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Professional Negligence for Ambush Marketing: an Australian legal perspective

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Background:

Ambush marketing– the practice of unauthorised association of a brand with something or someone to give the impression of authorised association (Thorpe et al, 2009: 362) – is one of the most controversial topics in sport marketing law. Some regard it as the sport marketer's paradise (Thorpe et al: 363); others see it as the game that one has to play (Brewer,1993: 70*);* while yet others take the view it is stealing (Mandel, 1999).

Whatever is one's perspective, as Thompson(2005: 398) states: "Ambush marketing includes a variety of practices which, in general terms, are intended to neutralise the marketing advantage that might otherwise accrue through the sponsorship of a sporting event". What is missing from this statement is the intention to exploit.

The effect of ambush marketing is to devalue the commercial investment of official sponsors, suppliers and partners. It also deprives the event organiser, sport organisation, team and athlete of revenue that should have been paid by the ambusher for the association and may cost the event organiser the future support of the authorised sponsor – if not their job. As such, the event organiser, sport organisation, team and athlete must find ways to stop the practice.

Objectives

This paper will consider the relevant laws that relate to Ambush marketing - consumer protection; passing off and intellectual property - and the law of professional negligence to establish that a sport manager has a duty of care to protect a sponsor from being ambushed by a competitor. It will be argued that failure to prevent an ambush may result in the sport manager being succesfully sued for professional negligence.

Methods

The ability to avoid an ambush using legal rights has been illustrated in a number of Australian cases that will be considered such as C*ampomar Sociedad, Limitada v Nike International* Ltd(2000) and *Talmax Pty Ltd and Anor (Perkins) v Telstra Corporation Ltd (1996).* But ambush marketing is not always successfully prosecuted by the law as will be illustrated by the cases of:*Honey v Australian Airlines Ltd and Another (1989) and Australian Olympic Committee Inc v Baxter & Co Pty Ltd(1996).* There have been numerous cases in other jurisdictions involving ambush marketing illustrating that this is certainly a world wide issue, for example: *National Hockey League v Pepsi Cola Canada* (1992)

There has been a dogged and on-going determination by the legal authorities to minimize if not kill-off ambush marketing practices – at least in connection with major sport events and venues. The most recent strategy developed by the Australian law makers to meet the ambush marketing challenge is the development of special purpose legislation. The legislation has specific provisions to combat ambush marketing and some of the strategies involved will be described.

Results:
From the analysis it will be seen that there is law that can prevent the abuse and unauthorised exploitation of intellectual property and other rights from sports marketers. There are, in addition, a number of risk management practical strategies that will be identified.

Discussion and conclusion
From all this, the question arises: Should not the reasonable sport organizer, marketer or manager be wary of the possibility of an ambush and therefore take reasonable steps to minimize, if not prevent, an ambush? Moreover, if a sport event is successfully ambushed, can the event organizer, marketer or sport manager be sued for professional negligence by the sponsor?

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