

Ambush Marketing

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As advertising has evolved, sponsorship has become an important tool - and that in turn has led to the growth of ambush marketing. We look at what ambush marketing is, discuss some prominent cases, and provide advice on how it can be dealt with under the law in Turkey.

The development of advertising, the extension of its dimensions, and the evolution of its features have led to a change in how advertising is defined. At the beginning of the 20th century, advertising was described as "salesmanship on paper", but this definition is too limited today.

Nowadays, thanks to technological changes, there are many channels where advertisements can be transmitted, and advertisers and publicity agents seek creative solutions to reach the target audience. Sponsorship, which has been used for a long time in advertising, is one of the tools that provides communication with the related audience.

Sponsorship enables businesses to reach the target audiences in their goods and/or services markets not through conventional advertising activities, but by contributing to the sporting, artistic or social events that these audiences enjoy and are interested in.^[1] In this way, the sponsor benefits from the reputation, interest and appreciation of the institution or activity that it supports^[2], and the organization, which is sponsored, gains resources for its activities.^[3]

Some corporations may not be able to be involved in the organization as sponsors due to the high cost of sponsorship, while the limited availability for sponsorship positions may lead to competition between parties to become one of the sponsors. In such circumstances, those parties look for new methods to associate themselves or their products (without paying any sponsorship fee) with an institution or organization that they do not sponsor or to benefit as much as possible from the interest, attraction, or environment created by the relevant institution or organization. This practice is known as "ambush marketing". Although ambush marketing entered the Turkish legislation as "trap marketing", it should not be confused with trap advertisements.

Illegal Ambush Marketing - Parasitic Actions

Ambush marketing refers to the methods used by businesses, which are not official sponsors, to attempt to attract the attention of the audience, participants or related parties to their goods or services instead of the sponsored ones, to carry out advertising or marketing of their goods and services in this way, and at the same time to weaken the gains that the sponsors aim to achieve via the organization.

Ambush marketing, as accepted in jurisprudence, is the effort to weaken the official sponsorship position earned in consideration of a sponsorship fee and expected gains from the sponsorship by targeting the competitor directly (ambush marketing in the narrow sense). Ambush marketing is also defined as an effort to benefit from the reputation or interest and admiration of an organization for which the company is not a sponsor or has no authorization, by establishing a relationship between itself or its product (ambush marketing in a broad sense).

For advertising to be perceived as ambush marketing, the party carrying out the advertising activity should try to associate itself with the event, organization, person, institution, or campaign that they seek to benefit from. Therefore, conducting an advertising campaign during an important event or organization cannot be considered ambush marketing under every circumstance; the purpose of creating a link between advertising and the organization or event should be established.

However, the owner of the organization is merely the owner of the organization, not the owner of the entire concept of the organization that it is concerned with or the aura surrounding it.^[4] The illegality arises with the unfair and/or misleading use of the organization, event, person, institution, or campaign to which the activity is parasitically associated.

An absolute loss by the sponsors, the sponsored or a related party is not necessary for illegal ambush marketing. The possibility of harm is sufficient for it to be considered as ambush marketing.

In most cases the sponsor (which may be damaged by the ambush marketing) is a competitor of the party carrying out the advertising activity. However, ambush marketing does not necessarily target the competitor; it can also violate the interests of an organization (or of its owner) which has no sponsors.

Ambush marketing does not solely occur in sponsored events. It is also the case that associating its own activities/products with an advertising campaign carried out by a party independently can be considered as ambush marketing as well as creating unfair competition in actions that both benefit and harm the other party by dividing its effect.

Examples of Ambush Marketing

In 2010, a famous personal music player manufacturer of the period rented a large billboard in Montreal as part of its campaign to promote the renewed colors of its product and it designed a poster with images of products in various colors. In the poster, colors were depicted overflowing the products to emphasize the striking colors of the products.

In the same period, a big Canadian DIY store was also carrying out a project on the recycling of paints and they found it appropriate to benefit from another existing advertising campaign for the promotion of their project. They attached a billboard beneath the first company's advertising with exactly the same colors dripping into paint buckets with the writing underneath: "Nous récupérons les restes de peinture." what means: "We recycle leftover paint." As the result of the ambush marketing, which attracted great attention, it is said that the DIY store collected 2 million liters of paint.^[5]

In this case, it is clear that the company running the secondary campaign benefited from the investment and promotional activities made by the other company. Although the existence of a direct loss is debatable, it should be considered that it undermines the effect of the promotional activity of the first company, distracts the consumer, and therefore prevents the expected benefit from the investment made in promotion.

The 2010 World Cup, in which an American beer brand known for its red and white colors was the official beer sponsor, is one of the examples where the ambush marketing initiative took place directly in the organization area. During the first half of the match between the Netherlands and Denmark, 36 women took off their clothes and continued to support their teams wearing the same dresses in orange. The identically dressed female fans suddenly attracted the attention of both the supporters in the stadium and the cameras. This situation did not go unnoticed by the tournament officials, and the aforementioned fans were taken out of the stadium on the grounds that they advertised a Dutch beer brand, notorious for such activities and known for its orange color, without permission. Moreover, two people in the group were arrested for allegedly organizing the aforementioned activity, which is regulated as a crime in South Africa.^[6]

With regards to ambush marketing, it cannot be expected that the action constituting ambush marketing occurs only in the relevant organization or the field that the event takes place, as in the example above. As the popularity of the relevant event or organization and its power to reach people increase, the media that can be used for ambush marketing expand at the same rate. For example, in organizations such as the Olympic Games or the World Cup that are followed by all people regardless of the venue, it is not only the stadium or the city where the event takes place that can be used for ambush marketing activities, but also any media that can reach people.

It has been revealed by the surveys that one of the most well-known sportswear brands has a place in the public's mind as the sponsor of Olympic Games although it was not in fact a sponsor. This may be a result of ambush marketing activities carried out during many Olympic Games events over the years. The brand in question carried out very effective ambush marketing activities by renting billboards and screens in public transportation vehicles, as well as in advertising areas on the roads leading to the Olympic venue in the cities where the Olympics were held. The Olympic committee has tightened the rules to be applied in the host cities every year in order to prevent such activities.

Preventing Ambush Marketing

To prevent ambush marketing, comprehensive sponsorship and license agreements are executed between the parties, and the boundaries of the rights are often clearly drawn in the beginning. However, as contracts are only binding on the parties to the agreement, they are not sufficient to prevent unauthorized interventions of third parties, which is inherent to ambush marketing. At this point, violation of the intellectual property law, advertising law, and especially unfair competition law can also arise.

First, conducting marketing activities as if a sponsor of an organization even though one is not, or establishing an unfair association, constitutes unfair competition against other parties and is also in violation of the rule of good faith. The protection of the right is handled within the scope of unfair competition provisions.

In fact, during the 2016 European Football Championship, in which Turkey also participated, a lawsuit was filed by the Turkish Football Federation for the determination of unfair competition, demanding compensation, against a company that carried out an intense advertising campaign accompanied by the anthem on television and radio channels, and conducting promotional activities for its customers in a way that could be associated with the Championship. As a result of the proceedings, the Court of First Instance ruled that the defendant made advertisements in a way that would create the impression that it was a sponsor although it did not have any sponsorship relationship with the plaintiff, and that this act constituted unfair competition. [7]

The decision was appealed by the defendant and the Regional Court rejected the appeal request on the grounds that:

- the use of the name of the national team in the advertising and promotional activities led to the assumption that the defendant was the sponsor of the national team in the eyes of the average consumer;
- the carrying out of these activities during the dates of the Championships supported the ambush marketing; and
- the acts of the defendant, by unfairly benefiting from the reputation and interest shown in the national team, by not supporting the organization as a sponsor and by pretending to be the plaintiff's sponsor, constituted unfair competition by giving false and misleading information to third parties through deceptive advertisements.[8]

Previous decisions of the Court of Appeal also stated that similar advertising and promotional activities carried out by various parties during the organizations in which the Turkish national team was included were also deceptive and it was decided such acts should be prevented by the unfair competition provisions.[9]

The unauthorized use of brands and organization names by third parties, for which usage rights are often provided exclusively to certain parties within the scope of the sponsorship and license agreements mentioned above, will also constitute an infringement of trademark rights. However, protection through trademark law is not always possible in cases of ambush marketing as the person carrying out the ambush marketing will not use the trademark of the sponsor, but will engage in such activities with its own brand while referring to a certain organization and will ensure that its brand is identified with this event.[10]

Finally, if a marketing activity is unfair, misleading, or deceptive and if there is a possibility of deceiving the average consumer, such actions are also prohibited by the advertising law. In addition to acts constituting unfair competition within the scope of the Regulation, the following are also defined as deceptive activities:

- actions that may deceive the consumer regarding the identity, property, abilities, status, membership information of institutions or organizations, and the commercial rights, intellectual and industrial property rights;
- qualities such as awards and honors won from authorized authorities; and
- such rights of those who carry out commercial practices or their representatives.

As stated above, although there is no direct regulation regarding ambush marketing in the legislation, such advertisements can be evaluated by the Advertisement Board due to their deceptive nature.

The Advertising Self-Regulatory Board's Code of Control also regulates ambush marketing by stating: "No one should attempt to give the impression of being a sponsor of an event or media coverage of an event, whether sponsored or not, unless they are the official sponsor of the product or media coverage." However, it should be noted that the Advertising Self-Regulatory Board has no enforcement power over advertisements and advertisers.

In this context, the struggle of the victims of ambush marketing, which is described as a rational action, is not limited to a single field but requires collective work across different legal fields due to the nature of the act. Likewise, parties engaged in ambush marketing activities need to find new and creative ways of communication.

[1] Gülçin Elçin Grassinger, Sponsorluk Sözleşmesi, 2003, p. 30

[2] Gülçin Elçin Grassinger, Sponsorluk Sözleşmesi, 2003, p. 26

[3] Emrehan Şenal, Başak Baysal, Reklam Hukuku ve Uygulaması, 2008, p. 161

[4] Anita Moorman, Chris Greenwell, Consumer Attitudes of Deception and the Legality of Ambush Marketing Practices, 2005, s. 184

[5] <https://www.businessinsider.com/best-ambush-marketing-campaigns-2012-6>

[6] <https://www.theguardian.com/football/2010/jun/16/fifa-world-cup-ambush-marketing>

[7] İstanbul BAM, 13. HD., E. 2018/1857 K. 2020/617 T. 11.6.2020

[8] İstanbul Anadolu 5. Asliye Ticaret Mahkemesi, E. 2016/633, K. 2018/234, T. 1.3.2018

[9] Yargıtay 11. HD., E. 2014/727 K. 2014/19586 T. 11.12.2014 - Yargıtay 11. HD., E. 2015/5501 K. 2016/948 T. 28.1.2016 - Yargıtay 11. HD., E. 2011/1725 K. 2013/2349 T. 12.02.2013

[10] Edward Vassallo, Kristen Blemaster, Patricia Werner, An International Look at Ambush Marketing, 2005, p. 1341

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