Lost In Translation: Are We Talking about the Same Thing?

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

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Introduction

The first reported ambush marketing incident happened in Los Angeles Olympics in 1988 where Fuji Photo Film USA was the exclusive official 35mm film sponsor of the Games, and its rival Kodak counteracted by paying considerably less to sponsor the US track and field trials and ABC television network’s Olympic broadcast (Sandler and Shani 1989). Since then the practice has continuously been the subject of study mainly in the marketing communication field and later in the legal field after event-specific anti-ambush marketing legislation was introduced to address the “problem”.¹ However, in spite of the increased attention that it has received, ambush marketing is still a vague and fluid term. Crow (2003) observes that event organisers tend to label rival’s brand competition behaviours as ambush marketing. Meenaghan (1996) pointed out that many of the activities previously labelled ambush marketing or competitive advertising during and around sponsored events, are now seen as legitimate activities. This change demonstrates how fluid the term has become, and even within Meenaghan’s description there is ambiguity; for example what does “legitimate” mean within this context? Does it mean legal, moral or simply allowed by the events owners?² Or more importantly, can ambush marketing be legitimate? In other words, if one activity is legitimate, is it still taken as ambush marketing?

¹ Event owners such as International Olympic Committees and host countries viewed ambush marketing as a problem which will reduce the sponsorship revenue.
² Meenaghan started the debate “is ambush marketing illegal or immoral”, which was not well followed.
The need for a clear understanding of the scope of AM

It is agreed that ambush marketing involves “a spectrum of behaviour from glaring obvious to the ambiguous and subtle” (the Australian Senate Legal and Constitutional Reference Committee cited by Longdin 2009). One example of an “obvious” incident may be American Express' advertising campaign during the 1992 Barcelona Olympic Games during which they ran an advertisement with the slogan, “Remember, to visit Spain, you don’t need a Visa”. Visa were the official sponsor for the Games. An example of a more "ambiguous and subtle” nature possibly occurred during the Sydney Olympic medal ceremony when Ian Thorpe obscured the Nike logo with his towel. Nike were the official sponsors of the Games, and it was suggested the gesture was made to protect Thope's personal endorsement with Adidas.

The fact that ambushing behaviours spread on wide spectrum implies a difference in these behaviours in terms of their nature, effects, and moral and legal implication. Such difference, however, has often been ignored in the ambush marketing studies. Consequently, doubt has been casted on the impacts of ambush marketing. In particular the negative impact has been claimed to jeopardise the sponsorship value (Payne 1998, 2006). The event specific legislation is enacted based on the persistent claim that ambush marketing is detrimental to the sponsorship value, but the continual growth of sponsorship for IOC does not support this claim (Ellis et al 2011). To clarify the link (if it exists) between ambush marketing effects and sponsorship value requires more comprehensive empirical evidence. The instruments currently used to measure the impact of ambushing marketing are ill suited for this purpose. These instruments tend to assess the consumer response to a whole range of ambushing behaviours without differentiating them. This is illogical: if the behaviour confuses ambush marketers and sponsors, the benefits that sponsors expect will be deflected towards the
ambush marketers and will naturally be undermined; and if the behaviours simply benefit from the publicity created by the event, what ambush marketers have gained is not at the cost of sponsors and it is difficult to demonstrate the harm to sponsorship value. When the assessment mixed ambushing behaviour of different nature together, the results would not contribute to the debate whether we need to regulate ambush marketing or not.

Moreover there is a need to frame ambush marketing into a legal issue because of the emerging trend of introducing event specific anti-ambush marketing legislation. Ellis et al (2011) have identified that a key concern with addressing ambush marketing in legislation lies in the difficulty of identifying with precision" the objectionable conduct” and Parliaments are confused about how to define the ambush marketing precisely. UK Parliament has also admitted that ambush marketing is a vague term (Hansard). Without the clarification of what constitutes ambush marketing, those who seek to combat the practice through new legislation face an unclear task.

In this article we strive to identify the key elements that constitute ambush marketing. We will firstly review that literature which has sought to clarify what constitutes ambush marketing, and which has sought to differentiate a wide spectrum of ambushing behaviours. Secondly we will extend Meenaghan and Dean's narrow and broad conceptions of ambush marketing, and will find that consumer confusion is the key element for ambush marketing in the narrow sense and consumer association for ambush marketing in the broad sense. The concepts of confusion and association are implanted from trade mark law, where they are well explained. Thirdly we will discuss the relationship between the two key elements, confusion and association on the one hand and on the other hand, the association behaviour which is a term often used in marketing literature and the right of association that arises in some event specific legislation. Fourthly based on a collection of the current definitions of ambush marketing, we will demonstrate how the two key elements are congruent with the
current understanding of the practice in the literature. Fifth, we propose that an instrument that can measure consumer response: confusion or association should be designed. Through reviewing the marketing literature we identify some factors that need to be taken into consideration when designing such an instrument. In the end, we will explain the implications of the identifications of the two elements in both the legal and marketing fields.

**Literature background**

Some effort has been made to define the scope of ambush marketing in both the legal and marketing fields. Crow and Hoek (2003) proposed to use legality to define the scope of ambush marketing: behaviour will only be labelled as ambush marketing when it is in breach of law. They argue only when the alleged behaviour is in breach of the law, the sponsors have the legal standing in the court and are entitled to seek the legal remedy. However this proposal has the some weaknesses. First, it filters out a large quantity of behaviours that are still referred to as ambush marketing within the marketing field. The effects and impact of these behaviours are still worth studying even though they are not in breach of any existing law. In particular, there is controversy regarding whether some of these behaviours should be outlawed. For example, Dean argued that new law should be introduced to regulate ambushing behaviours that intrude upon the publicity generated by the event (even thought they are not in breach of any pre-existing law) because publicity is the most valuable property of an event. Secondly, after the introduction of event-specific legislation by some host countries, the boundary of the law in these countries have been reshaped and many activities which were previously lawful become unlawful. Using legality to define ambush marketing will make the scope of the practice very fluid.

Meenaghan and Dean categorize ambush marketing in the narrow sense and in the broad sense. Categorization as such has benefits in two ways. Firstly, by recognising the existence
of the practice in the broad sense, the behaviours that are colloquially referred to as ambush marketing can be covered and further reflected in either the research or the regulation. Secondly, the categorization recognises there is a difference between the behaviours within the spectrum. Understanding such difference allows host countries who are committed to regulate ambush marketing to consider suitable approaches to different categories of ambush marketing accordingly. It also helps the ambush marketing studies in the marketing field to identify precisely their subject of studies, i.e., which category of ambushing behaviour are under the study. However, such benefits are greatly reduced because none of the above categorization has provided effective differentiation between ambush marketing in the narrow sense and that in the broad sense. Perhaps this reason why Frontier Economics points out a clear differentiation between the two categories of ambush marketing is important.

**Confusion and association in trade mark law**

*Confusion* is a long-existing concept in trade mark law (UK Trade mark Act 1994, trade mark Act 1938). The basic function of trade marks is to allow the consumers to identify the origin of the products bearing the mark and differentiate it from the same or similar products by other manufacturers (Poshner, Preamble of EU trade mark directive). For example, the trade mark Coke Cola allows a consumer to identify the coke made by Coke Cola among so many other cokes available on the supermarket shelf. If consumers confuse a protected trade mark and another mark, the basic function of the protected mark will be destroyed. Therefore it makes sense for trade mark law to prohibit any confusion based infringement.

In Cannon v. case, the European Courts of Justice (ECJ) established that a trade mark confusion claim can be either of the following two types: (1) where the public confuses the sign [B] and the mark in question [A] (likelihood of direct confusion); (2) where the public
makes a connection between the proprietors of the sign [B] and those of the mark [A] and confuses them (likelihood of indirect confusion). The effect of direct confusion is that consumers buy product B under the impression that they buy product A, and the effect of indirect confusion is that consumers believe that A and B has some special relationship such as endorsement and license agreement. In both circumstances, B has infringed upon A. Confusion here indicates that consumers were led into believing something that is untrue. As a mental state, confusion (either direct or indirect) is in line with the concept of confusion in ambush marketing. In the reported classic ambush marketing incidents, the public think that ambush marketers have sponsored the event or have had some supporting relationship (such as endorsement) with the event, which is untrue. What is clear here is that public confusion occurs regarding the relationship between ambush marketers and the event. Hence confusion is the key element that constitutes ambush marketing in narrow sense.

Association was a new concept to many EU states when it was introduced into EU Trade Mark Directive. It originated from Benelux trade mark law. The meaning of association in Benelux law is in line with the definition of “association in the strict sense” in Canon, which refers to “where the public considers the sign [B] to be similar to the mark and perception of the sign [B] calls to mind the memory of the mark [A], although the two are not confused.” Put it simply, association in strict sense is a mental state of consumers and it refers situations in which B reminds consumers of A although consumers do not confuse A and B. This concept was applied in Benelux case Monopoly where the mark anti-monopoly has been considered to infringe the mark Monopoly based on the ground of association. The reasoning was although consumers would not confuse monopoly with anti-monopoly, the latter draws upon consumers’ memory of the former and association occurs. The likelihood of association in strict sense is not a ground for the claim of trade mark confusion (Canon and Sabel) but a required element for the claim of trade mark dilution. Dilution is a broader protection than
confusion and only applies to the trade marks which have established a reputation. Dilution occurs when the famous mark or a mark similar to it has been used by a third party on irrelevant products (for example, Rolex restaurants or Burberry sandwiches), and as a consequence, the reputation or the distinctiveness of the mark has been damaged or unfair advantage has been taken of the famous mark (EU trade mark Directive). Confusion is not a required element to establish a dilution claim but association as causal link between the infringed use and the famous mark needs to be presented (Illalah 2006, 2008).

Ambush marketing in the broad sense is often claimed to intrude “upon public consciousness surrounding an event” (Meenaghan) or to “intrude upon the publicity generated by an event” (Owen Dean) or to “misappropriate the goodwill of an event” (TM reporter), while the public does not confuse the relationship between the ambush marketer and the event. To allow this happen, the behaviour of ambushers has to make the public think of the event (if the public cannot even link a marketing behaviour with the event, the behaviour is then a purely marketing behaviour and has nothing to do with the event). Hence association in strict sense is the right element to define the scope of ambush marketing in the broad sense: the public associates ambush marketers with an event but does not think there is any concrete supporting relationship between the two.

Association (in general) is a broader concept than confusion and it appears logical that confusion is just one type of association (in general) (Gienien and Neauberg J). Trade mark confusion in EU trade mark Directive is stated as “likelihood of confusion including likelihood of association” and the drafting is criticised as confusing (Ref). It makes association appear like a subset of confusion. Doubts surround the scope of (trade mark) confusion and association has been clarified. Through a serial of cases (Wagamama, Sabel and Canon), the following issues have been clarified now:
1. The claim of trade mark confusion is only based on the existence of either direct or indirect confusion (sable, canon)

2. Association in strict sense is an independent concept to confusion. The former exists in absence of the latter. (Canon)

3. Association in strict sense is not a sufficient ground for the trade mark confusion claim. (Canon, sable)

4. Trade mark dilution claim does not require the existence of confusion (Lloyds) but association is a necessary element for the claim to succeed. (Adidas)

The concept of association we adopt to define the scope of ambush marketing in the broad sense is in line with association in the strict sense in trade mark context. This concept is also an independent one to the concept of confusion and exists in absence of consumer confusion.

**Mental association vs. Association behaviour vs. the right of association**

The concept of association we adopt to define the scope of ambush marketing in broad sense refers to a mental state where ambush marketers remind the public of an event but the public does not confuse the relationship between the two. Association as a term also often appears in the ambush marketing literature. For example, ambush marketing is defined as “a form of associative marketing” (Chadwick 2011: page?) or “an attempt ……to associate its own brand with the sponsored activity” (O'Sullivan and Murphy 1998: page?) or “unauthorised association by businesses of their names, brands, products or services with a sports event or competition” (Townley 1992: page?). All these uses of the term “association” refer to the behaviours of ambush marketers to associate their own brands or companies with an event. The effect of the association behaviours can be either that the public confuse the relationship between ambush marketers and an event (ambush marketing in the narrow sense) or ambush
marketers simply remind the public of an event and the public link the two together (ambush marketing in broad sense). Therefore mental association is just one type of the effects of association behaviours.

Scassa (2011) observed in the event specific legislation that the right of association has arisen to address ambush marketing. The right of association described by Scassa is a new right introduced to address the association behaviour. Therefore the two “associations” here are the same. For example, the Sydney Games Act 1996 created the right to stop the use of a mark that would ‘suggest’ a sponsorship relationship. South Africa’s Trade Practices Act, 1976 (Trade Practices Amendment Bill, 2001) prohibits “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” [emphasis added]. In the South Africa Merchandise Marks Amendment Act of 2002, a trademark owner may not use his mark in relation to the protected event “in a manner which is calculated to achieve publicity for that trade-mark and thereby to derive special promotional benefit from the event, without the prior authority of the organizer of such event”. In the London Olympics Act 2006, the London Olympic Association Right has been created to combat an attempt in the course of trade to create an association between services or goods or a person who provides goods or services and the London Olympic or Paralympic Games.

Association as behaviour is a new concept to the legal field and it has no legal root. The term by its name overlaps with association as a mental state which has already existed in trade mark law. Hence, we argue that directly translating the association behaviour into a legal term does not help to explain its scope and can confuse with the existing legal understanding of association as a mental state. A typical example is the creation of the London Olympic

\[\text{paragraph 3 of Schedule 4}\]
Association Right in London Olympic Games Act. Here association is defined as occurring where a person has created a commercial or contractual, or corporate or financial (e.g. sponsorship) link between a person, product or service and the Games. It thus appears that the Act targets business behaviours that could generate public confusion regarding the relationship between the business entity and the London Games. In other words, the business entity presents a non-existing relationship such as sponsorship with the London Games.

However, London Organising Committee of Olympic Games (LOCOG) obviously believed that courts would interpret the scope of the Right beyond confusion. The Act stipulates that the expressions set out in the Act may be taken into account by a court when considering whether or not there is infringement to the Right. In the guidelines issued by LOCOG, examples of the use of the protected expressions for promotion or commercial purpose are deemed as infringement even though such use might not necessarily create any contractual or business link with the Games (see Figure 1).

Insert Figure 1 here

LOCOG’s willingness is not groundless. In the limited ambush marketing cases that were taken to the courts based on pre-existing laws, the majority of events owners failed their claims because they could not prove that the confusion was caused or likely to be caused by ambush marketers. For example, in the New Zealand case, *New Zealand Olympic and Commonwealth Games Association Inc v Telecom New Zealand Ltd*, the defendant published the advertisement with small print reading “with Telecom mobile you can take your own mobile phone to the Olympics” (Figure 2). The claims of passing off failed because the judge decided: although the average reader will understand that the advertisement is a play with the
Olympic symbol and be amused, “it is a long way from that brief mental process to an assumption that this play on the Olympic five circles must have been with the authority of the Olympic organisation, or through sponsorship of the Olympics.” Event specific legislation was introduced to close what events owners viewed as “loopholes” in the pre-existing law. It appears logical to presume that the Act intended to grant protection that was more extensive than the confusion protection. However, the scope of the Right will remain unclear until the interpretation by the UK courts has come out.

In summary, the concept of association we adopt to define the scope of ambush marketing in the broad sense is a mental state where the ambushing behaviour calls upon the consumers’ memory of an event. “Association” in the context of marketing literature refers to the behaviours of ambush marketers to associate their brand or company with an event. “Association” as in the right of association is in line with association behaviour. Because of the lack of a legal root and the overlapping use of the words “association” with association as a mental state that has already been accepted in trade mark law, the right of association is an unclear and vague term in the legal field.

Confusion/association and AM definitions

Our identification of confusion and association as the key elements of ambush marketing in the narrow sense and in the broad sense respectively are congruent with the definitions of practice in the literature. We have searched the official websites of 22 leading international sports organisations for their definitions of ambush marketing and managed to locate 2 definitions given by IOC and FIFA. In addition, we have located 12 definitions in academic literature. We analysed these 14 definitions in order to see whether they contain the elements of consumer confusion and association. The findings are summarised in Table 1.
All of the 14 definitions contain at least one of the two elements (confusion and association). Among the 14, 5 definitions contain the element confusion only, which indicates that they refer to ambush marketing in narrow sense. These five definitions clearly point out that ambush marketers either confuse the public as to who is the sponsor (eg. Payne 1991) or suggest an untrue supporting relationship with the event (eg. Mazodier et al 2012). The other 9 definitions contain both elements, confusion and association, which indicate that they are ambush marketing in broad sense. Among these 9 definitions, some of the definitions adopt narrow and broad conceptions of ambush marketing. Their category of ambush marketing in the narrow sense is congruent to the concept of confusion and ambush marketing in the broad sense to the concept of association. For example, Dean (2003) define ambush marketing in the narrow sense as “ambushers mislead the public into thinking that they are legitimate sponsors of an event” while in broad sense happens when an ambush marketer “does not seek to suggest a connection with the event but rather to give his own brand or other insignia exposure through the medium of the publicity attracted by the event and without the authorization of the event organiser”. 5 The analysis also appears to indicate a trend that the scope of ambush marketing has been expanding: the early definitions (before 2000) tend to cover the confusion element only, and the later ones (2000 onwards) tend to capture both confusion and association elements. A conclusion on the existence of this trend, however, requires further studies.

**Assessing consumer confusion and association in the context of ambush marketing**

In the previous section, we argued that consumer confusion and association are two essential elements of ambush marketing. This part provides a framework to assess consumer confusion or association. No literature has directly measured confusion and association. We propose an

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5 It is worth noting that Dean termed his ambush marketing in narrow sense as ambush marketing by association, and ambush marketing in broad sense as ambush marketing by intrusion.
instrument needs to be designed for this purpose. Based on the sponsorship and ambush marketing literature, the following factors are identified contributing to the effects of ambush marketing incidents.

**Consumer knowledge**

Sandler and Shani (1993) found that a lack of knowledge amongst consumers regarding sponsorship would lead to an overall apathy to the practice of AM, with consumers’ attitudes towards an official sponsor and ambushers being largely indifferent. In their later research, it is claimed that "ambush marketing can be a successful tactic only when consumers are not well informed about who are the official sponsors, what are their rights and what is the role the sponsors play in staging the Olympic Games" (Sandler and Shani, 1998: 370). A research study conducted by the IOC demonstrated that when educated, 68% of participants agreed that their opinion of a brand that engaged in AM would be lowered (Meenaghan 1998).

**Brand knowledge and past experience**

Donlan (2013) discovered that the brand-building role of sponsorship is one of reinforcement, rather than creation. Through comparing the effectiveness of brand-building between new and established brands, his results suggest that sponsorship is capable only of building awareness for new brands, while for an established brand, sponsorship has positive impacts on brand associations, perceived quality and brand loyalty. The role of consumers' brand knowledge is hence crucial for image transfer to occur between the sponsored event and the sponsoring brand.

Furthermore, according to classical conditioning research in advertising, respondents’ pre-exposure to, and prior attitudes toward the conditioned stimulus (the brand) affect their response to the unconditioned stimulus (the ad or the endorser) (Mitchell and Olsen, 1981;
Stuart, et al., 1987). Speed and Thompson (2000) applied these findings to the sponsorship context and indicated that “the level of prior knowledge and strength of opinions a respondents holds about the sponsor will determine the extent to which the sponsorship is able to develop a conditioned response” (p229).

**Audience’s level of involvement with the event**

The extent of consumer confusion is also determined by their level of involvement with the events. According to (Meenaghan, 1994) “consumers span a continuum of involvement from being intensely involved fans of an activity to being causal, unengaged and even ambivalent about the activity” (p.316). A number of studies have indicated that consumers’ involvement with a sponsored event may play a fundamental role in determining their response to sponsorship, in terms of more positive overall thoughts and attitudes towards a sponsor (Roy & Cornwell 2004; Alexandris, et al., 2007), better sponsor recognition, higher perception of corporate image, and likelihood of purchase (Meenaghan 2001; Smith, 2004; Ko et al., 2008). Nevertheless, Pham's (1992) study identified an inverted-U shape relationship between involvement with a soccer game and short-term recognition of sponsorship stimuli. When involvement reaches high levels, attention becomes more focused on the relevant source of information, (i.e., the game itself), rather than the sponsorship stimuli.

The survey conducted by Sandler and Shani (1989) showed that the audience’s ability to both recognise and recall the sponsors varied directly with their TV viewing hours of the games. Heavy viewers are more capable to correctly recognize and recall the sponsors than light viewers. Accordingly heavy viewers are less likely to be confused by ambush marketing message than light viewers.

**Demographics**
Sponsorship studies testing the effect of demographic backgrounds on sponsorship identification have yielded mixed findings. Sandler and Shani's (1989) study found out that age, income and education level did not account for differences in respondents' ability to correctly identify sponsors. Nevertheless, Gardner and Shuman's (1987) study confirmed significant differences in accuracy of sponsor identification by age, income, education and occupation. Their findings suggest that accurate identification is greatest for respondents between 21 and 35 years old, with incomes over $50,000, with at least some college, and with professional occupations. Pham (1992) observed that the recognition of the sponsorship stimuli in a soccer game was significantly lower among females than among males, and this gender effect remained significant when arousal, felt involvement, knowledge and previous exposure to the game were controlled. He attributed such results to the expertise differences between female and males in processing soccer. Non-experts would need to invest more effort in processing the game, and therefore had less capacity available for processing the sponsorship stimuli.

**Perceived sponsorship relevance**

The effect of congruency or match-up between sponsor and event on sponsorship effectiveness has been well documented. However the findings remain inconclusive (e.g, Speed and Thompson, 2000; Fleck and Quester, 2007). Congruence is mostly described as the link or relevance between sponsor and property (e.g., Johar & Pham, 1999; Rogers, 2003). Literature to date suggests that congruence between sponsor and event enhances sponsor recall (Johar and Pham, 1999; Rogers, 2004) and image transfer (Gwinner and Eaton, 1999), and generates more positive attitudes towards the sponsors (Rifon et al., 2004). Nevertheless, another stream of research confirmed that a certain degree of incongruence between sponsor and event may enhance consumers' response to sponsorship, resulting in
better recall and more favourable attitudes toward the sponsor (Fleck and Quester, 2007; Jagre et al., 2001). Hence, moderate levels of congruence are more effective than either low or high levels, and the impact of congruence on effectiveness may be curvi-linear (Fleck and Quester, 2007). Ambushers will get a better chance to create more confusion if there is direct fit between the brand and sponsored event.

**The way that messages are delivered**

- **On-line vs. off-line communications**

Traditional mass communication tools can lead to consumer skepticism and negative attitudes towards the brands (Obermiller and Spangenberg, 1998). Hence, companies are seeking for alternatives in order to compete successfully within the marketplace.

The development of new media has led to a higher investment by companies, drawing away from TV advertisement (Kalpic and Bernus, 2006). It is evident that social media enabled non-sponsors to use display, social and search marketing to tap into the excitement surrounding the London Olympic Games. They monitored the news and trends and adapted campaigns to slot-in with the online buzz and constant search for information (O’Reilly 2012). They were able to target audiences directly and associate themselves with the Olympics to allow two-way communication and hence increase audience engagement with their marketing activities. For example, Nike sponsored three celebrity athletes including Sanya Richards-Ross, Serena Williams and Paula Radcliffe, and Puma referenced Usain Bolt, as a legitimate link to the London Games, supporting them through a range of Facebook activities.

- **Power of celebrity endorsement and other marketing effort**
The sponsorship outcomes are the "result of an integrated marketing effort, not only the outcome of sponsorship" (Pham, 1991:59) as sponsorship operations are typically supported by other marketing activities, such as sales promotions, advertising, celebrity endorsement etc.

It has been well documented that celebrity endorsement allows marketers to leverage the public's knowledge to increase a brand's attention, polish brand image, introduce new brands and reposition them (Erdogan, 1999; Ericsson and Hakansson, 2005). This then promotes consumers' positive attitudes towards the brand, increases the likelihood of purchase and customer loyalty (Aaker, 1991; Bush et al., 2004). Previous research indicates that celebrities are particularly effective endorsers and have a significant impact on consumer behaviour, as they are viewed as highly trustworthy, believable, persuasive and likeable (Atkin and Block, 1983; McCracken, 1989). The use of sports celebrities in advertising has become increasingly popular (Chan et al., 2008). Athletes have the ability to capture the interest of the general population, and are often iconized more so than other types of celebrity (McCutcheon et al, 2000). Athlete endorsers can often access hard to reach groups, especially if they project images of heroism as opposed to a mass celebrity status which is less justified and deserved (Stevens et al, 2003).

- **Message disclosure duration**

In addition, consumers' brand responses such as brand memory and brand attitudes are also influenced by sponsorship disclosure. Berman et al.'s (2012) experiments revealed that sponsorship disclosure on television directly increased brand memory, regardless of duration. The media coverage approach is probably the most commonly used method for sponsors to evaluate the effectiveness of their sponsorship (Collett and Fenton, 2011). However, this approach has been criticised as "they cannot be considered measures of sponsorship..."
effectiveness because achieving media coverage is not an end in itself…What should count for marketers is in fact the response to this stimulus" (Pham, 1991: 54). Indeed, literature indicates that measures of exposure to sponsorship stimuli may overestimate real effectiveness in terms of brand recall and recognition (Nebenzahl and Hornik, 1985; d’Ydewalle et al., 1987). In addition, a longer (6-second) exposure in fact indirectly resulted in less favorable brand attitudes via higher rates of attitudinal persuasion knowledge than a shorter one (3-second) (Berman et al., 2012).

**Implications**

The identification of consumer confusion and association as the key elements for ambush marketing in the narrow sense and in the broad sense respectively has substantial implications for both the legal and marketing fields.

Firstly, the identification helps to clear the way for framing ambush marketing as a legal issue. The trend has emerged to address ambush marketing through event specific anti-ambush marketing legislation. The legal field thus needs to understand ambush marketing which originated as a marketing phenomenon, and hence there is a need to frame ambush marketing as a legal issue. The key concern for the framing is the lack of understanding of what constitutes ambush marketing. This concern is resolved once the two key elements that constitute ambush marketing in both the narrow and broad sense respectively have been identified. Moreover, it clarified the confusion generated by the creation of the right of association. The creation of the right is in effect an attempt to translate the association behaviour described in the marketing field into a legal term and therefore is part of whole process to frame ambush marketing as a legal issue. The confusion arises because of the overlapping use of the word “association” between the right of association and association as
a mental state that has already been accepted in trade mark law. Through our identification, the concepts of mental association, association behaviour and the right of association have been clarified and the relationship between them becomes clear. The confusing issue generated by the emerging right of association has been clarified here. Therefore this identification has removed two barriers in the framing process.

Secondly this identification contribute to the debate about whether ambush marketing should be regulated. It allows the future legislature who considers regulating ambush marketing to benefit from the experience of and the discussion about the regulation of behaviours that contain the elements of confusion and association.

The law has a long tradition of prohibiting behaviours that generate consumer confusion. This can be evidenced in trade mark Law (EU Trade Mark Directive, UK Trade Mark Act 1994), the tort of passing off (UK), and the unfair competition law (New Zealand Fair Trading Act of 1986, Canada Competition Act of 1985). Regulating behaviours that generate confusion protect consumers from being confused by ambush marketers. Moreover, confusion implies deceit on the part of ambush marketers and is morally wrong. Hence, regulating ambush marketing in the narrow sense would be a have positive benefits for the host countries because behaviours of this type generate consumer confusion regarding the relationship between ambush marketers and an event.

Regulating behaviours that generate association is a much more complicated issue. The experience in trade mark law can shed some light on this issue. Trade mark law does not provide a general level of protection to a trade mark purely based on a likelihood of association in the mind of consumers. Protection purely based on likelihood of association is taken as inefficient because it would impose high costs on other traders and consumers in general. These costs would be high because a general level of protection based on a
likelihood of association would be broad, hard to define precisely and therefore hard to predict. It would also significantly reduce the pool of potential marks available to other traders (Griffiths 2001).

Association together with other elements can give a sufficient ground for a trade mark dilution claim. Other elements that need to be presented are the reputation of the mark and either the damage to distinctiveness or reputation, or the unfair advantage that has been taken of the protected mark (EU Trade Mark Directive, UK Trade Mark Act 1994). The purpose of trade mark dilution law is not for the protection of consumers’ interests but rather rewarding the marketing effort of the trade mark owners by stopping other traders riding “on the coat-tail” of a successful mark (ECJ in L’Oréal SA v Bellure 2009). However, the protection given to the trade mark owner has to be very carefully considered. On the whole, all of the intellectual property rights have to “strike a balance between the need to encourage innovation and creativity and discourage consumer deception through the granting of temporary and limited legal monopolies and the potentially adverse effect on the wider economy that such monopolies can entail” (Longdin 2009).

Regulating ambush marketing in the broad sense is no less complicated than regulating trade mark dilution. If ambushing behaviours are regulated merely on the ground of association generated, the regulation has to create a right for the events owners/organisers that would be broad, hard to define precisely and therefore hard to predict and hence impose high cost on the other (non-sponsors) traders and the public. In addition, so far there is no evidence to prove that association will generate any economic harm. Hence it is difficult to justify the regulation of ambush marketing in the broad sense.
Perhaps, ambush marketing in the broad sense can be partly regulated based on association and other additional elements such as harm to the sponsorship value. This type of regulation however still creates some new intellectual property rights for the event owners/organisers and therefore has to strike the balance that the IP field has always strived to maintain (Longdin 2009). So far, the new rights created by the event specific legislation in different jurisdictions do not appear to strike the balance well. This is evidenced by the criticism to the overreach of the protection granted to the events owners/organisers in the legislation (Corbett and Roy 2010; Longdin 2009; Scassa 2011).

Furthermore, the proposed conceptual framework will provide fundamentals in designing effective measurement instruments to assess the two key elements identified (consumer confusion and association). This will help to generate empirical evidence which will contribute to the debate whether ambush marketing should be regulated.

**Limitations and recommendations**

Considering the limitations of the study, this is a conceptual paper based on systematic review of current ambush legislation and legal and marketing literature. Hence it lacks empirical validation. Moreover, it is still difficult to empirically assess the two elements generated by ambush marketers. For example, although the empirical study can find out if consumers are actually confused, it is still hard to prove the confusion is caused by ambush marketing. Other factors such as consumers’ pre knowledge of the ambushting brand might contribute to the occurrence of confusion. We have only achieved in identifying some of factors that are relevant for assessing confusion and association. Following the conceptual framework developed from the study, future research should focus on the design and validation of measurement instruments of consumer confusion and association.


Mitchell, Andrew A. and Jerry C. Olson. 1981. Are product attribute beliefs the only mediator of advertising effects on brand attitude? Journal of Marketing Research. 18(August), 318-332


Figure 1: Example artwork provided by LOCOG

An in-store promotion for flat screen TVs with marketing material displayed throughout the store:

X Brand
Giving you the clearest picture of the London Games

An advert for a caffeine drink:

If you don’t want to miss a minute of the 2012 Games
drinking X Brand can help you stay awake
Note: the colour of the "Ring" characters correspond to the original colour of the rings in the Olympic logo.
Table 1: Definitions of Ambush Marketing and Key Elements

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