

FIFA WORLD CUP 2010 – Ambush marketing or Pseudo sponsorship?

Let the games begin. This is probably the most over-used phrase when launching sporting spectacles ranging from the Olympic Games to any number of other competitions. However, apart from introducing the pinnacle of this beautiful game for the first time on the African continent, it also exposes the international past-time of brand holders beating FIFA at its own game.

The game is ambush marketing, the players are any number of multinational companies who did not fork out the prescribed sponsorship money, and the field of play remains to be seen. As in the past, whether at any soccer, rugby or cricket World Cups or any of the Olympic Games, the world will once again be intrigued and fascinated by the marketing games played behind the scenes and often also in public. FIFA is only too aware of the ingenuity displayed by the official “unofficial” commercial partners and sponsors of their showpiece. One would have to look at who did not make the list of FIFA partners, 2010 sponsors and 2010 national supporters, to realise that FIFA is probably up against the cream of the crop of international brands and their creative and ingenious marketing teams. These brand holders probably cannot wait to get their slice of the proverbial pie and put one past the goalie!

Adidas, Coca-Cola, Emirates, Kia/Hyundai, Sony and Visa, FIFA partners for the 2010 World Cup, have all been on the receiving end of ambush marketing by their traditional rivals. Nike, Pepsi and American Express have been very prominent in the past as a result of their creative ambushing tactics. As a result of these often widely publicised exploits, one has to ask whether the enormous sponsorships payable by the official partners have given them any better exposure than the ambush marketers. It is almost an industry fact that Nike does not want to become “official”, probably because of the aggressive and very successful ambush marketing campaigns it has had in the past.

As with Nike ambushing Converse in the 1984 Summer Olympics in Los Angeles, American Express ambushing Visa in Barcelona in 1992, Nike ambushing Umbro in UEFA Euro in 1996, Bavaria Brewery ambushing Budweiser in the 2006 FIFA World Cup in Germany or Pepsico ambushing Coca-Cola in the 2008 Olympics in Beijing, the 2010 FIFA World Cup in South Africa will be no different. However, the time has long gone for blatant and unimaginative latching onto such mega-events by ambush marketers. One only has to consider what FIFA has put into place from a legislative point of view to protect its partners, sponsors and supporters, to realise that the casual, unsophisticated ambush marketer is in for a rough ride.

The protection granted to FIFA finds its legislative support in the South African Trade Marks Act, Trade Practices Act and Merchandise Marks Act and FIFA will rely on the South African Copyright Act and common law remedies such as passing-off to protect itself and its sponsors. In addition, FIFA will undoubtedly rely on the Advertising Standards Authority Code of Advertising Practice to curb any unauthorised association with the event by aspiring ambush marketers. Once its money has been paid, a FIFA partner is entitled to the following standard rights package: the use of the Official Marks; exposure in and around the stadia, in all official FIFA publications and on the FIFA website; acknowledgement of their

support through a sponsor recognition programme; hospitality opportunities; ambush marketing protection; and direct advertising and promotional opportunities.

Conversely, the ambush marketer is entitled to none of these. The very nature of ambush marketing is for a party not to pay any sponsorship fee but to nevertheless associate itself with an event. As part of its public awareness campaign, FIFA published guidelines on its website to illustrate instances of unauthorised commercial association with the 2010 event. The question that must be asked is whether this does not in fact provide actual guidelines to would-be ambushers as to precisely where the boundaries are. To explain, the following marks may not be used in advertising, marketing or point of sale displays, which imply an association with the 2010 FIFA World Cup :

2010 or "Twenty Ten" used with the words soccer", football, South Africa, RSA, SA, World Cup or with soccer or FIFA World Cup imagery. In addition, "World Cup" cannot be used with the words "soccer", "football", South Africa, RSA, SA or soccer imagery.

It is also interesting to note that the prohibited marks, as promulgated in terms of the Merchandise Marks Act, only refer to 2010 FIFA WORLD CUP SOUTH AFRICA, FOOTBALL WORLD CUP, FIFA WORLD CUP, 2010 FIFA WORLD CUP or SOCCER WORLD CUP.

General advertisements and promotions may use general football terms and imagery. The question that begs to be asked is whether adding 2010 and the name of an official unofficial sponsor, such as Nike or Nandos, will infuriate the likes of Adidas and McDonalds. Clearly, if they add any of the FIFA trade marks, FIFA would be able to take action against them. It is likely that, on the general principles of ambush marketing, FIFA may have an arguable case.

Any type of ticket promotion, auction, game or lottery creates an unauthorised association, whether or not reference is specifically made to the event.

Any legitimate editorial in a newspaper does not create an unauthorised association however, an infomercial using one or more of the FIFA representations or imageries would certainly create the association. The same applies to the publication of a commercial match schedule. MasterCard or American Express would not be able to hand out credit card sized match schedules without running up against FIFA.

In general, a football related or South African business name *per se* does not create an unauthorised association as long as any association through the use of the marks referred to above, is avoided.

In so far as merchandising goes, items with general football terms, South Africa related terms or national flags do not infringe FIFA's rights. However, a T-shirt featuring 2010 SOUTH AFRICA would. On the other hand, it seems that the use of PEPSI 2010 or PUMA with a South African flag is arguable.

In-store decoration of general football nature would be permitted as long as the use of the FIFA marks and imagery is avoided. Does this mean that the NIKE concept store may go to town with in-store soccer related

exhibitions, flags and the like? More difficult, would the Apple i Store get away with soccer related displays and all the flags of the competing nations? In both instances, probably.

The use of official FIFA marks as part of a domain name or URL would be legitimate as long as the use is descriptive such as : www.accomodation-company.co/worldcupaccomodationinfo.htm. However, use of www.worldcup.accomodation.company.com would be frowned upon. Any commercial use of the FIFA marks on any website in any manner would be actionable.

The use of any of the legitimate trade marks of any of the “official unofficial” sponsors would not be a defence to ambush marketing if it is used in any manner or form implying an association with the event. This clearly cannot be the case where any ambush marketer uses its trade mark without any reference to FIFA or to the event. In 1984, Nike created murals near the Olympic Games sites featuring Nike-sponsored track athletes. These murals were all visible from the sites. FIFA countered this by implementing exclusion zones in which commercial activity by any person other than the accredited FIFA partners and sponsors is prohibited. In 1996, during the UEFA Cup, Nike purchased all poster space and advertising sites in the tube stations leading to Wembley stadium. This has since lead to the organisers of UEFA renting all advertising space within a 1-3 km radius from the venues. In both these instances, the organisers were unable to prevent the ambush marketing from taking place at the time. Measures were subsequently implemented to avoid this happening again although it is clear that, strictly speaking, no actionable ambush marketing took place.

It is interesting to refer to some lesser-known instances of “legitimate” ambush marketing that has taken place in the past. These examples below serve to illustrate the manner in which the association with an event was achieved by the ambush marketer without the obvious association with the event, relying almost exclusively on the reputation of their own brands.

1. During the lead up to the 2008 Beijing Summer Olympics, Nike made considerable use of the number 8, a symbol of luck and fortune in China and incorporated the design pattern on items of clothing and footwear.
2. During the Open Championship held at Royal Birkdale, Bentley set up a row of cars outside an adjacent golf club, attracting obvious interest in their own brand and detracting attention from the official sponsor, Lexus.
3. During the 2008 French Open, K-Swiss, a rival of Adidas and La Coste, both official sponsors, set up a very large purple K-Swiss branded tennis ball on top of a crashed car, en route to Roland Garros.
4. At the Summer Olympics in 2008, Speedo received such substantial media attention because of their technologically advanced swimming suits worn by several medal winners, that the brand was identified as a sponsor by the public and resulted in its swimsuits saturating the market.

5. Lucozade, in the run up to and during the Summer Olympics in 2008, aggressively promoted their brand through all media, over and above their normal marketing activities. The media campaign focussed on athletes involved in a variety of sports.

6. During the 2009 Six Nations campaign, Fuller's Brewery ran an advertising campaign which featured images of a rugby post with the text "Support English Rugby". The Rugby Football Union lodged a complaint at the Advertising Standards Authority on the basis that the ad implied that Fuller's Brewery was the official sponsor of the England rugby team. The ASA held that, as the ad did not claim that the brand was the official partner or sponsor of the English rugby team, it was unlikely that any reader would think that it was so. Fuller's Brewery argued that "English rugby" is not the same as the English rugby team.

South Africa's ambush marketing legislation will undoubtedly be tested during 2010. Apart from the usual remedies available in terms of the Trade Marks Act, Copyright Act, Counterfeit Goods Act, the common law and the Advertising Standards Authority, South Africa has enacted very specific anti-ambush marketing legislation. This is evident particularly in three Sections, that is,

Section 9(D) of the Trade Practices Act of 1976 which prohibits the making of false or misleading statements which imply a contractual or other connection between that person and the 2010 FIFA World Cup.

Section 15A of the Merchandise Marks Act 17 of 1941, as amended. As a gazetted "protected event", the 2010 FIFA World Cup is afforded protection against the use of a trade mark, in relation to such event, in such a manner which is calculated to achieve publicity for that trade mark and thereby deriving special promotional benefit from the event.

And, Section 15 of the Merchandise Marks Act 17 of 1941. wherein the Minister of Trade and Industry prohibited the use of certain words and emblems for purposes of the 2010 FIFA World Cup. Apart from certain FIFA emblems, both current and past, the depiction of the FIFA World Cup and Jules Rimet Cup, the use of the following marks was prohibited: 2010 FIFA WORLD CUP SOUTH AFRICA, FOOTBALL WORLD CUP, FIFA WORLD CUP, 2010 FIFA WORLD CUP, SOCCER WORLD CUP, and CONFEDERATIONS CUP.

The legislation referred to above was successfully applied in the case of FIFA v Metcash Trading Africa (Pty) Ltd. Metcash produced a lollipop product which was marketed as "2010 Pops" and featured images of soccer balls similar in design to the official ball used by FIFA in a past tournament, together with the South African flag. The court found in favour of FIFA, finding that Metcash intended its lollipop product to be associated with the 2010 FIFA World Cup and to derive special promotional benefit from the event.

In an earlier case against a popular sports bar, FIFA obtained a consent order against the sports bar for using the words WORLD CUP 2010 below the main signage of its building.

A local businessman who had registered a design of a keying which incorporates "2010", a vuvuzela and a soccer ball, was challenged by FIFA on the basis that it constituted 'passing-off' and suggested that there is

a connection between FIFA and the businessman. This has not gone to court but the businessman faces the possibility of having to pay FIFA's legal fees in settlement.

However, the shoe was on the other foot for local exclusive licensee, Skye Footwear. They were granted the exclusive licence by Global Brands, the exclusive licensing and marketing agent of FIFA, to produce a range of 2010 footwear, ranging from basketball shoes, jogging shoes, sneakers, cross trainers and canvas shoes to sandals, casual and dress shoes. To their surprise, and probably outrage, they came across a range of sneakers branded as "twenty10 – why wait" produced by Armadillo Footwear. It turns out that the "twenty10 – why wait" product was cleared by FIFA through their firm of attorneys on the basis that the shoes would not have a football association. Skye Footwear must be asking themselves why they paid the licence fees to FIFA if FIFA erodes the very market that Skye sought to exploit, by allowing Armadillo Footwear on the market. A slippery slope indeed.

The impact of these well orchestrated campaigns on the official sponsors and partners is far greater than the occasional infringement of the FIFA trade marks, prohibited marks of imagery. The latter is normally easily dealt with by sending strongly worded cease and desist letters. However, a campaign where internationally well known trade marks are used would be notoriously difficult to stop. At the very best, the organisers of such mega events can only hope to close loopholes as and when they are encountered. Examples are the efforts of UEFA who bought and controlled all broadcast advertising during matches and made it available only to sponsors.

The same goes for marketing exclusion zones surrounding stadia which came about as a result of Nike's Euro 1996 and 1998 FIFA World Cup promotions. These exclusion zones are now seen as a requirement for any Olympic host bid. The 2010 FIFA World Cup South Africa Special Measures Act, 2006 makes specific provision for the establishment of such areas. This Act gives effect to the Organising Association Agreement between FIFA and the South African Football Association and the guarantees issued by the Government of South Africa to comply with the list of requirements issued by FIFA. It is clear that FIFA has incorporated this in its own bid requirement.

If one considers the development of ambush marketing over the past 15 years or so, it is clear that the ambush marketers have come of age. It appears that the blatant latching on to a protected event such as the 2010 FIFA World Cup by official unofficial sponsors has been replaced by far more subtle and ingenious methods. No company in its right mind will design an ad campaign in which any of the prohibited marks, registered FIFA trade marks or imagery is used. It is clear from the two court cases referred to above that FIFA would successfully act against such unsophisticated ambush marketers.

The scene is set for the likes of Nike, MasterCard, Pepsi, Puma and a host of other international and local brand holders to showcase their marketing genius. Expect to see campaigns devoid of any soccer or soccer related images or themes. Expect American Express to embark on a campaign that has as a central theme the fact that you do not require a visa to visit South Africa. They have after all done it before, quite successfully. Expect Nike to embark on a large-scale campaign to advertise their sponsorship of an

unrelated international event in the local press. As in the case of American Express, they have done so successfully in the past.

If this trend is to continue, it may perhaps be more apt to refer to pseudo-sponsorship rather than ambush marketing. It is really such an ugly word.

So, let the games begin!

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