

# LEGAL MEASURES FOR AMBUSH MARKETING IN THAILAND\*

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## ABSTRACT

Ambush marketing comprises a broad range of marketing operations by business organizations seeking affiliation with an event without bearing any financial burden of sponsorship. Although the ethical topics related to ambush marketing are still controversial, it clearly causes disadvantages to the sponsorship business by devaluing the sponsorship relationship between official sponsors and organizing committees. It is reasonable that this marketing practice should be regulated under an appropriately designed legal framework.

Many attempts have been made in other countries to deal with ambush marketing. The United States of America and the United Kingdom have introduced event-specific legislation to guard against ambush marketing for the Olympic Games, as requested by the International Olympic Committee. New Zealand and South Africa have provided protection for any events considered ‘major event’ with an umbrella legislation which is not specifically designed for the Olympic Games or any other single event.

In Thailand, although there are some legal grounds that make it possible to formulate a claim against ambush marketing, such as trademark infringement, civil passing off, and basic tort claims as well as consumer protection law, it appears that such existing laws

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are insufficient to deal with this controversial marketing activity due to various non-infringing techniques of ambush marketing.

Consequently, a single piece of new legislation should be enacted. Business relationships between event organizers and official sponsors must be protected while achieving a balance among the rights of sponsors, property owners, and other affected parties. Therefore, ambush marketing legislation should focus on clear-cut definition, declaration of the protected event, and legal protection for ambush marketing by way of association and intrusion, time limitations, and exceptions of violation.

**Keywords:** Ambush marketing, Sponsorship, Trademark law, Passing off, Law of tort, Consumer protection law.

#### บทคัดย่อ

การตลาดแบบซุ่มโจมตีคือรูปแบบของกิจกรรมทางการตลาดแบบต่างๆ ที่เกิดขึ้นโดยองค์กรธุรกิจที่มุ่งหวังที่จะสร้างความเชื่อมโยงระหว่างตนเองกับมหกรรมใดๆ โดยมีได้รับอนุญาตและมีได้จ่ายเงินสนับสนุนหรือค่าสปอนเซอร์ให้แก่มหกรรมนั้น ซึ่งแม้ว่าประเด็นด้านจริยธรรมของการตลาดแบบซุ่มโจมตีนั้นยังคงเป็นที่ถกเถียงกันอยู่ แต่ก็ชัดเจนว่าวิธีการทำการตลาดเช่นนี้ย่อมสร้างความเสียหายให้แก่ธุรกิจทางด้านสปอนเซอร์ เนื่องจากการตลาดแบบซุ่มโจมตีทำให้คุณค่าของสัญญาการให้การสนับสนุนระหว่างผู้สนับสนุนอย่างเป็นทางการกับผู้จัดงานมหกรรมนั้นด้อยค่าลง ดังนั้น การทำการตลาดแบบซุ่มโจมตีจึงควรได้รับการควบคุมภายใต้มาตรการทางกฎหมายที่เหมาะสม

ได้มีความพยายามในหลายประเทศที่จะสร้างมาตรการทางกฎหมายเพื่อรับมือกับการทำการตลาดแบบซุ่มโจมตี โดยประเทศสหรัฐอเมริกาและสหราชอาณาจักรได้ออกกฎหมายสำหรับป้องกันการทำการตลาดแบบซุ่มโจมตีโดยเฉพาะสำหรับการแข่งขันโอลิมปิกเกมส์ที่ประเทศดังกล่าวเป็นเจ้าภาพตามชื่อเรียกร่องของคณะกรรมการโอลิมปิกสากล ในขณะที่ประเทศนิวซีแลนด์และประเทศแอฟริกาใต้ได้ให้ความคุ้มครองมหกรรมที่ได้รับการพิจารณาให้เป็น “มหกรรมที่สำคัญ” โดยการออกกฎหมายที่ให้ความคุ้มครองแบบครอบคลุมโดยมิได้จำกัดเฉพาะโอลิมปิกเกมส์หรือมหกรรมใดมหกรรมหนึ่ง

สำหรับประเทศไทย แม้ว่าบทบัญญัติและหลักกฎหมายบางเรื่อง เช่น หลักกฎหมายการละเมิดสิทธิในเครื่องหมายการค้า การลวงขาย กฎหมายละเมิด และกฎหมายคุ้มครองผู้บริโภค อาจจะสามารถ

ปรับใช้ได้สำหรับการดำเนินการทางกฎหมายต่อการทำการตลาดแบบซุ่มโจมตี แต่กฎหมายที่มีอยู่นั้นก็ไม่เพียงพอที่จะรับมือกับการทำการตลาดเช่นนั้นได้อย่างครอบคลุม เนื่องจากผู้ทำการตลาดได้พัฒนาวิธีการทำการตลาดแบบซุ่มโจมตีโดยอาศัยช่องว่างทางกฎหมายและหลีกเลี่ยงการกระทำที่ฝ่าฝืนต่อบทบัญญัติและหลักกฎหมายดังกล่าวข้างต้น

ด้วยเหตุนี้ ประเทศไทยจึงควรพิจารณาออกกฎหมายใหม่สำหรับการควบคุมการทำการตลาดแบบซุ่มโจมตี โดยมีหลักการสำคัญในการคุ้มครองความสัมพันธ์ทางธุรกิจระหว่างผู้จ้างงานมหกรรมและผู้สนับสนุนอย่างเป็นทางการ ควบคู่ไปกับการสร้างความสมดุลและความเป็นธรรมระหว่างผู้สนับสนุนอย่างเป็นทางการ เจ้าของสิทธิในทรัพย์สินของมหกรรม และผู้ที่ได้รับผลกระทบจากกฎหมายฉบับนี้ทุกฝ่าย ดังนั้น กฎหมายสำหรับการตลาดแบบซุ่มโจมตีควรให้ความสำคัญกับการกำหนดนิยามของการตลาดแบบซุ่มโจมตี ขั้นตอนในการพิจารณาการให้การคุ้มครองมหกรรม มาตรการทางกฎหมายสำหรับป้องกันการตลาดแบบซุ่มโจมตีทั้งโดยการเชื่อมโยงและโดยการแทรกซอน กำหนดระยะเวลาการให้ความคุ้มครอง และข้อยกเว้นการกระทำผิด

**คำสำคัญ:** การตลาดแบบซุ่มโจมตี, การให้การสนับสนุน, กฎหมายเครื่องหมายการค้า, การลงขาย, กฎหมายละเมิด, กฎหมายคุ้มครองผู้บริโภค

## Introduction

Commercial companies have various ways of acquiring customers in order to build up their businesses. Amongst all the marketing activities, commercial sponsorship represents one of the most significant marketing developments over recent decades and has become prevalent in society. The great value and exclusivity right will be given to the official sponsors in exchange for the sponsoring amount that they have paid. This exclusivity creates a challenge to the competitors of the official sponsors who are not able to legitimately capitalize on the event due to the exclusivity policy, and ambush marketing has become an effective weapon for non-sponsors to do so.

Many attempts have been made in other countries to deal with ambush marketing. In addition to the traditional form of legal protections, the United States of America and the United Kingdom

have introduced event-specific legislation to guard against ambush marketing for the Olympic Games, as requested by the International Olympic Committee. New Zealand and South Africa have provided protection for any events considered ‘major event’ with an umbrella legislation which is not specifically designed for the Olympic Games or any other single event.

In spite of not having any specifically designed legislation or legal measures to handle ambush marketing in Thailand, there are some legal grounds which could allow a claim of ambush marketing to be made. In the Trademark Act B.E. 2534, a trademark infringement claim and the law of passing off are the applicable existing laws.<sup>1</sup> However, a trademark infringement claim can be used only in some circumstances since the ambusher is normally aware how to avoid trademark infringement. Moreover, the short lifecycle of the event may cause difficulties to the owner of an unregistered mark in establishing the actual use of its trademark in order to enjoy the passing off protection under the Trademark Act of Thailand.

Alternatively, the event organizers may pursue a basic tort provision under the Civil and Commercial Code of Thailand against unauthorized usage of the event’s mark in ambushing activities if such unauthorized use is believed to be an abuse of their rights. However, it would be very difficult for the trademark owner to identify the ambusher’s unlawful act since many ambushing strategies are not obviously illegal in Thailand and the use of tort claim is not well developed in the field of ambush marketing.<sup>2</sup>

Furthermore, although Thai consumer protection law may represent an alternative way for organizing bodies and official sponsors of the event to counter ambush marketing, it is not

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<sup>1</sup> Siraprapha Rungpry, “*Dealing with Ambush Marketing*”, [www.asiaiplaw.com/article/41/747/](http://www.asiaiplaw.com/article/41/747/) (accessed October 21, 2015)

<sup>2</sup> Somboon Earterasarn & Clemence Gautier, “*Protection of Major Sports Events and associated commercial activities through Trademarks and other IPR*”, <https://www.aippi.org/download/committees/210/GR210thailand.pdf> (accessed October 14, 2015)

specifically designed for this phenomenon and may not be effective enough to cover all subtle strategies of ambush marketing.

By the abovementioned movements of other countries and the benefit of legal measures for ambush marketing, it may imply that the benefits that each of the countries takes from providing legal controls to ambush marketing is worthwhile enough. This article therefore aims to study and analyze the existing applicable Thai laws in comparison with the legal measures which govern ambush marketing in foreign countries, as well as to propose new legislative solutions and recommendations in order to enhance sponsorship investment in Thailand.

## **Ambush Marketing and Related Issues**

### **1. Definition and Characteristics**

Ambush marketing is an attempt to gain benefits from the popularity and goodwill of a particular event by way of establishing an association between oneself and the event, without explicit authorization from the event organizer and without spending any requisite fees to be an official sponsor.<sup>3</sup> It is sometimes called “parasite marketing” since the value and quality of the sponsorship opportunity and the efficacious message of the official sponsor are reduced and devalued by this marketing activity.<sup>4</sup>

This marketing practice has attracted much debate amongst marketing scholars. Some researchers argue that it is an unethical and illegitimate marketing activity because it devalues the sponsorship between the event and official sponsor<sup>5</sup> and sometimes misleads consumers into believing that ambushers are actually providing a

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<sup>3</sup> Steve Mckelvey & John Grady, “*Ambush Marketing: The Legal Battleground for Sport Marketers*”, 21 **WTR Ent. & Sports Law** 8, 9 (2004).

<sup>4</sup> Tony Meenaghan, “*Ambush Marketing: A Threat to Corporate Sponsorship*”, 38 **Sloan Management Review** 103, 109 (1996).

<sup>5</sup> Information Resources Management Association, **Marketing and Consumer Behavior: Concepts, Methodologies, Tools, and Application** 102 (2015).

sponsorship fee.<sup>6</sup> Other researchers take the completely opposite view stating that it is not illegal because it is the natural result of healthy competition. Although the ethics of ambush marketing remain controversial, it clearly causes disadvantages to the sponsorship business by devaluing the sponsorship relationship between official sponsors and organizing committees. Therefore, ambush marketing should be controlled under an appropriate legal measure.

## 2. Types of Ambush Marketing

It is extensively acknowledged that ambush marketing can be categorized into two types; ambush marketing by way of “association” and “intrusion”.<sup>7</sup>

### (1) Ambush Marketing by Association

An association can be exploited by ambush marketers in order to create confusion and deceive consumers into believing that they actually contribute to the sponsorship revenue of the event and that they are an officially authorized sponsor. This can be achieved by utilizing the emblem of the event or an emblem which is confusingly similar to the actual event’s emblem. Ambush marketing by way of association can also be done by persuading consumers in some way that the ambusher or its brand is connected with the event,<sup>8</sup> for examples, using symbolic images or words relating to the event in advertising, sponsoring athletes individually instead of the event, and distributing free tickets or event souvenirs, such as free shirts or caps, in an advertising campaign.

### (2) Ambush Marketing by Intrusion

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<sup>6</sup> Gabriela Bodden, “*Ambush Marketing and Trademark Infringement in the Caribbean*”, <http://www.lexology.com/library/detail.aspx?g=2098fdec-cd56-4d4f-9a86-9dbc6cf549ad> (accessed December 5, 2015)

<sup>7</sup> Philip Johnson, **Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event** 7 (2008).

<sup>8</sup> Dean Crow & Janet Hoek, “*Ambush Marketing: A Critical Review and Some Practical Advice*”, [http://iimkbltn-dev.massey.ac.nz/V14/MB\\_V14\\_A1\\_Crow.pdf](http://iimkbltn-dev.massey.ac.nz/V14/MB_V14_A1_Crow.pdf) (accessed October 20, 2015)

Intrusive ambush marketing is when the ambushing companies cunningly use the environment of the event to show their trademark or brand name and simultaneously create brand awareness and recognition by virtue of the media reporting or broadcasting of the event when they are not entitled to do so.<sup>9</sup> The most famous instance of this was probably the presence of the Bavaria Beer girls at the FIFA World Cup 2010. Bavaria Beer ambushed Budweiser's official sponsorship during the 2010 FIFA World Cup by sending 36 women wearing orange dresses that looked suspiciously similar to the sales promotion items given away with purchases of Bavaria beer to the stadium in order to get media coverage for its business.<sup>10</sup>

### **3. Ambush Marketing Strategies**

To create an implied association with an event, a non-sponsor may simply utilize a registered event's trademark on merchandise without explicit authorization, or falsely pretend to be an official supporter of a particular event.<sup>11</sup> However, these marketing strategies are considered illegal and normally have a clear-cut remedy under the law. Therefore, instead of engaging in ambushing strategies equivalent to piracy, non-sponsors are knowledgeable and usually utilize their creativity to develop more subtle strategies of ambush marketing, for examples, sponsoring a subcategory of the event or the event's broadcast, establishing advertising activities surrounding the event venue, and other creative advertising strategies that coincided with the event, for which legal remedies are less clear-cut.

### **4. Effects of Ambush Marketing**

The major effect may be that companies no longer take an interest in supporting such events since the advantages of being an official sponsor are regularly weakened by the action of ambushing

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<sup>9</sup> Bodden, *supra* note 6.

<sup>10</sup> Datamonitor, "Ambush Marketing Case Study: successfully leveraging high-profile events to raise brand profile", <http://acervo-digital.espm.br/cases/306395.pdf> (accessed December 5, 2015)

<sup>11</sup> Rukmani Seth, "Ambush Marketing – Need for legislation in India", 15 *Journal of Intellectual Property Rights* 455, 456 (November 2010).

companies.<sup>12</sup> If that is so, the major event organizer will lack financial assistance in order to organize the event because commercial companies are not willing to make an investment in something from which they cannot take any benefit.<sup>13</sup>

## **Legal Measures for Ambush Marketing in Foreign Countries**

### **1. The United States of America**

Although there is currently no specific legislation regarding ambush marketing in the United States of America,<sup>14</sup> right holders and official sponsors can legally challenge ambushing activities using legal protections provided by an intellectual property protection under the Lanham Act, the doctrine of misappropriation in the common law, and the Olympic and Amateur Sport Act.<sup>15</sup>

#### **(1) Intellectual Property Protection**

In most ambush marketing situations, an ambusher is smart enough not to use the official trademarks but rather circuitously associate itself with the event. And even though it actually uses a mark, it is most likely unregistered. Therefore, in most cases, the cases relevant to ambush marketing in the United States will place the focus on Section 43(a)<sup>16</sup> which codifies the facts that give rise to the right of action on behalf of the person whose trademark is not officially registered in the State, and also provides protection against persons making false representations or engaging in unfair competition, even in a case that does not involve trademarked goods or services.

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<sup>12</sup> Zaman Kala, “*Ambush Marketing in the Context of the 2012 London Olympic Games*”, Master’s Thesis, University of Central Lancashire (2012) 9.

<sup>13</sup> Philip Johnson, **Ambush Marketing and Brand Protection: Law and Practice** 3 (2nd ed. 2011).

<sup>14</sup> The Global Advertising Lawyers Alliance, **Ambush Marketing: A Global Legal Perspective** 158 (2014).

<sup>15</sup> Lori L. Bean, “*Ambush Marketing: Sports sponsorship confusion and the Lanham Act*”, 75 **Boston University Law Review** 1099, 1109 (1995).

<sup>16</sup> 15 U.S.C. § 1125



Nevertheless, in order to be successful in a false advertising claim under this Act, the plaintiff has the burden of showing that the defendant's activities are likely to create confusion among consumers.<sup>17</sup> It is difficult for a plaintiff to prove consumer confusion as a consequence of ambush marketing. There is consumer behavior research which shows that consumers lack knowledge about the different levels of sponsorship and the rights associated with the various sponsors.<sup>18</sup> Consumers appear to place little emphasis on the industry of the ambushing company. The sponsorship targets tend to perceive as an official sponsor the brand whose television commercial they viewed most recently in the context of the event. Therefore, it seems difficult to prove that it is the ambushing which creates confusion.

## (2) Common Law

In the context of common law, an event organization or official sponsor can also challenge ambush marketing with the doctrine of misappropriation. The misappropriation doctrine is one of the bodies of unfair competition law which operates against another person trying to reap some of the benefits which it has not sown, by misappropriating the value of the products or services.<sup>19</sup> An ambush marketer could be accused of adopting unfair business practices even without misusing a trademark or creating consumer confusion.

However, the ambushing activities usually do not rise to the level of fraud, misrepresentation, or otherwise misleading practices which are generally required for a successful cause of action for

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<sup>17</sup> *Id.* at 1114.

<sup>18</sup> David Shani & Dennis M. Sandler, "Ambush Marketing: Is Confusion To Blame for the Flickering of the Flame?", 15 **Psychology & Marketing** 367, 367 (1998).

<sup>19</sup> Michelle L. Spaulding, "The doctrine of Misappropriation", <http://cyber.law.harvard.edu/metaschool/fisher/linking/doctrine/> (accessed on November 20, 2015)

unfair business practices.<sup>20</sup> An injured person may face difficulties in showing harm in a traditional legal sense.

### (3) Event-Specific Legislation

The Olympic and Amateur Sport Act (OASA) grants privileged status to the United States Olympic Committee (USOC). USOC is given the exclusive right to control the usage of Olympics' properties such as trademarks, symbols, and words, regardless of whether their unauthorized use creates a likelihood of consumer confusion.<sup>21</sup> The unauthorized use of certain Olympic trademarks and mottos are also prohibited by the Act.

## 2. The United Kingdom

There is no specific legislation in the United Kingdom which prohibits ambush marketing in general, although special event-specific legislation such as The Olympic Symbol (Protection) Act 1995 and the London Olympic Games and Paralympic Games Act 2006, which is no longer in force, were enacted to guard against unauthorized commercial association with the London Olympic Games 2012.<sup>22</sup> Thus, the event organizers and their official sponsors have generally challenged ambush marketing using the traditional forms of intellectual property protection such as trademark infringement and passing off. Other legal frameworks in the United Kingdom such as advertising standards and consumer protection regulations may also be invoked as legal measures to combat ambush marketing.

### (1) Intellectual Property Protection

Section 10 of the Trademark Act 1994 offsets out the infringement of a registered trademark and demonstrate that a

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<sup>20</sup> Gerlinde Berger-Walliser, et al., "*Bavarian Blondes Don't Need a Visa: A Comparative Law Analysis of Ambush Marketing*", 21 **Tulane Journal of International and Comparative Law** 1, 5 (Winter 2012).

<sup>21</sup> Matthew J. Mitten, **Sports Law in the United States** 190 (2011).

<sup>22</sup> The Global Advertising Lawyers Alliance, *supra* note 14, at 154.

trademark infringement claim is likely to be an adequate way of dealing with ambush marketing, especially in situations where a mark which is similar or identical to the event's registered mark is used in relation to similar or identical goods and services. However, as it has been noted, the trademarks of major events may potentially face difficulties in the objection process of the trademark registration due to the fact that the registration process is somewhat burdensome. Moreover, there are several ambushing strategies that could easily circumvent trademark protection.

Passing off represents one of the traditional forms of intellectual property protection that could possibly be used to formulate a claim against ambush marketing. It prevents one marketer from misrepresenting its goods or services by claiming that it has some connection or affiliation with some other; it also prevents a marketer from claiming goods or services are some other goods and services.<sup>23</sup> However, in order to be successful in a passing off claim, the following criteria must be proven before the court: the existence of goodwill, misrepresentation, and damage to goodwill.<sup>24</sup> Hence, to bring an action on the ground of passing off, the right holder needs to present all of the following: reputation or goodwill has been established in the event in the course of examination; the other has made an untrue representation causing the customers to believe that its supplied goods are those of the right holder; and the event organizer or official sponsor has suffered or is likely to suffer damage.

## (2) Advertising Standards

The United Kingdom's advertising regulatory standards, the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code), can also be invoked as a legal measure to combat ambush marketing. It requires that all advertisements in the

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<sup>23</sup> "*Passing off*", <https://duhaime.org/LegalDictionary/P/PassingOff.aspx> (accessed October 24, 2015)

<sup>24</sup> *Id.*

UK must be lawful, proper, true and honest.<sup>25</sup> The CAP Code also prohibits advertisers from taking unfair advantage of a competitor's trademark and requires them to hold evidence as to the genuineness of any endorsements.

### (3) Consumer Protection Regulations

There are regulations that prohibit misleading actions, including marketing practices which are composed of incorrect information, those which contain factually correct information but which is likely to mislead consumers, and those that create confusion with a competitor's distinguishing marks.<sup>26</sup> These legal grounds might be invoked by interested parties to oppose ambushing activities that contain the abovementioned misleading actions.

### (4) Event-Specific Legislations

Event organizers have experienced problems confining the variety of ambushing activities within the scope of the traditional forms of protection. Due to this, they have, in recent years, required the host country of the event to enact an effective anti-ambush marketing legislation. Given the above fact, the UK government passed The Olympic Symbol (Protection) Act 1995 and the London Olympic Games and Paralympic Games Act 2006. Under the Olympic Symbol (Protection) Act 1995, the proprietor of the right is given an Olympics Association Right (OAR) which is an exclusive right related to the utilization of the Olympic properties,<sup>27</sup> and is entitled to preclude unauthorized commercial usage of a representation of the Olympic insignia, Olympic slogan, or a protected phrase, or anything confusingly similar to that Olympic insignia, Olympic slogan, or a protected phrase as to be likely to establish an implied association in the public mind.<sup>28</sup>

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<sup>25</sup> Clause 1.1 of the CAP Code

<sup>26</sup> Section 5 of the Consumer Protection from Unfair Trading Regulations 2008

<sup>27</sup> Section 2(1) of the Olympic Symbol (Protection) Act 1995

<sup>28</sup> Section 3 of the Olympic Symbol (Protection) Act 1995

With regard to the London Olympic Games and Paralympic Games Act 2006, the London Organizing Committee of the Olympic and Paralympic Games (LOCOG) was the proprietor of the LOAR and received the exclusive right to establish a commercial connection with the London Games; it was also given the authority to grant authorizations to utilize a London Representation.<sup>29</sup> This Act states further that the commercial use of certain combinations of words, including “Games”, “2012”, “Two Thousand and Twelve”, “Twenty Twelve”, “Gold”, “Silver”, “Bronze”, “Medals”, “Sponsor”, “London” and “Summer”, in advertising by a non-sponsor could establish a presumption of being likely to create an implied association in the public mind.<sup>30</sup>

### 3. New Zealand

The New Zealand government introduced the Major Events Management Act 2007 (MEMA) in order to ensure that major events in New Zealand would be effectively organized without disruption, and to provide event organizers and official sponsors with a certain amount of protection around the investment that official sponsors make in a major event. Unlike the event-specific legislation in the UK and the US, this Act can be used on multiple occurrences for any events that have been announced by the New Zealand authorities as major events. There have been many events that have been given the status of ‘major event’ and organized under the MEMA, for example, the 2008 FIFA Under-17 Women’s Football World Cup, the 2010 ICC Under-19 Cricket World Cup, and the 2011 Rugby World Cup.<sup>31</sup>

MEMA includes three essential principles which are the declaration of a major event;<sup>32</sup> the prohibition of unauthorized

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<sup>29</sup> Warren L. Phelops, “*Unauthorised Association with the London Olympics*”, <http://www.klgates.com/unauthorised-association-with-the-london-olympics-08-01-2005/> (accessed April 22, 2016)

<sup>30</sup> Paragraph 3(3) and (4) in Schedule 4 of the London Olympic Games and Paralympic Games Act 2006.

<sup>31</sup> New Zealand Major Events, “*Protection From Ambush Marketing*”, <http://www.majorevents.govt.nz/major-events-management-act-2007/protection-from-ambush-marketing> (accessed April 13, 2016)

<sup>32</sup> Section 7 of the Major Events Management Act 2007

representation of association with a major event which is in order to guard against ambush marketing by association;<sup>33</sup> and the declaration of clean zones, clean transport routes, and clean periods which is in order to protect major event from ambush marketing by intrusion.<sup>34</sup> It also includes a number of exceptions, the most notable of which allows businesses to carry on their ordinary activities.<sup>35</sup> Therefore, it is considered the strongest legislation to prevent ambush marketing in New Zealand.

#### 4. South Africa

South Africa then introduced two additional pieces of legislation, which are the Merchandise Marks Act and the South Africa's Consumer Protection Act, in order to specifically safeguard against ambush marketing in their country. The first legal approach towards ambush marketing in the Republic of South Africa came under Section 15A of the Merchandise Marks Act. It provides legal protection against an abuse of a trademark on the basis of 'designated event legislation' which means this provision comes into action when an event has been designated as a 'protected event'. The significant matter of this provision is that, during the protection period, a legitimate proprietor of a registered trademark can be prohibited from using its own trademark in relation to the event without explicit authorization of the event's organizer.<sup>36</sup> This provision therefore initiates the legal protection for ambush marketing by intrusion.

Another legal approach applicable for ambush marketing comes under Section 29 of the Consumer Protection Act of 2008. According to the statute, a commercial business shall not market any goods or services, with regard to the sponsoring of any event, in a misleading, fraudulent or deceptive manner. This provision is

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<sup>33</sup> Section 10 of the Major Events Management Act 2007

<sup>34</sup> Section 16 of the Major Events Management Act 2007

<sup>35</sup> Section 22 of the Major Events Management Act 2007

<sup>36</sup> Coenraad Visser, "*The Soccer World Cup 2010: Special Event and Ambush Marketing Protection in South Africa*", 11 **Intellectual Property Law and Policy** 567, 568 (2010).

considered another legal measure applicable to ambush marketing by association in South Africa.

## **Legal Measures for Ambush Marketing in Thailand**

Due to the growth of sponsorship investment in Thailand, activating ambush marketing strategies in commercial activities has increased over time among Thai entrepreneurs. There are some Thai legal grounds that make it possible to formulate a claim against ambush marketing, such as trademark infringement, civil passing off, and basic tort claims as well as consumer protection law.

### **(1) Trademark Infringement**

To exploit an unauthorized association with an event in order to mislead the public into believing that they are an authorized sponsor or contributor associated with it, non-official sponsors may use the trademark of the event or trademarks which are confusingly similar to it. Therefore, a trademark infringement claim could be one of the main legal frameworks that could be invoked for combating ambushing activities in Thailand.<sup>37</sup> Unauthorized use of the registered trademark of an event by non-official sponsors is strictly prohibited by Section 44 of the Trademark Act of Thailand B.E. 2534. This Act gives an owner of a registered trademark the exclusive right to use such a registered mark for the goods for which it is registered, and excludes any person which uses a trademark that is similar or identical to the registered mark.<sup>38</sup>

Although it demonstrates that a trademark infringement claim seems to be adequate to deal with some ambushing strategies where a mark which is similar or identical to the event's registered mark is utilized in relation to similar or identical goods and services, it has limited application to most creative ambush marketing activities since a protected event's trademark is not always used in well-planned ambushing activities. Moreover, the provision does not cover the

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<sup>37</sup> Rungpry, *supra* note 1.

<sup>38</sup> โชยศ เหมะรัชตะ, ลักษณะของกฎหมายทรัพย์สินทางปัญญา 328 (พิมพ์ครั้งที่ 9, 2555) (Chaiyos Hemarajata, *The Nature of Intellectual Property Law* 328 (9th ed. 2012)).

situation where the event's trademark is not officially registered in Thailand. The provision seems to be ineffective to guard against ambush marketing, especially for intrusive marketing in which the non-sponsors use their own trademark or brand name in the ambushing activity.

## (2) Passing Off

A passing off claim could also be another legal framework for event organizers or official sponsors to handle ambush marketing issues, especially in the case that the event's trademark is not officially registered, or it is not registered in connection with relevant classification that grants an action ground for bringing a lawsuit under the Trademark Act of Thailand.<sup>39</sup> In order for the owner of an unregistered trademark to be afforded the legal protection for passing off under Section 46 paragraph 2 of the Trademark Act of Thailand, such an owner has to prove that the mark have actually been launched into the market prior to the unauthorized use of the infringer in order for the mark to gain its reputation among consumers.<sup>40</sup>

Even though the provision gives protection to the unregistered trademark of the event and is likely to provide a broader scope of protection against ambush marketing, it is still problematic to apply this provision to ambush marketing in Thailand due to the fact that the short lifecycle of events may cause difficulties in establishing the actual use of an unregistered trademark in order to enjoy the passing off protection by virtue of this provision.

## (3) The Law of Tort

In the case that non-sponsors use an event's properties, such as marks or emblems, and establish a commercial connection with the event without the consent of the owner of the event's properties, non-sponsors may be said to commit a wrongful act under this provision and may be bound to compensate for their fault. In using this

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<sup>39</sup> Earterasarun & Gautier, *supra* note 2, at 4.

<sup>40</sup> เหมะรัชตะ (Hemarajata), *supra* note 38, at 341.



provision as a legal ground for combating ambush marketers, the proprietor of an event's properties would have to prove that he or she has legal rights over these, and such unauthorized use of the event's property right is considered illegal and harmful to his or her legitimate rights.<sup>41</sup> Furthermore, event organizers and their official sponsors could possibly also pursue a civil action against ambushers based on Section 421 of the Civil and Commercial Code in the case that ambushers have exercised their legitimate right by using their own trademark in their commercial activity with the intention to ambush and devalue the sponsorship relationship of the event organizers and official sponsors.

However, event organizers and their official sponsors may face difficulties in proving an unlawful act of the ambusher due to the fact that many ambushing strategies are not clearly outlawed in Thailand. Furthermore, even though a civil action against ambush marketing could possibly also be formulated under Section 421, it still leaves rooms for varying interpretations of the provision since this provision is not specifically designed to deal with ambush marketing nor well-developed in this area.

#### (4) The Consumer Protection Act

Organizers and official sponsors of an event may potentially refer to Section 22 of the Consumer Protection Act to oppose an ambush marketer in the event that its advertisement consists of an incorrect or deceptive statement which misleads the consumer into perceiving that the ambusher is an official sponsor of the event, as this provision prohibit marketers from advertising a statement that is unfair to public consumers, which includes deceptive statement and

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<sup>41</sup> เพ็ง เพ็งนิตติ, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยละเมิด ความรับผิดทางละเมิดของเจ้าหน้าที่ และกฎหมายอื่นที่เกี่ยวข้อง 10 (พิมพ์ครั้งที่ 6, 2552) (Peng Pengniti, **Description of the Civil Code of Thailand: The Act of Tort, The Tort Liability by Officer and Other Related Laws** 10 (6th ed. 2009)).

any other statements that creates misunderstanding in the substantial elements in regard to goods or services.<sup>42</sup>

Despite inclusion of suitable concepts for the protection against ambush marketing such as the prohibition of deceptive advertising, this provision only prohibits the misleading advertisement which is concerned with the origin, condition, quality or description of goods or services as well as the delivery, procurement or use of goods or services. It seems the provision cannot be applied to the misleading advertisement with regard to the sponsoring of an event.

## **Conclusion and Recommendations**

The study implicitly indicates that the legal measures to combat ambush marketing in Thailand are far from adequate to protect the commercial relationship between an event organizer and its official sponsors from ambush marketing either by way of intrusion or association when compared to the legal measures found in other countries. Consequently, specific legislation for ambush marketing is needed. This would provide positive results for sponsorship investment in Thailand and increase the likelihood of Thailand qualifying as a host country for world major events which would result in deriving an infrastructure legacy, increasing tourism, enhancing its reputation, as well as other economic benefits of being a host country which can be felt for years after the events.

Business relationships between event organizers and official sponsors must be protected while achieving a balance among the rights of sponsors, property owners, and other affected parties. In doing this, the author recommends that the following principles should be provided under the new ambush marketing legislation:

1. The clear-cut definition of ambush marketing should be provided.

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<sup>42</sup> สุขุม สุภานิตย์, คำอธิบายกฎหมายคุ้มครองผู้บริโภค 171 (พิมพ์ครั้งที่ 8, 2556) (Susom Supanit, **Description of Consumer Protection Law 171** (8th ed. 2013)).

2. Any events that need to be protected under the specific legislation have to be declared by the government authority as a protected event. In determining a major event, the government authority may take into account matters of fact such as the number of spectators, the number of participants, the required and involved level of professional management, the tourism opportunities for Thailand, global reputation of Thailand during the event, and the level of international media coverage. The event must be able to create valuable long-term and short-term economic, cultural and social advantages for Thailand.

3. The protection of the protected event should have time limitation.

4. Any unauthorized representations which are likely to imply to the public that there is a legitimate commercial connection between a protected event and its brand, its goods or services, or a person who supplies such goods or services, shall be prohibited during the protection period. However, such specific protection ought not to be applied to any single generic term as long as the usage of such a generic term is not able to establish a false recognition of an event's sponsorship.

5. A clean zone should be able to be established in and around the protected event's venues during a reasonable limited period of time.

6. Some exceptions for ongoing marketing activities to fairly balance commercial free speech rights and sponsorship relationship should be carefully and appropriately provided. For example, non-commercial speech and pre-existing advertising which has been done by an organization that continues to carry out its ordinary activities should be allowed as long as it does not create an implied association between the event and a non-sponsor or a false implication of sponsorship or confusion among the public.

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