

The FIFA World Cup 2018 - Ambush Marketing and the Law



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Introduction

The FIFA World Cup stimulates a frenzy of marketing activity – both official and unofficial.

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.

The Brazil 2014 World Cup saw the rise of the 'social' ambush with numerous companies, including Spec Savers and Peperami, opportunistically posting jokes related to Louis Suarez biting the shoulder of Italian player Giorgio Chiellini. Meanwhile Activia gave the world the most shared commercial through a clever, and no doubt expensive, ambush which culminated in a global-football themed video for Shakira's song La-La-La. The video featured some of the world's highest profile players and encouraged public support for the World Food Programme's school meals initiative by sharing the video.

Although Shakira, the players and the WFP were undoubtedly officially endorsing the campaign, Activia were not an official World Cup sponsor. In fact their global football credentials appeared to be limited to their 'owned' event, the Danone Nation's Cup ("the world's biggest football tournament, for children aged 10 to 12"). Despite this, Activia lucked out with FIFA curiously selecting La-La-La as an official tune for Brazil 2014 and the viral music video looked like an incredibly authentic, official campaign.

It is yet to be seen what companies will come up with ahead of the start of the FIFA World Cup 2018 in Russia, 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.

The Walkers, Pepsi, KitKat and Activia adverts mentioned above are all good examples of indirect associations with the World Cup which did not result in any legal proceedings. Similarly, in the

run up to the World Cup 2014 Beats by Dre, a manufacturer of headphones, ran a successful advertising campaign "THE GAME BEFORE THE GAME" featuring football stars promoting Beats. Players were banned from wearing headphones at the stadia during the World Cup, but FIFA could not prevent the adverts running globally as they made no express reference to the event.

In the case of the 2018 FIFA World Cup however companies should be aware of the very wide scope of protection offered to FIFA and its official sponsors, in Russia under special "2018 World Cup Law" which may prevent this type of activity in the host country (see further details below).

Ambush by intrusion

An 'intruding' ambusher will normally seek to gain prominent brand exposure at the event, targeting the audience in the stadia and through broadcast media. This may occur within the event's area of control, or just outside. For example tactics can include erecting huge signs on land in shot of cameras, blimps, skywriting, or simply distributing products to fans as they arrive at the event. The World Cup has seen its fair share of ambush of this nature.

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).

At the 2014 World Cup the Brazilian footballer Neymar took off his shirt and revealed Brazilian coloured boxers peaking above his shorts. Apparently these were a 'gift' sent by Blue Man, a well-known Rio de Janeiro swimwear brand, to all of the Brazilian team. The brand posted images of Neymar on social media which prompted FIFA to investigate possible disciplinary action against Neymar, however no action was taken on the basis that the 'reveal' was incidental rather



than intentional, with the brand itself claiming they could never afford to pay Neymar for the publicity..

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. The Suarez biting scandal at Brazil World Cup 2014 is a classic example. Another example is Oreo which 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 lightning, 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). For example use of the name of the event, the event logo or official mascots, posters or designs.

If an ambusher avoids using the event's official 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 will be relevant. In England, the tort of passing off is likely to be asserted.

Given the creativeness of ambush marketers, 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 2018 World Cup, FIFA). The new laws normally go further than other pre-existing rights, preventing all advertising which creates an 'association' or 'connection' 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 the Olympic year, in Brazil the offence of ambush marketing established under in so called 'World Cup 2014 Law' could only be enforced until the end of 2014.

While there is no anti-association right in respect of the 2018 FIFA World Cup in the UK, there is in Russia (see further below).

Finally, event organisers may 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.

Remember that team and players participating in the event will also benefit from protection in

various guises, so caution should also be exercised when referring or alluding to them.

Protection against ambush by association for the World Cup 2018

FIFA's official guidelines for the use of FIFA's Official Marks asserts that all of the following (in amongst others) are protected in relation to 2018 World Cup:

- Official event Emblems, Trophies, and Mascot ("Zabivaka")
- FIFA Logo, FIFA, FIFA World Cup, 2018 FIFA World Cup Russia, World Cup
- COPA 2018, MONDIAL 2018, MONDIALI 2018
- RUSSIA 2018; Host City + year (eg Moscow 2018)
- The official event Typeface, Posters, "Look" (ie designs) of the Event, and the Match Ball

FIFA does have extensive trade mark registrations and, putting aside the word-marks above, copyright or design right will also provide protection around the world. FIFA's protection for some of the word-marks such as "Moscow 2018" and "World Cup" (without the addition of FIFA, Football or 2018 etc) is more limited, at least outside of Russia. In Russia, over 90 trade marks have however been registered en masse by FIFA, including all of the host city names accompanied with the year 2018, the official event slogans (including "Football for Hope"), and even the name of the official Typeface. Nevertheless, use of the words, marks and designs listed above without permission of FIFA, or without having taken specific legal advice, is likely to be risky.

The trade mark protection in Russia is bolstered further by special legislation which deals with ambush by association (and ambush by intrusion – see below). The Federal Law No. FZ-108 ("The 2018 World Cup Law") of 7 June 2013 was signed by the President of Russia into law just over four years ago. It establishes that the existing administrative offence of 'unlawful trade' will be committed where any products or services are associated, directly or indirectly, with FIFA or the World Cup without the permission of FIFA. It expands on this in a number of ways. For example the unlawful trade offence may be committed



by: using a very extensive range of 'protected marks' without the permission of FIFA (the list of protected marks is even more extensive than that above); undertaking marketing which falsely suggests approval, recommendation, certification by, or connection with FIFA or the World Cup; and use of tickets for marketing, including competitions and promotional campaigns. While we are not Russian lawyers, the extent of the rules seem very wide and we'd suggest local advice be taken before running any campaigns which are targeted at or may extend into Russia.

The penalty for the offence of unfair competition ranges from a personal administrative liability and a fine of 12,000 Russian Rubles (currently £162,00) for the officer of an offending organisation to up to three years director's disqualification and a corporate fine of a minimum of 100,000 Russian Rubles (about £1,356,00). Criminal liability is also a possibility.

Rule of thumb

If you are considering a campaign linked to the World Cup in the UK, in addition to avoiding use of the marks and words listed 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.

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 the 2018 World Cup in Russia, this might be the use of a football theme, something that references Russia or a nationalistic theme (but bear in mind that the elements used in the 'official' World Cup design works are protected). 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 Russian 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 2018 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. Special laws introduced for the World Cup 2014 in Brazil, and in the UK for the London 2012 Olympic and Paralympic Games. Similar provisions have been introduced under the Russian 2018 World Cup Law, such that 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. If not, the Russian administrative offence of unfair competition may be committed. Again, we'd recommend taking local law advice before implementing any 'on the ground' advertising in Russia during the World Cup.

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.

Non legal tactics

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 Russian/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 2018 FIFA World Cup Russia sponsor campaign:

- Don't use any official Russia 2018 or national team logos, protected terms, designs, images or footage in your advertising
- 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 may be prohibited from contributing to an ambush campaign



- Don't use the World Cup tickets in promotional activities
- Remember that social media is also a form of advertising - brief your digital teams/agencies. Use of event hashtags or emojis (especially repeatedly or systematically) or even regular re-posting of content related to the World Cup or a national team could present a scenario in which FIFA or the national team would look to take action
- If you're planning on advertising in Russia during or in connection with the World Cup, ensure you don't infringe the 2018 World Cup Law either by associating directly or indirectly with the event or by advertising within 2km of stadia without authorisation and take local legal advice

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 Russia during the World Cup ensure you've got the necessary authorisations required if you're advertising within 2km of stadia

**For further information
on this subject please contact:**

Alex Kelham

Head of Sports Business Group

T + 44 (0) 20 7074 8211

alex.kelham@lewissilkin.com

