an event. For the abovementioned reason, the provision of consumer protection against advertising by virtue of Section 22 of the Consumer Protection Act of Thailand may not be able to effectively handle ambush marketing.

The study implicitly indicates that the legal measures to combat ambush marketing in Thailand are far from adequate to protect the commercial relationship between an event organizer and its official sponsors from ambush marketing either by way of intrusion or association when compared to the legal measures found in other countries. Consequently, specific legislation for ambush marketing is needed. This would provide positive results for sponsorship investment in Thailand and increase the likelihood of Thailand qualifying as a host country for world major events which would result in deriving an infrastructure legacy, increasing tourism, enhancing its

reputation, as well as other economic benefits of being a host country which can be felt for years after the Games.

5.2 Recommendations

The study indicates that there is no legislation that provides suitable and specific protection against ambush marketing in Thailand. Furthermore, the relevant laws that could possibly be applicable to ambush marketing are spread across several pieces of legislation, such as the Trademark Act of Thailand B.E. 2534, the Civil and Commercial Code and the Consumer Protection Act. This causes difficulties for legal practitioners in enforcement of the law. Accordingly, new legislation in a single piece of legislation needs to be enacted. It is considered important to protect the business relationship between an event organizer and its official sponsor while achieving a balance between sponsors' rights and the property owners' right and all the affected parties. Therefore, the proposed principles that should be provided under ambush marketing legislation are as follows:

1. The clear-cut definition of ambush marketing should be provided in new legislation to pursuit against any such plea. Two types of ambush marketing should also be obviously classified in the legislation. Restricted "ambush marketing" activities should be clearly identified and limited in scope in order for only commercial practices that establish or appear to establish in consumers' minds, an implied association between the event and non-sponsor or a false implication of sponsorship or confusion among the public concerning sponsorship to be strictly prohibited.

2. Any events that need to be protected under the specific legislation have to be declared by the government authority as a protected event. In determining a major event, the government authority may take into account matters of fact such as the number of spectators, the number of participants, the required and involved level of professional management, the tourism opportunities for Thailand, global reputation of Thailand during the event, and the level of international media coverage. The event

must be able to create valuable long-term and short-term economic, cultural and social advantages for Thailand.

3. Time limitation of protection for the protected event should be taken into account. The extraordinary protections by virtue of the ambush marketing legislation, which are granted to the organizing bodies and the official sponsors of the protected event, have to be confined to a limited period time. In essence, it is appropriate for the protections to be effective only for a certain amount of time before the beginning of the protected event, and to last for a reasonable amount of time after the conclusion of the event.

4. In order to protect the exclusivity rights of the official sponsors from ambush marketing by association, any unauthorized representations which are likely to imply to the public that there is a legitimate commercial connection between a protected event and its brand, its goods or services, or a person who supplies such goods or services, shall be prohibited during the protection period. However, such specific protection ought not to be applied to any single generic term as long as the usage of such a generic term is not able to establish a false recognition of an event's sponsorship.

5. In order to protect the sponsorship exclusivity rights from intrusive ambushing activities, a clean zone should be able to be established in and around the protected event's venues during a reasonable limited period of time. Therefore, the clean zone policy must be in force only for a reasonable amount of time leading up to the event and for a certain amount of time following that particular occurrence.

6. Some exceptions for ongoing marketing activities to fairly balance commercial free speech rights and sponsorship relationship should be carefully and appropriately provided. For example, non-commercial speech and pre-existing advertising which has been done by an organization that continues to carry out its ordinary activities should be allowed as long as it does not create an implied association between the event and a non-sponsor or a false implication of sponsorship or confusion among the public.

REFERENCES

1. Books and Book Articles

1.1 English books

Aaker, David A. and George S. Day. **Consumerism: Search for the Consumer Interest**. 4th ed. London: Collier Macmillan, 1982.

Frawley, Stephen and Daryl Adair. **Managing the Football World Cup**. New York: Palgrave Macmillan, 2014.

Information Resource Management Association. **Marketing and Consumer Behavior: Concepts, Methodologies, Tools, and Application**. Pennsylvania: IGI Global, 2014.

Johnson, Philip. **Ambush Marketing and Brand Protection: Law and Practice**. 2nd ed. Oxford: Oxford University Press, 2011.

Johnson, Phillip. **Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event**. London: Sweet and Maxwell, 2008.

Mcdonnell, Ian and Malcolm Moir. **Event Sponsorship**. New York: Routledge, 2013.

Mitten, Matthew J. **Sports Law in the United States**. Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2011.

Needle, David. **Business in Context: An Introduction to Business and Its Environment**. 5th ed. Andover: Cengage Learning Business Press, 2010.

Nufer, Gerd. **Ambush Marketing in Sport: Theory and the Practice**. New York: Routledge, 2013.

Sleight, Steve. **Sponsorship: What it is and how to use it**. Berkshire, United Kingdom: McGraw-Hill, 1989.

Walliser, Björn. **Le Parrainage: Sponsoring et Mécénat**. Paris: Dunod, 2006.

1.2 Thai books

ไชยศ เหมะรัชตะ. **ลักษณะของกฎหมายทรัพย์สินทางปัญญา**. พิมพ์ครั้งที่ 9. กรุงเทพมหานคร: สำนักพิมพ์นิติธรรม, 2555. (Chaiyos Hemarajata. **The Nature of Intellectual Property Law**. 9th ed. Bangkok: Nititham Publishing, 2012.)

เพ็ง เพ็งนิตติ. คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยละเมิด ความรับผิดทางละเมิดของเจ้าหน้าที่ และ

กฎหมายอื่นที่เกี่ยวข้อง. พิมพ์ครั้งที่ 6. กรุงเทพฯ: จีรรัชการพิมพ์, 2552. (Peng Pengniti.

Description of the Civil Code of Thailand: The Act of Tort, Tort Liability by Officer and Other Related Laws. 6th ed. Bangkok: Jiraratkarnpim, 2009.)

วิเลิศ ภูริวัชร. **MARKETING is all around!**. กรุงเทพมหานคร : กรุงเทพธุรกิจ บิซบุ๊ก, 2553. (Vilert

Puriwat. **MARKETING is all around!**. Bangkok: Bangkok Business Bizbook, 2000.)

ศนันท์กรรณ์ (จำปี) โสคติพันธุ์. คำอธิบายกฎหมายลักษณะละเมิด การจัดการงานนอกสั่ง ลากมิควรรได้. พิมพ์ครั้งที่

2. กรุงเทพฯ: สำนักพิมพ์วิญญูชน, 2552. (Sanunkorn (Jumpee) Sothibundhu.

Description of the Law of Tort, Management of Affairs Without Mandate, and Undue Enrichment. 2nd ed. Bangkok: Winyuchon, 2009.)

สุขุม สุภนิตย์. คำอธิบายกฎหมายคุ้มครองผู้บริโภค. พิมพ์ครั้งที่ 8. กรุงเทพฯ: สำนักพิมพ์แห่งจุฬาลงกรณ์

มหาวิทยาลัย, 2556. (Susom Supanit. **Description of Consumer Protection Law.**

8th ed. Bangkok: Chulalongkorn University, 2013.)

2. Articles

Bean, Lori L. “*Ambush Marketing: Sports sponsorship confusion and the Lanham Act*”. **Boston University Law Review**, Vol. 75, 1995, pp. 1099-1134.

Berger-Walliser, Gerlinde, Melanie Stallings Williams, Björn Walliser, and Mark Bender. “*Bavarian Blondes Don’t Need a Visa: A Comparative Law Analysis of Ambush Marketing*”. **Tulane Journal of International & Comparative Law**, Vol. 21(1), 2012, pp. 1-35.

Bhattacharjee, Sudipta and Ganesh Rao. “*Tackling Ambush Marketing: The Need for Regulation and Analysing the Present Legislative and Contractual Effort*”. **Sport in Society**, Vol. 9(1), 2006, pp. 128-149.

- Chadwik, Simon and Nicholas Burton, “*Ambush Marketing in Sport: An Assessment of Implications and Management Strategies*”. **The CIBS Working Paper Series**, No. 3, 2008.
- Dean, Owen. “*Ambush Marketing and Protected Events*”. **DE REBUS**, 2003, pp. 20-23.
- Fuchs, Stephan. “*Le pseudo-parrainage: une autre façon de faire du parrainage?*”. **Decisions Marketing**, Vol. 30, 2003, pp. 31-39.
- Hoek, Janet and Philip Gendall. “*Ambush Marketing: More Than Just A Commercial Irritant?*”. **Entertainment Law**, Vol. 1(2), 2002, pp. 72-91.
- McKelvey, Steve. “*Sans Legal Restraint, No Stopping Brash, Creative Ambush Marketers*”. **Brandweek**, Vol. 35(16), 1994, pp. 20.
- McKelvey, Steve and John Grady. “*Ambush Marketing: The Legal Battleground for Sport Marketers*”. **WTR Ent. & Sports Law**, Vol. 21(4), 2004, pp. 8-15.
- Meenaghan, Tony. “*Point of View: Ambush Marketing: Immoral or Imaginative Practice?*”. **Journal of Advertising Research**, Vol. 34(5), 1994, pp. 77-88.
- Meenaghan, Tony. “*Ambush Marketing: A Threat to Corporate Sponsorship*”. **Sloan Management Review**, Vol. 38(1), 1996, pp. 103-113.
- Meenaghan, Tony. “*Ambush Marketing: Corporate Strategy and Consumer Reaction*”. **Psychology & Marketing**, Vol.15(4), 1998, pp. 305-322.
- Mishra, Pratika and Saurabh Mishra. “*The Legal Perspective of Ambush Marketing: An Arm Length Study in Indian Scenario*”. **IJBIT**, Vol. 4(2), 2011, pp. 128-134.
- Moorman, Anita and Christopher Greenwell. “*Consumer Attitude of Deception and the Legality of Ambush Marketing Practices*”. **J. Legal Aspects of Sports**, Vol. 15(2), 2005, pp. 183-212.
- O’Sullivan, Paul and Patrick Murphy. “*Ambush Marketing: The Ethical Issues*”. **Psychology and Marketing**, Vol. 15(4), 1998, pp. 349-366.
- Sandler, Dennis M. & David Shani. “*Olympic Sponsorship vs. Ambush Marketing: Who Gets the Gold?*”. **Journal of Advertising Research**, Vol. 29(4), 1989, pp. 9-14.

- Scassa, Teresa. “*Ambush Marketing Legislation to Protect Olympic Sponsor: A Step Too Far in the Name of Brand Protection?*”. **Journal of Sport Management**, Vol. 25, 2011, pp. 354-370.
- Schmitz, Jason K. “*Ambush Marketing: The Off Field Competition at the Olympic Games*”. **Nw. J. Tech. & Intell. Prop.**, Vol. 3(2), 2005, pp. 203-208.
- Schwab, Florian. “*FIFA’s Trademark Tactics*”. **World Trademark Review**, Vol. 3, 2006, pp. 6-9.
- Seth, Rukmani. “*Ambush Marketing – Need for Legislation in India*”. **Journal of Intellectual Property Rights**, Vol.15, 2010, pp. 455-463.
- Shani, David and Dennis M. Sandler. “*Ambush Marketing: Is Confusion To Blame for the Flickering of the Flame?*”. **Psychology & Marketing**, Vol. 15(4), 1998, pp. 367-383.
- Townley, Stephen, Harrington Dan and Couchman Nicholas. “*The Legal and Practical Prevention of Ambush Marketing in Sport*”. **Psychology and Marketing**, Vol. 15(4), 1998, pp. 333-348.
- Visser, Coenraad. “*The Soccer World Cup 2010: Special Event and Ambush Marketing Protection in South Africa*”. **Intellectual Property Law and Policy**, Vol. 11, 2010, pp. 567-570.
- Vivlund, Martina. “*Event Marks: Trademark Abuse or Necessary Form of Protection in View of Ambush Marketing?*”. **LSEU**, Vol. 1, 2012, pp. 8-20.

3. Theses

- Kala, Zaman. *Ambush Marketing in the Context of the 2012 London Olympic Games*. Thesis of Master of law, University of Central Lancashire, 2012.

4. Other Materials

- Australian Government. “*Ambush marketing Legislation Review: Prepared for IP Australia and the Department of Communications, Information Technology*

and the Arts (DCITA)". Prepared by IP Australia and Department of Communications Information Technology and the Arts. Melbourne: Frontier Economics, 2007.

The Global Advertising Lawyers Alliance. "*Ambush Marketing: A Global Legal Perspective*". New York: Global Advertising Lawyers Alliance, 2014.

5. Electronic Media

5.1 English websites

Aboy, Mateo. "*What is the purpose of trademark law*".

<http://www.mateoaboy.com/f6/blog_files/9975bff2077d8f58d340539a3c68b02b-23.html> (accessed November 28, 2015).

Advertising Age. "*The IOC Police*". <<http://adage.com/article/news/ioc-police/88305/>> (accessed October 9, 2015).

Balfour, Frederick. "*Ambush in Beijing*".

<<http://www.bloomberg.com/bw/stories/2008-03-12/ambush-in-beijing>> (accessed October 20, 2015).

Bodden, Gabriela. "*Ambush Marketing and Trademark Infringement in the Caribbean*". <<http://www.lexology.com/library/detail.aspx?g=2098fdec-cd56-4d4f-9a86-9dbc6cf549ad>> (accessed December 5, 2015).

Chapmantripp. "*Major Event Management Act: All Black (and White) or Gray?*".

<<http://www.chapmantripp.com/publications/Pages/Major-Events-Management-Act-All-black-and-white-or-grey.aspx>> (accessed November 25, 2015).

Crow, Dean and Janet Hoek. "*Ambush Marketing: A Critical Review and Some Practical Advice*". <http://iimkbltn-dev.massey.ac.nz/V14/MB_V14_A1_Crow.pdf> (accessed October 20, 2015).

Datamonitor. "*Ambush Marketing Case Study: successfully leveraging high-profile*

events to raise brand profile". <<http://acervo-digital.espm.br/cases/306395.pdf>> (accessed December 5, 2015).

- Deolekar, Pranav P. “*Ambush Marketing*”.
<http://www.indianmba.com/Occasional_Papers/OP14/op14.html> (accessed March 10, 2016).
- Dictionary. “*utilitarianism*”. <<http://dictionary.reference.com/browse/utilitarianism>> (accessed October 16, 2015).
- Dore, Pauline. “*Ambush Marketing in The UK*”. <<http://uk.practicallaw.com/5-505-4306#a249320>> (accessed November 25, 2015).
- Doust, Denise. “*The Ethics of Ambush Marketing*”.
<<http://fulltext.ausport.gov.au/fulltext/1997/cjism/v1n3/doust.html>> (accessed June 19, 2015).
- Duhaime’s Law Dictionary. “*Passing off*”.
<<https://duhaime.org/LegalDictionary/P/PassingOff.aspx>> (accessed October 24, 2015).
- Emmett, James. “*Rise of the Pseudo-Sponsors: A History of Ambush Marketing*”.
<http://www.sportspromedia.com/notes_and_insights/rise_of_the_pseudo-sponsors_a_history_of_ambush_marketing> (accessed March 9, 2016).
- Frizelle, Lauren. “*Afcon 2013: Ambush Marketing*”.
<<http://documents.lexology.com/1e19ffd6-cb71-4aa8-b383-5439b373982a.pdf>> (accessed May 13, 2016).
- Funderburk Funderburk Courtois, LLP. “*Texas Unfair Competition*”.
<<http://www.ffllp.com/texas-unfair-competition/>> (accessed November 20, 2015).
- Guru in the Bottle. “*Ambush Marketing Threat to Global Sponsors!*”.
<<http://www.guruinabottle.com/ambush-marketing-threat-to-global-sponsors>> (accessed March 11, 2016).
- Harle, Wilson. “*Ambush Marketing Law in the Year of Rugby*”.
<<http://www.wilsonharle.com/assets/Ambush-Marketing-Law-MEMA-June-final-.pdf>> (accessed April 13, 2016).
- Hendricks, Drew. “*How to Boost Your Small Business Through a Sponsorship*”.
<<http://www.inc.com/drew-hendricks/how-to-boost-your-small-business-through-a-sponsorship.html>> (accessed July 24, 2015).

Investopedia. “*Corporate Sponsorship*”.

<<http://www.investopedia.com/terms/c/corporate-sponsorship.asp>> (accessed July 24, 2015).

Jackson, James. “*How the Montreal Olympic Games Shaped the Future of Sponsorship*”. <<https://jamesjackson129.wordpress.com/2013/04/09/how-the-montreal-olympic-games-shaped-the-future-of-sponsorship/>> (accessed March 9, 2016).

Kapraun, Carrie Urban. “*Fun with Category Exclusivity*”.

<<http://www.sponsorship.com/About-IEG/Sponsorship-Blogs/Carrie-Urban-Kapraun/July-2009/Fun-with-Category-Exclusivity.aspx>> (accessed March 9, 2016).

Mcivor, Sam. “*Rugby World Cup 2011 and the Major Events Management*”.

<<http://www.wynnwilliams.co.nz/wynnwilliams/media/Articles/Rugby-World-Cup-2011-Major-Events-Management-Act-2007.pdf>> (accessed April 13, 2016).

New Zealand Major Events. “*Definition*”. <<http://www.majorevents.govt.nz/new-zealand-major-events/definition>> (accessed April 13, 2016).

New Zealand Major Events. “*Major Events Management Act 2007*”.

<<http://www.majorevents.govt.nz/major-events-management-act-2007>> (accessed April 13, 2016).

New Zealand Major Events. “*Protection From Ambush Marketing*”.

<<http://www.majorevents.govt.nz/major-events-management-act-2007/protection-from-ambush-marketing>> (accessed April 13, 2016).

Ozeke, Herguner Bilgen. “*Ambush marketing: A Marketing Practice That Catches Legislators Off Guard*”.

<<https://www.mondaq.com/turkey/x/210908/advertising+marketing+branding/Ambush+Marketing+A+Marketing+Practice+That+Catches+Legislators+Off+Guard>> (accessed October 23, 2015).

Phelops, Warren L. “*Unauthorised Association with the London Olympics*”.

<<http://www.klgates.com/unauthorised-association-with-the-london-olympics-08-01-2005/>> (accessed April 22, 2016).

- Purnell, Newley. “*World Cup Ambush Marketing: Thai Style*”.
 <<http://newley.com/2006/05/29/world-cup-ambush-marketing-thai-style/>>
 (accessed November 16, 2015).
- Siraprapha Rungpry. “*Dealing with Ambush Marketing*”.
 <<http://www.asiaiplaw.com/article/41/747/>> (accessed October 21, 2015).
- Smith, Mark. “*Rugby World Cup 2015: Ambush Marketing Risk*”.
 <<http://franchiseandcommerciallawblog.fieldfisher.com/2015/rugby-world-cup-2015-ambush-marketing-risks>> (accessed November 24, 2015).
- Somboon Earterasarn and Clemence Gautier. “*Protection of Major Sports Events and associated commercial activities through Trademarks and other IPR*”.
 <<https://www.aippi.org/download/committees/210/GR210thailand.pdf>>
 (accessed October 14, 2015).
- Spaulding, Michelle L. “*The doctrine of Misappropriation*”.
 <<http://cyber.law.harvard.edu/metaschool/fisher/linking/doctrine/>> (accessed November 20, 2015).
- Stanford Encyclopedia of Philosophy. “*Virtue Ethics*”.
 <<http://plato.stanford.edu/entries/ethics-virtue/>> (accessed October 16, 2015).
- Statista. “*Global sponsorship Spending from 2007-2016 (in billion US dollars)*”.
 <<http://www.statista.com/statistics/196864/global-sponsorship-spending-since-2007>> (accessed February 27, 2016).
- The Editors of Encyclopaedia Britannica. “*Deontological ethics*”.
 <<http://britannica.com/topic/deontological-ethics>> (accessed October 16, 2015).
- The Guardian. “*World Cup 2010: Women Arrested Over ‘Ambush Marketing’ Freed on Bail*”. <<http://www.theguardian.com/football/2010/jun/16/fifa-world-cup-ambush-marketing>> (accessed March 12, 2016).
- Wei, Lingling. “*Legal regulation of ambush marketing: Where is the base?*”.
 <<http://www.epip.eu/conferences/epip06/papers/Parallel%20Session%20Paper%20s/WEI%20Lingling.pdf>> (accessed October 20, 2015).
- Welsh, Jerry C. “*Ambush Marketing: What it is, What it isn’t*”.
 <http://welshmktg.com/WMA_ambushmktg.pdf> (accessed June 19, 2015).

Woodard, Emhardt, Moriarty, McNett and Henry LLP. “*Ambush Marketing and Clean Zone Ordinances for the Super Bowl*”.

<<http://www.uspatent.com/tag/clean-zone-ordinance/>> (accessed November 21, 2015).

Yazdanifard, Rashad and Ashreen Shahira Binti Mohd Aslam. “*Ambush Marketing: Are Sponsors Really Sponsoring?*”.

<http://www.researchgate.net/profile/Ashreen_Shahira/publication/265729251_Ambush_Marketing_Are_Sponsors_Really_Sponsoring/links/541a51f40cf2218008bfad7a.pdf> (accessed October 20, 2015).

5.2 Thai websites

สารานุกรมปรัชญาออนไลน์ฉบับสังเขป. “*จริยศาสตร์เชิงคุณธรรม*”.

<<http://www.philospedia.net/virtueethics.html>> (สืบค้นเมื่อวันที่ 16 ตุลาคม 2558).

(Philosopedia. “*Virtue Ethics*”.

<<http://www.philospedia.net/virtueethics.html>> (accessed October 16, 2015).)

สมชาติ ลีลาไกรสร. “*กรณีศึกษา: ต้น อิชิตัน – ศิลปะการขโมยจีน*”.

<<https://somchartlee.wordpress.com/2012/09/07/ichitan/>> (สืบค้นเมื่อวันที่ 16

พฤศจิกายน 2558). (Somchart Leelakraisorn. “*Case Study: Tan Ichitan – Ambush Marketing*”. <<https://somchartlee.wordpress.com/2012/09/07/ichitan/>> (accessed November 16, 2015).)

ผู้จัดการออนไลน์. “*เทสโตตอกย้ำเจ้าตำรับไส้กรอกเยอรมัน ปล่อยโปรโมชันเค้กรับฟุตบอลโลก2006*”.

<<http://www.manager.co.th/iBizChannel/ViewNews.aspx?NewsID=9490000062808>> (สืบค้นเมื่อวันที่ 11 พฤศจิกายน 2558). (Manager Online. “*Tasto emphasizes its initiator of German sausage by offering promotional campaign to entertain FIFA World Cup 2006*”.

<<http://www.manager.co.th/iBizChannel/ViewNews.aspx?NewsID=9490000062808>> (accessed November 11, 2015).)

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