

Ambush Marketing in Sports Realm

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Abstract

The sale of Tickets is not the only way of generating revenue and profits in sports events but there are ample other techniques that companies use to earn a good number of clients and make money from them. One of them is Parasite marketing or also popularly known as ambush marketing which companies often use during the events season.

Ambush Marketing is a kind of marketing strategy where a brand directly or indirectly tries to show association to an event, despite not being its official sponsor. This is done to advertise and capitalize on brand goodwill, without having to pay the hefty sum to become the official sponsor of the event. The objective of this kind of marketing is to give an impression that the brand is, in some way, connected to the event, to derive the commercial benefits of being an “official sponsor,” without actually being one.

This kind of marketing is unethical. It demotivates brands from paying colossal sponsorship fees and become an official sponsor, since other brands can benefit from it, on the official sponsors' goodwill. This is a common practice in Indian sporting events and lack of legislation is causing these unethical marketing strategies to go unregulated. Many countries, such as – Canada, Australia, England, Brazil, China, have brought about legislation or amendments to fix liability on users of this marketing strategy. India too should legislate on the matter, since it is having a lot of large-scale events being organized, and the need to protect the interests of the official sponsor is paramount.

This paper aims to analyse the nuances involved in ambush marketing, discusses the emergence of ambush marketing in India & worldwide, the Intellectual Property aspects related to ambush marketing, the need for codified legislation in India to tackle parasite marketing taking the reference of League & sports events.

Keywords – Ambush Marketing, Sports, Leagues, Intellectual Property, Sponsorship.

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Introduction

With the advancement in technology, the Sports arena is also developing at a rapid pace and this development in the sports arena gives rise to the commercialisation of Sports and if sports are being commercialised then obviously there must be different parties involved and for that regulation of sports is a must. One of the most important and popular aspects of commercialisation in sports is Sponsorship. Everyone is aware of the fact that for conducting any sports event even at a small level sponsorship is a must. As we see Premier Leagues and tournaments of different-different sports have Cola Companies, Telecom Companies, Finance Companies/banks, etc. as their sponsors. If any company or firm is sponsoring the tournament, then it has the exclusive right to dominate the tournament and generate leads for their company but abusing sponsorship rights especially exclusivity could affect the relationship between the sponsor and the sponsored party. It can lead to conflict between both the parties which in anyways will lead to loss of goodwill of the organizers and the tournament as well.

Ambush Marketing, also known as Parasite marketing, is a marketing strategy through which one company benefits from the publicity provided by an important event without contributing anything to the sponsorship of that particular event to endorse their product or make the public aware of their product to gain financial advantage. Here the company acts as a parasite to the event which feeds on the sponsorship of some other company this is also the reason why ambush marketing is known as parasite marketing. Ambush Marketing operates by claiming to have a false relationship with the rights owner with his permission and in return, it gets a sort of media coverage and publicity. This type of marketing is basically a strategy that a corporation uses to 'ambush' an event and compete for exposure between competing advertisers. In ambush marketing the company that is ambushing usually generates capital on the efforts and resources of its competing brands who are sponsoring the event. Ambush marketing occurs when the advertiser uses that event to its advantage without paying the sponsorship or admission fee.

The most interesting part about ambush marketing is it is not illegal, although it's immoral and unethical there are no such stringent codified legislation or penalties for the Ambush Marketers. Due to ambush marketing, the impact of the official sponsors reduces in the event and the ambush marketer's impact increases. Usually when the consumers visit to watch any tournament their one of the main concerns is that who is the sponsor of this particular event and sadly ambush marketing leads to confusion in the mind of the spectators regarding the official sponsor of the event. In this case, consumers can identify the business line of the official sponsor but they won't be able to say exactly who the sponsor is; let us suppose that a tournament is sponsored by a cola (soft drink) company and in that same tournament another cola company does ambush

marketing so here spectators will be in dilemma who is the real sponsor of the tournament. The foremost aim of an ambush marketer is to trick the customers into believing that it has an official sponsorship or association with that particular event. Ambushers don't use 3rd party's trademark rather they creatively imply to an event by using their trademark in such a way so that it looks that they are connected with the event.

Ambush Marketing in Sports

There are several reasons why ambush marketing exists in sports.

Firstly, the tournaments or sports events take place for a really short duration of 2-4, because of which it becomes extremely difficult for organizers to exercise their legal rights and opinions in order to prevent and prohibit such activities.

Secondly, existing laws are not stringent enough to prohibit ambush marketing, and current laws for ambush marketing are too non-specific in nature and there are no such precedents available for the same due to less judicial intervention in this arena. Another reason for less judicial intervention is that it is a time-consuming and lengthy ongoing process so companies refrain from filing suits against the ambush marketers.

Thirdly, Ambusher Companies are now immunizing themselves against the potential expensive lawsuits by putting up disclaimers, while marketing, that they are not officially associated or sponsoring the event organized.

Fourthly, due to the lack of case laws and lack of precedents related to ambush marketing, and decision of the courts in favour of the ambush marketer company could be set up as a precedent and in the future, it can be pleaded by other ambush marketing companies in their defense so brands and sponsors are a bit hesitant to file a lawsuit again these companies.

Let's look at few techniques for how ambush marketing is done. It is done in a very generic and vague manner such as flying an airborne banner over the event location, handing out caps and t-shirts to the spectators or any other free merchandise near the venue of the event, advertising about the product on the billboards, sponsoring individual players in order to promote them by wearing the brand's symbol or logo during the game, etc.

To understand the process of ambush marketing and how it comes under the purview of Intellectual Property Law we shall dive deep into the types of ambush marketing schemes that companies adopt. It has been categorized broadly into 3 categories and they are as follows:

1. Direct Ambush Marketing
2. Indirect Ambush Marketing
3. Incidental Ambush Marketing

Let's start with **Direct Ambushing**, it is one of the most serious types of ambush marketing where a brand or a company has an intent to appear affiliated with a sporting event directly ambushing its rival authorized companies/brands it is known as direct ambushing. The reason why this type of ambushing is serious in nature is because it straight forwardly violates the exclusive rights of usage of the existing sponsor via its unauthorized use of symbols, logos, or other marketing elements. Another type of ambushing apart from Direct ambushing is **Indirect Ambushing**. The intentional use of images and pictures, without implying any association or official sponsorship with the event, in order to portray that the company has direct links with the sporting event which it doesn't have is known as *Associative Ambushing*. The last type of ambushing is **Incidental Ambushing** and in this type of ambushing the spectators think that the brand is associated with the sponsors or the sporting event without any intention on the brand's part to imply any sort of connection. Although unintentional this type of ambushing can be an issue for the organizers because it confuses the spectators and disrupts the marketing environment.

An Infringement of Intellectual Property Rights

There is a connection between Intellectual Property Rights Infringement and Ambush Marketing. In India, we don't have any specific codified legislation for prohibiting Ambush Marketing so the official sponsors of any sporting event or the event organisers rely on **The Trademarks Act, 1999 & The Copyright Act, 1957** or Passing Off for seeking protection.

Trademark Infringement

In India the trademark act, 1999 serves two main purposes, **First**, to protect the goodwill of the business or company or firm, and **Second**, to protect consumers from being deceived through fraudulent marks. Thus, any and all unauthorized use of symbols, logos, designs, etc. associated with any sporting event will be a case of infringement of the trademark. In India, if the organizer has registered the trademark or any similar mark/design which is been used by the unauthorized sponsor then the sporting event organizer can file a suit of trademark infringement against the company or organization which is using its registered trademark for its unauthorized benefit under Section 29³ of the Trademarks Act and claim damages or injunctions from them.

³ A registered trademark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trademark

Copyright Infringement

Copyright Infringement takes place when there is an unlicensed and commercial use of the event's video recordings, images, audios, pictorial data, use of words, symbols for capitalization. Copyright Infringement⁴ comes under purview of **Section 51 of the Copyrights Act, 1957**. Some examples of Copyright Infringement are commercial use of privileges and rights, unauthorized tie-ups with athletes or players for marketing purposes by the companies rather than the sponsors or organizers.

Passing Off

Under Intellectual Property Law Passing Off is a non-statutory remedy available for the petitioners. To have a legitimate claim under passing off, the aggrieved party needs to show few things:

- (i) It has established goodwill
- (ii) The infringing party has misrepresented the public via marketing leading to believe them that it is somehow associated with that organization or company.
- (iii) The aggrieved party suffered or is likely to suffer damages due to misrepresentation.

Passing Off is one of the strongest defenses currently available against Ambush Marketing.

Passing Off has not been specifically defined under the Trademarks Act of 1999 but it has been referred to in two sections, **Section 27(2) & Section 135**. Under **Section 27(2)** Rights of Action for passing off have been provided whereas under **section 135** Specific Remedies are Available for the suit of Passing off and the 3 requirements of passing off have already been discussed in the former part of passing off.

There are two important cases regarding Passing Off and they are as follows:

- (i) National Hockey League v. Pepsi Cola Canada Ltd⁵.
- (ii) ICC Development (Int.) Ltd. v. Arvee Enterprises and Anr⁶.

In the case of *National Hockey League v. Pepsi Cola*, the official soft drink of the event was designated to Coca-Cola Ltd. and was allowed to exercise affiliation with the National Hockey League. However, the rival brand of Coca-Cola, Pepsi Cola Ltd. was landed the rights to advertise

in relation to goods or services in respect of which the trademark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trademark.

⁴ *Castrol Ltd. v. Muralidhar Reddy*, (2001) PTC 137 (Mad).

⁵ (1992) 92 DLR (4th) 349 (BC Sup Ct).

⁶ 2003 VIIAD Delhi 405, 2003.

during the sporting event broadcasting so Pepsi used promotion tactics in such a manner that it conveyed to people a false impression that the National Hockey League or the Members or Players of the leagues are somehow associated to Pepsi Ltd. In the court, Pepsi argued that it constituted “an aggressive but a legitimate marketing campaign” during the broadcasting of the event and after examining the tort of passing off it was adjudged by the court that Pepsi’s actions constituted Ambush Marketing.

Another important case in this regard is *ICC Development (International) Ltd. v. Arvee Enterprises & Anr.*, this case was dealt with in the High Court of Delhi and this case was also about Passing off and ambush marketing. In this case, it was alleged that Phillips was taking advantage of the world cup without investing a single penny and thereby it deprived the rights of the sponsor of enjoying their exclusivity of rights which was granted to them because Philips organized a contest where it used catchphrases such as “Philips: Diwali Manao World Cup Jao” whereas ICC has already filed registration of the logo and mascot “Dazzler” and words “ICC Cricket World Cup South Africa 2003”. The Delhi High Court had rejected the claim of the ICC on the grounds that the words ‘World Cup’ are broad in nature and have been used in various contexts and moreover logo of ICC has not been misused by Philips.

Need for Legislation in India

As discussed above there have been various cases before courts to hold corporations liable for activities like selling merchandise without license, passing off their brand as the official logo, using their limited rights of advertising beyond what is permissible, holding contests using the name of the event or misusing the logo of an event, under intellectual property infringement. Current remedies of trademark infringement, copyright infringement, or passing off are not exhaustive, as most defendants can evade liability. Parasitic marketing is unethical and immoral as it is a cheap way to benefit at others' expense. Examples of the past have shown how the current Intellectual Property Rights laws are not exhaustive to protect the interest of the official sponsors.

Global Scenario

Many countries like – Australia, England and China, etc. have established laws specific to curbing the menace of ambush marketing and fixing liability on the offenders.

South Africa has enacted legislations, which prohibits such practices. As under **section 9(d) of the Trade Practices Act of 1976**. The act states that “No person shall: in connection with a sponsored event, make, publish or display any false or misleading statement, communication or

advertising which represents, implies or suggests a contractual or other connection or association between that person and the event, or the person sponsoring the event, or cause such statement, communication or advertisement to be made, published or displayed.” This law helps prevent ambush marketing of two kinds – through association and intrusion. And the **Merchandise Marks Amendment Act, 2002** also confers powers on the Ministry of Trade and Industry to announce certain events as protected events. **Section 15A** reads, “For the period during which an event is protected, no person may use a trademark concerning such event in a manner which is calculated to achieve publicity for that trademark and thereby to derive special promotional benefit from the event without the prior authorization of the organizer of such event.” Hence, protecting the official sponsors from being ambush marketed during the course of the event.

The United States of America has also safeguarded the rights of official sponsors by illegalising acts of false or misleading description or representation in commercial advertising or promotion, under the Lanham Act.

New Zealand has safeguarded sponsor interests by enacting laws to restrict Ambush Marketing through the New Zealand Major Events Management Act 2007. This prohibits ambush market by the association under sections 10 and 11 and ambush marketing by intrusion under sections 16 and 20.

Common to all these legislations, is the presumption that using major events words or emblems suggests association and hence provides strong grounds for protection of interests of the official sponsors.

India can take into account the above examples and should be encouraged to make legislations to curb the practice of this kind of marketing and promotion since it is host to many international events being organized here and the possibility of corporations taking advantage of the absence of ambush marketing laws is very high.

It is unjust that one corporation is paying millions of dollars to purchase exclusive intellectual rights over the event, and another corporation ambushes and reaps all the same benefits, without paying that same cost and still evading liability due to present loopholes. Sponsorship costs paid by corporations are substantial funds used to organize the event. The sponsorship cost for the London Olympics 2012 was approximately 2 billion dollars, which was a huge portion of the total funds required to organize the event. If a corporation can reap the benefit of 2 billion dollars’ worth, without paying it, it’ll try its best to avoid such costs. Hence, ambush marketing poses a huge risk of losing out on sponsorships and substantially affecting the funding of the event.

Conclusion

Corporations are tempted to Ambush market because is an inexpensive and quick way of drawing the attention of consumers to their products. It is also important to understand that ambush marketing also threatens the viability of the events. This warrants a need for legislation to come into force to prevent this practice. If ambush marketers continue unhindered, negligible incentive remains for corporations to become official sponsors by paying huge amounts in sponsorship fees, with the lack of which these events simply cannot take place. Unless the courts or legislature set precedents, ambush marketing will continue flourishing and these instances will just keep increasing. The Indian Judiciary has shown a readiness towards penalizing or at least issuing an injunction to those who indulge in these practices, as can be seen by a recent order passed by the Delhi High Court.

Parasitic marketing means hitching a piggyback ride on one's competitor's official sponsorship of a prime event despite warnings from sponsors and event organizers. An ambush marketer implying an impression of involvement, without having to pay requisite costs is purely serving its unhealthy selfish interests and, while doing so, is engaging in behaviour that is harmful to the welfare of sports and other high profile events. It is not only important to maintain a no-tolerance policy for ambush marketing, but it is also necessary to create consciousness of this practice so that third parties think twice before engaging in such practices.

The need for legislation is appropriately emphasized. Declarations under trademark or copyright infringement, passing off are only temporarily able to deter ambush marketing attempts and not a permanent solution. Legislations of countries, discussed above, can be used as a reference to draft a legislation suitable for the country, to curb this menace. If special legislation is not possible, provisions against ambush marketing could at least be incorporated into the existing legislations, like the trademark and copyright legislation, itself through amendments.

Events of international scale play huge roles in boosting economies and sports systems as well as in the promotion of tourism, and ultimately they also impact the economic growth of the states along with its relations with other states. These kind of events require sponsors because they cannot be organized with the tax payer's money alone. If the threat of ambush marketing cannot be put to rest by the organizers, it'll scare the sponsors away from such events in the future. Prospective sponsors should be able to have confidence on the organizers of the events and the environments in which the event is being planned. To ensure the sponsors' safety from ambush marketing, it warrants special legislation focusing solely on ambush marketing since these events are usually of national importance.