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The Defending Champion Since its inception in the late 1800s, Coca-Cola has experienced meteoric growth, progressing from nine glasses per day to nearly 4. 5 billion cases on an annual basis (“ Top 10,” 2004). Today, Coca-Cola offers nearly 400 brands in over 200 countries and controls the highest market share (44%) in the soft drink market (“ Top 10,” 2004). In addition to its leading global market-share, Coca-Cola also retains the title of having the most popular individual beverage in the world in Coca-Cola Classic, with an 18. 6% market share (“ Top 10,” 2004). Additionally, in 2003 it placed four beverages in the top 10 for individual product sales: Coke Classic (#1), Diet Coke (3), Sprite (5), and Caffeine Free Diet Coke (8) (“ Top 10,” 2004).

Through Research & Development (R&D) and acquisitions, Coca-Cola has also expanded its product line to include non-carbonated beverage products, including: Dasani, Fanta, Fruitopia, Hi-C, Minute Maid, and Mr. Pibb. In 2003, Coca-Cola spent approximately $1. 9 billion on marketing and advertising. In November 2004, Coca-Cola CEO Neville Isdell stated that “[Marketing expenditures] would rise by $350-$400 million a year ..

. forever” (Marketplace Roundup, 2004). Pepsi-Cola: The Challenger With the exception of brief bankruptcy stints in 1923 and 1932, Pepsi-Cola assumed its place at the heels of Coca-Cola through its creation of an extensive franchise bottling network and distribution outlets (Yoffie, 2004). Over the years, the Pepsi-Cola company has expanded its product offerings, through R&D and acquisitions, to include: Diet Pepsi, Mountain Dew, Mug Root Beer, Slice, Sierra Mist, Lipton, Aquafina, andStarbucksFrappachino, among others. Pepsicola’s acquisition of Gatorade from the Ouaker Oats company in December 2000 further proved its commitment to broadening its product base as well as expanding its sponsorship connection to the sport industry, in which Gatorade was already a major player. As of 2003, Pepsi controlled 31. 8% of the market in the soft drink industry with annual sales of 3. 2 billion cases (“ Top 10,” 2004). Today, the company’s flagship brand, Pepsi-Cola, ranks second only to Coca-Cola Classic, with a U.

S. market share of 11. 9% (“ Top 10,” 2004). Similar to the Coca-Cola company, it also has four products in the top 10 on an individual product sales basis: Pepsi (#2), Mountain Dew (4), Diet Pepsi (6), and Sierra Mist (9) (“ Top 10,” 2004). In 2003, Pepsi spent $1.

billion dollars on marketing and advertising (www. pepsico. com). Introduction It was March 31, 2003, and the Coca-Cola Classic brand management team was excited about enjoying another Major League Baseball opening day at Turner Field against the visiting Montreal Expos. As the team drove out to Turner Field, most of the talk centered on the Atlanta Braves’ prospects for the upcoming season. Jill Smith, however, had her mind on football—specifically, the 2004 Super Bowl in Houston—only 10 months away.

Although Coca-Cola was no longer the official soft drink sponsor of the National Football League—rival Pepsi-Cola had outbid Coca-Cola for those rights in 2002—Coca-Cola was an official team sponsor of the Houston Texans, the hosts of the upcoming Super Bowl. Jill, the senior marketing executive on the Coca-Cola Classic brand, had recently received a memo from her boss, the Vice President of Brand Management for the Classic brand, requesting that, within two weeks, she present her recommendations for what, if any, promotional activity the company should conduct in conjunction with the 2004 Super Bowl in Houston. Jill knew that if Coca-Cola planned to conduct any such promotional activity, it would be viewed by some, including the NFL and Pepsi, as “ ambush marketing. ” Her recommendations might not only have ethical implications for Coca-Cola, but also legal implications as well. As a local Atlanta youth choir sang the national anthem to commence the Braves’ 2003 season, Jill’s mind was elsewhere, mulling over a wide range of concerns and possible recommendations.

Steve McKelvey, JD, is an assistant professor in the Department of Sport Management at the University of Massachusetts Amherst. His research interests include sport sponsorship and legal issues in sport marketing. 114 Volume 15 • Number 2 • 2006 • Sport MarHetIng Quarterly The “ Cola Wars” The “ cola wars,” which describes the on-going battle between Coca-Cola and Pepsi for supremacy in the soft drink industry, date back to the 1950s when Pepsi’s corporate focus became “ Beat Coke” (Yoffie, 2004). Since then, they have battled domestically and globally for market share and sales, with a tremendous amount at stake: the soft drink industry annually produces approximately 10. billion cases of soft drinks domestically, with a total U. S.

retail value of $65 billion. Of that annual dollar total, the “ cola” flavors represent close to a 70% market share, followed distantly by the lemon/lime, citrus, pepper, root beer, and orange flavored soft drinks (Yoffie, 2004). Civen the amount at stake, the “ cola wars” are fought daily between Coca-Cola and Pepsi-Cola on a variety of fronts, as illustrated below: New Products: There seem to be no secrets in the beverage category, with Coca-Cola and Pepsi typically releasing new products in unison. For example, in 2003 when Coca-Cola introduced Vanilla Coke and Sprite Re-Mix, Pepsi simultaneously countered by introducing Mountain Dew Live Wire, Pepsi Blue, and Sierra Mist (Chura, 2003). Within the last tive years, both CocaCola and Pepsi also introduced their own brands of bottled waters (Aquafma and Dasani, respectively). More recently, responding to the low-carb craze, within weeks of Coca-Cola’s launch of C2, Pepsi responded with Pepsi Edge (Moses, 2004).

The “ cola wars” even extends to product packaging: recently, both corporations have tried to reduce costs and increase profit margins with the release of the streamlined L5-liter bottle in attempt to phase out the 2-liter bottles. Global Expansion: The “ cola wars” have also heated up on the international front. For example, India, a nation with over one billion potential customers, has become one of the latest battlegrounds. Over the past five years, both corporations have battled for the rights to use cricket stars as sponsors, to fund “ Bollywood” movies, and to secure online relationships (Yahoo! India with Pepsi; Hungama with Coca-Cola). Both companies have aired commercials with high profile Indian personalities in an effort to capture this burgeoning market (Datta, 2001).

Likewise, as China has opened its borders to international trade, Coca-Cola and Pepsi have aggressively moved to establish themselves. Both companies have moved aggressively to establish distribution, manufacturing, and bottling networks in China, enabling both to offset stagnant soft drink sales in the United States (Terhune, 2004). In 2003, Houston Rockets basketball sensation Yao Ming, a native of China, was at the center of ambush marketing allegations and a sub- sequent lawsuit when Coca-Cola utilized his image on packaging without his permission (Anthony, 2004). Coca-Cola alleged that it had properly secured the rights to feature Ming through its official sponsorship of the Chinese national basketball team (Anthony, 2003). The lawsuit, though settled, illustrate just how much is a stake in global expansion for companies like Coca-Cola and Pepsi, as the profile of major U.

S. sport leagues and its stars expand to countries like China. U. S. -based Marketing Initiatives: The summer months always serve as a key battleground for high-profile promotional sweepstakes campaigns. For instance, in the summer of 2004, Coca-Cola launched its “ Unexpected Summer” promotion centered on its tradition and in-store merchandising, wbich Pepsi countered with its “ Play for a Billion” promotion (MacArthur, 2004).

Over the past decade, the “ cola wars” bave expanded into new venues, including sponsorship deals with public schools and municipalities (Benson, 1999). The “ cola wars” have also recently entered the digital music world. For instance, in 2004, when Coca-Cola launched www. mycokemusic in an effort to tap into tbe growing on-line, tech-sawy, digital media market, Pepsi immediately countered with a consumer offer of 100 million songs in a co-branded promotion witbApple‘ s iTunes (Briggs, 2004).

Sport Sponsorships: Sport sponsorship has become an increasingly integral part of marketing strategy for botb Coke and Pepsi. Over tbe past few decades, concurrent with tbe overall rise in sport sponsorship spending, botb corporations bave aligned tbeir core brands witb sport properties tbat tbey feel effectively deliver particular market segments. Botb corporations annually rank among tbe top 50 in sports advertising spending. In 2003, tbe Pepsi-Cola beverage division spent an estimated $77 million (ranking 10) and Coca-Cola spent an estimated $64 million (ranking 17) (Top 50, 2004). Appendix A lists tbe major involvements of botb corporations witbin tbe area of sport sponsorsbips.

As sball be seen in greater detail, arguably no U. S. sport property provides more fertile ground for tbe “ cola wars” tban tbe National Football League. Overview of NFL sponsorship programTwo events cbanged tbe course of professional sports in tbe 1950s. Tbe first event was CBS signing on in 1956 to televise NFL games. Tbe second occurred at Yankee Stadium on December 28, 1958, wben, in tbrilling fashion, tbe underdog Baltimore Colts beat tbe New York Ciants, 23-17, for tbe NFL Cbampionsbip before an estimated television audience Volume 15 • Number 2 • 2006 • Sport MarHetIng Quarterly 115 of 45 million people.

Based upon the growing popularity of the NFL as a television property, in 1962 the NFL renewed its broadcast arrangement with CBS, for a then-exorbitant $4. 5 million annually (Mihoces, 1998). With each subsequent television negotiation, the NFL achieved monumental increases in television rights fees, reflecting the fact that the Super Bowl is the top rated sports telecast every year. In 1998, the NFL entered into eight-year television rights deals with ABC, Fox, CBS, and ESPN totaling $17. 6 billion, representing an average annual value of $2.

2 billion {By the Numbers, 2004). In addition, in 2004 DirecTV extended its Sunday Ticket package contract through 2010 at a total five-year cost of $3. billion (Bernstein, 2004). In 1963, to further capitalize on its growing popularity, the NFL, through a representation agreement with its member franchises known as the NFL Trust Agreement, created a division whose main purpose was to generate income as a method of underwriting the league’s charitable programs (this division within NFL was officially named NFL Properties, or “ NFLP,” in 1982). The premise of the NFL Trust Agreement was that all revenues generated through broadcasting, hcensing, and sponsorship would be shared equally among all the NFL teams. It was not until the 1980s that the NFL began to fully realize the potential for additional revenues through licensing and corporate sponsorship.

Corporations today are willing to invest tens of millions of dollars on a multi-year basis to gain an association with the NFL and access to its fan base, and the escalating cost of these sponsorship deals suggests that an NFL sponsorship creates numerous benefits for the corporations. Table 1 identifies the NFL’s 2003 official sponsors. Historically, an official sponsorship deal with the NFL granted the sponsor the rights to utilize not only leaguewide NFL trademarks, but also the individual trademarks of all of the NFL teams in their advertising and promotional campaigns. However, in the mid 1990s, a small coalition of owners led by Jerry Jones of the Dallas Cowboys began to challenge the NFL to release the local marketing rights back to the individual teams. In an attempt to force this issue on the NFLP, Jones embarked on a series of highly-publicized sponsorship signings that made companies like Pepsi, Nike, American Express, AT&T, and Dr. Pepper official sponsors of the Dallas Cowboys stadium (a clever maneuver designed to associate these companies with the Dallas Cowboys while not violating the legal provisions of the team’s agreement with NFLP) (“ NFL, Cowboys owner,” 1996). Table / 2003 NFL Sponsors Company (brand) Bayer Pharmaceuticals Corp. Campbell Soup Co. CanonUSA, Inc.

Castrol North America, Inc. Coors Brewing Co. DirecTV, Inc. FedexCorp.

Frito-Lay North America Catorade/ Tropicana (Catorade) Catorade/Tropicana (Tropicana) Ceneral Motors Corp. (Cadillac)IBMKraft Foods, Inc. (Oscar Mayer) Masterfoods MBNA America BankMotorolaInc. News America Pepsi-Cola North America (Pepsi)Southwest AirlinesCo. Staples Visa USA Category Pharmaceutical Soup Cameras and Equipment Motor Oil Beer Satellite Television Worldwide Delivery Service Salty Snack Sports Beverage (Isotonic) Juice Car and Passenger Truck Computer Hardware Processed Meats/Pickles Chocolate and Non-chocolate Confectionery Team-Identified Credit Cards Wireless Telecommunications Equipment Super Bowl Free Standing Inserts Soft Drinks Airline Office Supply Retailer Payment Systems Services Partner Since 2003 1998 1984 1991 2002 1994 2000 2000 1983 2002 2001 2003 1983 2002 1995 1999 1979 2002 1997 1996 1995Source: By the Numbers 2004 (2004). SportsBusiness Journal, 6(36), 22. 116 Volume 15 • Number 2 • 2006 • Sport MarHetIng Quarterly In response to Jones’ renegade efforts, in 1995 the NFL sued Jones and the Dallas Cowboys for violating the Trust Agreement the club signed in 1982 authorizing the NFL to negotiate commercial uses of the team’s name, helmet, uniform, and slogans (“ NFL, Cowboys owner,” 1996). The NFL also voiced concern that Jones’ actions in signing sponsorship deals with competitors of NFL official sponsors, including Coca-Cola, constituted ambush marketing (“ NFL, Cowboys owner,” 1996).

The case was eventually settled out of court, with the NFL recognizing Jones’ right to sell sponsorships to the Dallas Cowboys stadium. However, in 2002, spurred by the continued lobbying of Jones and newer owners such as Washington’s Daniel Snyder, the NFL agreed to cede local marketing rights back to the individual teams, creating the opportunity for individual teams to sell its trademark rights to whomever they choose, including competitors of NFL official league-wide sponsors (Lefton, 2002). Capitalizing on this policy change, competitors of official NFL sponsors began to aggressively pursue individual team sponsorship rights. One of those companies was MasterCard, which went from no NFL team deals in 2002 to 25 NFL team deals by 2004, leaving Visa with the seven remaining NFL teams despite its position as the NFL’s “ official credit card. ” advertising in and around the Super Bowl telecast, 2) presence in and around the venue of the Super Bowl, 3) consumer promotions tying into the event, which typically offer football-themed merchandise in proofof purchase offers or trips and tickets as sweepstakes prizes, and 4) congratulatory messages. Purchase of Advertising Time in and Around the Event: The purchase of advertising in and around a sporting event telecast is one of the most common and popular tactics of ambush marketing (McKelvey, 1992; Meenaghan, 1996; McAuley ; Sutton, 1999).

This tactic was also deemed to be the most effective form of ambush marketing in a survey designed to assess the attitudes and opinions of senior marketing executives of corporations actively engaged in sport sponsorship (McKelvey ; Gladden, 2003). Given ts unparalleled worldwide audience, telecasts of the Super Bowl have historically provided fertile ground for ambush marketers. Throughout the 1990s, for example, Anheuser-Busch conducted a series of highly-publicized “ Bud Bowl” commercials that aired during Super Bowl telecasts, serving to ambush Miller Brewing’s position as the NFL’s official beer sponsor of the Super Bowl. The “ Bud Bowl” campaign featured its main beers, Budweiser and Bud Light (the bottles personified as football players), competing in a fantasy football game for the mythic “ Bud Bowl Championship. Throughout the Super Bowl telecasts the commercials provided highlights of the “ game.

” Corporations seeking to gain an association with the Super Bowl have also resorted to purchasing advertising on local affiliate stations, thus ambushing competitors who have secured exclusive category advertising rights within the national telecast of the Super Bowl. Presence in and Around the Event Venue Another popular form of ambush marketing is for non-sponsors to secure a presence in and around the sporting event venue. In the early days of ambush marketing, companies would employ blimps and airplanes with trailing banners to ambush a major sporting event, but event owners have successfully closed this ambush avenue by working closely with the Federal Aviation Administration and with host cities to enact air traffic restrictions during such events. Other popular ambush marketing avenues have included: securing strategically placed billboards; erecting tents and inflatables in high-traffic locations; and distributing literature and samples to consumers attending the event. These types of activities are all designed to gain an implied association with the event.

However, as found in the survey by McKelvey and Gladden (2003), securing signage near or around the event venue, as well as What is Ambush Marketmg? As the popularity of the NFL has increased, so too has the number of companies seeking to align themselves with the league without actually securing the official sponsorship rights. This tactic, known as ambush marketing, has been defined as “ a company’s intentional efforts to weaken—or ambush—its competitor’s ‘ official sponsorship. It does this by engaging in promotions and advertising that trade off the event or property’s goodwill and reputation, and that seek to confuse the buying public as to which companies reaJly hold official sponsorship rights” (McKelvey, 1994a, p. 20). Further literature on ambush marketing has suggested that, beyond this narrow and more pejorative definition, ambush marketing can be more broadly defined to describe “ a whole variety of wholly legitimate and morally correct methods of intruding upon public consciousness surrounding an event” (Meenaghan, 1994, p.

9). Thus, for instance, even a company that purchases generic (non-football themed) advertising within a Super Bowl telecast could, as a competitor of an NFL official sponsor, be construed as an “ ambush marketer” regardless of the company’s motives or intentions. The country’s premier sporting event, the Super Bowl, has long been one of the key battlefields in ambush marketing. Over the years, a broad range of tactics have been utilized, including: 1) the purchase ofVolume 15 • Number 2 • 2006 • Sport MarHeting Quarterly 117 sampling and promotional literature distribution, were deemed by corporate sport marketers to be among the least effective ambush marketing tactics. In-venue ambushing can also involve a direct conflict between an official league sponsor and a nonsponsor.

In 1995, tbe New England Patriots became the first team to crack Coca-Cola’s monopoly on local NFL team agreements, signing Pepsi to an official sponsorship that included in-stadium pouring rights. This deal was soon followed by Jerry Jones’ high-profile signing of Pepsi to be the official sponsor ofthe Dallas Cowboys’ stadium, as discussed above (Vaillancourt, 2001). Conducting Consumer Promotions Another popular avenue of ambush marketing is to conduct consumer promotions that associate the ambush marketer with popular sporting events. Such promotions typically are offered at retail locations and are supported by point-of-sale displays that feature visuals “ themed” to the particular sporting event and that utilize words that generically refer to the sporting event. For instance, a company intent on associating itself with the Super Bowl may run an in-store promotion offering consumers a free football in exchange for proofs-of-purchase and/or inviting consumers to enter to win “ a trip for 2 for the Big Game.

” W^hile purposely avoiding the use of any registered trademarks, the displays are intended to lure consumers through an implied association with the Super Bowl. Companies are also finding increasingly creative ways to associate themselves with events like the Super Bowl, without specifically offering Super Bowl trips. For instance, companies have provided consumers the opportunity to win trips to “ Big Game”-themed parties in attractive locations such as Las Vegas or the Playboy mansion. Increasingly, these types of promotions are also being offered on-line, providing further challenges to sport organizations in identifying and addressing such consumer promotions. Congratulatory Messages In an attempt to create an association with a particular event, companies will often create advertisements offering “ congratulations” to the winning team or certain players. For instance, only days after the 2003 Super Bowl, The Milk Counsel, although not an official sponsor ofthe NFL, ran a full-page advertisement in USA TODAY featuring the game’s two MVPs in their “ Got Milk? ” moustache campaign.

This tactic is one of the most indirect forms of ambush marketing, and because of the one-time nature of the advertisement and First Amendment concerns, it is one of the most legally protected methods of associating with a sporting event, especially if the “ congratulations” message is not tied directly to the sale of a product or service. The Effectiveness of Ambush Marketing The effectiveness of ambush marketing has been the subject of numerous research studies which, with sometimes conflicting results, have focused on consumer perceptions. The majority of research has focused on the success or failure of ambush marketing in terms of levels of recall and recognition of ambush marketers versus “ official sponsors” (McDaniel & Kinney, 1998; McDaniel & Kinney, 1996; Performance Research Inc. , 1992; Shani & Sandier, 1998). Research studies have also found consumer confusion regarding the classification of sponsors (McDaniel & Kinney, 1998; Sandier & Shani, 1993, 1989; Stotlar, 1993). Shani and Sandier (1998) found that consumers’ attitudes toward ambush marketing were largely indifferent and linked to their levels of knowledge of an event.

More recently, Lyberger and McCarthy (2001) concluded that there existed confusion and a lack of knowledge regarding sponsorship of the Super Bowl that was unaffected by levels of interest in sport, in the NFL, or in the event itself Their study further found that consumers are less aware of mbush tactics being employed at the Super Bowl than those being employed at the Olympic Games, and that there is “ a broad lack of awareness of levels of sponsorship and of the entitlements associated with those levels” (p. 136). Finally, results of their study demonstrated that a significant number of respondents did not oppose ambush marketing practices and that consumers were not “ disgruntled” by companies that engage in ambush marketing and that there seems to be “ a general acceptance ofthe practice” (p. 137). The effectiveness of ambush marketing has also been assessed through a survey of corporate decision makers (McKelvey & Gladden, 2003). Their study found that almost 90% of the respondents agreed that effective ambush marketing can confuse consumers into thinking a non-sponsor is actually a sponsor, and that nearly three-quarters ofthe respondents agreed that the average consumer does not differentiate between official sponsors and ambushers.

The survey also found that, on the whole, executives felt that sport properties were ineffective in dealing with ambush marketing threats. For instance, almost 70% of the respondents agreed that while properties often imply they will combat ambush marketing at the time of contracting, they seem powerless to do so when it occurs. Furthermore, a majority of executives agreed with the notion that properties are either too lazy or ambivalent to address the ambush marketing concerns of its corporate sponsors (McKelvey & Gladden, 2003). 118 Volume 15 • Number 2 • 2006 • Sport MarHetIng Quarterly cease its promotional activity. For instance, the NFL is reported to send out “ dozens of cease-and-desist letters annually to companies that engage in trademark infringement” (p. DI).

However, given the gray areas that surround the legalities of ambush marketing, U. S. professional sports leagues have historically been reluctant to bring lawsuits, primarily because ambush marketers are Legal Landscape of Ambush Marketing savvy and knowledgeable enough to avoid blatantly The debate over ambush marketing is further cloud- infringing on registered trademarks. As a result, there ed by questions regarding its legality, particularly given exists no decided U. S.

case law based directly upon an the intangible nature of ambush marketing typically ambush marketing scenario, absent an outright case of manifested through promotion and advertising trademark infringement {Host Communications v. (McKelvey, 1994b). According to U. S. law, there are Kellogg Company, 1994) or a contractual dispute that several legal recourses that a sport organization can involved the licensing of official sponsor rights in contake to prevent ambush marketing.

First, if an ambush- flicting categories {MasterCard v. Sprint, 1994). ing company uses a trademarked name, symbol, or One of the reasons that professional sport leagues logo ofthe event, the organization can sue for tradehave been reluctant to bring suit against ambush marmark infringement. Under the Lanham Act, an keters is the fear of an adverse court ruling. Such was ambushing company using a mark that is Jikely to the case in 1992, when a Canadian court upheld the cause consumer confusion with respect to the corpolegality of ambush marketing NHL v. Pepsi Cola rate affiliation can be held liable for damages.

Absent Canada (McKelvey, 1992). In 1990, the National blatant trademark infringement, however, the Lanham Hockey League (“ NHL”) sued Pepsi-Cola Canada Act requires that the organization demonstrate, most (“ Pepsi”) in a Canadian court in the first-ever litigaoften through the use of consumer surveys, that there tion specifically addressing ambush marketing. The is not only a likelihood of confusion, but that concase provided a textbook illustration of ambush marsumers have actually been confused as to which comketing in action. Pepsi did not utilize any NHL regispany is the official sponsor. tered trademarks in its promotional and advertising materials. Instead, the company utilized city names A second legal remedy is to sue ambushers for false representing NHL playoff participants and game numendorsement.

This legal claim, which can be brought bers printed under bottle caps and on scratch-off game under the Lanham Act or under state unfair competicards as part of its “ Pro Hockey Playoff Pool” promotion statutes, enables the sport organization to argue that the ambusher is trading off of the goodwill associ- tion offering consumers various hockey-related prizes. ated with an event—goodwill that has been built up by Pepsi also sponsored the league’s telecasts of the Stanley Cup playoffs throughout Canada and featured the organization, over time, through a tremendous hockey imagery as well as hockey legend Don Cherry investment of resources. o advertise the promotion. To allay potential conAmbush marketing campaigns, however, are most often conducted by marketers who are savvy enough to sumer confusion as to its association with the NHL, Pepsi utilized disclaimer language, stating in advertisavoid blatant trademark infringement, instead prefering and promotional materials that its promotion was ring to more subtly imply or evoke a false relationship “ neither associated with nor sponsored by the National with the sport property in the minds of consumers. Hockey League or any of its member team or other V^hen sport organizations are confronted by affiliates” (p. 7).

Despite the NHL’s claims that Pepsi ambush marketing campaigns, especially those that had engaged in misappropriation and unfair competispecifically threaten their official sponsors, they may tion (referred to under Canadian laws as the tort of react by publicly denouncing the actions ofthe “ passing of), or alternatively, that Pepsi had unlawfulambusbing company. As NFL spokesman Brian ly interfered with the NHL’s business associations, the McCarthy publicly stated prior to the 2004 Super court found in favor of Pepsi, holding that, inter alia, it Bowl, in addressing ambush marketing activities by several beer companies, “ Ambush marketing is a trans- had used disclaimers sufficient to alleviate any consumer confusion. parent attempt to cash in on the passions of our fans” (Murphy, 2003, p. DI). When sport organizations As stated earlier, one of the most popular forms of believe that they have valid legal grounds, they issue ambush marketing is the offering of tickets for special cease-and-desist letters to potential infringers, threatevents in consumer sweepstakes. This tactic was chalening potential legal action if the company refuses to lenged in by the National Collegiate Athletic Volume 15 • Number 2 • 2006 • Sport Marheting Quarterly 119This research study, coupled with research studies involving consumer attitudes toward ambush marketing, suggests significant hurdles for sport organizations regarding the prospects of educating the general public with respect to the official sponsors ofthe event and the potential negative impact of ambush marketing upon the value of official sponsorship programs.

Association (NCAA), which, in 2002, sued Coors Brewing Company for ttie unauthorized use of NCAA Final Four tickets in a consumer promotion. The NCAA argued ttiat Coors’ use of Final Four tickets constituted a breach of ontract based on the ticket back language that resembles that on the back of atl special event tickets inctuding Super Bowt tickets: “[U]ntess specificalty authorized in advance by the NCAA, this ticket may not be offered in a commercial promotion or as a prize in a sweepstakes or contest” (McKetvey, 2003). Although this case had the potential to become a seminat U. S. case on the tegatities of ambush marketing, it was settled out of court in Aprit 2003 (McKetvey, 2003).

Ethical Considerations of Ambush MarketingWtiite the practice of ambush marketing has been widety debated, particutarty around premier sporting events sucti as the Otympics, World Cup and Super Bowt, the answer to whether it is an “ immorat or imaginative practice … may wett tie in the eye of the behotder” (Meenaghan, t994, p. 85).

For instance, sport property owners and their officiat sponsors typicatty regard as immorat or unethicat any activity by a nonsponsor that wittingty or unwittingty intrudes upon the property’s and/or sponsors’ rigtits, thus potentiatty detracting from the officiat sponsor’s “ exctusive” association with the sport property. On ttie other hand, such activity engaged in by non-sponsors is typicatty perceived and defended as nothing more than a part of the “ normat ‘ cut and thrust’ of business activity based on a strong economic justification” (p. 85). Ttie diverse positions taken by two teading sport marketing executives further serve to ittustrate the ettiicat issues surrounding ambush marketing. Former American Express marketing executive lerry Wetsh, the arctiitect betiind his company’s tiighty pubticized assautt on Visa’s Otympic sponsorship, has been a noted defender of ambush marketing: In explaining the practice of ambush marketing .

.. bere is no need to discuss etbics or moratity. Companies routinety compete – mostty, we bope and expect, bonestty and bard – and ambusb marketing, correctty understood and rigbtty practiced, is an important, etbicatty correct, competitive toot in a non-sponsoring company’s arsenat of business and image-buitding weapons. To tbink otberwise is eitber not to understand – or wittfutty to misrepresent – tbe meaning of ambusb marketing and its significance for good – and winning – marketing practice. Wetsb, 2002, p.

4) On tbe otber end of tbe spectrum, former Internationat Otympic Committee (IOC) bead of marketing Micbaet Payne, wbo coined tbe term “ parasitic marketing” to refer to ambusbers of tbe Otympic Movement, bas stated: Ambusb marketing is an attempt by corporations to mistead tbe pubtic into betieving tbat tbey are supporting a sports event. Tbis deception contravenes a basic premise of etbicat business practice: tbat of trutb in advertising and business communications. .. It is in tbe interests of sport tbat ambusb marketing activity be positioned in tbe pubtic mind as unetbicat and deceptive and tbat offenders be subject to pubtic exposure and embarrassment.

It is only by matcing ambusb marketing unattractive to potentiat offenders tbat sport can continue to protect its revenue base. (Payne, 1998, p. 330-331) Regardtess of one’s perspective, it is important to consider ambusb marketing witbin an etbicat framework. Ambusb marketing, attbougb usuatty tegat, bas often been criticized as deceptive and unetbicat (Doust, 1998; O’Suttivan ; Murpby, 1998). Doust (1998) suggests tbat ambusb marketing can be viewed witbin tbe etbics paradigm of marketing in generat. Betcb and Betcb (1995) define etbics as “.

.. morat principtes and vatues tbat govern tbe actions and decisions of an individuat or group. A particutar action may be witbin tbe taw and stitt not be etbicat” (p. 680). Doust (1998) bas furtber suggested tbat “ tbe degree to wbicb a company agrees to ‘ back off a bit’ witt to a targe extent be determined by its own code of etbics, and by wbetber tbat company views ambusb marketing practices as unetbicat or simpty good business sense” (p.

25). Dickson (1994) furtber argues tbat companies need etbicat guidetines because tbe tetter of tbe taw is generatty considered to be onty a minimum etbicat standard: “ tbe taw is a ftoor, and must not serve as tbe onty basis for individuat and corporate etbics” (p. 203). Wbite most corporations bave a generat code of marketing etbics (some written, otbers not), tbe need to meet performance goats resutts in etbicat stresses being ptaced on marketers’ personat codes of etbics (p. 203-206).

Tbe etbics of ambusb marketing can be viewed from two tbeoreticat frameworks. Tbe first emptoys utititarian tbeory; essentiatty, tbe rigbt action is tbat wbicb produces tbe most good for tbe most peopte in a specific situation. Laczniak and Murpby (1993) state: In an organizational context, utititarianism basicatty states tbat a decision concerning corporate conduct is proper if and onty if tbat ecision produces tbe greatest good for tbe greatest number of individuats. Good is usuatty defined as net benefits tbat accrue to tbe parties affected by cboice. (p. 30) Tbus, from an etbicat perspective, as suggested by Meenagban (1996), an ambusb marketer tbat “ gives tbe impression of invotvement witb payment is merety serving its own narrow setf-interest and, in doing so.

120 Votume 15 • Number 2 • 2006 • Sport MarHeting Quarterly engages in bebavior tbat is barmfut to tbe greater good of sport” (p. 109). As Dickson (1994) furtber points out, tbere are several problems inberent in apptying utititarian tbeory, often atso referred to as situationat etbics: 1) it is difficutt to catcutate wbat constitutes tbe most good for tbe most peopte in a specific situation, as tbe principte of utitity does not betp in measuring good or bad; 2) it does not explain wbetber totat good can be measured by adding up att tbe positive outcomes and tben subtracting att tbe negative outcomes; 3) it can resutt in companies sinking to tbe towest etbicat standards among a group of competitors, wben eacb rationatizes tbat it is at teast as etbicat as tbe competition; and 4) marketers can become fixated witb bow bis or ber company witt benefit, resutting in tower etbicat standards being apptied. Wbite utititarian tbeory focuses on tbe consequences of ones actions, tbe second tbeory focuses on tbe intentions of tbe decision maker. Tbis second tbeory can be traced back to Kantian morat tbeory, wbicb “ reties on universat standards of goodness and tbe motivation to futfitt one’s duties and obtigations” (Meenagban, 1996, p. 109).

Tbis tbeory bas atso been referred to as “ duty-based etbics” (O’Suttivan & Murpby, 1998). Dickson (1994) argues tbat wbite tbis approacb takes most of tbe situation or context out of tbe etbicat evatuation, it stitt requires tbe decision maker to see tbe universat wrong or evit in tbe act if everyone did it. In otber words, immorat or morat individuats may answer tbat, yes it woutd be fine for society and for otbers to act in tbe same way toward tbem. If, for instance, an ambusb marketer’s main objective is to confuse tbe consumers about wbo tbe sponsor is and tberefore gain tbe associated benefits witbout payment of a rigbts fee, tbe intention is ctearty one of deceit and tbus woutd be an etbicatty questionabte practice. On tbe otber band, an ambusb marketer may betieve be or sbe bas a morat dut^ and obtigation to stoctcbotders to maximize revenues. Tbus, in creating a promotionat campaign tbemed to a major sporting event, an ambusb marketer may ctaim tbat, witbout ambusbing, it is otberwise denied tbe rigbt to participate in an important sporting event due merety to tbe fact tbat a competitor bas atready secured “ officiat” rigbts to tbe event, tbat it can not afford to pay tbe sponsorsbip fee, or tbat it does not believe tbe “ officiat” association is commensurate witb tbe property’s sponsorsbip fee.

As pointed out by O’Suttivan and Murpby (1998), tbe financiat success of Nit