

Ambush Marketing

In focus: Tokyo 2020 Olympic Games

May 2021



► Inside

What is Ambush Marketing?

Types of Ambush Marketing

How does UK law protect against Ambush Marketing?

Practical steps for event organisers to counter Ambush Marketing

Ambush Marketing in focus: Tokyo Olympic and Paralympic Games

What's protected?

Rule 40 of the Olympic Charter

Top Tips for Advertisers and Brands



Introduction

With businesses at times paying many millions to associate themselves with an event it is not surprising that their competitors engage in 'ambush marketing'.

What is Ambush Marketing?

Ambush marketing is an attempt by an unauthorised party, through deliberate marketing activity, to take advantage of the high media profile of an event, team or individual, without paying any licence or sponsorship fees.

There is no agreed definition for ambush marketing. It can be interpreted widely, as above, or more narrowly, being an activity which merely causes public confusion over who is the sponsor of an event.

Ambush marketing is clearly an effective marketing tool for brand owners as it can achieve similar results without incurring the expense of an official sponsorship or endorsement. It is also often done at the expense of a competitor who has invested in the event. However, it also has damaging effects, not only for those ambushed competitors, but also for the integrity of the event, team or individual concerned and their potential to attract future sponsors. Ambush marketing can also backfire for the brand undertaking the unauthorised activity, either from a PR and/or legal point of view.

Types of Ambush Marketing

There are three main types of ambush which, depending on a number of factors (as discussed below), may fall foul of the law.

Ambush by association

This occurs when the non-sponsor ambusher seeks to associate itself with the event without authorisation and consequently misleads the public into thinking the ambusher is somehow connected with the event. For example, if a brand runs an "Olympic Offers" promotion or directly refers to the event, despite not being an official sponsor.

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. 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.

Opportunistic ambush

Whether or not 'opportunistic' advertising, which reacts and refers to topical events, can genuinely be referred to as ambush marketing is up for debate; it is often done in a humorous manner so is arguably unlikely to mislead the public into believing there is a commercial endorsement or association. A prime example of this was when the flame expired during the Sochi 2014 Winter Olympic torch relay and was caught on camera being relit by a Zippo lighter. Zippo capitalised on this by using the photograph across its social media.

How does UK law protect against Ambush Marketing?

There is currently no specific legislation in the UK, which outlaws ambush marketing per se.

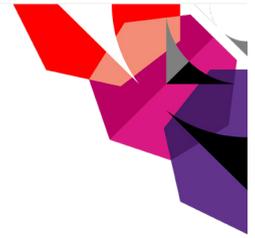
Where event organisers and their official sponsors are aggrieved by the ambushing of events by third parties, they must generally seek redress through traditional forms of intellectual property protection (trade mark infringement or copyright infringement), and torts such as passing off. However event-specific anti-ambush marketing legislation has been introduced for major-events hosted in the UK. The London 2012 Olympic and Paralympic Games and the Glasgow 2014 Commonwealth Games benefitted from such legislation and the forthcoming Birmingham 2022 Commonwealth Games has similar protection in place. The unauthorised commercial use of Olympic and Paralympic symbols and terminology also benefits from enhanced protection.

Below we briefly note the traditional legal grounds available to address ambush marketing. We refer to event organisers throughout, but teams, individuals or any other ambushed rights-owner can potentially rely on these.

Passing Off

In order to ground an action in passing off, broadly, the event organiser would need to show all of the following:

- it has established a reputation or goodwill in the event in question;
- the third party has made a misrepresentation



which has led to confusion in the minds of the public as to whether there is a connection with the event organiser; and

- the event organiser has suffered or is likely to suffer damage.

Registered Trade Marks

Where the event organiser has a registered trade mark for the name of the event itself (e.g. FIFA World Cup, Tokyo 2020) or logos, mascots, expressions, etc associated with it, and that trade mark or a similar mark has been used by a third party in its advertising, the event organiser may be able to bring action against the third party for trade mark infringement.

Copyright

The event organiser is likely to have created a logo and other graphics, artwork or designs (including mascots, pictograms and 'look and feel'), or even music, for the event. These will likely be sufficiently original to attract copyright. All imagery and footage taken of the event will also benefit from copyright protection. The event organiser will own that imagery or footage (or otherwise seek to control the rights via contract). Unauthorised reproduction of such copyright works by an ambush marketer is therefore likely constitute copyright infringement which the event organiser can bring enforcement action for.

Advertising Codes and CPRs

Event organisers may also have recourse to the advertising self-regulatory regime, the CAP and BCAP Codes, to combat ambush marketing. These Codes require (among other things) that all adverts are honest and truthful and that they should not be misleading. The use of the names or image of individuals, such as athletes, without their consent, may also fall foul of the Codes.

Ambush marketers should also be aware of the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPRs'). Marketing can constitute an "unfair commercial practice" under the CPRs, if it is misleading.

Ticket Terms and Conditions & Contract

The ticket terms and conditions for events will usually also prevent the use of tickets for any commercial/marketing purposes without the permission of the event organiser, for example the use of tickets in unauthorised promotions. Legislation may also make this a criminal offence.

The ticket T&Cs of an event will also routinely prevent ambush by intrusion by prohibiting spectators from distributing or displaying commercial paraphernalia.

Event organisers will normally use contractual terms to seek to prevent ambush marketing by including relevant terms in their agreements with participants in the event (athletes, teams, officials etc.). These will often include similar restrictions to those included in the ticket T&Cs to restrict what commercial messages they can display (for example on kit and equipment), but may also prevent them from allowing their name or image to be used within advertising during the event and/or for the purposes of ambush marketing. An example of this is the Rule of 40 of the Olympic Charter which places restrictions on athletes competing in the Olympic Games.

Practical steps for event organisers to counter Ambush Marketing

In addition to asserting the rights, and implementing the contractual protections described above, a range of practical steps can be taken by event organisers and sponsors in order to help prevent ambush marketing. For example event organisers may buy up all of the billboard and other advertising space in the vicinity of the venue(s) and then resell only to official sponsors, or they may impose contractual obligations on media organisations to restrict advertising and promotion during broadcasts to official sponsors. Finally, mounting official sponsor awareness campaigns, and ensuring official sponsors activate their rights strongly will help to ensure that the public know who the official sponsors are and diminish the efforts of ambushers.



Ambush Marketing in focus: Tokyo Olympic and Paralympic Games

The Tokyo Olympic and Paralympic Games present a number of legal pitfalls for the uninformed marketer and with the Tokyo Olympics around the corner, after such a turbulent year, brands and sponsors are evidently cautious, yet ready to be part of a sporting event that will hopefully raise everyone's spirits this Summer.

Given the creativeness of ambush marketers, many countries hosting major events such as the Olympic and Paralympic Games create special anti-ambush laws. Such laws are often demanded of bidding countries by the international rights holder. Unlike for past Olympics, Tokyo has not however enacted any such special legislation for the Games. Nonetheless, the usual legal risks associated with ambush marketing (detailed above) will be as relevant as ever and any brands considering ambushing the Games in the UK this summer need to be alert to them, as well as the specific protections set out below.

The Olympic Symbol (Protection) Act 1995 ("OPSA")

This UK Act of Parliament prevents the unauthorised use in the course of any trade (i.e. use on any products or marketing materials of any business which does not have consent) of (1) the Olympic and Paralympic symbols and mottos, (2) the words: 'Olympic', 'Paralympic', 'Olympian', 'Paralympian', 'Olympiad', and 'Paralympiad' and (3) any similar words and/or symbols. Acting in contravention of this law is a criminal offence and the British Olympic Association and British Paralympic Association are also granted rights which allow them to bring civil actions against infringement.

However, there are a limited number of defences available. For example, where relevant factual statements are made which include the protected words there should not be infringement if this in accordance with honest commercial practices. Historic use which commenced prior to 1995 is also permitted (so Olympic Airlines and many "Olympian" restaurants around the country are protected).

What's protected?

All of the words, logos, designs and images set out below are protected by a combination of copyright and/or trade marks. This is not an exhaustive list:

"Core" Olympic and Paralympic IP:

- the Olympic Symbol (the rings)
- "OLYMPIC GAMES"
- The Olympic motto: "Citius, Altius, Fortius" ("Faster, Higher, Stronger")

- Paralympic symbol (the three "agitos")
- "PARALYMPIC GAMES"
- The Paralympic motto: "Spirit in Motion"

Tokyo 2020 IP:

- "Tokyo 2020"
- "Games of the XXXII Olympiad"
- The Tokyo 2020 Olympic and Paralympic Games logos (including a "Tokyo 2021" version)
- Medal and Torch designs
- Mascot images and names ("Miraitowa" and "Someity")
- Look & Feel and other designs protected by copyright such as stadium renders

Team IP:

National Olympic and Paralympic Committees around the world will protect their team names, logos and other IP. In the UK, these include:

- "Team GB" and "ParalympicsGB"
- The Team GB and ParalympicsGB 'lion' logos
- The team's kit designs

Athlete IP:

Current and past Olympians and Paralympians may assert their 'image rights' to prevent ambushes that use them without permission. In the UK this will either be through the tort of passing off or by asserting any trade marks they may have registered, for example in their:

- Name
- Image
- Logos
- Name/nicknames

Rule 40 of the Olympic Charter

Sponsors of individual Olympians competing in Tokyo need to be alert to Rule 40 of the Olympic Charter, especially if they are not also official Olympic sponsors. "Rule 40" limits the ability of athletes to allow their personal sponsors to market their association during the "Games Period" (which runs from 13 July to 10 August 2021). "Generic" advertising which does not use any Games IP or allude to the Games or the athlete's performance at



the Games is generally permitted to continue provided it has previously been in market and it is run consistently in nature and frequency (i.e. without 'uplift' during the Games).

Each National Olympic Committee around the world is taking a slightly different approach, and the International Olympic Committee has issued guidance for global campaigns.

In the UK, the British Olympic Association (BOA) requires brands to notify it of any generic campaigns the brand intends to run through the Games Period by 29 June 2021, and those campaigns must also be in market by that date. The BOA does not allow brands to undertake any good luck or congratulatory messages during the Games Period, including on social media. However, it does allow athletes to issue a controlled number of generic thank you messages to their personal sponsors during the Games Period. More details are set out in the BOA's guidelines on its website, [here](#).

5. Consider the following which may affect the likelihood of a rights holder taking action:
 - The content of the ad
 - The timing
 - The scale of the campaign
 - Any actual or potential conflicts between the products/services you're promoting and those of any of the official sponsors (as the rights holder is likely to come under pressure from them to take action to prevent your campaign.)
6. Always consider the legal and reputational risk when deciding whether to go ahead with a campaign.

Top Tips for Advertisers and Brands for Tokyo 2020

1. Avoid using the marks and words listed above.
2. 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. For example, if you would expect to see an official Olympic/Tokyo 2020/Team GB 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.
3. Use alternatives, such as a minor nod to the event, for example, using the Japanese nationalistic theme and referencing competitions or athletes. However, be careful to not to combine too many of these elements together to give an overall effect which could be misleading.
4. 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 Tokyo 2020 could be an infringement and result in legal action.

If you have any questions about this document, ambush marketing or sports marketing more generally please contact Alex Kelham:



Alex Kelham
Partner

+44 (0)20 7074 8211
alex.kelham@lewissilkin.com