



# RED CARD OR FAIR PLAY? AMBUSH MARKETING BACK IN THE NEWS AS FIFA WORLD CUP KICKS OFF

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Legal Briefings - By **Emma Iles, Anna Vandervliet and Byron Turner**

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Ambush marketing can be an impactful, but legally risky, advertising strategy. Businesses that are the subject of, or otherwise engaging in, ambush marketing should consider potential infringement of the target brand's intellectual property rights.

Advertisements that capitalise on the reputation of another brand or event can raise issues of trade mark and copyright infringement, as well as issues pursuant to Australian Consumer Law and should be analysed closely by both target brands and those doing the ambushing.

## KEY TAKEAWAYS

Ambush marketing strategies leverage off a target company's reputation in a brand or event, and so carry the risk of infringement of intellectual property rights or breaches of consumer law protections.

The nature of the use of a target brand's logos, word marks or other 'get-up' will be critical in assessing whether the ambush marketing has strayed into trade mark or copyright infringement territory. This includes considering whether such use is for the purpose of identifying the target company as the subject of criticism.

Where representations made in advertising are intended to disassociate the marketer from the target brand, rightsholders may have difficulties in pursuing claims of misleading and deceptive conduct or false and misleading representation under Australian Consumer Law (**ACL**). Claims of trade mark infringement, which require trade mark *use* (i.e. use to indicate the origin of goods/services), may also be problematic.

Ultimately, the success of any claim will depend on the advertisement in question and the context in which the target brand is used.

## AMBUSH MARKETING - A CASE STUDY IN THE FIFA WORLD CUP

Ambush marketing is a term generally used to refer to marketing strategies that involve capitalising on the exposure offered by another company's event or status. Recent, well-publicised examples have arisen out of the Federation Internationale de Football Association (FIFA) World Cup. As one of the most-watched sporting events in the world, the FIFA World Cup generates significant marketing activity. In 2018, for example, Paddy Power ran a campaign with the slogan *"From Russia with Equal Love: Why we're making accidental allies of the World Cup home nation"*, where the company donated [£10,000 to LGBT+ charities](#) for every goal the Russian national team scored, protesting against anti-LGBT+ sentiment in Russia. There have also been various in-person ambush marketing campaigns run at past editions of the tournament, including several notorious stunts organised by Bavaria Beer to the detriment of official drinks sponsor Budweiser.

The 2022 edition of the World Cup has already seen its fair share of ambush marketing, particularly given the controversy surrounding the award of the World Cup to host nation Qatar and the management of the World Cup project. For example, Sportsbet has run a campaign with the slogan *"Yeah, Nah Qatar"*, while sports apparel company Hummel (sponsor of the Danish national team) and drink manufacturer Lucozade (sponsor of the English national team) have pulled their branding from the tournament in protest.

Possibly the boldest example to date is BrewDog, a UK brewing company with operations in Australia. For the 2022 World Cup, the company launched an *"anti-sponsorship"* campaign featuring taglines such as *"Proud Anti-Sponsor of The World F\*Cup"*, *"The Beautiful GShame"* and *"Eat, Sleep, Breathe Bribe Football"*, along with various other strong statements on its [website](#) voicing its protest. It is notable that FIFA has registered trade marks for *"FIFA"*, *"World Cup"*, as well as other related word marks and logos.

## AMBUSH MARKETING IN AUSTRALIA

Ambush marketing inherently involves capitalising on the reputation and consumer reach offered by a popular event or brand. This type of advertising raises considerations regarding the protection of any intellectual property rights of the target company, particularly trade marks and copyright, as well as protections afforded by consumer law.

### TRADE MARKS

Marketing materials that leverage off of word marks or logos of the target brand carry the risk of trade mark infringement.

For a trade mark to be infringed, it is necessary not only that another person uses a sign that is substantially identical or deceptively similar to the registered mark, but that the person uses that sign “as a trade mark” and does so, in general, in relation to goods or services that are the same as or similar to those for which the trade mark is registered.

For this reason, use of a trade mark, such as a logo, to identify the associated brand or company as the subject of critical comment, parody or satire will not in general amount to trade mark infringement.

This was considered recently in Australia in *AGL v Greenpeace* (see our analysis of that decision [here](#)).<sup>1</sup> In that case, Greenpeace had created and used various reproductions of the AGL logo, which had been modified to refer to AGL as “Australia’s Greatest Liability”. Burley J held that Greenpeace would have used the modified AGL logo as a trade mark if “it would appear to consumers that the modified AGL logo possessed the character of a brand that Greenpeace was using in relation to the registered services so as to indicate a connection in the course of trade between those services and Greenpeace.” However, his Honour found that this was not the case, since the modified AGL logo was used to identify the AGL brand as the subject of criticism, and it would not appear to consumers that Greenpeace was offering any goods or services by reference to the logo.

Burley J also considered that the modified AGL logo had not been used in relation to any relevant goods or services for which the trade mark was registered. The claim for trade mark infringement was therefore dismissed in that case.

## COPYRIGHT

Use of the target company’s brand materials or corporate logo in ambush marketing materials may constitute copyright infringement. However, such use may be permissible if it constitutes a fair dealing with the copyright work for the genuine purpose of “parody or satire”. This description is not met simply because the materials are critical of the target. Rather, careful consideration of the intended use on a case-by-case basis is required.

The separate fair dealing exception for the purpose of criticism or review applies to criticism or review of a copyright work, and not to criticism of a person (or organisation) generally. It is therefore less likely to apply in the ambush marketing context.

In *AGL v Greenpeace*, Burley J held that, consistently with *Universal Music Publishing Pty Ltd v Palmer (No 2)* [2021] FCA 434, as well as other earlier decisions,<sup>2</sup> the use of a copyright work will be for the purpose of parody or satire where “the impugned work is used ‘to expose, denounce or deride vice’, often in the context of a humorous or ridiculous juxtaposition.”

Issues of copyright infringement should therefore be considered in relation to ambush marketing campaigns, particularly where marketing materials make use of the target company's corporate logo or other insignia.

## CONSUMER LAW

Marketing in Australia that capitalises on the reputation and consumer reach offered by a popular event or brand will also be subject to the ACL. Any representations made in those materials that can be said to amount to a false representation of affiliation between the marketer and the target brand may constitute misleading and deceptive conduct or a false and misleading representation pursuant to the ACL. Similarly, the misrepresentations could amount to passing off under the common law.

Interestingly, and by way of example, the primary purpose of the current BrewDog World Cup campaign is to voice protest through their "*anti-sponsorship*" of the World Cup. In this way, the marketing communications, whilst leveraging off the reputation and topicality of FIFA and the World Cup, in fact are clear that BrewDog is not affiliated with FIFA or the World Cup in any way. Ambush marketing of this type may be more difficult for rightsholders to legitimately complain about using the ACL or common law of passing off. The context in which the representation is made, and the underlying factual basis for that representation, will be important considerations in this circumstance.

## CONCLUSIONS

The risk of infringement of intellectual property rights or breaches of consumer law protections by a publisher of ambush marketing materials will depend on the advertisement in question and the context in which the target brand is used.

For campaigns of protest and the like where the purpose of the representation in the advertisement is to in fact disassociate the marketer from the target brand, there may be particular difficulties for rightsholders in enforcing their rights, for example, in relation to claims under ACL. Ambush marketing materials should be analysed closely by both target brands and those doing the ambushing.

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1. *AGL Energy Limited v Greenpeace Australia Pacific Limited* [2021] FCA 625.
  2. See eg. *Pokémon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2001] FCA 108 (The Panel Case); *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2002] FCAFC 146.





## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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