

Media & Entertainment - Switzerland

Olympic Games: ambush marketing and athletes' rights

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March 15 2012

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Introduction

With the 2012 Olympic Games just months away, it is worth examining the issue of ambush marketing and athletes' rights. Since the UEFA Euro 2008 championship, the biggest sporting event ever held in Switzerland, most people know what 'ambush marketing' involves. It is understood as any attempt by a company to associate itself with a high-profile sporting event through any type of marketing activity with a view to deriving a commercial benefit from such association. The marketing activity is 'ambush' because the company undertaking it is not authorised to do so and it is often done at the expense of another company's official association with the sporting event.

No special ambush marketing law

In connection with the UEFA Euro 2008 tournament, the Union of European Football Associations (UEFA) tried – as a precondition for Switzerland hosting the championship – to have specific legislation introduced. Subsequently, the Federal Council prepared draft amendments to the Unfair Competition Act, which included a new Article 3(e). However, after lengthy discussions, the proposal was turned down. It was successfully argued that a new Article 3 was not necessary, useful or justified. The possibilities for competitors to promote their products and services would have been limited, which would have created a factual restraint of economic activities, leading to a dysfunctional regime for the Swiss economy. In addition, it was argued that the draft was not precise enough (it prohibited 'parasitical' advertisement), which would have extended the power of the organisers far beyond their rights. Thus, in November 22 2006 the Federal Council blocked the amendments. The main reason for this decision was that Swiss law already provides a set of legal options, which are available to sporting event holders and their sponsors in order to limit ambush marketing.

Legal basis against ambush marketing

Under Swiss law, the main instrument against ambush marketing is the Unfair Competition Act. Based on Article 3 of the act, the following types of behaviour or business conduct are prohibited:

- behaviour or conduct that is degrading to a competitor;
- behaviour or conduct that involves a risk of misleading the public;
- behaviour or conduct that involves a risk of confusion; and
- behaviour or conduct that creates an association with or involves the exploitation of a competitor's reputation.

Under the sweeping clause in Article 2, a non-sponsor is prohibited from enticing visitors in front of a stadium or on the way to the stadium and from violating the general terms and conditions of the event by promoting its own messages in association with the event.

The registration of IP rights (eg, for trademarks and designs) helps to prevent the use of the competitors' brands. The Olympic rings and the Olympic Games are protected as trademarks worldwide. However, marks such as EUROPEAN CHAMPIONSHIPS or WORLD CHAMPIONSHIPS or the image of a football cannot be registered, as these marks belong to the public domain. Furthermore, event songs, event slogans or event

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logos are basically protected by copyright law. This is also the case for pictures and videos from certain sporting events, which can qualify as 'creations' under copyright law. However, sporting events themselves are not considered as a 'creation' according to Swiss copyright law (just like in the European Union).

In addition to the Unfair Competition Act and IP rights, basic legal instruments (eg, public concessions, property rights and contracts) have become important in the fight against ambush marketing. Public concessions and/or contracts with the communities guarantee the sporting event organiser's exclusivity in the areas surrounding the sporting venues. Finally, detailed contracts with venue rights holders, sponsors, participating teams and athletes and spectators help to prevent ambush marketing. Thus, the organisers can widely protect their events.

IOC prevention strategy

Over the years, the International Olympic Committee (IOC) has adopted a well-thought-out prevention strategy against ambush marketing, and has successfully protected its brands, designs and domain names worldwide. The IOC's marks are well-known trademarks and thus enjoy wider protection under Swiss law. Also, the IOC always asks the organising country for public concessions to guarantee the exclusivity of sponsors. Finally, the IOC imposes very strict rules on broadcasters and participants, which prohibit any commercial activities in relation to the Olympic Games. According to Article 40 of the Olympic Charter, athletes are not allowed to undertake any commercial activity from nine days before to three days after the Olympic Games. According to the Swiss Olympic guidelines for advertising and public relations in connection with the Olympics, after this period it is also completely forbidden to use athletes' images with an 'Olympic' background. The athletes are not even allowed to write in newspapers about their Olympic experiences.

Athletes' rights

The IOC redistributes over 90% of its revenues within the Olympic Movement; athletes do not benefit directly from the profits (by signing the eligibility forms, they waive most of their image rights). The question is thus not only whether this distribution of revenues is justified, but also whether it is legally possible for the IOC (as a monopolistic organisation) to impose such strict rules. According to Swiss legislation, in such situations a proper balance must be established between the organisation's actions and the rights of the participants concerned. Considering the IOC's strict rules, such a fair distribution of revenues is at least questionable.

Smart ambush marketing

Athletes and their sponsors can generally use sporting events to their advantage by exercising smart ambush marketing. Such smart ambush marketing is possible if any reference to the sporting event is not too strong, systematic and/or blatant. The campaign itself must not be misleading and must not cause a danger of confusion. Furthermore, personal rights and IP rights must be respected. In smart ambush marketing campaigns, the athlete (and his or her personal sponsor) should rely on his or her own personality and constitutional rights, as well as on his or her own naming and IP rights. These rights are particularly effective in monopolistic situations where a fair balance between the rights of both parties needs to be established. If the athlete and his or her sponsor exercise their own rights properly, it will be difficult for the sporting event rights holder to forbid their marketing campaign.

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