Ambush Marketing, an ongoing practice, hard to prevent!

A report recently published by the Global Advertising Lawyers’ Alliance (GALA\(^1\)) shows, with respect to the current millennium, a significant increase of the practice of *ambush marketing* in relation to events benefitting from broad media coverage. The practice, defined as “*a free ride on the footboard of someone else’s vehicle*”, develops primarily around events capable - due to modern means of communication - of targeting an audience of millions, sometime of billions. Quite obviously, it clashes with the event organizers’ interests and even more with those of the sponsors, who usually provide the economic support (or at least a significant part of it), crucial for the event’s performance. Multi-national companies, dedicating huge budgets\(^2\) for a partnership with organizers of events reaching out to broad audiences worldwide, find themselves more and more exposed to the tricks and smart moves of their main competitors, also doing business on a global level, not willing to undergo the economic burden of an official sponsorship and therefore relying on the practice of ambush marketing in order to associate their brands with a specific event.

After a first survey – performed back in 2011 – on the practice of *ambush marketing* GALA has decided to integrate its initial findings with an update after the 2012 London Games, considering that a significant number of major events were lining up as a ‘spicy occasion’ for ambushers: the FIFA 2014 Soccer World Championship in Brazil, the XX Commonwealth Games in Scotland in a few weeks, the Universal Exhibition EXPO 2015 in Milan (Italy) and the next Olympic Games in 2016 also in Brazil.

According to a summary of the main findings of the updated report:

(a) In the past, it was primarily the International Olympic Committee – IOC to address some aspects of ambush marketing (such as the unauthorized use of the Olympic symbols) by promoting the Nairobi Treaty of September 26\(^{th}\), 1981,

(b) At the time – and for many years in the following – the statute laws of the countries scrutinized by the report did not reserve specific rules to the phenomenon, but tended to related on the provisions set for preventing (or reacting to) acts of unfair competition,

(c) At the end of the Nineties such approach resulted totally unsatisfying to protect efficiently the positions of the official sponsors, who turned out to be essential for performing major events (due to their – increasing - economic contributions) and who’s expectations frequently had to suffer from undue brand association put into place by their main competitors through questionable business practices .

(d) As a reaction to such trend, the organizers of prominent international sports events (IOC, UEFA, FIFA, etc.) decided to make the assignment of their most significant events conditional to a specific obligation of the hosting country for the adoption of guarantee measures, suitable to offer sufficient protection to sponsors’ positions and immaterial rights (such as trademarks, distinctive signs, logos, brands) through special (temporary) legislation, usually subject to time limits, entering into force several months ahead to the event’s start and remaining valid until a certain moment after its end.

(e) Such special legislation is generally accompanied by additional – *ad hoc* – regulations, governing the use, for marketing/advertising purposes, of sports venues and their surroundings (and even the aerial

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\(^1\) GALA is an alliance of lawyers located throughout the world with expertise and experience in advertising, marketing and promotion law. For details, refer to the following URL: [http://www.gala-marketlaw.com/](http://www.gala-marketlaw.com/).

The report covers more than 52 countries worldwide.

\(^2\) The ‘ticket’ a main sponsor has to buy in order to enter the inner circle of the IOC as an “official partner” of the Olympic Games calls for at least 100 million USD, without considering the additional expenses such a company will have to face for performing its specific marketing campaign around such event.
space above them) as well as the temporary eclipsing of signs/symbols, usually legitimately in use, but conflicting with sponsors’ distinctive signs (e.g. temporary hiding of a Bar or a Cinema called “Olympia”, even if in place for decades under such denomination).

(f) The efforts for offering adequate surveillance on compliance and for granting proper enforcement of such special measures involve a broad range of subjects and entities: the national branch of the organizing committee, local authorities, municipalities and police forces. According to the British Press, during the London Games approximately 300 enforcement officers were spread across the country in order to prevent practices of ambush marketing or potential illegal associations with the Games at the expense of the rights of the official sponsors. One of the ‘Magic Circle’ law firms was appointed as a legal services provider to the Games. Finally, athletes had to comply with precise limitations as to use of social media and to the purpose, special agreement was stipulated with the owners of the most popular online platforms 3 .

(g) Despite all these significant efforts and the impressive display of forces in charge of granting compliance, nobody did ever succeed in completely preventing ambush marketing practices during major events. During the London Games one of the main sponsors had to face the move of its primary competitor, who supplied a significant number of athletes (many of becoming champions or winning medals) with colorful (actually fluorescent neon) running shoes, which simply couldn’t be overlooked while used on the training camp, on the race track in the stadium or during the medal awarding ceremonies. The same company also aired a TV campaign (under the headlines “Find your greatness” and “Greatness doesn’t only exist in SW19”, with obvious reference to Wimbledon) showing everyday people during competitions taking place in locations around the world named ‘London’ (in Nigeria, Ohio, France, Norway, Jamaica, South Africa, Canada, Arizona, Qatar). No valid legal grounds could be found for halting these initiatives and the company clearly could take advantage of such indirect association in terms of brand recognition. The official sponsor for electronic equipment was hit by a similar practice, when famous swimmers appeared poolside wearing headphones supplied by a competitor.

(h) It has also to be mentioned that limitations meant to prevent ambush marketing have gained harsh criticism from those who felt that such measures resulted in an unacceptable restriction of the freedom of expression (or freedom of – commercial – speech) principle. Others took the view that a practice like ambush marketing is simply part of the game: companies have to expect it and to live with it.

Italy has adhered to the 1981 Nairobi Treaty, implementing its provisions through Law no. 434 of July 24, 1985 and – by doing so – preventing both, undue trademark registrations as well as non-authorized uses for commercial purposes of the Olympic symbols. When hosting (in 2006) the Winter Olympics, Law no. 167 of August 17, 2005 introduced special additional (temporary) provisions in order to protect official sponsors’ rights. Such provisions address specifically the practice of ambush marketing defined as “activities parallel to those undertaken by economic or noneconomic bodies authorized by the organizers of the sporting events, with the aim of making a profit” and prohibited it as illicit. Aside from traditional remedies, generally available for reacting to TM infringement, unfair competition and misleading advertising, the special law also provided for administrative sanctions (fines) from Euro 1,000 up to Euro 100,000, enforcement through Revenue Officers, State Police and other competent Legal Authorities, potential seizure of all infringing products. The Law’s validity expired on December 31, 2006. To which extent did the special provisions result effective? Again, not completely: a big US company, active in the retail sector, successfully managed to associate its brand with the Winter Games by closing a deal with Italian Railways, months ahead of the event, which involved wrapping the trains transferring fans to the sports venues in its corporate logo. The company succeeded in setting up a moving billboard, as spectators approaching the sports venues ended up travelling

3 Reference is to Rule 40 of the Olympic Charter
on trains depicted all over with red and white bull’s-eye logos, were greeted on board of the “T.... Express” by young welcome teams, when leaving at stations connecting to Olympic locations, were provided with special, branded gadgets (wooden train whistles, small air horns, large foam gloves), and were greeted by slogans such as “T... helps you express your passion. Get ready to make some noise!” The Organizing Committee of the Winter Games, though fuming about the smart move, decided to not take action, as the perspective for a success in court did not appear to be very high.

The main question therefore becomes what to do preventively about ambush marketing, if your company decides to sponsor an event.

While there is no “one fits all” answer to such question, a proper approach to the issue will have to consider the following criteria:

- Make an accurate preventive assessment about you main competitors, most likely to indulge in a practice such as ambush marketing,
- Try to anticipate your competitor’s strategy by working in tight coordination with the event organizers in order to prepare appropriate countermeasures for quick and effective reaction (in short, an emergency plan ready),
- Don’t prepare just for traditional marketing moves (ambush marketing hardly relies on them), but consider a broad range of potential options in relation to all communication tools (those already available as well as to ready in a near future) and never forget that the context maybe tri-dimensional,
- Accept the fact that you won’t be able to foresee every possibility, development and move the ambushers may come up with,
- Finally, in case of accidents, don’t rush for hasty action or precipitous legal steps, rather consider the situation and all its implications rationally together with your (and the event organizer’s) legal consultants and never forget listening to your people of the commercial department (sometimes a competitor’s practice may offer an opportunity for a successful counter-campaign).

With respect to the last recommendation mentioned above, I recall an clear example of questionable over-reaction occurred during the 2010 FIFA World Championship in South Africa: a Dutch beer producer, competitor of one of the event’s main sponsors, managed to introduce into a stadium a group of handsome blond girls all wearing orange suits, the national color of one of the teams competing on the playground (but also the typical brand color of the company not officially associated to the event). The group of girls cheered in favor of the ‘orange’ players and – obviously – were noticed by the “brand police” present at the venue. During the halftime, the girls were blocked by surveillance staff and forced to leave the stadium. Two of them – deemed to have organized the initiative – were accompanied to a police station, had their passports seized and were kept in custody for one night in order to appear in front of a local court. Quick and extremely effective enforcement, yes, but here is the B-Side of the story: a situation that would possibly have just achieved a few seconds of coverage by a cameraman of a TV station, was in the media worldwide for almost ten days, registered the presence of 50 reporters and journalists at the court hearing, led to an official protest of the Dutch Secretary for Foreign Affairs and had the South African Ambassador to the Netherlands appear before the Dutch Government for ‘formal explanations’. Perfect timing, great enforcement effectiveness, no question, but one wonders how happy the official sponsor may have felt about the fact that everybody knew about the ambushers and its brand, while just a few were able to recall the company performing as the event partner.

To conclude a glimpse towards some upcoming events.

Months ago, the international press has reported that in the light of the upcoming Soccer World Championship in Brazil FIFA and the local organizers had already ascertained several hundreds of
infringements taking action against offenders. Easy to predict that with the event about to start in a few days there will a rapid and significant increase of cases of ambush marketing. On previous occasions, FIFA used to retain an impressive range of legal resources and special teams in order to fight practices of undue association with the championship. Nevertheless, all such efforts until now failed to register a complete success in preventing the phenomenon of ambush marketing.

Italy will host the 2015 Universal Exhibition EXPO in Milan (from May throughout October) and the Italian Parliament, once more, felt necessary relying on an event specific protection with respect to TMs, logos, distinctive signs, symbols and colors characteristic for the Exhibition. Such protection relates to signs’ and symbols’ use and will be granted from the event’s beginning until December 31, 2015. According to Section 5/e of Law no. 71 of 2013, the competent State Departments are called to issue a specific Regulation with measures aimed at: (i) hindering unauthorized and illegitimate use of all distinctive signs associated with the Universal Exhibition Expo Milan 2015, (ii) preventing both, ‘parallel initiatives’ as well as ‘parasitic commercial activities’ capable of making infringers gain visibility or undue economic profit (with a specific reference to practices commonly known as 'ambush marketing), (iii) hitting offenders with fines from Euro 5.000 up to 250.000, unconditional of other traditional remedies eventually available. The announced Ministerial Regulation will provide additional details on the measures deemed adequate for enforcing this protection.

How will it end up? In my personal view, the answer should be simple: just as usual. There will be a number of moves and tricks though which the ‘smart guys’ – taking advantage of some loopholes in the system – will succeed in associating their brands with the event, without “paying the ticket”.

Avv. Felix Hofer

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Felix Hofer is a named and founding partner of the Italian law firm Studio Legale Hofer Lösch Torricelli, in Firenze (50132), via Giambologna 2/rosso. He is the country member for Italy of the Global Advertising Lawyers’ Alliance - GALA; he may be reached through the following contact details: Phone +39.055.5535166 , Fax +39.055.578230 – e-mail: fhofer@hltlaw.it (personal) or info@hltlaw.it (firm e-mail).