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Ambush marketing (2021)

The What, the Why, the How and the Whether

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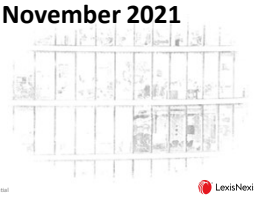
The law as stated during this webinar is up to date as of **25 November 2021**



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Ambush Marketing

Introduction

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Ambush Marketing - Introduction

- What is Ambush Marketing?

  An attempt by a third party to associate itself directly or indirectly with a major brand or event in order to benefit from its goodwill or prestige, without having to pay for that privilege as an official sponsor would do.

- Why is this such a big issue?

Organisers of major events make a huge amount of revenue from (and depend enormously on) investment by their sponsors. (At the London 2012 Olympics, in the region of £750 million of the Intenational Olympic Committee's revenue derived from sponsors and marketing agreements.)

With such vast sums of money involved, official sponsors expect a degree of exclusivity for their investment. Without the guarantee of such exclusivity, critical revenue streams dry up.

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Ambush Marketing – Legal Framework

- Non-Specific Law (a Mosaic of Protection):
  - Registered Trade Mark Protection
  - Rights in Passing Off
  - Copyright
  - Design Rights
  - Domain Names
  - Business and Consumer Protection Regulation
  - Advertising Standards (CAP Codes)
- Tailored Rules and Regulations, e.g.:
  - The Olympic Symbol (Protection) Act 1995
  - London Olympic Games and Paralympic Games Act 2006
  - Trade Descriptions Act

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Ambush Marketing – Tools in an Official Sponsor's Armory

- Contractual Safeguards
  - B2B Restrictions
  - Ticketing Terms
- Intellectual Property Protection
  - Procuring registered trade mark and design protection for key branding/event names
- Controlling the Event Environment:
  - Imposing Physical Restrictions
  - Virtual Restrictions in the Online Space
- Taking Civil Proceedings
- Regulatory Enforcement
  - ASA and Trading Standards Complaints

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Real Life Examples

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Ambush Marketing - Historic Examples of Ambush Marketing

- 1984 Olympics – Kodak sponsoring US Broadcast
- 2012 Olympics:
  - Paddy Power – "London France" event
  - Nike – "Find your Greatness" – London (Ohio)
- Running shoes and equipment:
  - Michael Johnson (Nike) – 1996
  - Linford Christie (Puma contact lenses) - 1996
  - Usain Bolt (Puma) – various
  - Manu Tuilagi (gumshields) 2011 RWC
  - Beats – 2012 – Free Headphones

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Ambush Marketing - Modern Ambush Marketing Approaches

- Ambushing "news" events not just fixed events?
  - "Pringoals" – cancellation of 2020 Euros
- Social media:
  - Burger King/McDonalds/Wendy's
  - Snickers/Nandos – 2014 World Cup (Luis Suarez)
  - Sports celebrities using photographs at events (e.g. Messi, Cheslin Kolbe)
- Rise of NFTs – capturing "moments"
  - Open nature of NFTs
  - Copyright issues
  - Anonymity

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Ambush Marketing - Modern Ambush Marketing(?) Approaches

- Social Media Case Studies

  Fallout from the Brewdog "Solid" Gold Can
  - ASA complaint re: advertising wording
  - Used as a springboard for new marketing/competition

  Cuthbert-gate
  - Deflecting potential legal action and
  - generating huge marketing from this;
  - Public statements to garner goodwill
  - in their brand;
  - Key learning – don't overreact!;
  - Latest update (Christmas Advert):

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Formulating an Effective Brand Registration Strategy

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Ambush Marketing – Modes of registration

- **Design rights**
  - Protects shape or configuration, if novel
  - Exclusions include must-fit, must match and principles of construction
- **Trade Mark**
  - Protects origin function (and certain other functions)
  - Must be distinctive and non-descriptive
  - Capable of representation on register and of designating origin
- **Copyright**
  - Protects work against reproduction of substantial part
  - Requires creator's own intellectual creation
- **Misc**
  - Domains, social media handles, customs

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Ambush Marketing – Why register?

- Potentially **required** for large scale events (especially international sporting events and events with alternating host cities)
- Scope of **enforcement** improved through registration:
  - third party platforms;
  - trading standards; and
  - customs
- **Licensing** opportunities
- Potential avenues for **copyright** registration
- Use of ® and "TM" indications
- **Deterrence**

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Ambush Marketing – What to register?

- Traditional branding:
  - Colours
  - Words
  - Slogans
  - Logos

"I'M LOVIN' IT"

- Additional brand elements:
  - Patterns
  - Shapes
  - Sounds
  - Smells and tastes?

McDONALDS

♫ I'M LOVIN' ♫

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Key considerations for registering interests:

- **Confidentiality**
  - Trade mark applications are on public record
  - Use of *strawman* may be advisable
- **Timings**
  - Registration of trade marks is not immediate (usually 6-8 months)
  - Fast Track applications
  - Back dating of damages may not be sufficient
  - Design and copyright protection as a quicker alternative
- **Ownership**
  - Unincorporated associations
  - Licence arrangements and resulting ownership of goodwill
- **Clearance work**
  - Red flags are relative
  - Implications of duration of intended use (*one offs* versus long term planning)

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Registering IP with ambushers in mind: Summary

- **Clearance**
  - Check for registrability and enforceability ahead of time
  - Certain liabilities can be outsourced
- **Register brand elements which indicate origin**
  - Consider timescales for registration and enforcement
  - Keep confidentiality in mind
- **Seek broad protection**
  - Breadth of specification (holder vs sponsor)
  - Selection of form of right for protection
- **Ensure use complies with brand guidelines**
  - Especially where licensees or authorised third parties are involved

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A Practical Guide to Contractual Protection

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Ambush Marketing - Contractual Protection

- Licences and Contracts for "exclusive" events
  - Licenses can be exclusive (where there is IP to license):
    - Territorial
    - Sectoral
    - Temporal
  - Where no Registered IP exists:
    - Contractual terms on enforcement against third parties
    - Role of confidentiality/exclusive rights
    - Recourse to the ASA?
    - Who bears the costs

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Ambush Marketing - Contractual Terms

- Key Contractual Clauses
  - Warranties
  - Indemnities/penalty clauses
  - Enforcement clauses
  - Termination/break clauses
- Negotiation Tips
  - Goals for the Agreement
  - Heads of Terms and clarity
  - Value judgment on agreement

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When Ambush Marking is Lawful – Defences and Limits

Finally... Is Ambush Marketing inherently wrong?

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Questions?

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Intellectual Property webinars in 2021

- WN0121 The Unified Patent Court in 2021 - Q1 2021
- WN0221 IP in photographs and images (2021) - Q1 2021
- WN0321 Trademarks and designs following Brexit (2021) - Q2 2021
- WN0421 IP issues for artificial intelligence (2021) - Q2 2021
- WN0521 Ambush marketing (2021) - Q3 2021
- WN0621 Extending the reach of copyright (2021) - Q3 2021
- WN0721 Gathering digital evidence (2021) - Q4 2021
- WN0821 Intellectual Property - end of year round-up 2021 - Q4 2021

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