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Ambush marketing: FIFA's rights protection programme

The 2010 FIFA World Cup will be remembered in the Netherlands not only for the country's excellent performance, but also for FIFA's attempted prosecution of women wearing orange miniskirts bearing Bavaria Beer's logo. Kris Lines and Jon Heshka, sports law Professors, examine the effectiveness of FIFA's methods of protecting itself from ambush marketing, how FIFA's rights protection is written into legislation and how this applied in South Africa.

Amidst the buzzing of the Vuvuzela's and the occasional officiating error, the 2010 FIFA World Cup South Africa(tm) will also be remembered for the expulsion of 36 orange mini-skirt wearing women from a match and the subsequent prosecution (and then dropping) of charges against the two alleged 'ringleaders' behind the incident. Whilst titillating, this is not just a story about beautiful women being used to market a product. The real story is about the lengths to which companies will go to exploit loop-holes in the existing law and what implications these campaigns have for tackling counter-insurgency actions at future events.

The article will conclude by examining how FIFA and Anheuser-Busch (the official beer sponsor) were so comprehensively ambushed that Bavaria rocketed from unmeasurable before the ambush to the fifth most visited beer website in the UK², while Nike's unofficial 'Write the Future' campaign was widely viewed as the most successful marketing campaign of the World Cup³.

Ambush marketing

The phrase 'ambush marketing' was coined in the 1980s to describe

attempts to capitalise on the goodwill, brand and reputation of a mega-event either by creating a false and/or unauthorised association with the right's holder, or by intruding upon an event to gain publicity for their own brand or product. Infamous examples of previously successful ambushes include Nike's blitzkrieg plastering of the Atlanta 1996 Summer Olympic Games at the expense of Reebok and American Express's clever 1992 tagline poking fun at how visitors to the Barcelona Olympics Games 'do not need a VISA'.

With the World Cup(tm) representing the confluence of business and the beautiful game⁴, it should come as no surprise that the 2010 event was a prime target for ambush marketing. This article does not challenge FIFA's need to defend its commercial interests against ambush - after all, their official six top-tier partners⁵, sponsors⁶ and national supporters⁷ all invested considerably for 'guaranteed exclusive association' with the World Cup(tm) - but rather the article questions the effectiveness of the anti-ambushing methods employed by FIFA.

FIFA's rights protection programme is primarily founded on an aggressive protection of their trademark and copyrights through national and international mark protection, the tort of passing off, contractual terms and anti-trust laws. However, while these tools have had some success preventing traditional trademark violation and counterfeiting⁸, increasingly they are having little effect against the sophisticated modern ambusher, who operates in the greyer (or perhaps that should be more orange!) areas of the law. To combat these loopholes, event organisers have used political and commercial clout to require host countries to promulgate even

stricter laws to further protect the rights vested in the events (in the case of South Africa, this was through a tightening of the Merchandise Marks Act 1941)⁹. However, even despite the restrictive nature of this legislation, it is still possible for ambushes to occur. For example, although a rival company's marketing campaign might detract from and dilute a sponsor's message, unless the campaign directly infringes a specified protected mark, a sponsor or event organiser has no legal right to block the offending advertising¹⁰. This can be illustrated in South Africa by FIFA's failure to include the Vuvuzela within the terms listed as part of the Merchandise Marks Act, thereby presenting companies¹¹ with an unprotected iconic image to use in an advert.

Ambush marketing by association (Nike)

Nike's 'Write the Future' campaign is an orthodox example of ambush marketing by associating a product indirectly with an event. However, while the aim was orthodox, the method of communication was anything but. Nike centred the campaign on a three minute video clip with slick production values, that explored the 'what if' concept during a fictional football tournament. The launch of the video was premiered on Youtube, Facebook and during the final of the UEFA Champions League to widespread critical and public acclaim¹². Indeed, at the time of writing, the official Youtube video had received a staggering 19.5 million hits!

This campaign was further extended by Nike during the tournament through 'Write the Headline'¹³, a 44 metre high colour LED display projected onto the side of Johannesburg's Southern Life Centre. Fans could also

interact with this projection through social media in order to display up to 100 messages of support for their team every evening. Taken together, the campaign was so successful that both Nielson and MEC report that Nike was the brand the public most linked to the tournament¹⁴, despite it not being an official partner.

The problem for FIFA is that while the Merchandise Marks Act might protect trademarks and words associated with the World Cup, Nike merely used football references focused on the individual athletes it sponsored. The lesson here is that while the Olympic Games prevents individual Olympians and teams from becoming involved in advertising during the Games, the same is not necessarily true for events staged by FIFA or other international federations.

Ambush marketing by intrusion (Bavaria)

In 2006, Bavaria gained international attention when more than one thousand Dutch fans were required to take off their Bavaria-branded orange lederhosen at a 2006 World Cup match pitting Holland against the Ivory Coast. That same year, the company successfully defended a lawsuit launched by Heineken, the official sponsor of the Dutch football association (KNBV) and Holland's biggest brewery. In ruling in its favour, the President Court of Utrecht held that the KNBV could not refuse access to ticket holders wearing Bavaria-branded lederhosen¹⁵.

Emboldened by their success at the 2006 World Cup(tm) and tearing a page from the Dim Dim Underwear Girls playbook at the Rugby World Cup 2007 in France¹⁶, Bavaria combined the two tactics

Trade mark, contractual terms and passing off give limited protection against ambushes, but they alone have proven inadequate

in South Africa. On 14 June 2010, 36 women entered Soccer City stadium in Johannesburg for the first round World Cup match between Holland and Denmark. In true insurgency style, the girls disguised themselves by wearing red Danish outfits and allegedly using a decoy group of fans on one side of the stadium to divert the attention of security for their entrance in a different location. Once inside the stadium, the girls stripped off to reveal orange mini-dresses, and midway through the game, started dancing en masse in the stands¹⁷. Predictably, this spectacle attracted the attention of the other spectators, media and FIFA, resulting in the women being expelled from the game at half time. Shortly afterwards, Barbara Castelein and Mirte Nieuwpoort were arrested under s 15.A of the Merchandise Marks Act for the 'unauthorised use of a trade mark at a protected event' and 'entry into a designated area while in possession of a prohibited commercial object', while the ITV football commentator Robbie Earle, who provided the tickets to the girls, was subsequently dismissed by the broadcaster.

Although the General Terms and Conditions to World Cup(tm) tickets now explicitly prohibit ticket holders from doing anything which could result in an unauthorised commercial association with FIFA or the World Cup(tm) to the detriment of FIFA or its commercial affiliates¹⁸, the problem FIFA had was that orange clothing is part of the national heritage of the Netherlands. In order to skirt any accusations of ambush marketing, Bavaria had also significantly reduced the size of the label on the dresses to a comparable size to the Nike swoosh on shirts. As such, it is difficult to reconcile the ban on any Netherlands supporter

unofficially adopting the Bavaria dresses as their own, when other supporters wear jeans or other clothing that display more visible logos and branding.

Just as the Constitutional Court ruled in *South African Breweries v Laugh It Off Promotions*¹⁹, FIFA would have had to show evidence that Anheuser-Busch, Inc. would have suffered substantial economic harm through lost Budweiser sales due to the reduced commercial magnetism of their mark as a result of the Bavaria ambush and that both its and Anheuser-Busch's trade marks were compromised to such an extent that it should have overridden the women's right to wear orange dresses. Given this, FIFA prudently chose to drop the charges.

Winning hearts and minds

Underlying any action by a right's holder ought to be a risk assessment weighing the pros and cons of any particular course of action. One option is to do nothing and let the story blow over and risk being seen to tacitly accept this conduct. Another is the 'name and shame' tactic championed so successfully by the IOC²⁰ against Nike in 1996, when the retailer dropped their 'didn't win silver, lost gold' campaign. However, there are risks with this approach. Rather than being buried in an avalanche of advertising, good will and good stories related to the sporting event, the effect of the 'name and shame' approach is to amplify the ambusher's message. Putting the ambusher in the spotlight can also play to the adage 'there is no such thing as bad publicity', marginalising the official sponsor. Indeed, what did FIFA think would happen when it paraded 36 very photogenic and tearful girls in short orange dresses in front of the world's media?

While it does not help FIFA's

cause that television cameras gravitated towards the Bavaria women at the 2010 World Cup(tm) just as TF1's 21 cameras tracked the Dim Dim Girls at the Rugby World Cup 2007, the key to successful counter-insurgency actions is preparation and anticipation. If rights holders can identify potential ambushes quickly and require their broadcasters not to show situations demonstrative of an ambush - for example as the London Marathon responded to a Nike ambush by shooting from angles which did not show Nike posters on bus shelters and obscuring from television view a huge billboard - ambushers will not receive the publicity they seek.

In responding as it did, FIFA anticipated public support, if not sympathy, for its cause. The court of public opinion, however, seemed to be firmly on Bavaria's side. FIFA did not have the legal tools in trade mark law to build a compelling case to the courts, nor to convince the public that it or Anheuser-Busch was harmed by the mini-skirt escapade and as a result, its response to the ambush appeared heavy-handed and disproportionate. Both the Nike and Bavaria examples demonstrate that the future of ambush marketing is very much archetypal guerrilla warfare - a small and highly mobile campaign supported by the public, acting against a larger unwieldy force. Ironically, the more that event rights holders rely on draconian and heavy handed statutory protections, the more they become fixed targets.

By pursuing a criminal case against two women over what amounted to essentially a commercial dispute simply for wearing a plain orange dress, FIFA was always going to elicit sympathy for the underdog brewer.

Finale

Companies which engage in this type of ambush marketing are too shrewd to make elementary IPR²² mistakes which would leave them vulnerable to legal courses of action. The culprits are among the biggest corporate entities in the world²³, with seasoned and streetwise legal and marketing machines prepared to exploit weaknesses in IPR law. It is in this light that the vulnerabilities of trade mark law in respect to sport are laid bare.

There is an argument that ambush marketing presents a clear and present danger to corporate sponsorship and effective capitalisation of a sporting organisation's commercial potential. Trade mark, contractual terms and passing off give limited protection against ambushes, but they alone have proven inadequate to effectively protect against sophisticated campaigns. Although rights holders have responded by requiring host nations to promulgate additional legislation - such as the London Olympic Games and Paralympic Games Act 2006 and the London Olympic Association Right - to further safeguard their intellectual property rights, the extent to which such an approach will be effective in law and accepted by business and the public is undetermined. As FIFA experienced in South Africa, even though it thought it was legally in the right, in the eyes of the rest of the world, its actions were offside.

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1. Fédération Internationale de Football Association.
2. The other beers were Carling, Cobra,

Budweiser and Carlsberg.
3. <http://www.football-marketing.com/2010/06/11/nike-ad-beats-official-sponsors-for-online-buzz/>
4. Conservative estimates suggest that FIFA will generate \$3.2 billion in 2010 and will attract a television audience of upwards of 28 billion people.
5. Adidas, Coca-Cola, Emirates, Hyundai KIA Motors, Sony, and VISA.
6. Budweiser, Castrol, Continental, McDonalds, MTN, Mahindra Satyam, Seara, and Yingli Solar.
7. BP South Africa, FNB, Neo Africa, Prasa, Shanduka-Aggreko, and Telkom.
8. In 2006, there were 3,300 rights infringements in 84 countries with less than 20% ending in litigation.
9. Discussed in detail by Michael Murphy in his article 'Ambush marketing: sanctions and state legislation', published in Volume 7, Issues 10 and 11 (October and November 2009) of World Sports Law Report.
10. J Heshka, 'Rules and Rogues - VANOC's approach to ambush marketers may keep the lawyers happy but the strategy is backfiring' (2010) Marketing Magazine 37.
11. For example Nestle KitKat, or Carling.
12. <http://www.football-marketing.com/2010/06/11/nike-ad-beats-official-sponsors-for-online-buzz/>
13. http://www.youtube.com/watch?v=pzBUlsX_gZk&feature=player_embedded#
14. http://blog.nielsen.com/nielsenwire/media_entertainment/nike-ambushes-official-world-cup-sponsors/
15. Presentation by Marinus Vromans of Van den Eynde Legal, 'Sports Management and Marketing Agreements' given at the Sixth International Sports Law and Taxation Seminar in Amsterdam on 3-4 December 2009.
http://www.vdelegal.be/cariboost_files/VDE_20Amsterdam_20_28MARINUS_29.pdf
16. <http://www.youtube.com/watch?v=d3q6Jy4iKk&feature=related>
17. http://www.youtube.com/watch?v=4TkhHLW_iV8&feature=related
18. Such an association could be by way of an unauthorised use of logos or otherwise. Ticket holders are further prohibited from using, wearing, possessing or holding promotional or commercial objects.
19. South African Breweries (Finance) BV trading as SAB Mark International v Laugh It Off Promotions CC (All SALR (2) 2003 454 (C)).
20. International Olympic Committee.
21. French television channel.
22. Intellectual property rights.
23. Includes Kodak, Nike, American Express, Puma, and Pepsi.



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Leading organisations, including the England & Wales Cricket Board, the British Horse Board, Hammonds, Fladgate Fielder, Clarke Willmott and Skadden Arps Meagre & Flom are subscribers.

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