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## Brazil in the Spotlight of Ambush Marketing

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Ambush marketing has been the subject of legal debate since the end of the 1980s, when sports events such as the Winter and Summer Olympic Games and the FIFA (Fédération International de Football Association) World Cup Finals, became big business involving millions in sponsoring and broadcasting revenues.

### Ambush Marketing and its Protection in Brazil

According to Wikipedia, “Ambush Marketing is a marketing campaign that takes place around an event but does not involve payment of a sponsorship fee to the event for most events of any significance, one brand will pay to become the exclusive and official sponsor of the event in a particular category or categories, and this exclusivity creates a problem for one or more other brands. Those other brands then find ways to promote themselves in connection with the same event, without paying the sponsorship fee and without breaking any laws”.

Although Brazil does not yet have a specific anti Ambush Marketing Act, there are several provisions in different legal diplomas that secure coverage over the most common acts of ambush marketing.

The scope of ambush marketing possibilities can be as broad as the human imagination, however, there are a few basic patterns that seem to repeat: trademark counterfeit; over-exposure of trademarks that are not official sponsors in environments intended for official sponsors; and undue association with the event by non-official sponsoring companies.

Intellectual property stands as a key element to set the limits between lawful and unlawful ambush marketing. Brazil has legislative and case law tradition in respect to intellectual property rights.

Protection of Olympic symbols is not new in the Brazilian legal system. The Brazilian Congress approved, by Legislative Decree n° 21, of June 4, 1984, the Nairobi Treaty on Protection of the Olympic Symbol, completed in Nairobi on September 26, 1981.

The principles assumed by the incorporation of the Nairobi Treaty are found in the Intellectual Property Law (Law n° 9279/96), and in the Act that regulates general standards on sports (Law n° 9615/98), also known as Pelé Act.

Under the provisions of both legislative acts combined, not only does the Brazilian legislation grant to the Olympic Committee the exclusive use of registration of trademarks with the INPI, but it also assures exclusive rights of using flags, anthems and Olympic and Paralympic symbols, as well as the expressions “Olympic games”, “Olympic”, “Paralympic games” and “Paralympic”, being allowed the use of the latter terms for events linked to educational and participation sports.

In addition, Pelé Act in article 87, grants to sports or sports practice administration entities, as well as to professional athletes, exclusive rights to use and explore commercially symbols and names serving as identification thereto. Protection is afforded regardless of formal registration. The mere constitution of a sports entity grants ownership on its distinguishing symbols and names.

As to the athlete's image, name, voice and any other characteristic that may recall the athlete as a person, this rule is in accordance with the Civil Code, which addresses the personality rights.

The Olympic symbols and mascots are also covered by the protection granted by the Copyrights Law (Law no. 9610/98), meaning that the copyright holder is entitled to exclusive use of its creation.

However, ambush marketing may not rely on direct violation of rights protected under intellectual property. Ambush marketing practice may occur in advertisement campaigns that make undue direct association with the significant event, without necessarily reproducing trademark or any material covered by copyright.

In many of these cases, even framing them as an unfair competition crime may be difficult, once it is an abstract concept that requires the fraudulent diversion of clientele. In these events, the Civil Code provides a significant tool to impair the enrichment of the one attaining it on an unjust basis.

It is worth noting that there is no need for a direct prejudice to the damaged party. The single fact of taking advantage of the other party's investment suffices to fit into the event of unjust enrichment.

This way, if one invests in the organisation and promotion of a major entertainment event it is only fair that it profits from the income generated by the event. After all, a third party that takes advantage of these investments will not bear any loss in any failure due to the fact it is not directly linked to it. Therefore, the enrichment, if this way attained, is unjust.

## Enforcement Measures

Brazil's legal system not only affords exclusivity on the trademarks and symbols related to sporting events, but also provides several tools to enforce said rights.

The regular procedural legislation also ensures urgency measures to immediately hinder practices that may cause harm to one that has its rights in imminent risk. Such tools associated with the acknowledgment by the Brazilian legal system of intellectual property protection provide a positive scenario, in spite of the absence of a specific legal act regulating ambush marketing.

Brazil is member of TRIPS, which, in its article 50.2, sets forth that the member countries must create "*inaudita altera parte*" cautionary measures to serve as a background for situations where delay in jurisdictional relief tends to cause irreparable damage to the right holder, or situations where there is evidence o risk that the proofs may be destroyed.

According to the Industrial Property Law, there are two main situations where a preliminary relief may be afforded: (i) actions that target the prevention of patent, industrial designs and trademarks counterfeit acts; (ii) patent or industrial designs and trademarks nullity proceedings that may be granted by INPI opposing legal provisions.

Grounded in article 209 of said Law, Paragraph 1 and 2, the judge, in the proceeding claiming indemnity for loss arising out of industrial property violation, may determine, on an injunctive basis, the suspension of the violation, as well as, in cases of blatant trademark infringement, the seizure of all the goods in which the fake or imitated mark is printed.

That means that it is possible to obtain “*inaudita altera parte*” injunction from the Brazilian judicial system, in order to suspend counterfeit, as well as to seize goods in which the fake or imitated mark is printed. For that purpose, the procedural “*periculum in mora*” and “*fumus boni juris*” presumptions must be in place. Such requirements are provided in art. 461, Paragraph 3, of the Code of Civil Procedure.

The heading of the Article 209 of the Industrial Property Law is clear when entitling the owner to be reimbursed for losses arising from industrial property violation and acts of unfair competition. Even though not expressly provided herein, said provision is broad enough to encompass unlawful ambush marketing hypotheses not provided in the law.

Moreover, whenever the industrial property rights are violated, the plaintiff is entitled to have its loss of profit compensated, in compliance with Article 210, items I, II and III of the Industrial Property Law.

On top of that, article 402 of the Civil Code determines that loss of profit is a reasonable amount of profit the aggrieved party did not gain. However, the Industrial Property Law goes beyond and includes the benefits gained by the infringing party; and the compensation the defendant would have paid to the plaintiff in the event of the licence to use the trademark illegally manufactured. Regarding unlawful ambush marketing, by means of merchandising false products, the indemnity shall be grounded on contracts executed by the official licensed parties.

In a recent ruling from the Rio de Janeiro Court of Appeals issued on September 02, 2009, the local organisation committee for the Pan-American Games, held in the city of Rio de Janeiro in 2007 (Comitê Organizador do Jogos Pan-Americanos Rio 2007 – CO-RIO), confirmed first instance decision that granted injunction to stop unauthorised use of trademark “RIO 2007” by the Rio de Janeiro’s International Airport Taxi Service.

In the merits, the court of appeals confirmed that the unauthorised use of “RIO 2007” consisted in both a trademark violation and an act of ambush marketing. According to said ruling, the use of said mark created an undue association with Pan American games as if the defendant were an official sponsor to the event. Damages were awarded based on the values the defendant would have paid for the grant of an official licence to use the mark.

Such provisions and their constant application by Brazilian courts presents a statement to the market that unlawful ambush marketing will result in severe losses to the undertaking.

## **Conclusion**

The situation has never been so positive for the debate on ambush marketing in Brazil. Brazil has become an important player in the international scene and it is supported by the international recognition of political stability and respect to the institutions of the State.

In spite of no specific ambush marketing laws, the laws of intellectual property offer a safe environment for the investments in events of high media magnitude, such as the 2014 FIFA World Cup Finals and 2016 Summer Olympic Games.

The existing laws are applied by a Judiciary that offers mechanisms of urgent custody, including *ex parte* ensuring the protection of protected rights by means of judicial order for immediate infringement stoppage and collection of the counterfeit material.

In light of the above, despite the absence of a legal diploma that specifically deals with ambush marketing,

the Brazilian legal system incorporates the basic principles used as pillars for the protection of the rights related to major sports and entertainment events.

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## Biotechnology IP Due Diligence

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Brazil is recognised worldwide for its great natural endowments and cultural richness. In recent years it has been making great strides in its economic and social development. The economic stability over the past 15 years has led to substantial growth in the local market, prompting companies all over the world to revise their business plans for the country, particularly with respect to exploitation of raw materials and the local market.

One of the sectors that has developed the most is agribusiness. Building on the traditional strength in producing agricultural products for both the domestic and export markets, Brazil has become one of the world's leading producers of plant and animal products. Besides this, there is growing interest in developing new technologies based on the great local biodiversity, in areas such as new pharmaceuticals from flora and fauna, expanded output of renewable energy sources like biofuels and other new sustainable materials and technologies.

With an eye on this potential, companies are making consistent investments in research and development of new products and services, as well as in acquiring promising new technologies already developed by others through joint ventures or mergers and acquisitions.

According to the "Mergers & Acquisitions Review Fourth Quarter 2008" report, published by Thomson Reuters, in 2008 there were some 40,000 M&A transactions announced in the world, involving US\$2.9 trillion.

To lay the groundwork for these deals, it is necessary to perform a due diligence investigation, to confirm the situation of the target firm's assets and liabilities, recurrent revenue stream, potential competitive advantages and possible risks of going through with a transaction, so as to assess whether the expected future profitability of the target company is sustainable in the long run.

Although one may think that conducting a due diligence in a company has become a commoditised work, experience has shown that due diligences made without the proper definition of scope, or in disregard of the real potential risks peculiar to each industry sector, can result in as bad a result as not conducting a due diligence at all.

Superficial due diligences can be quite misleading, as they will not identify the real risks associated with a certain transaction, leading to the conclusion that no specific attention should be driven to a critical aspect of