



The FIFA World Cup 2014 - Ambush Marketing and the Law

Inside



- What is ambush marketing?
- Legal controls
- Top tips

Introduction

The 2010 FIFA World Cup marked possibly the first time ambush marketing really made headlines in the UK. Bavaria beer's stunt at The Netherlands' first match of the tournament involved beautiful Dutch models dressed in orange seeking entry into a match disguised as Danish fans, only to reveal their promotional intent once the match began. This episode led to the South African authorities making arrests, as well as the sacking of the TV pundit Robbie Earle, who had apparently supplied the tickets to the girls: a media storm ensued.

There were further examples of high-profile campaigns in the UK in 2010 which raised eyebrows – from Walkers' World Cup of Flavours and Pepsi's 'Oh Africa' to KitKat's 'Cross your fingers' campaign.

It is yet to be seen what companies will come up with ahead of the start of Brazil 2014, but if you want to stay out of the headlines and on the right side of the law, this note is here to help.

What is ambush marketing?

Ambush marketing is very difficult to define, with everyone having their own views as to whether an activity is below the belt or commercially acceptable in a competitive market. It is helpful to distinguish between three types of ambush. How these can be addressed legally will depend on a number of factors which we explore below.

Ambush by association

This occurs when the non-sponsor ambusher seeks to associate itself with the event (or a participating team or player) without authorisation and consequently misleads the public into thinking the ambusher is somehow connected with the event/team/player. The most blatant examples will involve direct references being made to the event/team/player, and may involve the use of protected trade marks. Big companies tend to be alert to such restrictions and will seek to avoid infringements by making less direct references. In the case of the 2014 FIFA World Cup, this might be through references to Brazil, football imagery and other images evocative of the global celebration of football.

The Walkers, Pepsi and KitKat adverts mentioned are all good examples of indirect associations that were created with the 2010 FIFA World Cup, none of which resulted in any legal proceedings.

Ambush by intrusion

The incident involving the Bavaria girls appearing at the 2010 FIFA World Cup was the sequel to a classic example of ambush by intrusion by Bavaria at the 2006 FIFA World Cup. On that occasion they gave away bright orange lederhosen, heavily branded with the Bavaria logo, to The Netherlands' fans attending matches. The 2010 Bavaria campaign was more subtle – the ladies' orange mini-dresses bore only the smallest of Bavaria logos but, combined with an ad campaign in The Netherlands which featured the same dress, they achieved a similar exposure (which was of course then maximised due to the publicity achieved as a result of the arrests).

Normally an 'intruding' ambusher will seek to gain prominent brand exposure at the event, targeting the audience in the stadia and in broadcast media. This may occur within the event's area of control, as with the Bavaria example, or just outside. For

example, Paddy Power constructed a 270ft-long sign at the 2010 Ryder Cup in Wales in a farmer's field that could clearly be seen from the first tee. Earlier in the year Paddy Power had also erected this sign outside, but visible from within, the racecourse for the Cheltenham Festival.

Opportunistic ambush/advertising

Whether or not 'opportunistic' advertising, which reacts and refers to topical events, can genuinely be referred to as ambush marketing is up for debate. This advertising is often done in a humorous or tongue-in-cheek manner. Although undoubtedly taking advantage of the public interest in the event, it is less likely to be misleading about the brand's connection to the event. Oreo took this type of advertising to lightning-quick levels at the 2013 Super Bowl, where a power cut at the stadium prompted its marketing team to produce an advert featuring the image of an Oreo in dim lighting, accompanied by the line 'You can still dunk in the dark'. The advert went viral on Twitter before the lights had even come back on.

Zippo lighters were 'gifted' a similar opportunity when the flame expired during the Sochi 2014 Winter Olympic torch relay and was caught on camera being relit by one of their lighters. They used social media to capitalise on this.

Another tactic can be to poke fun at how vigorously an event protects its IP. This was seen at the London 2012 Olympics with Oddbins, the liquor store, running adverts bemoaning the fact that "We can't mention the event, We can't mention the city, We can't even mention the year. At least they can't stop us telling you about this:..." followed by details of one of their products. They also introduced a 30% discount for customers who wore or displayed a variety of non-London 2012 sponsor products when shopping in their off-licences.

Legal Controls

Advertising agencies are often at their most inspired when coming up with ambush marketing campaigns. As it is not always straightforward in this area, rights holders' lawyers also need to get fairly creative with the law. Below we consider each of the types of ambush mentioned above and look at the legal tools that are available to prevent them.

Ambush by association

Various legal measures are typically deployed to deal with this type of ambush. The most blatant examples of ambush by association may involve breaches of trade mark or copyright laws (which will generally apply in one form or another worldwide).

What's protected?

FIFA's website asserts that all of the following are protected in relation to this summer's World Cup:

- > **the Official Emblem** (both the graphic of hands forming the shape of the World Cup and the words 'FIFA World Cup Brasil') **and the similar-looking Fan Fest Logo**
- > **the Official Mascot** of an armadillo holding a football
- > **the Official Slogan** ('All in one rhythm')
- > **the Official Look** (i.e. design) Element
- > **the image of the FIFA World Cup Trophy**
- > **the Official Poster**, which features an artistic representation of a football between two players
- > a variety of **terms including** the words "FIFA", "World Cup", "Mundial 2014" and "Copa 2014"

Some of the above terms (e.g. the Official Emblem, "FIFA" and "World Cup 2014") will be widely registered as trade marks worldwide, but FIFA's registered right in terms such as "World Cup" (by itself) will be much more narrow. For example, in the UK, "World Cup" is registered by FIFA for a narrow set of goods, including football boots and shirts. Nevertheless, the cautious approach would be to avoid use of the term "World Cup" in advertising this summer, as trade marks are not the only legal tool available for FIFA to deploy.

If an ambusher avoids using the event's intellectual property, but nevertheless creates the impression that it is a sponsor of or is endorsed by or affiliated to the event, laws dealing with misleading advertising and unfair competition may be relevant. In the UK, the tort of passing off is likely to be asserted.

Given the creativeness of ambush marketing, many countries hosting major events create special anti-

association laws. Such laws are often demanded of bidding countries by the international rights holder (in the case of the World Cup, FIFA). The new laws normally go further than other pre-existing rights, preventing all advertising which creates an 'association' between the advertiser and the event. This type of legislation tends only to apply locally and will be time-limited. For example, for London 2012, the 'London Olympic Association Right' applied in the UK only and expired at the end of 2012. A similar right is currently applicable in the UK in relation to the Glasgow 2014 Commonwealth Games.

In the UK, there is no anti-association right in respect of the 2014 FIFA World Cup. In Brazil, however, special legislation does apply. Under the 'World Cup Law', it is a civil and criminal offence to associate, directly or indirectly, any non-FIFA-authorized trade marks, products and services with FIFA or the World Cup for the purpose of obtaining economic gain or a marketing advantage. The penalty for non-compliance with this law is a fine or a prison term lasting between three months and a year.

Finally, event organisers will use contractual terms to seek to prevent participants in the event (athletes, teams, officials etc) from allowing their name or image etc to be used within advertising during the event and/or for the purposes of ambush marketing. The ticket terms and conditions will also normally prevent the use of tickets for any commercial/marketing purposes without the permission of the event organiser.

To avoid action under any of the laws mentioned above, the key is to ensure that the advertising does not mislead people into thinking there is a connection between the brand advertised and the event/team etc when there is not. Every rights holder is likely to take a slightly different approach, and the laws in the relevant country will obviously have a significant impact. However, in relation to special anti-association rights, these often haven't been considered by the courts. For example, the London Organising Committee of the Olympic and Paralympic Games took no action under the London Olympic Association Right which reached a court, so it is unclear how widely they may be interpreted.

Rule of thumb

A useful rule of thumb is that if you look at the advert and would almost expect to see an official sponsor logo at the end/in the corner of the advert because of the connection made to the event/team, it is likely to have crossed the line.

On the other hand, if there is only a minor allusion or nod to the event, the risk will be much lower. In the context of Brazil 2014, this might be the use of a football theme, something that references Brazil or a nationalistic theme. Use of one of these elements alone is unlikely to be problematic, as FIFA cannot claim a monopoly over any such element. However, if any of these elements are combined, for example, a Brazilian theme which also features a well-known ex-footballer, a complaint is much more likely.

Context is also likely to be key: the timing and placement can add to the suggestion of an association, and even the product and style of advertising will make a difference. If the product has no natural connection to football, and a football theme is introduced in a very gratuitous way, the assumption may be that the brand is associated with the World Cup. As such, a case-by-case review will be needed.

Ambush by intrusion

This will normally be controlled by all event organisers by a provision in the ticket terms and conditions which prevents the display of any commercial messages without authorisation in the stadia. Contractual controls will also be deployed to ensure competing athletes and teams, officials and even volunteers do not use their moment in front of the cameras to promote an unauthorised brand.

Major events will often back up these contractual controls with special laws preventing unauthorised advertising (and often also street trading) in and around stadia. Under the World Cup Law in Brazil, any advertising or trading situated within a two-kilometre radius of a stadium on a match day must have the prior approval of FIFA or its nominees. This rules out stunts like those of Paddy Power at the 2010 Ryder Cup. It was a similar provision under which the Bavaria girls were arrested in 2010.

Opportunistic ambush/advertising

How this is addressed will depend on the execution. Opportunistic ambushes

have historically been more difficult for rights holders to tackle. Implied references to the team/event in advertising are often negative in nature, making it hard to argue consumers will be misled or confused, and it's likely to be more difficult to assert special 'association rights' if the only association is a negative one. Brands deploying this type of tactic may nevertheless receive complaints from the rights holder, even if legal action is not available or pursued.

In relation to all forms of ambush, rights holders may deploy non-legal tactics to fight back. Generating negative news stories about the advertising may work if the brand is sensitive to this, but many brands which employ ambushing as a tactic will actually enjoy the additional publicity. Alternatively, rights holders might assert pressure on a 'moral' basis contacting senior executives to try to address the issue directly, and if the brand is accredited for any reason, the threat of withdrawing accreditation may well be the most effective tool available.

Top tips

As mentioned above, adverts will need to be considered in the round to decide whether they infringe: consider content, timing, placement plans, the nature of the product and of course the laws which apply in the relevant territory. Use of a football or a Brazilian/English/nationalistic theme on its own is likely to be low risk, but the more elements that are combined, the more likely action will be taken. The scale of the campaign and size of the brand/business behind the campaign is also likely to be a factor in determining how high up FIFA's to do list the advert will be.

Unless you're working on an official 2014 FIFA World Cup Brazil sponsor campaign:

- > Don't use any official Brazil 2014 or national team logos, protected terms, designs,

- > images or footage in your advertising (see list above)
- > Avoid advertising which otherwise seeks to associate with or ambush the World Cup – see highlighted "rule of thumb" section above
- > Be cautious when using player or team imagery – in addition to permission from the copyright owner, ensure you have permission from the player/team and, if the player/team is competing in the World Cup, be aware that they are likely to be prohibited from contributing to an ambush campaign
- > Don't use World Cup tickets in promotional activities
- > Remember that social media is also a form of advertising - brief your digital teams/agencies
- > If you're planning on advertising in Brazil during the World Cup (whether or not in connection with the World Cup), ensure you don't infringe the "World Cup Law" either by associating directly or indirectly with the event or by advertising within 2km of stadia without authorisation

If you're working on a campaign for an official World Cup or national team sponsor:

- > Check the extent of the rights and make sure you're operating within them. In particular, sponsors of the national teams are likely only to have rights to the team and not the event more generally, so they won't have rights to use the World Cup logos (as opposed to the relevant team logos)
- > Ensure you've gone through the appropriate approval process with the relevant rights holder (either FIFA or the relevant national team), and remember that approvals are likely to be required for all social media activations too
- > If you're using players or other

celebrities, make sure you have their permission

- > If undertaking any advertising in Brazil during the World Cup ensure you've got the necessary authorisations required if you're advertising within 2km of stadia

If one of your competitors is ambushing the World Cup and you think this should be addressed:

- > Draw it to the attention of FIFA or the relevant national association
- > However, given that ambush campaigns are normally short-lived, the time it will take to make a complaint means that it is unlikely to be processed before the campaign has run its course. Negative PR for the competitor may well still be seen as a positive result though.

For further information on this subject, please contact:

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