



Ambush Marketing: A Global Legal Perspective





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EXECUTIVE SUMMARY

'Ambush marketing': A controversial marketing practice involving unofficial association or intrusion that pits non-sponsors against event producers, official sponsors, and other rights holders. Even though ambush marketing campaigns are quite prevalent, most countries do not, in fact, have specific legislation designed to address the practise. Some countries have adopted more specific legislation to guard against ambush marketing where the event owners (such as the International Olympic Committee and FIFA) have pushed for the enactment of highly-restrictive event-based legislation in order for a locality to obtain the rights to produce the event – these include Brazil, Russia, and South Korea (when each hosted the Olympic Games), and Italy (which will host the Olympic Games in 2026). Without specific rules governing typical ambush marketing practises around the world, official sponsors, the so-called 'ambush marketers', and the owners of events themselves must look to traditional intellectual property and unfair competition laws to determine what each party can and cannot do.

One reason ambush marketing may not be specifically outlawed is that it is hard to define. Is the use of generic imagery of a sport or entertainment event by a non-sponsor an 'ambush' or even illegal? And should it be? Is a brand an 'ambusher' of the Olympic Games or the FIFA World Cup even though it sponsored several national teams or individual athletes? And what about new technology: is a filter or 'skin' within a social media app featuring advertising from a non-sponsor and which is triggered when the app user enters an event venue considered an ambush? These are critical questions that challenge the current legal frameworks around the world.

Ambush marketing is most often thought of in the context of sporting events, but it is certainly not limited to that field. Popular entertainment events and notable international events, such as the Academy Awards, the Grammys, 'fashion week' runway shows, and royal weddings, also generate a fair share of ambush marketing activity.

The practise of ambush marketing does not appear to be going away any time soon. As recent actions by the Australian and US Olympic Committees, the Danish Football Union,

the regulatory body of the Russian Federation, and the US' National Collegiate Athletic Association show, ambush marketing and the enforcement against it is still a hot button issue.

This guide, which updates GALA's 2014 edition, summarizes the laws, rules, and regulations governing ambush marketing in 68 countries. The guide addresses legal considerations, regulatory considerations, commercial considerations, and recent enforcement actions in the field of ambush marketing.

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ABOUT GALA

The Global Advertising Lawyers Alliance (GALA) is the leading network of advertising lawyers in the world. With firms representing more than 90 countries, each member has the local expertise and experience in advertising, marketing and promotion law that will help your campaign achieve its objectives, and navigate the legal minefield successfully. GALA is a uniquely sensitive global resource whose members maintain frequent contact with each other to maximize the effectiveness of their collaborative efforts for their shared clients. GALA provides the premier worldwide resource to advertisers and agencies seeking solutions to problems involving the complex legal issues affecting today's marketplace.

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LEGAL CONSIDERATIONS

While ambush marketing is generally associated with famous sport events, such as the Olympic Games or the Rugby World Cup, this phenomenon tends to take more and more forms, including in the political domain, as businesses and their ad agencies come up with creative ideas.

There is no specific legislation in France which would outlaw ambush marketing *per se*. Therefore, the traditional tools are used:

- **Intellectual property:** notably copyright infringement or trademark infringement, even if, in certain cases, such ground cannot be used, insofar as trademark infringement implies the use of a trademark by a competing company, and the freedom of speech is protected. Moreover, one notes that registered trademarks are rarely imitated by ambush marketers in France.
- **Unfair competition and the other associated legal notions:** while unfair competition implies a competing relationship between the suffering party and the ambush marketer (which is not always the case), the notion of “parasitism” has been developed by French authors, and then applied by judges to sanction disloyal behaviors towards non-competitors. The parasitism is based on torts, which requires that the suffering party evidences:
 - a fault (disloyal behavior consisting of the intention to promote its own commercial activity by freely, and without risks, benefiting from another party's efforts and investments),
 - a prejudice (to damage somebody's reputation or image, customers' misappropriation, destabilization, appropriation of investments) and
 - a link between them.
- **Misleading advertising/unfair commercial practice**, where applicable.
- **Contract law** (between the owner of the rights on an event and any potential partners/sponsors): the way is to clearly define the scope of the rights granted and the guarantee offered by the grantor.
- **Violation of provisions of the Code du sport** and in particular of section 333-1 that grants to the sports federations and organizers of sports events the ownership of the commercial use of the sporting events and competitions that they organize. This provision was specifically codified in order to protect sports events organizers, since most ambush marketing operations take place in the context of sports events. Further, Article L. 141-5 provides for a special protection regime applicable to the Olympic Games, according to which “the French National Olympic and Sporting Committee is the owner of the national Olympic emblems and depositary of the motto, anthem, Olympic symbol and the terms ‘Olympic Games’ and ‘Olympiad’” and they can take advantage of this foundation in order to put an end to all marketing ambush practices that would gravitate around the event of the Olympic Games.

- **Section 9 of the Code civil:** under which individuals have a right to the protection of their image, and may oppose the commercial use of their image.
- **Ad hoc laws:** may be enacted by the State in connection with an event in order to address ambush marketing risks.

REGULATORY CONSIDERATIONS

The advertising self-regulatory body, Autorité de Régulation Professionnelle de la Publicité ("ARPP") ensures that the Recommendations it issues are complied with by advertisers, but there is no specific Recommendation on ambush marketing. Rather, the ARPP uses the general principles of good faith, true and honest advertising, etc. However, article 15 of the Advertising and Marketing Communication practice Consolidated ICC Code prohibits the exploitation of the goodwill of a company or an institution, and more specifically "to take advantage of the goodwill earned by other marketing campaigns without prior consent".

COMMERCIAL CONSIDERATIONS

The following should be done:

- The legal teams carefully draft the agreements (right granted, exclusivity or not, duration and territory of the grant);
- Monitoring of any ambush marketing event next to the stadium, but also in the stadium;
- Internet monitoring services provided by specialized companies;
- Work with the broadcasters (diffuseurs) to avoid any pirating/hacking: eg, use of specific TV signals that cannot be modified.

Ambush marketing campaigns in France have taken various forms over the years:

- (1) In 2008, Ryanair's ad: "with Ryanair, everyone will be able to attend my wedding" associated with a picture of Nicolas Sarkozy, the French president at the time, and Carla Bruni (who was not yet his wife or even engaged to him), was sanctioned by the tribunal as a violation of Section 9 of the French civil code (the right to the protection of one's image) and Ryanair was ordered to pay €60,000 to Bruni and €1 to Sarkozy. Whilst not categorized as ambush marketing, it clearly was.
- (2) Similarly, in 2004, the Cour d'Appel of Paris ordered SFR, the French telecommunication company, and its advertiser to pay €1 million to Gaumont for parasitical practices as a result of the extensive display in France of an ad (posters, TV) shortly after the release of movie the "Fifth Element", in which not only the leading actress appeared, but a clear and direct reference to the movie was sought. Whilst the court did not qualify this behavior as an ambush marketing operation since the notion was not commonly used at the time, it was nonetheless a clear operation of ambush marketing. The very substantial and unusual amount of damages ordered

against the advertiser and its advertising agency lie in particular with the fact that the ad campaign was very substantial, and that SFR and Publicis did not discontinue it after the decision of first instance.

- (3) In 2013, in order to promote its AXE contest, the winner of which was to go into space, Unilever had individuals dressed up as astronauts attend a France/Germany soccer match in the VIP box, thereby drawing the attention of the TV cameramen. This was a reiteration of the first well-known ambush marketing operation initiated by DIM, the lingerie company, which had female spectators attend the rugby France/Ireland world cup match wearing lingerie in 2007. Neither the AXE nor DIM marketing campaigns gave rise to court actions.
- (4) In 2012, Fiat published an ad in L'Equipe, the French sports newspaper. In this ad, the day after a France/England rugby match, Fiat recalled the score of both teams, congratulated the English team and fixed a rendez-vous on 9 March with the French team for the France/Italy match. The ad was signed "Italie 500" a prediction of the score and a reference to the famous Fiat 500 car. The French Fédération Française de Rugby ("FFR") filed a claim against Fiat on the basis of the violation of Section 333-1 of the French Code du Sport that gives the sports federations and organizers of sports events the ownership of the commercial use of the sports events and competitions that they organize, and on the basis of parasitical practices. The FFR lost on both counts in a very controversial decision of the Cour d'Appel of Paris, confirming the first instance decision, even though most commentators agree that this was a clear violation of the provisions of Section 333-1 of the French Code du Sport and of parasitical practices. This decision of the Cour d'Appel of Paris was confirmed by the Cour de Cassation which ruled in favor of the freedom of the ambusher. It did so on the following terms: "the risk of confusion on the quality of Fiat and its dealers vis-à-vis the FFR was not proven" and therefore it "was not established against them that the promotion of their own commercial activity was carried out by taking advantage of the efforts and investments of the FFR".
- (5) In 2018, the Court of Appeal ordered Franck Provost to pay a rival hairdresser, Jacques Dessange, €120,000 in damages. Although the court held that an official partner of the Cannes Film Festival cannot oppose a competitor's communication about his activities on the occasion of the Festival, and the use of the terms "7th art", "Cannes" or "climbing the stairs", its use of the term "official" and the Festival's symbols (poster, palm tree), as well as suggesting the existence of a VIP access to the backstage area within the framework of a contest entitled "Special Cannes Film Festival" was likely to wrongly attribute to it, in the consumer's mind, the status of official long-term partner of the Festival, to the detriment of the company having invested in, and financed, the event in order to promote its image and profile. Note, however, that this behavior, even though it was a clear operation of ambush marketing, was nonetheless qualified and

condemned as acts of unfair competition and of parasitism.

- (6) The simple retweeting by Snowleader, a brand of outdoor sports equipment, of a tweet posted by Martin Fourcade about his victory at the 2017 biathlon world championships, accompanied by a message of congratulations, was not considered to be at fault. The Tribunal dismissed the claim of infringement of the right to the protection of one's image, as the message did not suggest the existence of a partnership contract and as it fell within the scope of the brand's freedom of expression on a current event. Nor did the Tribunal consider that the behavior of the brand qualified as ambush marketing.

Overall, uncertainty remains regarding courts cases concerning ambush marketing operations where the operation is conducted in the context of an official sporting or cultural event by an advertiser which is not an official sponsor. Communication in the context of such event is possible, but precautions need to be taken in order to avoid a claim for parasitical practices.

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