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AMBUSH MARKETING & TRADEMARK

INFRINGEMENT - THE NEED FOR LEGISLATION IN

INDIAN LEGAL SCENARIO

Authored By-Vikash Kumar LL.M. WBNUJS

“When you look at sports leagues today, they manage a lot of intellectual property, which means it takes you into a lot of different kinds of businesses.”¹

Introduction

The act of ambush marketing is not new at the global level. During the 1980s, the word was coined by Jerry Welsh, the marketing guru, and manager of the company American Express during the 1980s.² The Cambridge Dictionary defines the term ambush as “the act of suddenly attacking someone from a hidden place.”³ Now let’s try to understand what comes under the ambit of ambush marketing. Imagine a cricketing league named American Premier League. ABC Company is the event's main sponsor and invested millions of money in buying the sponsorship tag. But, the company XYZ clothing strategically sends their people to the ground in their own merchandise signifying the brand name. XYZ reserves their seats below the scoreboard, below the main screen, and behind the umpire, because the camera will focus on their brand name as much as possible. In this example, only investing in thousands attracted lots of attention, and many viewers may presume that XYZ is the main sponsor, which promotes their goodwill. The situation is harsh for ABC because they paid the hefty sum for the sponsorship but didn’t receive a satisfactory result. This act of unethical marketing adopted by XYZ comes under the ambit of ambush marketing. Ambush marketing is a type of marketing in which the other company hijacks the advertisement campaign of the official sponsor to mislead & confuse the viewers about who the official sponsor is. These unethical practices are common in major world events like Olympic Games, International Cricket Council Cricket World Cup, Indian Premier League, FIFA, etc.

¹ Statement by Brian France.

² Aruna P, “A study on ambush marketing strategy in the context of ethical and unethical aspects”, *ResearchGate, Jan. 2012, available at* <https://www.researchgate.net/publication/334442791a_study_on_ambush_marketing_strategy_in_the_context_of_ethical_and_unethical_aspects> (last visited on Apr. 15, 2022).

³ Ambush, Cambridge Dictionary, <<https://dictionary.cambridge.org/dictionary/english/ambush>>.

Market & legal experts highlight several reasons behind this parasitic marketing approach, like the short period of an event & its impossibility to prohibit these kinds of marketing strategies, negligible registration of cases, using disclaimer to avoid legal suits & lack of judicial precedents.

The above discussion raises the question that ambush marketing violates which types of intellectual property. Directly & indirectly, the unethical practice of ambush marketing violates different types of intellectual properties like trademarks, copyrights, etc. But, this research project will include the effect of ambush marketing on trademark law only. The critical issue here is whether there are regulations to regulate ambush marketing in Indian intellectual property laws specifically in the trademark laws or whether there is a need for the legislation to tackle ambush marketing in India.

While answering these questions, this project will emphasize first the evolution of these unethical practices of ambush marketing, what are the types of ambush marketing are prevalent worldwide, how the Indian Judiciary responded to this issue, what are the prevailing laws & the need for the legislation to combat the practices of ambush marketing.

History Of Ambush Marketing

As discussed above, it was coined during the 1980s. During the 1984 Summer Olympics which were held in Los Angeles.⁴ The Japanese company Fuji was the official film sponsor of the event. During the event, the rival company Kodak, an American company, bought a large amount of advertisement space on television. Further, Kodak's presence on the Olympic track was everywhere during the event. Because of this, they created the impression that they were the official film sponsor of the event and not the Fuji.⁵ This event was considered the first alarm for the significant organization that conducts events on a global stage.

Even in the 1994 winter Olympic Games, the same kind of approach was adopted by American Express. In that event, Visa paid \$40 Million to International Olympic Committee for the sponsorship and provided them the exclusive rights to regulate credit card services during the event.

⁴ *Ibid.*

⁵ Steve Mckelvey, "Memos reveal advent of ambush marketing around '84 games", *SBJ Sports Business Journal*, Feb. 17, 2014, available at <<https://www.sportsbusinessjournal.com/Journal/Issues/2014/02/17/Opinion/From-the-Field-of-Marketing.aspx>> (last visited on Apr. 15, 2022).

During that event, American Express, in its advertisement, used the voice note that “if you are traveling to Norway, all you need is a passport but don’t need a visa.” Even the International Olympic Committee accused American Express as a parasite for the Winter Olympic Games of misleading advertisements.⁶ In the justification, American Express highlighted that they have been running their business throughout the country of Norway since 1916.⁷ They are not under obligation to take permission from the International Olympic Committee & or the Visa. In this, the International Olympic Committee, Visa & many market experts accused American Express of ambush marketing. The judicial discourse of ambush marketing was triggered by *National Hockey League (NHL) et al. v. Pepsi-Cola Ltd.*⁸. It widely supported the ambushers subject to it doesn’t violate trademark in the name of the campaign.

Even in the Indian Context, the same dispute arose in the 1997 Asia Cup, a cricket tournament. In this event, Pepsi was the official sponsor, but Coca-Cola owned the rights for the television sponsorships for the same event.⁹ Coca-Cola used its rights of television sponsorship to confuse people

Types Of Ambush Marketing

To understand the unethical practices of ambush marketing, it is essential to understand the types of ambush marketing prevalent worldwide. Mainly, three types of ambush marketing are further divided into other parts. The types & the subtypes of ambush marketing are discussed below.

Direct Ambush Marketing

Under this, a brand without any sponsorship or right but by aggressive campaign associates themselves with the main event. Under this brand intentionally tries to seek the viewers' attention despite the fact they are not the official sponsor & don’t have any rights in the event.¹⁰

The incident of the 1994 FIFA World Cup event is a prime example of this. In this, the MasterCard was the official sponsor of the event, but the Sprint Communication used the logo of

⁶ L.A. Times Archives, “Credit Card War Erupts at Olympics: Advertising: IOC accuses American Express Co. of ‘ambush marketing’ in campaign aimed at rival Visa”, *Los Angeles Times*, Feb. 19, 1994, available at <<https://www.latimes.com/archives/la-xpm-1994-02-19-fi-24757-story.html>> (last visited on Apr. 18, 2022).

⁷ *Ibid.*

⁸ (1995) 56 B.C.A.C. 1 (CA).

⁹ “The Coke Pepsi Rivalry”, *ICMR India*, 2001, available at <<https://www.icmrindia.org/free%20resources/casestudies/Marketing%20freecasep4.htm>> (last visited on Apr. 26, 2022).

¹⁰ Himanshu Sinha, “Ambush marketing and trademark law in India”, *The IP Press*, Jun. 27, 2021, available at <<https://www.theipress.com/2021/06/27/ambush-marketing-and-trademark-law-in-india/#:~:text=Ambush%20marketing%20is%20a%20form,the%20promoters%20of%20the%20event>> (last visited on Apr. 26, 2022).

FIFA in their advertisement. Sprint Communication used the logo without the organizer's permission, i.e., FIFA.¹¹

These are further divided into subtypes as discussed below;

- Predatory Ambushing

Under this, the other company purposely/intentionally targets & attacks the campaign of the official sponsor to confuse & mislead the public intentionally. In the Indian context, the 1997 Asia Cup, where Pepsi was the official sponsor, and Coca-Cola used the television sponsorship right to create confusion.¹² In the International context 1994 winter Olympic Games as discussed above comes under this.

- Coattail Ambushing

Coattails are a cloth attached to a jacket that hangs from the back. Under this kind of marketing, the brand attempted to connect with the event, and this attempt was not through sponsorship but from other methods. The prime example of this is the 2016 Rio Olympic incident. Adidas was the official sponsor of the event. But Usain Bolt, after winning the gold medal, lifted his shining golden Puma Shoes like an award. Puma has also done an extensive campaign on social networking sites with the hashtag #ForeverFaster.¹³

- Property or Trademark Infringement

Small brands often adopt these marketing strategies. In this, they use the trademarks, logos, symbols, etc., of the event to promote their product and confuse the viewers as well as the customers. In global events like the Olympics, the organizing committee appoints officers to protect the brand of official sponsors.¹⁴

- Self-Ambushing

The concept of self-ambushing is interesting because many consider this as not a sub-types of ambushing but merely an infringement of the contract between the sponsor & the organizers. As in this, the official sponsor goes behind the terms of the sponsorship contract. The same incident happened in the 2008 UEFA European Championship.

¹¹ Shlok Bansal, "Ambush marketing and trademark law in India", *Ipleaders*, Sept. 07, 2021, available at <<https://blog.ipleaders.in/ambush-marketing-trademark-law-india/>> (last visited on Apr. 27, 2022).

¹² *Supra* note 9.

¹³ Joscha Thieringer, "Usain Bolt and Puma outsmart the IOC with a pair of Golden Shoes", *ISPO*, and Aug. 08, 2016, available at <https://www.ispo.com/en/companies/id_78704878/usain-bolt-and-puma-outsmart-the-ioc-ambush-marketing.html> (last visited on Apr. 28, 2022).

¹⁴ *Supra* note 11.

Carlsberg was the event's official sponsor, but some other companies had the right to distribute free merchandise during the event.¹⁵ But, the Carlsberg gifted freebies during the event and violated the sponsorship contract.

Indirect Ambush Marketing

In this, the companies indirectly associate with the advertisement's opponent brand campaign. Under this, the company uses the opponent company's photos, symbols & words. In these marketing strategy, the approach is not intentional or aggressive but only to find some attention from the event & to associate the marketing strategy of the opponent brand.¹⁶ They are further divided into sub-types as discussed below;

- Associative Ambushing

Under this, the company uses slogans, phrases, and images for its advertisement campaign. Subject to these rights are not protected by intellectual property. The main objective is to create confusion that the brand has some connection with the event.

- Distractive Ambushing

This approach is used to distract the consumer. For example, MasterCard is the official sponsor of a friendly match of Arsenal v. Manchester United. Still, Visa has fixed a stall just before the entrance gate of the stadium without making any target to the sponsor.

- Parallel Property Ambushing

In this, the opponent brand sponsors a similar kind of event to divert the viewer's attention. Many marketing experts didn't consider this unethical and considered this a strategy to improve their brand's goodwill.¹⁷

- Insurgent Ambushing

This includes aggressive promotional activity like a skit or flash mob during an event. In this approach, the main objective is to distract the audience from the official sponsor.¹⁸

¹⁵ Ryan James, "Sports and Ambush marketing", *Khurana and Khurana*, Sept. 20, 2021, available at <<https://www.khuranaandkhurana.com/2021/09/20/sports-and-ambush-marketing/>> (last visited on Apr. 30, 2022).

¹⁶ *Supra* note 11.

¹⁷ *Ibid.*

¹⁸ *Supra* note 9.

Incidental Ambush Marketing

Even in this, the company approach is unintentional, but the campaign incidentally ambushes the official sponsor's advertisement campaign. In this, the brand exhaustively campaigns equivalent to an official sponsor.¹⁹ Under this, people are confused and start believing them as the official sponsor. Last year in 2021, the Indian Premier League was sponsored by Vivo, that is a Chinese mobile brand, but the company Cred bombarded their advertisement on television during the show. This comes under the ambit of incidental ambush marketing. They are further divided into two; the first is unintentional, where viewers consider the rival the official sponsor because of the prior association. The second is the saturation ambushing where the other brand drastically increases its advertisement during the event, confusing people regarding the event's official sponsor.

In a few studies, the ambush market is divided into three types: direct ambushing, associative ambushing, & incidental ambushing.²⁰

Trademark Law In India

The globalization of trade demanded uniform minimum standards of protection, adequate procedures & efficient enforcement methods, which is why world leaders recognized TRIPS. India under obligations, introduced the 'Trademarks Act, 1999'. The primary purpose of the act is to safeguard the right of the business from unfair competition.²¹ The ambit of the act is so vast that it also protects the company's goodwill. The other objective of the act is it helps the consumers to avoid confusion and protects them from deception & mistakenly believing that the product originates from another trader.²²

¹⁹ Shrabani Rout, "India: Ambush Marketing: Need for legislation in India", *Mondaq*, Apr. 10, 2018, available at < <https://www.mondaq.com/india/trademark/690204/ambush-marketing-need-for-legislation-in-india>> (last visited on May 03, 2022).

²⁰ Ms. Charul Agrawal and Ms. Jyoti Byahatti, "Reengineering of Indian economy-Opportunities and challenges", 3 *Asia Pacific Journal of Research* (2013).

²¹ Vaish Associates Advocates, "India: Trademarks law in India- Everything you must know", *Mondaq*, Mar. 31, 2011, available at < <https://www.mondaq.com/india/trademark/127680/trademarks-law-in-india-everything-you-must-know>> (last visited on May 02, 2022).

²² *Ibid.*

Legal Protection For Ambush Marketing In India

In the context of ambush marketing, only section 29 of the trademark act 1999 is crucial under trademark laws of India. The provision highlights infringement of registered trademarks. Under this, if any opponent company uses the registered trademark of the official sponsor or mark which is identical or even deceptively similar without the permission of the official sponsor in the course of the trade, then it comes under infringement of the registered trademarks.²³ Even section 29 of the act is general in nature & applied indirectly in ambush marketing cases. *Arsenal Football Club plc v. Mathew Reed*²⁴ is a prime example of this, but this case doesn't come under the ambit of Indian trademark law. Under trademark laws of India, there are no specific provisions to prohibit, punish & or regulate ambush markets in India.

In light of judicial precedent, there is only one case of ambush marketing in India by the Hon'ble Delhi High Court, i.e., *ICC Development (International) Ltd. (ICCDL) v. Arvee Enterprises and Another*²⁵. In 2003, ICCDL was organizing the ICC 2003 World Cup, and before the event, the ICCDL applied for the trademark on the terms 'ICC World Cup', 'Logo, & 'Mascot.' Philips in his advertising campaign during the event introduced interesting slogans like "Diwali Manao World Cup Jao" and aggressively promoted the slogans on televisions, radio, etc. In that event, Philips has no sponsorship agreement with the ICCDL.²⁶ Aggrieved by that, ICCDL approached Delhi High Court against Philips for their advertisement campaign of using the word 'World Cup' in their slogan. ICCDL contended that they had already filed the application to register the trademark. In this, the exclusive right is given to the official sponsor who paid the sponsorship fees, and Philips has no right to use the term 'World Cup'. The court rejected the contention of ICCDL and said that the word 'World Cup' is generic in nature, and Philips is not indulged in misusing the logo of the International Cricket Council.²⁷ Further, the court emphasized that there is no confusion among the viewers & consumers on the issue of actual sponsors. But interestingly, the court granted an injunction on the unfair use of the ICC logo by Philips. Apart from this, there is no judicial discourse on ambush marketing in India.

²³ Trade Marks Act, 1999 (Act 47 of 1999), S. 29

²⁴ 92 DLR 4th 349.

²⁵ (2003) 26 PTC 245(DEL).

²⁶ *Supra* note 19.

²⁷ *Supra* note 12.

The Need For Anti-Ambush Market Laws In India

The above contention justifies that there are no specific provisions and judicial discourse on ambush marketing in India. The objective of trademark law is failing to achieve its objective after introducing such a parasitic approach to marketing. Apart from this, several reasons also justify the need for legislation on ambush marketing in India. A few of them are discussed below;

- Anti-Ambush marketing legislation is already prevalent in different countries- Developed countries like the USA have anti-ambush laws incorporated under the Lanham Act, which recognize the rights of the official sponsors. The trade practices act 1976 in South Africa, the Sydney 2000 Games (Indicia and Images) Protection Act 1996 in Australia, Major Events Management Act 2007 in New Zealand are a few of the examples of Anti-ambush laws prevailing worldwide.²⁸ Apart from them, there are several other countries like Canada, Brazil, China, etc., have enacted laws to prevent ambush marketing in their jurisdiction. In a globalized world where the competition among the countries is so high, the absence of these laws will not give a good impression to foreign investors.²⁹
- Affecting the goodwill of the company- One of the main objectives of the sponsorship is to capitalize on its goodwill. But, the rival companies, by associating themselves with the event or with the sponsor company, affect the growth of the goodwill of the sponsor company.³⁰ Like in the last Indian Premier League, Vivo was the official sponsor, but Cred, that is a credit card payment company, stole the show with their advertisement campaign.
- Ambush marketing has a long history- The issue of ambush marketing is very long and can be traced from the 1980s. But still, countries like India have no legislation to prevent ambush marketing. Even the first ambush marketing incident was in the 1990s, i.e., during the Asia Cup, and even after two decades, there are no laws on ambush marketing.
- Massive investment in Sports Events in India- The investment by companies in sports events is increasing drastically. In 2022, the Indian Premier League sponsorship cost was

²⁸ *Supra* note 19.

²⁹ Prateek Singh and Rajat Chawda, "The issue of ambush marketing: Need for a specialized legislation", *Jurist*, Oct. 07, 2021, available at < <https://www.jurist.org/commentary/2021/10/singh-chawda-ambush-marketing/>> (last visited on May 04, 2022).

³⁰ Shristi Bansal, "India- Ambush marketing: where there is goodwill there is a way", *Conventus Law*, Aug. 25, 2015, available at < <https://conventuslaw.com/report/india-ambush-marketing-where-there-is-goodwill/>> (last visited on May 04, 2022).

above Rs 1,000 Crore.³¹ Imagine if a company is investing such huge money and still their rights are not protected because of the ambush marketing. Apart from this, other leagues of football, hockey, kabaddi, etc. The international player comes to India for the tournament, which attracts International media as well.

- Low literacy rate in India- The literacy rate in India is low, which makes it easy for the big corporate house to confuse people about the sponsors. If the other brands use the method of ambush marketing, then the sponsor's objective to reach every level of India not be fulfilled.



³¹ IANS, “For the first time in 15 years, IPL sponsorships cross Rs 1000 Crore”, *Business Standard*, Mar. 26, 2022, available at <https://www.business-standard.com/article/sports/for-the-first-time-in-15-years-ipl-sponsorships-cross-rs-1-000-crore-122032600420_1.html#:~:text=Vivo%20had%20agreed%20to%20pa,during%20the%20two%20forthcoming%20seasons> (last visited on May 05, 2022).

Conclusion

In recent times, ambush marketing is considered one of the strong methods for advertisement but is also considered as unethical in nature. In International & National sports events, these practices are quite common. Indian laws don't have anti-ambush provisions to safeguard the sponsor's rights in these events. With regard to trademark laws in India, there is an urgent need to introduce changes to incorporate anti-ambush provisions. There are different aspects of anti-ambush marketing. A few of them are done direct & others are indirect or incidental. The new law must also respect the distinction and prevent only those which are intentional in nature. The other argument is that the law on ambush marketing affects fair competition and promotes monopoly in the market. The other rival companies lawfully promote their product in many cases. But, this argument will contradict the concept of sponsorship & exclusive rights of the sponsorship. In a globalized world, many countries enact laws to regulate ambush marketing strategies in their jurisdictions. Many developing countries are also on the list that has anti-ambush marketing law. Further, the other countries started recognizing it since the 1980s, but after four decades, India has not made any progress on the anti-ambush law.

In the Indian context, the situation is a little drastic after the *ICCDL Case*³², where the court was slightly inclined toward the ambushers. Under trademark laws, protection is only if the rival uses the registered trademark's logo, symbols, or slogans directly, and any other approaches are not penalized under the act. The ambit of ambush marketing is vast, and sec. 29 of the act is inefficient in preventing the unethical parasitic practice. In light of the above argument, there is an urgent need to introduce legislation to combat these guerrilla market strategies and contribute to the country's economic development.

³² *Supra* note 25.