

## **Ambush Marketing—The Problem and the Projected Solutions *vis-a-vis* Intellectual Property Law—A Global Perspective**

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The problem of ambush marketing has been plaguing the organizers of various sporting and other events for the last four to five years. Due to the enormous financial losses caused by ambush marketing, the sponsors have been reconsidering the decisions to shell out astronomical sums for sponsoring various events. This paper analyses in great detail the concept of ambush marketing to its genesis, the various famous incidents of ambush marketing and the consequential losses and evaluates the existing intellectual property regime in combating this menace. It also analyses the various *sui generis* legislations framed by countries like South Africa and Australia to combat ambush marketing and tries to cull out a suitable anti-ambush marketing legislative policy for the Indian scenario.

‘Ambush marketing’ has assumed great importance in the modern advertising and marketing terminology. In 1996, soft drinks giant, Coke, paid a fortune for the right to call itself the official sponsor of the World Cup. Rival Pepsi promptly launched a massive advertising blitz, based on the catch line: Nothing official about it. The Pepsi campaign captured the public imagination and Coke, the official sponsor, lost out. The above incident highlights the subtlety and potential of ambush marketing in hijacking the consumer’s mind. Although marketers have described ambush marketing as a parasitic activity that encroaches on

legitimate sponsorship, their claims often provide no basis for legal action. This article examines instances of alleged ambushes and how these fit within a wider legal framework. Ambushing appears to encompass legitimate competitive behaviour to passing-off and misuse of trademarks. There is absolute dearth of legal scholarship on this aspect, especially in India. The author has made a sincere attempt to plug that vacuum.

Ambush marketing, sometimes referred to as parasitic marketing, has been broadly defined as "the unauthorized association of a business or organization with the marketing of a particular event — gaining benefit for the marketing right or licensing fee applicable in order to be

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associated with an event, such as a sporting event.”<sup>1</sup> Sports lawyer, Stephen Townley, explains that ambush marketing can be divided into two broad classes of activity:

1. Activities traditionally considered piracies - these will usually have a clear-cut remedy in law. They are activities that clearly constitute infringements of the property rights in an event, for example, unauthorized use of a registered event logo on merchandise, or false claims to be official suppliers of a particular team<sup>2</sup>.

2. Other activities - more subtle practices for which the remedy is less clear-cut or may not even exist<sup>3</sup>.

#### **Ambushing Strategies**

‘Ambushers’ are becoming increasingly astute at developing ways to circumvent legal attempts to control non-sponsor marketing strategies. Elaborating on the second category noted above, several methods of ambush marketing could be identified if one accepts the broadest meaning of the term:

#### ***Sponsor the Broadcast of the Event***

The so-called ‘ambusher’ sponsors the broadcast of the event. The benefits of this approach are obvious when one considers that the media audience for most events is much larger than the on-site audience. In such an instance the so-called ‘ambusher’ is seeking a perfectly legitimate sponsorship opportunity in its own right<sup>4</sup>.

#### ***Sponsor Subcategories within the Event and Exploit this Investment Aggressively***

This is a widespread and often very cost-effective method of association with

an event of major public interest. Essentially, the ‘ambusher’ sponsors some lesser element attached to the overall event and exploits this association through major promotional effort. In the case of the Olympic games, while the official worldwide sponsor is sponsoring a particular top category at a price of \$20 to \$25 million, the so-called ‘ambusher’ sponsors some lesser category such as a federation or team (such as the British swimming team)<sup>5</sup>.

#### ***Purchasing Advertising Time Around Relays of the Competitor's Event***

A company wishing to deny a competitor the full benefits of their event or broadcast sponsorship can engage in ambush marketing by buying advertising time in the slots around television relays of the event<sup>6</sup>.

#### ***Engage in Major Non-sponsorship Promotions to Coincide with the Event***<sup>7</sup>

For example, organize contests to send consumers to the event, placement of hoarding or booths at strategic locations during the event, etc.

#### ***Pourage Agreements***

The sale of products at events is a useful and high profile way for certain types of potential sponsors (usually soft drinks and fast food suppliers), to both raise their profile in association with a sport and also to sell products<sup>8</sup>.

#### ***Corporate Hospitality and Ticketing***

This method consists of buying up tickets for the event and offer hospitality packages, which are not being sanctioned by the rights owners<sup>9</sup>.

### ***Other Ambushing Strategies***

In addition to the above list of strategies, many 'ambushers' have adopted highly creative and inventive strategies to suggest their involvement with major global events<sup>10</sup>. Often, 'ambushers' will rely on a number of these methods at the same time, with clever and highly effective results. At the 1994 Winter Olympics, for example, American Express, which had been replaced as an official sponsor by Visa, marketed itself worldwide with the motto: "If you are traveling to Lillehammer, you'll need a passport, but you don't need a Visa"<sup>11</sup>. Survey results indicated that strategies of this sort are highly effective. One research group asked consumers less than a month after the 1996 Atlanta Olympics to name half-dozen companies associated with the Games<sup>12</sup>. Some 54% of respondents named American Express and 72% named Visa. While to the viewing public, Visa might seem to have won this battle for media supremacy, the victory seems less impressive once it is noted that American Express did not spend \$40 million for the privilege of being associated with the Games and Visa did<sup>13</sup>. These results are similar to those unveiled in a survey conducted after the 1994 Winter Games, in which 52% of respondents inferred that American Express had an association with the Games. Again, American Express had not sponsored the Games<sup>14</sup>.

To appreciate the true nature of ambush marketing, and thereby deriving a strategy against it, it would be relevant to understand the nature of sponsorship, since ambush marketing is nothing but an

unethical sponsorship practice<sup>15</sup>. Ehrenberg suggested that, advertising and sponsorship are one of a range of reinforcers designed to reassure purchasers and increase the probability of repeat-purchase behaviour<sup>16</sup>. To sum up, the existing marketing communication literature, sponsorship is a commercial agreement or arrangement, whereby a sponsor pays a certain sum of money or provides certain products, services or other facilities to the sponsored party, in return for which the sponsor is granted certain rights of association (official designation) with the sponsored party which culminates into improved perception of the brand<sup>17</sup>. In the words of Crimmins: "sponsorship improves the perception of a brand by flanking our beliefs about the brand and linking the brand to an event or organization that the target audience already values highly."<sup>18</sup> Ambush marketing spoils this chance of improved perception. Not surprisingly, the organizers of major sporting events have all expressed concern that competition of this sort will diminish their ability to retain top paying sponsors, thus jeopardizing their ability to fund these events<sup>19</sup>. It is clear then, at least in the eyes of those who sponsor major sporting events like the Olympic Games, that ambush marketing strategies are more than just a merely irritating, they represent a substantial threat to economic interests<sup>20</sup>.

### **Intellectual Property Regime *vis-a-vis* Ambush Marketing**

The existing intellectual property regime is efficient enough to deal with

the first kind of ambush marketing. To be more specific the law of trademarks and to some extent the law of copyright can be used in this regard. Trademarks can be seen as serving two main purposes, to protect business goodwill, and to protect consumers from deception, that is to prevent the buying public purchasing goods or services in the mistaken belief that they originate from or are provided by another trader<sup>21</sup>.

That being the case, any unauthorized use of any kind of logo or symbol associated with any event, will be a straightforward case of trademark infringement. An important case in this regard would be the case of *Arsenal Football Club plc v Mathew Reed*<sup>22</sup>. The football club sued Reed. He was selling club merchandise unofficially without licence from the club. The merchandise had the club logo on it, which was trademark protected. Reed argued that he was not using the Arsenal logo that was on his merchandise as a trademark for his goods (that is to indicate origin), but merely as badges of allegiance. Reed's arguments were rightly rejected<sup>23</sup>.

Coming to the issue of copyright, it is clear that if the logos or symbols associated with an event can be copyrighted, the degree of protection that can be offered against any unauthorized use would be much higher. Under the Indian Copyright Act, a special legislation or ordinance can be passed<sup>24</sup> declaring something to be copyrightable<sup>25</sup>. As will be discussed in the subsequent pages, countries like Australia and China have also resorted to the same strategy of imputing copy-

rightability in the various logos and symbols associated with the event through legislations<sup>26</sup>.

The following are the examples of the ambush marketing practices which are *prima-facie* unlawful.

- Commercial use of rights, benefits and privileges without authorization.
- Clear attempt to associate with the event without a licence.
- Unauthorized commercial use of copyrighted photographs, illustrations, film or satellite feed.
- Use of words, symbols or pictorials confusingly similar to the event.
- The production of print publications or television features about the event by non-rights holders for commercial gain, beyond that which is considered appropriate for news and editorial coverage
- Producing or selling counterfeit merchandise.
- Sampling or selling competitive products in the event venues.
- Registering website domain names with the Internet to profit using famous names.
- Downloading copyrighted satellite feed of the official Olympic broadcast and transmitting it via the Internet without proper authorization.
- Unauthorized use of athlete appearances, images or likeness for advertising purposes during the event.

These activities can reasonably be combated through the trademarks or copyright law and to some extent the law of passing off and hence are not of much concern.

'Ambushers' are becoming increasingly astute at developing ways to circumvent legal attempts to control non-sponsor marketing strategies. At this point, a few judicial decisions around the world in this regard are discussed.

To date, there have been few reported cases dealing specifically with ambush marketing. The most important of them is the Canadian case of *National Hockey League (NHL) et al v Pepsi Cola Ltd*<sup>27</sup>. Although the case deals with a passing off claim, it does indicate just how far competitors are able to go before the courts see fit to view their actions as misleading and deceptive—hence deserving legal penalty. It thus merits some consideration when determining how best to deal with the problem. Although the case is Canadian, the legal principles relating to passing off in Canada are substantially the same as those in India. At that time, the NHL consisted of 21 ice hockey clubs and had an affiliated services company, the National Hockey League Services Ltd (NHLS). An important source of revenue for the NHL comes from the sale by NHLS of licences to the producers of a variety of products to display the league's registered trademarks on or in conjunction with their products and to claim affiliation in one way or another with the NHL and its member teams. NHLS agreed with Coca Cola Ltd that its product would be designated the official soft drink of NHL. In consideration of the rights it attained under the agreement, Coca Cola agreed to pay the NHLS approximately \$2.6 million<sup>28</sup>. This agreement did not, however, give Coca

Cola the right to advertise during broadcasts of NHL games. The NHL gave this right to Molson Breweries<sup>29</sup>. The Canadian Broadcasting Corporation (CBC) broadcasts at least one NHL game nation-wide in Canada every Saturday night during the regular playing season. Molson granted Pepsi-Cola, Coke's main competitor, the right to advertise Pepsi's soft drinks during broadcasts. Pepsi-Cola advertised its product by means of a contest called "the Diet Pepsi four million dollar pro-hockey playoff pool." The case at trial arose primarily out of Pepsi's advertising campaign and the promotional material related to that campaign (the 'Contest')<sup>30</sup>. As part of its HNIC advertising, Pepsi sponsored a programme called 'Coach's Corner', which was televised during the Stanley-Cup playoff games, at half time. This programme featured well-known sports celebrity, Don Cherry, being interviewed by a CBC sports commentator<sup>31</sup>. Don Cherry is well known throughout Canada and is viewed by many as the voice of the NHL. The advertisements were set in a hockey dressing room with Cherry explaining the contest to three men dressed as hockey players. In one of the television advertisements, the audio portion consisted of a monologue by Cherry in which he stated:

"Just cool it! Just cool it! There's \$4 million to be won in Diet Pepsi's Playoff Pool.

Now look here! Check under the caps of Pepsi and 7-Up products! If, for instance, it says "Calgary in 6" and they win the Playoff finals in 6, you could win \$10,000, \$10.00 or

free Diet Pepsi. Now, hit the ice you guys! Play Diet Pepsi's \$4 million Playoff Pool.

Can you believe these guys?"<sup>32</sup>

At trial, the position taken by the NHL, as plaintiffs, was that the contest and particularly the television advertisements featuring Don Cherry, were "likely to convey to the public a false impression that the NHL and its member teams approved, authorized, endorsed or were in some manner associated with the contest, and thereby, Pepsi's products."<sup>33</sup>

The NHL contended that Pepsi was guilty of the tort of passing off because the television commercials in particular "conveyed a false impression to the public that the NHL, in some form, approved or was associated with the contest."<sup>34</sup> Pepsi, in response, argued that its actions constituted little more than "an aggressive but legitimate marketing campaign."<sup>35</sup> In examining the tort of passing off the Court held that:

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<sup>36</sup>. The question here is whether the advertising went beyond that which was legitimate and misrepresented to the public that one or more of the plaintiffs approved, authorized or endorsed the contest, and thereby, by implication, the defendant's products, or that there was some business connection between the

plaintiffs and the defendant<sup>37</sup>. In deciding the issue, the Court relied on the House of Lord's decision in *General Electric Co Ltd v General Electric Co*<sup>38</sup>. in which it was held, on the issue of the likelihood of the public being deceived, that the tribunal of fact must not only consider the evidence but also use its own common sense. Applying this test, the Court found that although Pepsi's actions did clearly constitute ambush marketing<sup>39</sup> there was nothing in law that could be done to protect either Coke or the NHL in its endeavours to protect Coke from its main competitor<sup>40</sup>.

To date, *NHL v Pepsi* is one of only a few judicial decisions in which a court of law has dealt specifically with a claim of ambush marketing. Although the case is Canadian, and hence not necessarily binding in India, it does send a clear message to those wanting to undertake tactics similar to those used by Pepsi. As Davis notes, the case also demonstrates just how reluctant the courts can be to find a violation of existing law unless there has been a clear "trademark and trade name infringement" and this infringement is part of the overall marketing campaign<sup>41</sup>.

In *MasterCard International Incorporated v Sprint Communications Co & ISL Football AG*<sup>42</sup>, is one of the rare decisions where ambush marketing was the subject of a court injunction. In connection with its sponsorship of the 1994 World Cup, MasterCard received the exclusive right before and during the competition to use World Cup logos on,

and in association with, “all card-based payment and account access devices”. Sprint Communications was also involved as a backer of World Cup as an official partner, a category that was neither as extensive as that of a sponsor nor as costly. Sprint's exclusivity was in the field of long distance telecommunications. Sprint began marketing pre-paid telephone calling cards both in the US and Europe bearing World Cup logos, despite MasterCard's strong objection. In the litigation that ensued in the Federal Court in New York City, MasterCard established that Sprint's use of World Cup logos on its telephone cards infringed on MasterCard's category of “card-based payment and account access devices”, even though the telephone cards were not functionally the same as MasterCard's cards. The Court held that consumers would, on seeing the Sprint card bearing a World Cup logo, mistakenly assume that Sprint had rights in a category that, in fact, belonged exclusively to MasterCard<sup>43</sup>.

### **Indian Scenario**

Coming to the Indian scenario, recently the plea taken by International Cricket Council (ICC) against Britannia biscuits for ambush marketing was outright rejected by the Delhi High court which refused to recognize ambush marketing as a cause of action<sup>44</sup>. Again in the case of *ICC Development International Ltd (ICCDIL) v Arvee*<sup>45</sup>, where a suit filed for an injunction against the defendants using the slogans “Philips: Diwali Manao World Cup Jao” and “Buy a Philips Audio System, win a ticket to World

Cup”. ICC had already applied for the Registration of words “ICC Cricket World Cup South Africa 2003”. The grounds raised were *inter alia* of passing off and ambush marketing. The Court rejected this on the grounds that the logo of ICC has not been misused and hence there was no scope for any assumption amongst the purchasers of the defendants' goods that there is any connection between the defendants and the official sponsors of the event<sup>46</sup>. A saving grace would be the case of *ICC Dev v EGSS*<sup>47</sup>, where an injunction was granted against the misuse of the ICC logo by the defendants. The logo was held to be an artistic work of the Indian Copyright Act.

These cases demonstrate that the intellectual property law has not traditionally been well suited for dealing with implicit associations between an advertiser and a major sporting event. The law of passing off has been increasingly attempted to be used to combat the second category of ambush marketing practices. However, the courts have found that passing off is not well suited for dealing with implicit associations between an advertiser and a major sporting event<sup>48</sup>. The law of passing off has been settled through a catena of cases<sup>49</sup>. And it becomes obvious that without proving misrepresentation the action of passing –off can't be taken<sup>50</sup>.

In fact, in the Arsenal case discussed above<sup>51</sup>, an alternative action for passing off failed as Arsenal failed to show any evidence of any damage or any actual confusion caused by the merchandise of Reed<sup>52</sup>.

Hence it becomes very clear that the current intellectual property regime is only partially successful to combat ambush marketing and hence a *sui generis* approach has to be taken and new laws to be framed in the lines of South Africa, Australia, etc. The next focus will be on the special anti- ambush marketing legislations in different countries.

### **The Normative Structure Against Ambush Marketing in Various Countries**

The first ambush marketing specific legislation was devised by the Australian parliament, which is the Olympic Insignia Act.

#### ***The Australian Scenario Olympic Insignia Act***

On 29 October 2001 the Olympic Insignia Protection Amendment Act 2001 (2001 Amendment Act) came into effect in Australia. This Act amended the Olympic Insignia Protection Act 1987.

The Act provides:

- The Australian Olympic Committee (AOC) is the owner of copyright in the Olympic symbol;
- The AOC is the owner of certain Olympic designs;
- The Olympic motto, the Olympic symbol and certain other Olympic images must not be registered as trademarks; and
- Commercial use of certain Olympic expressions is prohibited, unless the user holds a licence granted by the AOC<sup>54</sup>. The Act provides for special copyright<sup>55</sup> and design<sup>56</sup> protection to the Olympic symbols and designs.

Section 19 provides that the Registrar of Trademarks shall not register under the *Trademarks Act 1995* a trademark that contains or consists of any of the following marks, or a mark so nearly resembling any of those marks as to be likely to be taken for that mark:

- (a) The Olympic motto;
- (b) The Olympic symbol;
- (c) Where an artistic work of an Olympic torch and flame is prescribed for the purposes of section 2A - the artistic work
- (d) Where the design in relation to an artistic work is registered under this Act, the artistic work.

#### ***Protected Olympic Expressions***

This is a new chapter inserted by the 2001 Amendment Act which restricts the use of the following expressions:

- (a) Olympic;
- (b) Olympics;
- (c) Olympic Games;
- (d) Olympiad; and
- (e) Olympiads<sup>57</sup>.

These expressions are said to be “protected Olympic expressions”. Under Section 36, a person, other than the AOC, must not use a protected Olympic expression for commercial purposes. This section does not apply if the person is a licensed user, and the use is in accordance with the terms and conditions of the licence.

The AOC may license a person to use all, or any one or more, of the protected Olympic expressions for commercial purposes (Section 38). Section 74 of the Act provides that chapter 3 has effect, in addition, to any contract:

(a) That relates to the use of a protected Olympic expression for commercial purposes; and

(b) To which any of the following is a party:

(i) The IOC;

(ii) The AOC;

(iii) The organizing committee for summer or winter Olympic games.

#### *Implications of the Act and the 2001 Amendment*

The obvious implication of the 2001 Amendment for companies, businesses and individuals is that it is now necessary to enter into a licence arrangement with the AOC if they wish to make 'commercial use' of the words 'Olympic', 'Olympics', 'Olympic Games', 'Olympiad', and 'Olympiads' (protected Olympic expressions) or of an expression so closely resembling a protected Olympic expression as to be likely to be mistaken by a reasonable person for a protected Olympic expression. However, this does not mean that the Olympic hotel or the Olympic fruit market will need to obtain a licence from the AOC to continue trading<sup>58</sup>. The Legislation limits the restriction to 'commercial use' which is defined clearly.

#### *Law in South Africa*

The South African legislation has been enacted as a preventive step in the wake of the cricket world cup in 2003. Since there is an absolute paucity of secondary materials in this regard the statements of objects and reasons of the legislations have been excerpted below to comprehend the perspective with which

the legislation was enacted. The Merchandise Marks Amendment Bill, 2002, defines ambush marketing and authorizes the Minister of Trade and Industry to protect certain events, e.g. major sporting events<sup>59</sup>.

Hence, it becomes very clear from the perusal of the normative structures against ambush marketing all over the world that the intellectual property regime is not sufficient to tackle ambush marketing. *Sui generis* legislations have to be framed to combat ambush marketing. It is humbly submitted that the Delhi High Court judgment, refusing to accept ambush marketing as a ground for relief, is a retrograde step. Sooner or later, this vice of ambush marketing has to be curbed, preferably through legislation in the South African model.

Prior to the Cricket World Cup, it was threatened by the official sponsors that anyone who goes to South Africa, under the "*Britannia Khao, World Cup Jao*" offer, might end up in trouble, because of the extremely strict, anti-ambush marketing penal laws there<sup>60</sup>.

#### **Conclusion**

After a careful perusal of the preceding pages, the author proposes to frame a broad policy outline for an anti-ambush marketing legislation in India.

#### **Policy Outline**

—'Event' means any conference, exhibition, show or competition of a cultural, religious, sporting, recreational or entertainment nature which is:

(a) Held or to be held in public;

- (b) Likely to attract the attention of the public or to be newsworthy; and
- (c) Financed or subsidized by commercial sponsorship, and includes any broadcast of such conference, exhibition, show or competition.
- Prohibit the use of certain expressions, such as ‘Olympiad’, ‘Olympic’, ‘Sydney 2000’ and ‘Share the Spirit’, in the context of Olympics; which are closely associated with the event. Licences to use the expressions should be granted by the organizers. Registrar of Trademarks shall not register under the Indian trademarks law, a trademark that contains or consists of any of the marks closely associated with the event, or a mark so nearly resembling any of those marks as to be likely to be taken for that mark. This is not going to affect the persons who are organizing the events, as they would be specially provided with the trademarks under the *sui generis* law.
  - Restrict the use of the expressions closely associated with the event; for example in the context of Olympics following expressions should be restricted: (a) Olympic;(b) Olympics; (c) Olympic Games;(d) Olympiad; and (e) Olympiads. These expressions are said to be ‘protected expressions’. A person, other than the organizers, must not use a protected expression for commercial purposes. This does not apply if the person is a licensed user, and the use is in accordance with the terms and conditions of the licence.
  - Specific exemptions apply to statements about past participation of people in the event, statements about the preparation or training of the participants by sporting or other organizations and institutes, statements about sports-related personal services and statements about supply or goods or services to past teams or games. This policy also provides that use of the protected expressions in connection with the provision of information or for purposes of criticism or review will not be enough to suggest a sponsorship or sponsorship-like support.
  - The policy outline bestows ownership of the copyright and the design of the event symbol upon the organizers.
  - The implementation has to be assigned to a ministry (or a new one be created) and the concerned ministry may, after investigation and subject to such conditions as may be appropriate in the circumstances, by notice in the Gazette designate an event as a protected event and in that notice stipulate the date (i) with effect from which the protection commences; and (ii) on which the protection ends, which date may not be later than two months after the completion or termination of the event. The minister of the concerned ministry may not designate an event as a protected event unless the staging of the event is in the public interest. For the period during which an event is protected, no person shall use a trademark in relation to such event in a manner, which is calculated to, achieve publicity for the trademark and thereby to derive special promotional benefit from the event, without the prior authority of the organizer of such event. For the above purposes, the use

of a trademark includes: (a) any visual representation of the trademark upon or in relation to goods, (b) any audible reproduction of the trademark in relation to goods, or (c) the use of the trademark in promotional activities, which in any way, directly or indirectly, are brought into association with or allude to an event. Any person, who contravenes the above, shall be guilty of an offence.

—No person, in connection with a sponsored event shall make, publish or display any false or misleading statement, communication or advertisement which represents, implies or suggests a contractual or other connection or association between that person and the event, or the person sponsoring the event, or cause such statement, communication or advertisement to be made, published or displayed. Any person who contravenes or fails to comply with any provision of the proposed Act shall be guilty of an offence and shall be liable upon conviction.

This outline being adopted from the anti – ambush marketing laws, all over the world is in consonance with the global normative structure, and hence should be given due importance.

### References and Notes

- 1 Frank Zimbo, "Ambush Marketing", (1996) 12(6) Australian New Zealand Trade Practices Law Bulletin 93, cited in [http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82\\_notes.html](http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82_notes.html). For a Indian perspective, <http://www.indiaonline.com/bisc/ambu.html>
- 2 Examples of this type of infringement are numerous. A recent US example is found in the case of Host Communications v Kellogg (1994), unreported, United States District Court of Kentucky, No. 94-26, per Wilhoit J, See also MasterCard International Inc v Sprint Communications Co. (1994) 30 USPQ 2d WL (US Dist.), as discussed in Anthony Verrelli, "Survey of Recent Developments in Sport" (1994) 4 Seton Hall J Sports L 726. Cited from <http://www.bakerbotts.com/news/printpage.asp?pubid=13511711191999>
- 3 Stephen Townley, Dan Harrington and Nicholas Couchman, The legal and practical prevention of ambush marketing in sport, *Psychology and Marketing*, 15(4) 1998, 335. Townley *et al* note (at 336) that "the 'ambusher' who employs the tactics set out under this heading is likely to be a more sophisticated and commercially wily animal", with typical examples of these activities including: unauthorised or unofficial merchandise; unauthorised or unofficial publications; unauthorised sales promotion activity; unauthorised broadcasts, virtual advertising, web sites, live screenings, films, video, photography, telephone commentary, information lines, pager services; unofficial corporate sponsorship. Cited from *ibid*
- 4 See, for example, the *National Hockey League et al v Pepsi Cola Ltd* case
- 5 See, Simon Gardiner, *Sports Law* (Cavendish Publishing, 2001) 2<sup>nd</sup> edition, page 509 – 511
- 6 For example, both Qantas and Adidas, both non-sponsors, purchased television advertisements, which were shown during the coverage of the Sydney 2000 Olympic Games
- 7 In June 2000, for example, Adidas launched a 12 part Olympics documentary series on the Ten Network, which featured 10 Adidas sponsored athletes
- 8 *Supra* note 6, page 511
- 9 <http://www.indiaonline.com/bisc/ambu.html>. See also, *supra* note 6
- 10 [http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82\\_notes.html](http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82_notes.html)
- 11 Tony Meenaghan, Ambush marketing: Immoral or imaginative practice? *Journal of Advertising Research*, 77, 34 (5) 1994 at 81. See also Tony Meenaghan, Ambush

- marketing: A threat to corporate sponsorship? *Sloan Management Review*, 38 (1) 1996, 103 cited from *ibid*
- 12 Howard Schlossberg, Marketing - The holes in exclusivity, *Credit Card Management*, May 31, 1997. cited from *ibid*
- 13 *Ibid*. See also, <http://www.bakerbotts.com/news/printpage.asp?pubid=13511711191999>
- 14 *Ibid*
- 15 <http://www.bonham.com/inside/glossary.html>
- 16 Ehrenberg A, Repeat Buying: Theory and Applications, 1988, London: Charles Griffin & Co, 2nd Edition, cited from *ibid*
- 17 See *supra* note 6, page 507
- 18 Crimmins J and Horn M, Sponsorship: From management ego trip to marketing success, *Journal of Advertising Research*, 36, 1996, 11-21. Cited from <http://marketing-bulletin.massey.ac.nz/article10/article1b.asp>
- 19 [http://www.icricket.com/series/icc\\_champ\\_trophy\\_2002/news/news137.shtml](http://www.icricket.com/series/icc_champ_trophy_2002/news/news137.shtml) Shortly after the 1998 World Cup, for example, Adidas announced that it would delay a decision on whether to remain an official sponsor after 2002 unless it could be assured that its investment dollar would be better protected. Sources are: - Sue Landau, "Budweiser seeks curbs on World Cup ambush marketing" Reuters News Service, July 15, 1999. See also Denise Gellene, "Coke Sponsorship is no Longer the Real Thing", *The Los Angeles Times*, September 4, 1996 at 1 and Jeff Jensen, "Some Sponsors Pass in Game Adds", *Advertising Age*, January 23, 1996 at 3. Cited from *ibid*
- 20 Whether it is the World Series, World Cup or the Olympic Games, sponsorship is big business. Some estimate that sponsorship rights for the 1988 Olympics yielded about \$338 million in sponsorship fees. Indeed, it has been estimated that the total sponsorship for the 1992 Olympic Games was approximately \$700 million, almost double the sponsorship fees for the same event just four years earlier (source- <http://www.bakerbotts.com/news/printpage.asp?pubid=13511711191999>). With this kind of money involved concern over ambush marketing is but natural
- 21 David Bainbridge, *Intellectual Property*, 1999 (Financial Times, Pitman Publishing), 4th edition, 521
- 22 (2001)RPC46 (HC), quoted from [www.pbpress.com](http://www.pbpress.com)
- 23 The arguments advanced by Reed, if accepted would have set a ridiculous precedent. Every infringer of trade mark would then come to the Court and say that he was not using a particular mark as a trademark but was showing his allegiance with the particular brand or company, making the entire trademark law inefficacious
- 24 P Narayanan, *Copyright* (Eastern Law House), 3rd edition, 484
- 25 Section 16 of the act: -" No person shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under and in accordance with the provisions of this act or any other law for the time being in force." ...." Hence as a logical corollary a person shall be entitled to copyright or any similar right in any work, whether published or unpublished, under the provisions of any other law for the time being in force. Hence the Indian Copyright Act allows a special legislation or ordinance to be passed declaring something (For example, various logos and symbols associated with the event) to be copyrightable and is not absolutely exhaustive in nature.
- 26 <http://www.china.org.cn/english/BAT/21504.htm> . See also, [http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82\\_notes.html](http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82_notes.html)
- 27 (1992) 92 DLR (4th) 349 (BC Sup Ct). For an excellent analysis of the cases and its possible implications in North America, see Robert Davis, "Ambushing the Olympic Games" (1996) *Villanova Sports and Entertainment Law Forum* 423. See also, Lori Bean, "Sports Sponsorship and the Lanham Act" (1995) 75 *Boston University Law Review*, 1099. Quoted from *ibid*
- 28 *Ibid*
- 29 *Ibid*
- 30 *Ibid* at 352
- 31 *Ibid*
- 32 *Ibid* at 356
- 33 *Ibid* at 356-357

- 34 *See note 42 of*  
[http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82\\_notes.html](http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82_notes.html)
- 35 *NHL v Pepsi* at 359
- 36 *See H P Bulmer Ltd v J Bollinger S A*, [1978] R P C 79 (C A), quoted from *ibid*
- 37 *Ibid*
- 38 [1972] 2 All ER 507 (HL), quoted from *ibid*
- 39 Specifically, the Court held that while "the Coke NHLS agreement obligates NHLs, so far as it is able, to protect the rights of Coke from ambush marketing, such an obligation cannot impose on a third party a duty to refrain from engaging in advertising its products in a manner which, although aggressive, is not, by the law of Canada, unlawful... It may be that, due to Coke's failure to secure the right to advertise its product during the television broadcasts of NHIC and the securing of such rights by the defendant, the commercial value to Coke of the right to describe its product as the 'official Soft Drink of the NHL' has less commercial value than would have been the case if Coke had also obtained the right to advertise on NHIC. But that cannot diminish the defendant's rights." (*Pepsi* at 369)
- 40 *Ibid* at 364
- 41 *See note 49 of*  
[http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82\\_notes.html](http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82_notes.html)
- 42 30 USPQ 2d 1963 (SDNY 1994); 23 F3d 397 (2d Cir. 1994)
- 43 <http://www.bakerbotts.com/news/printpage.asp?pubid=1405411191999>. One thing may be clarified at this juncture. Both this case and the Arsenal case mentioned earlier involves on a broad level usage of logo. However the Arsenal case has been placed in the first category (activities traditionally considered to be piracies) of Ambush Marketing activities whereas the MasterCard case is being placed in the second category (more subtle practices for which the remedy is less clear-cut or may not even exist) of Ambush Marketing practices. This may create some confusion. To clarify, in the first case there was a plain and simple unauthorized use of a logo, for which there is a clear-cut remedy. However in the second case, the unauthorized use was far subtler and had no clear-cut remedy. It was the foresightedness and superior analytical skill of the American Judiciary and the advocates that such a subtle unauthorized use could be remedied. This is why it has been placed in the second category of ambush marketing activities
- 44 The Delhi High Court dismissed an interim application by the International Cricket Council seeking to restrain Britannia Industries and its authorized departmental stores from using the logo, mark and mascot of the 2003 World Cup in their promotional schemes
- The ICC Development International Ltd (ICCDIL), a company formed by the ICC to control its commercial rights, including media and sponsorship rights relating to ICC events, had alleged that Britannia and its authorized departmental stores were misrepresenting their association with them by using the World Cup logo and other marks etc on their promotional material without permission.
- The ICC-held company accused the Indian biscuit manufacturer of resorting to ambush marketing to take advantage of the World Cup without investing a single rupee.
- The ICCDIL alleged that the scheme "Britannia Khao World Cup Jao" amounts to an act of unfair trade practice in addition to depriving the authorized sponsors to enjoy the exclusivity granted to them by the ICC's company.
- "Neither the plea of ambush marketing is available to the plaintiff (ICCDIL) nor any of aforesaid decisions has any applicability of the facts of this case. Plaintiff, thus, must be held to have prima facie not even made case for issue of the ad interim injunction prayed for," Justice K S Gupta said. Quoted from <http://www.rediff.com/cricket/2002/dec/04reje ct.htm>
- 45 (2003) 26 PTC 245(Del)
- 46 There was no discussion even on the issue of ambush marketing. The decision on passing off is also unsatisfactory because though the Court in course of their deliberations mentioned the English case of *Cadbury Schweppes Pvt Ltd v Public Squash Co Pvt Ltd* [(1981)1 All ER 213] where it was

- categorically laid down that Passing Off encompasses other descriptive material such as slogans or visual images which cause confusion, it paid no heed to the principle evolved through this case.
- 47 (2003) 26 PTC 228(Del)
- 48 <http://www.pbpress.com/images/HOME%20AIP%202002/aIP0105.pdf>
- 49 See, for example, *Spalding Brothers v A Gamage Ltd* (1915) 84 LJ Ch 449, *EWBVenootschap v. J Townsend & Sons Ltd*. [1979] AC731, Quoted from *supra note 38*
- 50 The main elements of passing off can be culled out as follows: -
- A misrepresentation
  - Made by a trader in the course of trade
  - To prospective customers of his or ultimate consumers of goods or services supplied by him
  - Which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence)
  - Which causes actual damage to a business or goodwill of the trader by whom the action is brought or will probably do so.
- Quoted from David Bainbridge, *Intellectual Property*, 1999( Financial Times, Pitman Publishing), 4th edition, 601
- 51 See *supra note 39*
- 52 <http://www.pbpress.com/images/HOME%20AIP%202002/aIP0105.pdf>
- 53 The following portion has been majorly adapted from an article in file with the author. However, unfortunately, the citation cannot be provided. Anyone interested in the original article might contact the author
- 54 See also,
- [http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82\\_notes.html](http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82_notes.html)
- 55 Copyright Protection
- Section 5 of the Act provides that, for the purposes of the Copyright Act 1968, the Olympic symbol should be taken to be an original artistic work in which copyright subsists and that the AOC shall be taken to be the owner of the copyright. Copyright in the Olympic symbol subsists indefinitely. In certain circumstances, a fair dealing with the Olympic symbol does not constitute an infringement. The section also provides that the AOC does not have the capacity to bring an action or proceeding under the law of a foreign country for infringement of copyright in the Olympic symbol
- 56 Design Protection
- Section 6 of the Act provides that the AOC is taken to be the owner of the design in the Olympic symbol and in any registered Olympic design that was registered under the Act immediately before the commencement of the 1994 Amendment Act. The AOC has a monopoly in protected designs. Section 10 of the Act provides that the AOC may apply to the Registrar of Designs to register under the Act a design that, when applied to any article, results in a reproduction of an Olympic artistic work
- 57 *Supra note 76*
- 58 *Ibid*
- 59 Memorandum on The Objects of The Merchandise Marks Amendment Bill, 2002  
[http://www.belldewar.co.za/news/articles\\_corpcompanyoratelaw/press\\_ambushmarketers.htm](http://www.belldewar.co.za/news/articles_corpcompanyoratelaw/press_ambushmarketers.htm)
- 60 See Malini Goyal, 'Stumped's, *India Today*, December 23,2002, 76-78