

# Ambush Marketing During the FIFA World Cup: The Brazilian Experience

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With the increasing importance and exposure of major sporting events in the media, the marketing rights related to these events have become extremely valuable assets and the respective sponsorship deals have been involving substantial sums. As a result, the debate over the protection of these investments has considerably drawn the attention of intellectual property professionals around the world

The purpose of this article is to provide an overview of the ambush marketing disputes which occurred in Brazil during the FIFA World Cup. For achieving this goal, it first outlines the Brazilian legal framework, in particular the legislation which was specifically enacted for the event. It will examine the legal tools which enabled both the *Fédération Internationale de Football Association* (FIFA) and the Brazilian Football Confederation (CBF) to take measures against companies which tried to create an unauthorized commercial association with the event or with the Brazilian team.

## **Legal framework and the special legislation**

As a condition to host the FIFA World Cup, the Brazilian government guaranteed to FIFA that it would enact specific legislation regulating the intellectual property and marketing rights related to the event. After several rounds of discussions, in 2012 Brazilian Congress passed the General World Cup Act (n° 12.663/12), which regulated several aspects of the FIFA World Cup.

Insofar as ambush marketing is concerned, the statute defined and prohibited both ambush marketing by association and ambush marketing by intrusion.

Ambush marketing “by association” was defined as the “*advertising of marks, goods or services (...) by means of a direct or indirect association with the official events or symbols (...) leading consumers to believe that such marks, goods or services are approved, authorized or endorsed by FIFA*”.

Ambush marketing by intrusion, in its turn, was defined as the “*exhibition of marks, goods, services or the performance of any promotional activity (...) in a manner to attract by any means the public attention at the sites of the official events, with the purpose of obtaining an economic or marketing advantage*”.

The statute also granted FIFA and its sponsors exclusive rights to expose and advertise their trademarks, goods and services, or conduct any promotional activity, in and around the official competition sites and in their main access routes.

These provisions served as an extremely powerful tool to curb the unauthorized association with the event by non-sponsoring companies. By prohibiting unauthorized association with the event, the statute created a tort which is not included in traditional IP laws, especially when no intellectual IP infringement is involved. Unsurprisingly, these provisions were very important

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in preventing non-sponsoring companies from free riding on the goodwill developed around the FIFA World Cup.

CBF also had some interesting weapons in its arsenal. Although the ambush marketing provisions of the special statute did not extend to it, CBF could rely on a powerful provision of the Sports-Related Issues Act (n° 9.615/98) - the so-called “Pelé Act”.

This provision creates a *sui generis* right and grants sports administration entities, such as CBF and FIFA exclusive rights to use and commercially exploit their symbols and names, in any class of goods and services, regardless the existence of a formal registration.

As the provision protects “symbols”, CBF advocates a broad construction of the term, in a manner to include not only its official crest but also the trade dress of the Brazilian team jerseys. This has substantially expanded the scope of its protection, enabling it to curb the reproduction, imitation or adulteration of the Brazilian Team jerseys and their unauthorized commercial uses.

Further, whenever CBF discovered that a company engaging in ambush marketing was a direct competitor of an official sponsor, it successfully relied on unfair competition and unjust enrichment laws to prevent unauthorized associations with the Brazilian Team.

From the FIFA Confederations Cup to the FIFA World Cup, FIFA has reportedly dealt with hundreds of IP infringement and ambush marketing cases in Brazil. Likewise, CBF also adopted an aggressive enforcement strategy during this period, sending more than cease letter and infringement lawsuits related to ambush marketing.

The rationale behind the anti-ambush marketing policy is simple: protecting the investments of the official sponsors by preventing non-sponsoring companies from engaging in unauthorized marketing activities that create an association with the event or with the team.

In practice, however, determining the scope and the boundaries of this right is not that simple. Several cases involve a high degree of subjectivity. Further, although the investments made by official sponsors should be preserved, a reasonable balance should be struck between that right and other legitimate interests. The limits of such boundaries are not entirely resolved as some activities of using the national colors or supporting the Brazilian fans may fall short of any protection.

Indeed, the Superior Court of Justice – the highest Brazilian court for non-constitutional matters – upheld a ruling on this issue. The court rejected the argument that CBF was trying to appropriate the colors yellow and green, and emphasized that *“the case is not about the misappropriation of national symbols, but about their use in a context which unequivocally creates a connection with the Brazilian Team, whose marketing rights belong to CBF”*.

This ruling is important because it allows CBF to tackle not only precise reproductions of its symbols, but also possible imitations. The ruling also stresses the importance to observe the

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overall context of the ad and to determine whether that context creates a fraudulent association. So far this is the only ambush marketing case decided by the Superior Court of Justice, which has significant authority over lower courts in Brazil.

### **Conclusion**

The changes in law provided FIFA with tools to fight ambush marketing and other illegal activities related to the event.

Some might criticize the enactment of special legislation, others might say it is too over-protective, but practical experience showed it is important to provide clarity. Several advertising activities do not infringe IP rights and cannot be curbed under traditional IP legislation. For this reason, it seems justifiable to enact specific provisions guaranteeing a certain level of certainty that only the official sponsors will be able to commercially associate their brands to the event.

Without any doubt, the Brazilian experience can provide useful guidance and an interesting background for any country which intends to host a major sporting event in the future.