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## **AMBUSH MARKETING: WILL STRATEGIC GAINS OUTWEIGH ETHICAL CONCERNS?**

AUTHORED BY - POOJA

In the marketing world, it's all about attracting consumers towards their products or services. For promoting their product or service, they use different marketing tools. Each entity competes with other entities in the battle of trading. They have to portray that their products or services are better than the other traders in the market. It is all about grabbing the best strategy in gaining consumers' attention. In order to familiarize the product and to internalize it in the memory of the consumers, many firms use advertisements and other type of campaigns. There is great paradigm shift in the consumers' behavior towards the marketing techniques which has benefitted the traders. However, the question that arises here is "whether the techniques used by the firms are legal in nature? If any information conveyed is false and misleading the consumers, then they will be punished as per consumer protection laws. If any firm does anything unlawful against competition the market, then they will be punished according to competition act. Such legal statutes help in smooth functioning of market and protects the consumers at all cost.

On the other hand, few marketing techniques may not be declared as illegal, but there may be ethical violations. One of the such most popular opportunistic marketing techniques is ambush marketing, which has been declared illegal in few countries. However, in India there is no explicit provision prohibiting the same. Countries like Australia, Canada, New Zealand, South Africa United States have made ambush marketing as illegal. The term ambush marketing means a competitor associates his product with an event to which he is not related to. Most of the common ambushing techniques is used in the field of sports. This paper analyzes the nuances of various ambushing techniques used by the rivalries in the field of sporting events. The main objectives of the trademark law are to protect the goodwill of the business and protecting the consumers from confusion. However, the Indian Trademark Law does not recognize the concept of ambush marketing.

### **Commercial value in sporting events**

The sporting events have become a profitable field for flourishing brand image of many products and services. The commercial value involved in advertising the products associating with a sports event is huge. The original sponsors have pooled in their money for enhancing the image of their brand, however the rivals use the ambushing technique for portraying themselves as sponsor to the event. There is huge amount of monetary loss on the part of the original sponsor. The sponsor of the event plays a major role in organizing the event; however, they are not given the results they expected because of the ambush marketing technique of the unofficial sponsor. The brand awareness is the main goal of advertising and sponsoring, in the case of ambush marketing, the brand of unofficial sponsor is popularized and the official sponsor does not recognition which he is legally entitled. The unofficial sponsor takes advantage of the reputation of the sports event without paying for the expenses of the event. To understand the concept of ambush marketing even better, let's take an example, for FIFA 2006, the Puma company distributed jerseys with the brand name of Puma to all the players. However, the long-time sponsor for FIFA was Adidas. The consumers might get wrong conception of the real sponsor. They might presume that Puma is the original sponsor for FIFA and their brand becomes more popular during the time of the event.

### **Different techniques of ambush marketing**

The ambusher does not use the trademark of the official sponsor, but they use different techniques which affect such sponsor's goodwill that he has earned for these many years. In few cases, the directly tarnish the image of their competitor. For example, the American Express company published an advertisement stating that to attend the event of Norway Olympics, people may need passport and not visa. However, the official sponsor of Norway Olympics was Visa. The advertisement directly insisted people in not using Visa card. At that time, many warnings were given to American Express for removing such advertisements. However, it was too late as the advertisement gained a lot of popularity among the public. In these cases, it's clearly shown how the ambush marketing technique uses the sports event for spreading their brand name and at the same time it tarnishes the image of the original sponsor. Some of the popular techniques that has been prevailing are:

- In order to advertise their products, the ambushers display banners or hoardings outside the stadium or near the vicinity of the event's venue. This creates an impression on the audience or the passer-by that the ambusher is associated with the event.

- Many goodies like cap, t-shirt, bottles, flags are distributed among the public in the event by the ambusher containing their brand name.
- Ticket of the event is given in gift vouchers with the product. This attracts the consumers towards the products; however, the sellers of the tickets are not the official sponsor which the consumer is unaware.
- Meta-tagging the website of the sports event in the online website of the ambushers.
- The ambushers advertise their product with good luck messages and congratulatory messages to the players of the sports event, this associates them with the event unofficially.
- Usage of unlicensed footages of the matches or any sporting event.
- The ambushers may use sports personalities at the time of the event, particularly players from such event are called for promoting the products of the unofficial sponsor. The players may have long-term commitment with the brand of the product, so they may not refuse that for the event. This is also one of the popular ambushing techniques used by the ambushers.

### **Element of intent in ambushing the rights of the sponsor**

The factor of intention in ambush marketing is to raise the reputation of the product and to increase the profits. In few cases, the intent is to tarnish the image of the rivals. How can that intent be traced out of an ambushing technique? the 3-part test is usually followed in find the intent of the advertiser. Firstly, the timing of the advertisement, if the advertisement is published by the ambusher proximate to the date of event. The timing of promotion of product is crucial for the traders. If the product is advertised closely to the date of the event. Then the intention is blatantly clear they want to enhance their brand image by linking themselves with the event. Secondly, the context of the advertisement or the promotions. If the context of the advertisement has anything related to the event that is happening or going to take place in future. The intention of the ambusher is to create impression on the public that the brand is one of the sponsors to the event. Thirdly, the intensity of the advertisement to attain their ambushing strategy can be used as another test. The TRP rate will prove the intention of such advertisers in ambushing the event.

### **Section 29 of the Trademarks Act, 1999:**

The trademark law protects the goodwill and brand name of the registered and unregistered



proprietor. Section 29 of the trademark law talks about the infringement of trademark. It protects the authorized user of trademark by preventing unauthorized use of trademark which belongs to the owner. In the case of ambush marketing, there is two types, direct and indirect ambushing. In direct ambushing, the trademark of the rightful owner is misused, therefore the provisions of trademarks Act will be attracted. However, in the cases of indirect ambushing, the trademark is not used but the violation occurs. When a mark is promoted or advertised by infringing another trademark then it will result in unfair advantage and damages the reputation of the proprietor. Therefore, when a non-official sponsor of an event uses the trademark of official sponsor then a trademark infringement action can be taken against the person. In addition to that, if any sports event or the organizer registers a trademark related to the such event, and the unofficial sponsor infringes the mark related to that event, then also infringement of trademark action can be taken under the Section 29 of the Act. The person alleging for infringement can claim either injunction against the use of the mark or for the damages that has occurred due to the unauthorized use.

If the unauthorized user uses any mark or logo of the event without the permission of the organizers, it will amount to infringement and the event organizers can also claim damages or injunction from the infringer. The facts of the case of Arsenal Football Club v. Mathew Reed, is that Reed unauthorized used the mark “ARSENAL” which has been registered mark of the football club. Reed was using the mark for merchandising souvenirs with the logo of Arsenal in it. The passing off action brought against Reed for infringement of trademark. The European court justice observed whether such use of mark has affected the essential function of the mark. The Court found that the use of mark by Reed had adverse effects on the proprietor of the mark, therefore Reed was held to be liable.<sup>1</sup>

The landmark case of indirect ambushing can be observed in the case of ICC Development (International) Ltd. Arvee Enterprises,<sup>2</sup> the facts of the case are that the plaintiff is ICC Development International Ltd. who had rights over the ICC events that are conducted. All the commercial rights regarding the intellectual property rights, media rights and sponsorship license was reserved to them. They were the official organizer of the ICC World Cup at South Africa, 2003. The company registered the logo and a mascot in relation to that. The official sponsorship was given by the company to few firms like Hero Honda, Toyota, Pepsi, Standard

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<sup>1</sup> Arsenal Football Club v. Mathew Reed, [2003] EWCA Civ 696.

<sup>2</sup> ICC Development (International) Ltd. Arvee Enterprises, (2003) 26 PTC 245 (Del).

Bank etc. However, the defendant in the present case was Philips India Ltd, had misrepresented through promotions that they were one of the sponsors. They gave advertisements in media portraying that they had association with the plaintiff and the event.

### **IPL guidelines for protecting intellectual property rights**

Moreover, in India, it can be observed that the major sports event like Indian Premier League issues guidelines to the broadcasting channels about the telecasting of the event. This helps in two ways; the broadcaster will know his limits in telecasting the event and the consumer also is educated about the rights and limits assigned by the event organizers. One of the examples is the guidelines issues by the Indian Premier League “The Brand and Content Protection Guidelines”.<sup>3</sup> In the guidelines of 2021, it is provided that the IPL has the duty to prevent unauthorized activities of third parties. The unlicensed parties should not permit to use any of the rights that pertain to licensee rights or franchisee rights. The mandate is placed in order to protect the intellectual property rights of the IPL. The guidelines include the list of names of the franchises, logos belonging to those franchises, the official website of the IPL-T20. The partial usage/substantial usage or usage in any form or variation is completely prohibited according to the guidelines. The images or audio-visual or any part of footage concerning the tournament if used by unauthorized licensee is considered as infringement of proprietary rights of the IPL authorized stakeholders.

Many aspects of intellectual property rights like design, trademark, copyright, broadcast laws and specific provisions related to signal; theft is also provided in the guidelines. Any sign/logo or mark related to IPL should not be used, even deceptively similarity as per the trademark law is prohibited. It is considered as unlawful to use names or marks relating to IPL, that may cause confusion to the public. Therefore, no person can make representation to the public that may portray any form of association to the sports event. The IPL guidelines clearly provide measures to circumvent the ambush marketing practices. However, no where the term is explicitly used. The sub-licensing is not allowed without prior permission from IPL. The guidelines explicitly states that the IPL does not restrict people from interacting about IPL or broadcasting in non-commercial news reporting, it only mandates that the IPL legal rights must be adhered and respected in such use. Therefore, the point to be noted is that the use of IPL name or logo is allowed without authorization from IPL only if they are used for non-

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<sup>3</sup> <https://bccplayerimages.s3.ap-south-1.amazonaws.com/bcci/documents/IPL-2021-Brand-Content-Protection-Guidelines.pdf>.

commercial purpose.

In addition to this, the guidelines also provide for consequences of infringement or violation of any provision provided in the guidelines. The IPL provides for legal action in any case of infringement. It includes action for injunction under trademark law, or resorting to civil or criminal remedies. The legal notice will be given to the infringer in occurrence of any violation. The guidelines also prohibit marketing communication involving the name or logo of IPL by the franchise sponsor or nay other partner involved. The guidelines list some of the unlicensed behavior that are explicitly prohibited. Some of the major ambush marketing techniques are summarized as follows:

1. **Physical advertising:** Any display of posters, banners or any type of hoardings which is placed near or outside the stadium where the event take place. The displaying maybe placed in non-fixed place like air, for example, few ambushers display their advertisement in the balloon which is flown near the stadium. This type of ambushing is usually practiced within the perimeter of the stadium. Sometimes the ambushers distribute accessories like cap, bottle, flags or any type of hand-outs for promoting their product. The physical advertisement can be done through the tie-up agreements with the hotels that are giving accommodation to the players and the organizers. The physical advertisement which are not practiced within the perimeters are giving away hospitality and travel expenses to consumers for attending the event, even though the ambushers are no way supporting the sports event.
2. **Online activities:** Some of the e-commerce platforms promote their products by portraying the association with the event. They use meta-tags or domain names of the sports event website. Sometimes, the platforms merely use the keywords in relation to the sports event. The consumer using these platforms may assume that the ecommerce trader is associated with sports event. Some of the offences include cyber-squatting that has been committed by the ambushers.
3. **Mobile content:** Live streaming of match and score updates of the match. The unauthorized person holds mobile games or contests which indirectly connects to the event. For example, Dream11 is one of the mobile applications which closely resembles the IPL. The consumers who are fan of the match or the players get attracted to these kinds of applications. In few marketing promotions they send bulk messages to consumers which contains information regarding the tournaments.

4. Ad-hoc ambush marketing: The products are sold along with gift cards or vouchers. The gifts or vouchers will be the tickets for the match or the hospitality charges for attending the event. The tickets are usually brought in bulk from the black market and sold to consumers with their products. The firms may advertise before the match conveying “Good luck” wishes, this creates in the minds of people that they are associated with the team or the event. Moreover, they may send congratulating messages through social media or through advertisement if any team wins the match.
5. Usage of footage of match: The broadcasting right or rights over the images or videos of the match are given by explicit license by the event organizer. However, for TRP purpose or for promoting the product the unlicensed parties will telecast some footages of the matches. Few newspapers for commercial purpose may release photos or stills from the match. If it is for non-commercial purpose and in public interest, then conveying such news to the public is not restricted. Few channels may interview players before or after match without the license from the organizer of the event. In those interviews, they may telecast few videos or images from match without prior consent. Pirated videos of match is made available in many websites during the match. Such telecasting is made concurrent with the live streaming or in a deferred time. In addition to this, they sell these unauthorized footages to third parties for monetary benefits.
6. Counterfeit goods: The ambushers use the logo or mark in their products and sell in the market. The fan base of the event is easily attracted to such fancy products. Many products in the market can be found with the name or picture of the player or the event. These are counterfeit goods which are sold without license. The merchandise sold by these producers is widely sold in the market by infringing either the right of the event organizer or the rights of the players. These products are found in online as well as offline market.

## Conclusion

Ambush marketing began as an innovative form of advertising. It began to cause legal problems as soon as it began to infringe on the holders of sponsorship rights. It has developed into a parasite that jeopardises the basis of resources and sponsorship opportunities. The field of ambush marketing has expanded due to the new types of ambush events. To make their brand more well-known, they sponsor events. Financial assistance is given to sporting events in order to improve brand perception. The brand is introduced to the public who are interested in sports promotions and events. The event is marketed, and the sponsor's product is promoted as well.

They will not receive any compensation if the unofficial sponsor ambushes the sponsor's promotions.

The ambusher's actions undermine the brand's primary goal of increasing its appeal. Since visitors only learn about the event via those adverts, event marketing is essential for the organisers. The infringer argues for commercial free speech even when a lawsuit is brought before the court. In numerous instances, both the US and India have acknowledged commercial free speech. Judges have frequently taken into account the distinction between commercial and non-commercial discourse. It is essential that advertisers adhere to the rules of the code of advertising standards. It shields the public from inaccurate and deceptive information; in a sense, it also stops ambush tactics. Along with this, the ambushers harm the athletes' personality rights. Advertisers do not have the players' express authorisation to use their names or images. Without their permission, they depict a relationship between the gamer and their product. Since ambush marketing violates a lot of people's rights, it is past time for India to impose legal restrictions to stop these kinds of activities.

