Consumer confusion and association in re-defining the scope of ambush marketing: The legal and marketing communications perspectives

1. Research Background

The first reported incident of ambush marketing happened in the 1984 Los Angeles Olympics when Fuji was the official sponsor for the Games. Kodak, who were not an official sponsor and had not paid any fees to the International Olympic Committee (IOC), still managed to benefit from the worldwide publicity of the event by sponsoring the UK track and field team. Since then, sporting organisations such as IOC and ICC (International Cricket Council) have started claiming that ambush marketing is detrimental to the sponsorship revenue of the events and accordingly to the financial viability of the Games (IOC 2011). The first piece of ambush marketing legislation was enacted in Australia in 1996 for the 2000 Olympic Games and subsequent host countries of mega events followed suit. In recent years there is a trend for tighter control of ambush marketing in various jurisdictions (Wei 2008).

There are currently many definitions of ambush marketing in the marketing literature (e.g., Chadwick & Burton, 2011). Whilst special legislation in different jurisdictions has been enacted to target this phenomenon, none of the existing definitions have been adopted in any piece of the special legislation. This then reveals a gap between the marketing and legal disciplines. From the marketing communications perspective, the academics and practitioners focus on the aims, objectives, strategies and outcomes of the ambush marketing practice (e.g. Meenaghan, 1994 ). Nevertheless, these definitions and findings from the marketing literature lack both transferability and rigorous measurability needed for legal purposes. On the other hand, the current law making lacks a profound understanding of the nature of ambush marketing, in particular it fails to identify the fundamental elements which are embedded in this phenomenon. Such elements, however, are important to provide strategic guidance on what the regulation of ambush marketing needs to target, and to generate understanding of the implication/impact of the regulation.

This is a conceptual paper and will explore the following research questions. Firstly, what is the nature of ambush marketing? More specifically, what are the key elements embedded in this phenomenon? Secondly, in the legal field, is there any precedent in law making that can shed light on the regulation of these elements? Finally, how do the existing definitions, commentary, and empirical research findings in the marketing literature (e.g., Chadwick and Burton's typology of ambush marketing strategies) align themselves with these elements?

2. Literature Background

The existing definitions of ambush marketing, either explicitly or implicitly state that the effect of ambush marketing can be assessed from the psychological reaction of the audience/consumer (Meenaghan, 1994). Hence, we postulate that consumer psychological reaction can also be used to help identify key elements of ambush marketing.

Extensive discussion has been made in the context of trade mark law in relation to the consumer's psychological reaction to trade marks (Philips, 2003; Simon, 2006a and 2006b). The trade mark infringement in general is categorized into two sets: confusion and dilution. The essence of trade mark confusion and trade mark dilution is consumer confusion and consumer association respectively (Canon v MGM, and Adidas v Fitnessworld). The concepts
of confusion and association have been well defined in EU trade mark case law (Sabel BV v Puma AG). The knowledge of these two concepts in the trade mark context is applicable to the ambush marketing context. Based on the exploration of existing definitions of ambush marketing, we claim that consumer confusion is the consumer reaction when ambush marketing in narrow sense occurs (where consumers regard ambushers as official sponsors). We then claim that association is the consumer reaction when ambush marketing in broad sense occurs (where ambushers intrude upon the publicity generated by the events).

The insights gained from regulating consumer confusion and association in trade mark context can provide better understanding of the impact and implication of the current and future regulation of ambush marketing. The protection against trade mark confusion is soundly justified, and well-accepted in the framework of trade mark law. The courts have also developed mature approaches to assess consumer confusion. Hence, the principles can be applied to regulating consumer confusion for ambush marketing control purposes. In contrast, protection against trade mark dilution is not well established in trade mark law. The justification of protection against dilution is contentious. Protection against dilution is not well accepted in the framework of trade mark law. There is no sound test for dilution claims. Last but not least, it needs to be noted that a successful dilution claim needs to prove the existence of both association and its consequent injuries. Consumer association per se does not qualify for dilution protection. Likewise, regulating consumer association for ambush marketing control purpose would be problematic. An analysis of recent special legislation enacted in countries such as UK and South Africa shows that the legislation prohibits ambush marketing that generates confusion as well as those that generate association. The criticism (e.g. Longdin, 2009) that such legislation has attracted actually mirrors the problems which have been intensively discussed in the trade mark context for the protection against confusion and dilution.

3. Research Methodology

A systematic review methodology is used, that involves critically appraising, summarizing, and attempting to reconcile the evidence in order to inform policy and practice (Petticrew & Roberts, 2006).

The scope of the review will be international. The underlying reasons are: firstly, ambush marketing is a global phenomenon. Secondly, the regulation is normally made by various host countries of mega events in order to fulfil the obligation set by a few international sports organisations such as IOC. For example, the legislation made for the London Olympic Games and the Beijing Olympic Games are both under the same guideline set by the IOC.

The review covers a period starting from 1984, when ambush marketing firstly emerged, to the most recent literature. All the studies reviewed are written in English. Eligible studies include published as well as unpublished works and may appear as journal articles, theses, reports, books, book chapters, legal documents (such as Hansard) or conference proceedings. Searches will also be performed in the EBSCOhost database to identify articles containing empirical information about ambush marketing. The reference lists of all relevant articles will also be checked to identify missed studies. The abstract of each study will be reviewed by both authors for inclusion or exclusion. Consultation with academics from both law and marketing disciplines will help to ensure that the review is as comprehensive as possible. Both qualitative and quantitative research findings are included.
4. Analysis and Results

Using the theories in trade mark law as an analogue, we propose that consumer confusion and association are the key elements for ambush marketing in narrow sense and in broad sense respectively. In order to test this assumption, we will develop a spectrum derived from the literature, commentary and past empirical studies. We are currently undergoing the review and analysis, and the results and findings will be presented.

5. Contributions and Limitations

This conceptual paper contributes to the existing literature in the ambush marketing arena from three perspectives. Firstly, it bridges the current knowledge gap between the policy-makers and legal scholars on the one hand, and marketing practitioners and academics on the other. Secondly, the effect of ambush marketing on consumers, i.e., consumer confusion and association, are identified explicitly for the first time as the key elements embedded in the phenomenon. Benefiting from the review of trade mark law, consumer confusion and association in the context of ambush marketing will be clearly conceptualized. Using these two concepts will delineate the boundary of ambush marketing practice, and will help regulate this phenomena more effectively. Finally, the conceptual paper provides a systematic analysis of a number of ambush marketing incidents, supported by insights and theories from both legal and marketing communications perspectives. Practical implications to policy makers, event organizers and companies are also provided.

Considering the limitations of the study, this is a conceptual paper based on systematic review of current ambush marketing literature and legislation, hence it lacks empirical validation. Following the conceptual map developed from the study, future research using empirical data can be conducted to develop more rigorous measurement scales of consumer confusion and association. The impacts of these constructs on consumers' response to ambush marketing activities can be also examined through qualitative and quantitative research.

References:


Cases cited
*Sabel BV v Puma AG 1997* E.C.R. I-6191
