

## **Is Everything Fair In Marketing?** **(Unraveling the Knitty-Gritty of Ambush marketing With Special Reference to India)**

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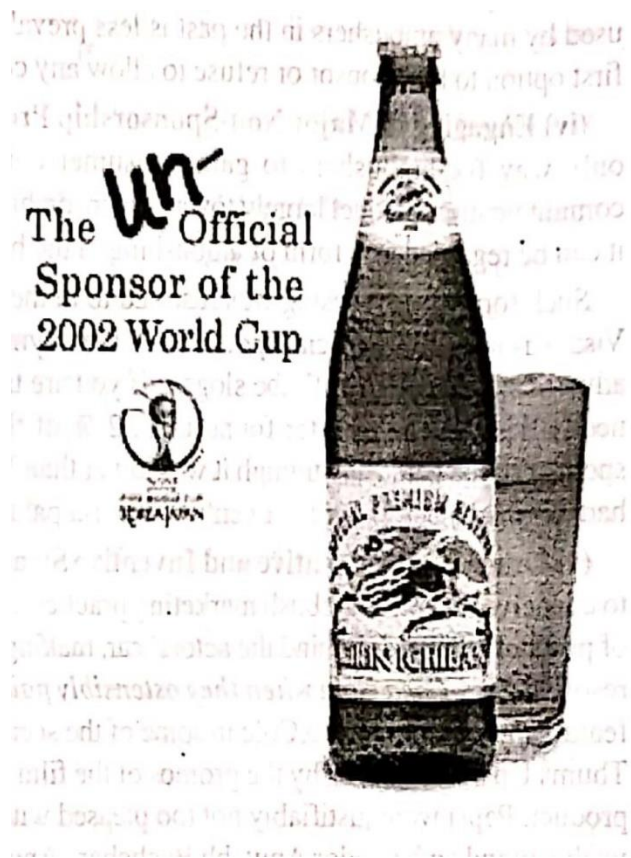
Ambush marketing - a term often hissed in industry circles - occurs when one brand pays to become an official sponsor of an event (most often athletic) and another competing brand attempts to cleverly connect itself with the event, without paying the sponsorship fee and, more frustratingly, without breaking any laws. Ambush, or guerilla, marketing is as undeniably effective as it is damaging, attracting consumers at the expense of competitors, all the while undermining an event's integrity and, most importantly, its ability to attract future sponsors. Marketing is the process of planning and executing the conception, pricing, promotion, and distribution of ideas, goods, and services to create, exchange, and satisfy individual and organizational objectives. Simply put, Marketing is figuring out what one has to do to sell one's product or service for a profit. But recently the multinational companies all over the world in an attempt to maximize their profits have engaged themselves in what many baptize as Ambush Marketing.

The term Ambush Marketing first coined by Jerry Welsh, is gestol i an attempt by a third party to associate itself directly or indirectly with an event(s) or the event(s) participant(s), typically major sporting events like the Olympics or the World Cups, without their sanction, thereby depriving the official sponsors, suppliers and partners of much of the commercial value deprived from the official' designation. It is for this reason that ambush marketing is frequently referred to as parasitic marketing.

### **The Objectives of Ambush Marketing are Two Fold:**

The Official Sponsor of the 2002 World Cup

1. Firstly to get maximum returns on the marketing buck and
2. Secondly to undermine the branding efforts of the rivals by stealing the attention, increasing the clutter and confusing



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**Forms of Ambush Marketing:** Ambush marketing can take various forms. It can be either direct or indirect.

(A) **Direct Ambush Marketing:** Sprints Communication Co. resorted to direct ambush marketing in the 1994 Football World Cup by using the official logo without permission of either FIFA (Football governing body) or Master Card who were assigned the exclusive rights for using the world cup logo.

(B) **Indirect Ambush Marketing:** Indirect ambushing can either be onsite or via the media.

(a) **Onsite Ambush Marketing:** Samsung, an unofficial Olympic sponsor, launched a very successful onsite ambush effort in Atlanta City during the 1996 Olympic Games. It was directed at Panasonic by taking squatters rights to a parking lot on the outer limits of the Centennial Olympic Park. Panasonic, the official Olympic sponsor, displayed its logo on the CNN tower looming over the Olympic Park. The result, Panasonic captured only three per cent awareness compared to the nine per cent stolen by Samsung.

(b) **Ambush Marketing via Media:** This is done by sponsoring the broadcast of the event, sponsor subcategories within the event and exploit this investment aggressively, purchasing advertising time around relays of the competitor's event, engaging in major non-sponsorship promotions to coincide with event and an assortment of other highly creative and inventive strategies.

(i) **Sponsoring the broadcast of the event:** This tactic is highly effective in accessing more consumers, as the media audience for big events is normally much larger than the on-site audience. McDonald's had paid a hefty sum of money for the right to be an official sponsor of the Games, which entitled it to use the Olympic insignia. Meanwhile Wendy became the proud sponsor of ABC's broadcast of the Olympics. In addition to this, they printed Olympic stories on its tray liners and also slapped the broadcast sponsorship logo on napkins, bags and signs in all its restaurants. Wendy was therefore successful in undermining the branding efforts of the rivals by stealing the attention.

(ii) **Sponsor subcategories within the event and exploit this investment aggressively:** In essence this type of ambush marketing tries to associate itself with the overall event by investing a much smaller sum of money in some lesser elements. This tactic is, therefore, very parsimonious.

- In the 1984 Olympics, Fuji was the official programme sponsor of the Games at considerable cost of \$40 million. Their competitors, Kodak, became the 'sponsor' of the U.S. track team and of ABC television's broadcast of the Games. Its film thereby became the official film of the U.S. track team, and it also proceeded to use the network's own set of symbols to advertise its merchandise.
- At the 1992 Barcelona Olympics, official sponsors including Reebok paid \$700 million to be the official sponsors but when the US basketball team won gold, Nike sponsored the press conference.

(iii) **Purchasing Advertising Time Around Relays of The Competitor's Event:** Such tactics taken by ambushers are to 'deny a competitor the full benefits of their event or broadcast sponsorship.' However, this practice successfully used by many ambushers in the past is less prevalent now as broadcasters in

many countries will now either offer first option to the sponsor or refuse to allow any competing advertising in slots around televised events.'

(iv) Engaging in Major Non-Sponsorship Promotions To Coincide With Event: This is understood to be the only way for ambushers to gain consumer consciousness when the sponsor has committed its marketing communications budget largely toward sponsorship. Since such tactics normally use mainstream media advertising, it can be regarded as a form of ambushing in the broadest sense.

Such form of advertising was resorted to in the Winter Olympics held in Lillehammer, Norway in 1994, where Visa was one of the official sponsors for the Olympic Games. American Express (Visa's counterpart) launched an advertising campaign with the slogan: If you are traveling to Lillehammer, you will need a passport, but you don't need a visa. A survey later found that 52 % of the respondents thought that American Express was the official sponsor of the games. Although it was lower than Visa's 72%, American Express had a reason to be pleased since it had not paid a penny for the event while Visa paid \$ 40 million to gain the official sponsor status.

(v) Other Highly Creative and Inventive Strategies: Here ambushers display their creativeness, ingeniousness to conceive inventive ambush marketing practices. One such practice is in- Film advertising, which includes placing of product billboards behind the actors' car, making the actors slurp famous Cola brands etc. In Film advertising was resorted to by Coca Cola when they ostensibly paid Sanjay Gupta, the producer of the film Kaante, Rs. 4 Crores to feature their product Coca Cola in some of the scenes of the movie and to air promos of the film that incorporate the Thums Up brand. Going by the promos of the film, it appeared that Thums Up had roped in six stars to endorse their product. Pepsi were justifiably not too pleased with the advertising because it had the effect of hijacking their very visible brand ambassador Amitabh Bachchan. Another incidence of ambush marketing took place when a couple of streakers ran on to the field of play during a match with Vodafone logo emblazoned on their backs. Telstra, Vodafone's rivals, owned the stadium. Vodafone's officials later conceded that had Okayed the streaker's suggestion for pulling of the prank that would give it up.

### **THE MAIN CONSEQUENCES OF AMBUSH MARKETING**

1. It decreases the commercial value of the event
2. It creates unhealthy competitive environment.
3. It may adversely effect the funding of the event, as it will be beneficial for the company to be an ambusher instead of roping huge amounts of sponsorship.

### **ETHICAL ASPECTS OF AMBUSH MARKETING:**

The question, which therefore arises, is whether ambush marketing can be regarded as ethical and justifiable route of Marketing. The answer to the particular query depends on whether the response comes from the ambusher or the sponsor/event organizer/marketer. Corporate sponsors obviously regard this practice as unethical and immoral. On the other hand the ambush marketers argue that it is all a fair game and further claim that without ambushing, they will be denied the right to participate in an important promotional opportunity due to the inability to meet the cost of official sponsorship.

## **HIGHLIGHTS IN AMBUSH MARKETING HISTORY INCLUDE:**

### **Famous Ambush Marketing Cases:**

- At the 1984 Olympics, Kodak sponsors TV broadcasts of the games as well as the US track team despite Fuji film being the official sponsor.
- At the 1988 Summer Olympics, Fuji film sponsors the games despite Kodak being the official sponsor.
- At the 1992 Summer Olympics in Barcelona, Nike sponsors press conferences with the US basketball team despite Reebok being the official sponsor.
- At the 1994 Winter Olympics, American Express sponsors the games despite Visa being the official sponsor.
- At the 1998 World Cup, Nike sponsored a number of teams competing in the Cup despite Adidas being the official sponsor.
- At the 2000 Sydney Olympics, Qantas Airlines' slogan "The Spirit of Australia" sounds strikingly similar to the games' slogan "Share the Spirit." despite Ansett Air being the official sponsor.
- At the 2002 Boston Marathon, as Adidas-sponsored runners come off the course, Nike are treated to spray painted messages honoring the day of the race, but not the race itself. At the 2006 FIFA World Cup, fans of the Netherlands had to disrobe Bavaria Brewery's leeuwenhosen because Budweiser was the official beer sponsor.

## **AND WHERE DOES THE LAW STAND IN SUCH CASES OF AMBUSH MARKETING?**

Usually somewhere out of view. Unlike piracy or counterfeiting, ambush-marketing cases are rarely actionable, especially if the ambushers know what they are doing. In 1992 the granddaddy of boy bands - New Kids on the Block sought legal action against newspaper USA Today, when it set up a charge-per-call service asking readers to tell them what they thought of the New Kids. The New Kids' suit (like their careers), ended unfavorably. For those finding themselves on the working end of an ambush marketing campaign, the real question is one of ethics. Is ambush marketing an ethical business practice? The ambush marketing cases that get the most press are those involving heavyweight brands with massive resources, such as Nike, adidas and Reebok or Coca-Cola and Pepsi. Between such large and equal players, ambush marketing is deemed a last ditch technique to use when no other forms of competition are available - the corporate sponsorship answer to Mutually Assured Destruction.

## **LEGAL ASPECTS OF AMBUSH MARKETING: A PEEP INTO LEGAL FRAMEWORK PREVAILING IN INDIA (MAJOR CASES)**

The majority of jurisdictions rely upon traditional laws such as the Intellectual Property Rights (Trademarks, Copyrights and Deign), Unfair Competition Laws and Passing Off laws to bestow protection on the sponsors. At times countries also enact special laws to stop market ambushers from appropriating some of the exclusivity reserved for the official sponsors.

## INTELLECTUAL PROPERTY RIGHTS

A good registration of Symbols and Words of the games, Sponsors Labels is a sine qua non for availing the entire gamut of intellectual property rights against market ambushers.

### TRADEMARK LAW

India enacted a new trademark law in 1999 to bring it in conformity with the requirements of TRIPS. According to section 2 (zb) of the Trademarks Act, 1999 a 'trademark' is defined as a mark capable of being represented graphically and which is competent to distinguish the goods or services of one person from those of the others and includes the shape of goods, their packaging and the combination of colours. 'Mark' is defined under section 2 (m) of the Trademarks Act, 1999 to include device, brand, heading, label, ticket, name, combination of colors etc. Here it is pertinent to note that the terms packaging, shape of goods, color combination were added under the new trademark law. The new law therefore gives an opportunity to the companies sponsoring the event and the 'games committees' to register their labels/marks as trademarks. This enables the registered proprietor of the trademark to have an exclusive right to use the trademark in relation to his goods or services in respect of which the trademark is registered. If any third person infringes the registered trademark, then in such an event it will be open for the proprietor of the trademark to institute passable legal proceedings against the third party. However, trademark law alone cannot provide adequate remedy against market ambushing for the reason that in most cases market ambushers do not directly make use of the trademarks or designs of the sponsors. They (market ambushers) usually refer to the sponsors or the games in their products or services in an ingenious and creative manner in order to circumvent the law. Another predicament for the applicability of trademark law is that at times the label/mark is not capable of registration as it lacks the necessary distinctiveness.

### COPYRIGHT LAW

Copyright law provides a number of exclusive rights to the copyright owners of original literary, artistic, dramatic, and musical works as well as films, sound recordings, television and radio broadcasts. Artistic work as under **section 2 (c) of the Copyright Acts** means a painting, sculpture, drawing, engraving or a photograph whether or not such artistic work possess any artistic quality; work of architecture and any other work of artistic craftsmanship. For an artistic work to qualify for copyright protection it should be original, i.e. it must originate from the author. The skill, judgment and effort required are minimal. Get up, arrangement, and colour scheme of labels used as trademarks can constitute works of artistic craftsmanship and be the subject matter of copyright protection. Such labels can also be considered as drawings or engravings. However it is pertinent to note that that no copyright subsists in mechanically reproduced labels and cartons because no skill or labor is involved in the production of such labels or cartons. Copyright can be claimed only in original artistic work produced by natural persons by the expenditure of his skill and labor. Therefore in order to prove ownership of copyright in artistic label or carton, the original work from which the printed reproductions have been made must be produced in evidence. the case of Castrol Ltd. v. V.O. Muralidhar Reddy the defendant was held liable for copying the color scheme, get up and layout of the plaintiffs Castrol; Noble tin of greases and oil products and an injunction was granted under the copyright and passing off.

But the quandary, which lies in the applicability of copyright law, is that the ambushers only suggest an association with the sponsors, games whereas the law requires a substantial reproduction of copyright works in order to constitute infringement.

## PASSING OFF

Passing off is a form of tort. The tort of passing off has undergone a plethora of changes in the course of the time. Passing off is not defined in the Trademarks Act, 1999. It is referred to in **Sections 27 (2), 134 (c) and 135**. **Section 27 (2)** states that the rights of the action against any person for passing off goods as the goods of another person or the remedies in respect thereof are unaffected by the provisions of the Act. Section 134 (c) refers to the jurisdiction of the courts to try suits of passing off arising out of the use of any trademark. Section 135 specifies the remedies available in respect of passing off arising from the use of the trademark. In order to succeed in an action for passing off, the claimant must establish that:

- ✓ The claimant has goodwill;
- ✓ The defendant made a misrepresentation that is likely to deceive/confuse the public and
- ✓ The misrepresentation damages the goodwill of the claimant. These tests are often referred to as the '*classical trinity*' of passing off.

Passing off cases can be divided into two broad categories.

**First** are those where the competitors are engaged in a common field of activity and the plaintiff complains that the defendants have named, packaged or described his product or business in a manner likely to lead the public to believe that the defendants' product or business is that of the plaintiff.

**Second** type of passing off, is where it is alleged that defendant has promoted his product or business in such a way as to create the false trademark.

Impression/confusion that his product or business, is in some way approved, authorized or endorsed by the plaintiff or that there is some business connection between them. By this false linkage or relationship, the defendant hopes to gain on the goodwill of another. This observation also finds support in the decision ***National Hockey League et alv. Pepsi Cola Ltd in the following words:***

"Now a days, perhaps the more common type of passing off is where it is alleged that a defendant has promoted his product or business in some way approved, authorized or endorsed by the plaintiff or that there is some business connection between the defendant and the plaintiff. By these means, a defendant may hope to cash in on the goodwill of the plaintiff."

It is the second type of passing off that quite often results in market ambushing. For advancing a successful passing off action against market ambushers a sine qua non is to prove the existence of confusion in the market which misleads the members of the public into believing that the ambushers are official sponsors or somewhat associated with the games/events and/or the sponsors. This is also emphasized in the case ***of H.P.Bulmer Ltd. v. J Bollinger in the following words:***

However, not every kind of connection claimed amounts to a passing off. There must be a representation that the defendant's goods are connected with the plaintiff in such a way as would lead people to accept them on the faith of the plaintiff's reputation.

One of the rare market ambushing cases, which succeeded in proving such confusion, is the case of ***Master Card International Inc. v. Sprint Communication Co. v. ISL Football AG. Master Card*** was assigned the exclusive right before and during the World Cup 1994 to use World Cup logos on, and in association with, all card-based payment and account access devices. Sprint Communications was also involved as backer of World Cup as an official partner, a category that was neither as extensive as that of a sponsor nor as costly. Sprints exclusivity was in the field of long distance tele-communications. Sprint began marketing pre-paid telephone calling cards both in the US and Europe bearing World Cup logos, despite Master Card's strong objection. In the litigation that ensued in the Federal Court in New York City, Master Card established that Sprint's use of World Cup logos on its telephone cards infringed on Master Card's category of card-based payments and account access devices, even though the telephone cards were not functionally the same as Master Card's cards. The court held that consumers would, on seeing the Sprint card bearing a World Cup logo, would mistakenly assume that Sprint had rights in a category that, in fact, belonged exclusively to MasterCard.

However in more recent cases, the event owners and sponsors found it very difficult to prove the confusion required to constitute unfair competition or passing off.

In the case of ***ICC Development (International) Ltd. v. Arvee Enterprises and Anr.*** The plaintiffs had filed a suit for permanent injunction restraining defendants from publishing any advertisement associating themselves with the plaintiff and the Cricket World Cup in any manner whatsoever. The challenge was to the sale promotion campaign by the second defendant offering Cricket World Cup tickets as prizes, using the slogans Philips: Diwali Manao World Cup Jao and Buy a Philips Audio System, win a ticket to the World Cup, inserting a pictorial representation of a ticket with an imaginative seat and gate number saying Cricket World Cup 2003.

**It was Inter alia pleaded that:**

- The ticket conditions of the event prohibit such distribution of tickets, unless authorized by the plaintiff. The defendants have resorted to ambush marketing to take advantage of the World Cup without investing a single # rupee towards its success.
- It was also the case of the plaintiffs that they have been using the words 'World Cup' since 1975 in the game of) cricket and have used the same exclusively, therefore, 'Cricket World Cup' is associated with the plaintiffs and that the defendants by making use of the impugned words are guilty of passing off indicia, mark and identity of the plaintiff and the World Cup thereby causing irreparable harm and injury to them.
- It was also pleaded that defendants are also depriving the sponsors of the Event from enjoying the exclusivity of rights granted to them and preventing the plaintiff from performing its contractual obligation.

## **FIRST CONTENTION THE COURT HELD:**

So far as plea of ambush marketing is concerned, marketing executives only uses the phrase ambush marketing. It is different from passing off. In the passing off action, there is an element of overt or covert deceit whereas the ambush marketing is opportunistic commercial exploitation of an event. The ambush marketer does not seek to suggest any connection with the event but gives his own brand or other insignia, a larger exposure to the people, attached to the event, without any authorization of the event organizer. However, in such cases, there no deception; therefore, the defendants' conduct cannot be categorized as wrongful or against public interest. It is now well settled that commercial advertisement is form of commercial speech. It is a part of the freedom of speech and expression guaranteed under **Article 19 (1) (a)**.

***Any International treaty or domestic law, unlike the word Olympics and its logo, which is protected under the Emblems and Names (Prevention of Improper Use) Act, 1950, do not protect the World Cup' or the Event. It is for Legislature to determine how far to curtail legitimate fair competition and freedom of speech. From the material on record, the advertising campaign offering tickets of the Event as prizes without using the logo or the mark of the plaintiff cannot be held to be unlawful.***

The second contention the court held that the word 'World Cup' is a generic term. The genericness of these words can be judged from the fact that these words have been used to refer to several other international sporting events, namely, Football-FIFA World Cup, Hockey-FIH World Cup, Para gliding, Skiing, Horse Racing, Skateboarding, Rugby, Boxing. The plaintiffs therefore have no trademark in the said words. These words belong to one genus. Such words can neither be brand names nor have any protection by the registered trademark. The court further held that prima facie, defendants' use of the disputed words, in the advertisement is descriptive and not as a mark. It is a fair use, permissible under the law. The court was therefore of the opinion that the defendants are not guilty of the tort of passing off.

The court also rejected the third argument of the plaintiffs that the right of publicity, in respect of ICC cricketing events vests with the plaintiff, and they alone are entitled to profit from the same.

Similarly in the case of NHL v. Pepsi, the court was of the opinion that although the impugned advertisements might constitute ambush marketing but the advertisements in no way suggest that the plaintiffs approved, authorized or endorsed the contest in any way or that there was some business connection between the plaintiffs and the defendants. From the above discussion it becomes palpable that the courts are reluctant to find a violation of existing laws unless there is a clear trademark and trade name infringement and this infringement is a part of the overall marketing campaign.

## **AMBUSH MARKETING IN INDIAN SCENARIO:**

The Pepsi hot air balloon flying above Sharjah, on the day of the Coca-Cola Cup final, is one such example. More recently, there is, for instance, the straight fight between Hero Honda, a global sponsor of the Champions Trophy taking place in Sri Lanka, and its rival TVS, TVS has, according to industry experts, paid Rs 12 crore to rope in cricketer Sachin Tendulkar as its brand ambassador for three years.



In the recent controversy between the cricketers and the ICC, the term called 'ambush marketing' has been used a lot. Apparently, the sponsors of the ICC tournament have used a clause to prevent the host of brands that currently use players as endorsers from 'ambushing' the main sponsors of the tournament. The ICC clause said that players cannot endorse any other brands a month before the ICC Champions Trophy and for a month after as well.

The current ICC controversy is precipitated by the desire to protect official sponsors of the Champions Trophy. The ICC does not want to allow any company to cash in on its events secured by other sponsors paying huge sums of money. The objective is to protect the exclusive rights granted to the sponsors at a whopping cost of \$550 million (until 2007). The International Olympic Committee is facing a similar problem. Sports brands such as Nike, which sponsored the entire uniforms of all the hockey teams from head to toe have achieved high salience and association without paying the \$5 million to \$50 million official sponsorships amounts.

Should the ICC protect the sponsors' exclusive rights that they have demanded and paid for? Yes, they should. Should rivals protect the sponsors from ambush? Yes, they should. However, I would like to add here, that in spite of 3 the protection provided, there would still be loopholes and opportunities for rivals to undermine the mileage gained from such events. One such example is the Pepsi World Cup baseline -- 'Nothing official about it'.

#### **SUGGESTIONS TO AVOID AMBUSH MARKETING:**

- The success of any sponsorship finally rests on the sponsor's ability to the opportunity and always stay a step ahead of competition.

*LG, for instance, has played smart in its recent global sponsorship contract with ICC. For the price it has paid to ICC, it has also seized the global sponsorship right to computer and computer peripherals apart from the durables. Consequently, Samsung cannot burst onto the TV screen even with its computer peripheral's commercials that feature the cricket stars. However, the fact remains that LG did not block the cell phone category, thus leaving it open for Samsung to advertise: But despite these measures, there is little that be can be done to control creative advertising. Samsung in an all out effort to undermine LG's sponsorship is launching a campaign saying 'Official sponsor of the digital passion'. It is important to remember, there is a war out there and one brand's ambush is another's victory!*

- To enable your sponsor-client to have a reasonable opportunity to minimize ambush-marketing efforts by competitors or combat them in court, it is vital to appreciate the myriad contexts in which ambush marketing can arise. These include tangential actions ranging from the placement of competitive advertising on television broadcasts of the event to the underwriting of promotions to send to families, participants or contestants to the event.
- Primary among the steps necessary to protect against ambush marketing is to ensure that the event organizers have effectively protected, usually via trademark registration, the principal visual identifiers of the event, from the names and logos to the obligatory mascot and merchandise.
- Likewise, photo and broadcast rights should be controlled within the realm of common hoardings, either on-site or near the focus of the event, should also be tightly controlled.

- Apart from the fact that the event organizers must own the intellectual property and related rights, it is absolutely essential that they effectively control the disposition of such rights via effective licensing contracts. For example, it is vital to ensure that the event organizers not only warrant their ownership and control of intellectual property rights but also that they are contractually obligated to defend the rights of the licensed sponsors.
- Sponsors should also have an independent contractual right of enforcement if the organizers choose not to take action.
- Each sponsor or affiliate should be placed on notice in its contract of the specific rights granted to all other sponsors and affiliates. In this way, each field for which exclusivity is sought is defined so that the most frustrating of all types of ambush scenarios, that in which one officially another sponsor ambushes authorized sponsor, can be effectively avoided, as in the MasterCard case.
- Another point to keep in mind when dealing with sponsorship contract issues is the fact that the event owners will often engage a licensing organization to oversee and administer the periodic presentation of the event. This! is true, for example, with the World Cup. The owner of the event, the Federation Internationale de Football (FIFA), is the exclusive holder of all worldwide commercial exploitation and broadcast rights for the formal World Cup competition. But FIFA grants to Swiss-based ISL Football AG (International Sport and Leisure) the exclusive license for worldwide commercial exploitation rights.

## CONCLUSION

Ambush marketing is probably just the next step on the marketing evolutionary ladder. It is as inevitable as taxes. As ambush marketing becomes more and more widespread and acceptable, the biggest losers will be the events that will become increasingly strapped for the means with which to host the events.

The only remedy is to block out all the competitors. This can be done by enacting special legislations such as the **Sydney Games (Indicia and Images) Protection Act, 1996**. The principle objective of the Act was to supplement the existing intellectual property rights in the area of copyright, trademark, passing off, unfair competition. Similarly the UK Government is also preparing law to prevent any business making reference to the 2012 Olympics in its promotion unless it is an official sponsor. Another way to prevent oneself from the debauched practice of market ambushing is drafting a proper contract. For instance LG has entered into a contract with ICC whereby it has seized the global sponsorship right to computer and computer peripherals apart from the durables. Consequently, Samsung cannot burst onto the TV screen even with its computer peripherals commercials that feature the cricket stars.

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