
The Role of Criminal Law Politics against Ambush Marketing Behavior in the Implementation of ASEAN Community

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Abstract:

Until now, Indonesia does not recognize the term ambush marketing, both in the Trademark Act, 2001 or the Anti Monopoly and Unfair Competition Act, 1999.

However, based on the Criminal Code, particularly Article 382 bis, there is similar behavior with ambush marketing, which is based on the meaning of misdirection public view for the purpose of personal benefit or business benefit. So according to the author, ambush marketing can be qualified as a crime in the criminal justice system in Indonesia.

The Establishment of the Political criminal law against ambush marketing if related with the ASEAN Community 2015, therefore, the establishe of the political criminla law in the future (ius contituendum) in the domain of intra-ASEAN trade, as a study of political law, currently has two main parameters, ie philosophy of Indonesian, in this case is the Pancasila; and agreements that have been made fellow ASEAN members.

Keywords: ASEAN, Ambush Marketing, political of criminal law, trademark.

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1. Introduction

In the context of Indonesian Law, there is not much literature that deals comprehensively with regard to ambush marketing in the world of commerce. However, in the context of marketing in the marketing world of a product, ambush marketing is commonplace. And to date, legislative policy has not considered the need for setting up ambush marketing. Ambush marketing behavior itself began to be tracked in literature in 1984, by Burton, N. & Chadwick, S² has an inventory of at least 16 (sixteen) ambush marketing behavior, begins precisely at the implementation of the Summer Olympics in Los Angeles. Where there are two ambush marketing events in the event; First, Fuji Films is the official sponsor of the event, but KODAK sponsors TV stations to show their sponsored US Athletic Team. Second, it is known that the Converse brand is an official sponsor, but the NIKE brand is displaying banners or murals near the Los Angeles Memorial Coliseum, where the events take place.

Concluding from the illustrations expressed by Burton, N. & Chadwick, S, it is known that ambush marketing behavior is a marketing activity against a product brand in every sport event that is colossal (big). Where such behavior tries to divert or mislead the general view of a product brand that is the official sponsor of an event with a target of increased sales of the product's brand (Bondarenko *et al.*, 2017).

The current business development of globalization has promised new opportunities and challenges for companies in Indonesia. The positive impact of rapid trade traffic in the era of globalization has created new business opportunities for the owners of capital (Akopova and Przhedetskaya, 2016; Sibirskaya *et al.*, 2016). But on the other hand this situation could have a negative impact that is a fraudulent business competition. The emergence of fraudulent competition that is not in accordance with the legislation would cause harm to some honest business actors. Although brand competition is a demand for business actors to continue to work and strive to strengthen the existence of companies to compete in the market, the success of brand competition can not be separated from a good sales strategy, planned, and structured (Liapis *et al.*, 2013). The formation of strategy in business competition begins by creating a brand (Trademark). Once the importance of a brand because in addition to the identity of the product, the brand will also foster consumer loyalty. Even along with the times, the brand is not just a sign, but includes the lifestyle.³

²Burton, N. & Chadwick, S., *Ambush marketing in sport: An assessment of implications and management strategies*. In Beech, J. (Ed.), *The Centre for the International Business of Sport, Working Paper Series No. 3*, (United Kingdom: Coventry University Business School, 2008), hlm. 3.

³Venantia Sri Hadiarianti, *Memahami Hukum Atas Karya Intelektual*, Jakarta : Penerbit Universitas Atma Jaya, 2009, hlm 51.

Intellectual Property (Intellectual Property Rights or IPR) is an asset that a person can own, sell, license, or even give away on pleasure. Unlike other assets, however, IPR, which is largely in the form of intangible objects and of a different kind, such as patents, designs, trademarks and copyrights, is an asset created from the creativity and innovation of the community, and the particular geographic location in question.

However, the lack of physical parameters where most of these assets can be defined or identified does not preclude the recognition of their innate value and the need to protect them from theft or unauthorized use, such as tangible assets. This is the main reason for the establishment of Intellectual Property Offices around the world. Intellectual Property Protection (IPR) stimulates creativity and innovation, which in turn spurs advances in industry and ultimately leads to national development.⁴

Although it is, to date, internationally still debated in relation to the classification of ambush marketing, whether it is in violation of the domain of Intellectual Property Rights or violations of the Competition Law? Can marketing strategies through ambush methods be classified as a violation of the law or is it simply a legalized method of marketing?

Each country is different in giving views to ambush marketing. However, the legal formation of ambush marketing in certain countries is purely based on the expectation of income for the State Treasury which is based on the implementation of international events. Organizing events Internasinal scale, in principle can not be separated from the tourism program part of Indonesia. Tourism Indonesia is a potential national economic driver to spur higher economic growth in the future. In 2008 the tourism of Indonesia contributed to the Gross Domestic Product (GDP) of Rp. 153.25 trillion or 3.09% of the total GDP of Indonesia (BPS, 2010). In 2009, its contribution increased to 3.25%. The growth of tourism GDP since 2001 always shows a higher growth rate than national GDP. Although still showing temporary figures, in 2009 GDP growth of tourism reached 8.18%, while the national GDP only 4.37%. In the same year, foreign exchange from tourism accounted for the third largest contributor of foreign exchange, after oil and gas and palm oil. This rating shows an increasing trend since 2006, which only ranked 6th out of 11 foreign exchange resources commodities.⁵

Implementation of various national, regional and international events in Indonesia has been able to trigger economic growth for regional organizers. So, the existing sporting event is no longer purely for the sake of sport. According to Rita Subowo, Chairman of the National Sports Committee of Indonesia (KONI) Center, from various national and international sports activities in Indonesia, has been able to give

⁴*ECAP-Project, ASEAN Intellectual Property Rights Action Plan 2011-2015, hlm. 1*

⁵*Warta Ekspor, DJPEN/MJL/002/07, Edisi Juli 2011, hlm. 3*

a big effect on the economy. In other words, according to him, sporting event is able to move the economic sector.⁶

Beginning at the 2nd ASEAN Summit on 15 December 1997 in Kuala Lumpur, Malaysia, with the approval of the ASEAN Vision 2020, the ASEAN Heads of States affirmed that ASEAN would: (i) create a stable, prosperous and stable ASEAN Economic Zone High competitiveness characterized by freight flow of goods, free services and investment, freer capital traffic flows, equitable economic development and reducing poverty and socio-economic disparities, (ii) accelerating trade liberalization in services, And (iii) promote the movement of professionals and other services freely in the region. Subsequently at the next summit (the 6th, 7th) summit, ASEAN leaders agreed on a range of steps whose goal was to realize the vision.

After the economic crisis in Southeast Asia, the ASEAN Heads of State at the 9th ASEAN Summit in Bali, Indonesia in 2003, agreed on the establishment of ASEAN Community in the field of Political-Security Community (ASEAN) Economic Community), and Socio-Culture Community (known as Bali Concord II). For the establishment of ASEAN Economic Community (AEC) in 2015, ASEAN agrees that its manifestation is aimed at regional economic integration whose implementation refers to ASEAN Economic Community (AEC) Blueprint.⁷

Over the past few years, ASEAN has worked on the development of Intellectual Property systems in the region through the ASEAN Working Group on Intellectual Property Cooperation (AWGIPC). The AWGIPC was established in 1996 in accordance with the ASEAN Framework Agreement on Intellectual Property Property, signed by ASEAN Member States (AMSS) in Bangkok, Thailand, in 1995. The AWGIPC is mandated to develop, coordinate and implement all IP- Related to regional programs and activities in ASEAN.

Since 2004, AWGIPC's work has been based on the ASEAN Plan of Action on IPR, 2004-2010, and the ASEAN Cooperation Work Plan on Copyrights. The IPR Action Plan is formulated "(1) to help accelerate the pace and scope of IP asset creation, commercialization and protection; To enhance the regional framework of policies and institutions related to IP and IPR, including the development and harmonization of enabling the IPR registration system; To promote IP cooperation and dialogue in the region as well as with regional Dialogue Partners and organizations; To strengthen the human and institutional power of IP-related capabilities in the region,

⁶"Pelaksanaan PON Picu Pertumbuhan Ekonomi Baru", Sumber: <http://riaubisnis.com/index.php/industry-news/ikm-industry/594-pelaksanaan-pon-picu-pertumbuhan-ekonomi-baru> (diakses 23 April 2017).

⁷Gusmardi Bustami, *Menuju ASEAN Economic Community 2015*, Jakarta: Departemen Perdagangan Republik Indonesia, hlm. v-vi.

including encouraging public awareness of issues and implications, related to IP and IPR.”⁸

With the acceleration of ASEAN Economic integration which initially is in 2020 to 2015, the Government of Indonesia should not only prepare the action plan in the economic field only, but the formation of legislative policy of Criminal Law related to the protection of business actors in running the company for negative behaviors Which can harm the nation's economy.

With respect to property rights and economic value that can be generated by the trademark owner, it is necessary to provide legal protection to protect the rights of the owner of the mark from another party with the disadvantage. However, along with the development of science and technology, the great influence on the issue of intellectual property rights in applying legal protection is not purely derived from the field of IPR solely because of the many interests associated with IPR, namely the economic and political fields that have become an integral element In discussing the issue of Intellectual Property Rights.⁹

So to overcome the world problems in the field of IPR, the development of law in the international world was not spared from the conventions of the International in the form specifically for the issue of IPR. On March 20, 1883 for the first time in Paris, France, the countries of the world successfully agreed to the protection of international intellectual property rights with the passing of the Paris Convention or the Paris Convention¹⁰ (also called The Paris Union). In principle, the Paris Convention regulates the protection of industrial property which includes patents, models and designs, industrial designs, trademarks, trade names and fraudulent competition. Other institutions such as the Convention Establishing the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) are also a form of protection of world trade law. Then, under the WTO organization has been in the form of Trade Related Aspects of Intellectual Property Rights (TRIPs)¹¹ which regulates specifically about aspects of trade related HKI.

Based on the above and given the importance of ASEAN trade with other countries outside the region, as well as the need for ASEAN Community to remain insightful, ASEAN Economic Community (AEC / KEA) has the following main characteristics: (a). Single market and production base, (b). A highly competitive economic region, (c). Regions with equitable economic development, (d). The

⁸ECAP-Project, *Op.cit*, hlm. 2.

⁹Muhamad Djumhana dan R. Djubaedillah, *Hak Milik Intelektual, Sejarah, Teori dan Prakteknya di Indonesia*, Bandung: Citra Aditya Bakti, 1997, hlm 8.

¹⁰It has been ratified by Presidential Decree No. 15 of 1997

¹¹It has been ratified by Act No. 7 of 1994

region is fully integrated with the global economy. These characteristics are closely related and mutually reinforcing one another.¹²

The free and open investment regulation is key to improving ASEAN's competitiveness in attracting foreign direct investment (FDI) including intra-ASEAN investment. The influx of new investments and enhancement of existing investments (reinvestments) will encourage and ensure the dynamic economic development of ASEAN.¹³

In connection with this, the behavior of ambush marketing globally has become a legal issue interesting enough to study more deeply. In its development, the power of event organizers, for example: FIFA, IOC, and others, have the power to force the event's executing countries to create a set of laws to protect the event organizer's interests. Which in the formation of his law is divided into two types of law, namely trademark law and unfair competition law.

In principle, the use of logos / emblems of event organizers is considered as a trademark is attached to business actors who try to show the public through the mass media, by connecting his trademark with the event raises the mathematical calculation that the event will increase revenue of the business actors who are bound to sponsorship agreements. These things are the study of the author related to the establishment of a criminal law system based on criminal law against the behavior of ambush marketing in the implementation of ASEAN Community 2015.

The problem of ambiguity, between trademark law and unfari competition law, is based on the use of emblems or logos of the event organizer by business actors who become sponsorship at the event. So it becomes an interesting legal issue, when the problem arises about:

1. Can ambush marketing be qualified as a criminal offense in the criminal law system in Indonesia?
2. What is the formation of criminal law politics against ambush marketing when it is associated with ASEAN Community 2015?

2. Research Methodology

In this study we have used the Juridical Normative method, with the application of the comparative approach. The writing uses secondary data as follows:

1. Primary Legal Material, which consists of:
 - a. The Criminal Code (Penal Code)
 - b. Law No. 20 of 2016 on Brands and Geographical Indications

¹² *Cetak Biru Komunitas Ekonomi ASEAN (ASEAN Economy Community Blueprint)*, Direktorat Jendral Kerjasama ASEAN, Departemen Luar Negeri RI Tahun 2009, hlm. 7.

¹³*Ibid.*, hlm. 16.

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- c. Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition
 - d. Trade Related Aspects of Intellectual Property Rights (TRIPs)
 - e. Paris Convention for the Protection of the Industrial Property (Paris Convention)
 - f. The Olympic and Paralympic Marks Act (Canada)
 - g. The Consumer Protection from Unfair Trading Regulation 2008 (UK)
 - h. London Olympic Games and Paralympics Games Act 2006 (UK)
 - i. The Act supplements the Olympic Symbol. (Protection) Act 1995 (UK)
 - j. The Major Event Management Act 2007 (MEMA 2007) (New Zealand)
 - k. Markengesetz (MarkenG) (Germany)
 - l. Gesetz gegen unlauteren Wettbewerf (UWG) (Germany)
 - m. Olympia Schutz Gesetz (Germany)
2. Secondary Law Material, which consists of books and scientific work of the jurists associated with this theme.
 3. Tertiary Law Material, which consists of Dictionary and Encyclopedia
- Data obtained information will be analyzed descriptively qualitative, so that can be drawn conclusions that can be justified scientifically.

3. Results and Discusion

Understanding Ambush Marketing

Ambush marketing can be defined as a marketing strategy by which advertisers associate themselves with, and therefore exploit, certain events without having to pay sponsorship fees. What is meant by ambush marketing is as a marketing strategy in which a competing brand connects itself to a major sporting event without paying a sponsor's fee.¹⁴ The word "ambush" used in the marketing of an ambush expression means "an attack of hidden position" and derives from the old French embuschier verb, meaning "to place in the forest." The term "marketing ambush" was created by Jerry Welsh's famous marketing strategy, While he worked as manager of global marketing efforts for American Express Company in the 1980s.¹⁵

From some literature compiled by Wikipedia, the ambush marketing understanding is among others as follows:¹⁶

- (1). "Predatory" ambushing:
False claims intentionally granted by non-sponsors to official sponsorship and / or false non-sponsored denial of an authorized sponsorship of the

¹⁴"Ambush Marketing", <http://en.wikipedia.org> diunduh 23 April 2017.

¹⁵"Ambush Marketing", Sumber: <http://www.smakristencilacap.com/id/ambush-marketing/>, diunduh 23 April 2017

¹⁶Ibid

marketplace, in each case with the intent to confuse the consumer and gain market share from the official sponsor who becomes Market competitors.

- (2). "Coattail" ambushing:
Attempts by the trademark owner to directly associate themselves with the property or event by "showing" the relationship to a valid property / event but without the official sponsor.
- (3). Ambushing via trademark / likeness infringement:
Unauthorized use of protected intellectual property. Such properties may include team logos or events, or make use of unauthorized references to tournaments, teams or athletes, words and symbols.
- (4). Ambushing "by degree":
Marketing activities undertaken by the official sponsor of the sponsorship contract and beyond what has been agreed upon in the sponsorship contract. Or often called "self-ambushing".
- (5). Ambushing "by association":
The use of imagery or terms is not protected by intellectual property law to create the illusion that an organization has links to sporting events or property.
- (6). Values-based ambushing:
The behavior of non-sponsored business actors by adjusting or making the same out of events and themes in marketing practices, so the audience is interested in promotions by non-sponsored business actors.
- (7). Ambushing "by distraction":
Setting up promotional presentations at or near an event, even without making specific reference to the event itself, its image, or its theme, in order to take advantage of the general public's attention to the audience's awareness and event 'of their environment.
- (8). "Insurgent" ambushing:
The use of street-style promotional surprises (blitz marketing) at an event or close enough for it that ambush businesses can identify and target audience members.
- (9). "Parallel property" ambushing:
The creation or sponsorship of an event or property that bears a qualitative likeness to ambush targets and competes with it for the public's attention.
- (10). Unintentional ambushing:
This behavior is also often referred to by the term free publication. Where it is possible, that the media covering the event mentioned other brands outside of the official sponsor. But most viewers do not consider it ambush marketing.
- (11). "Saturation" ambushing:
Saturation ambushers try to increase their marketing campaigns through media advertisements at the same time as the event, but the promotion campaign does not directly associate with the event, and tends to avoid it.¹⁷

¹⁷Simon Chadwick and Nicholas Burton, "New Definitions for Ambush Marketing", *The Wall Street Journal (WSJ.com) - Business News & Financial News*, 2010 October 20, available

Brand Definition

Legal protection of the brand is contained in Law no. 20 of 2016 on Trademark and Geographical Indication (Law 20/2016). This law is a renewal of Law Number 15 Year 2001 which was previously regulated in Law no. 21 of 1961 concerning Company Marks and Trade Marks, Law no. 19 of 1992 on Trademarks and Law no. Law No. 14 of 1997 on Amendment to Law no. 19 of 1992.

Article 1 of Law no. 20/2016 asserts the following: "Signs that may be displayed graphically are pictures, logos, names, words, letters, numbers, color arrangements, in the form of 2 (two) dimensions and / or 3 (three) dimensions, sounds, holograms, or a combination of 2 (two) Or more of such elements to distinguish goods and / or services produced by persons or legal entities in the goods and / or services trade activities. " With regard to this understanding, it is natural that the Brand is the spirit of a good or service, because it is the differentiating element between goods / services with one another. Therefore, the brand of a good is a guarantee of the quality of a product / service. A brand can be distinguished into three types based on reputation (renown) and renown, namely normal marks, well-known marks and renowned marks. Famous brand is a brand that has a high reputation. This brand has a dazzling and exciting power of emission, so that the type of goods under the brand instantly generate a touch of familiarity and mythical context to all layers of the consumer. The protection of a well-known brand is contained in Article 16 of the Trade-Related Aspects of Intellectual Property Rights (TRIP's) which supplement Article 6 bis of the Paris Convention on Well-known Marks. The provisions to protect the above-mentioned marks apply to all member states of the Paris Convention and the signing of the TRIPS Agreement (TRIPS) including Indonesia. Thus, the regulation on legal protection of the famous brand has also been set forth in Article 21 of Law no. 20 of 2016 on Trademarks and Geographical Indications, previously set forth in Article 6 paragraph (1) sub-paragraph b of Law no. 15 of 2001 on Marks.¹⁸

1. Regulation About Ambush Marketing in Some Countries

a. Canada

The Olympic and Paralympic Marks Act also prohibits the activities of ambush marketing in the conventional form, ie promotional activities or other activities that attract the attention of the public over a product or service in a certain way that makes it as if promotional activities or other activities that attract the attention of the

at<http://online.wsj.com/article/SB10001424052970204731804574391102699362862.html>, (Diunduh 23 April 2017).

¹⁸ M. Yahya Harahap, *Tinjauan Merek Secara Umum dan Hukum Merek di Indonesia Berdasarkan Undang-Undang Nomor 19 Tahun 1992*, Bandung: Citra Aditya Bakti, 1996, hlm. 82.

general public over the product Or the service has been approved by the organizer of the Olympic activities. The provisions are governed by:

(1). *Section 3 (1):*

“No person shall adopt or use in connection with a business, as a trade-mark or otherwise, an Olympic or Paralympic mark or a mark that so nearly resembles an Olympic or Paralympic mark as to be likely to be mistaken for it.”

(2). *Section 4 (1)*

“No person shall, during any period prescribed by regulation, in association with a trade-mark or other mark, promote or otherwise direct public attention to their business, wares or services in a manner that misleads or is likely to mislead the public into believing that:

- (a). *the person’s business, wares or services are approved, authorized or endorsed by an organizing committee, the COC or the CPC; or*
- (b). *a business association exists between the person’s business and the Olympic Games, the Paralympic Games, an organizing committee, the COC or the CPC.”*

**b. *United States of America
Trademark Law (Lanham Act)***

The first legal protection is through the Lanham Act, which is a statutory law form. Lanham Act provides protection against misleading promotions. Sections 32 (1) and 43 (a) of the Lanham Act prohibit the action of brand name cormalization in states that result in confusion, error or misleading / deceive:

*Section 32 (1) Lanham Act*¹⁹

(1) Any person who shall, without the consent of the registrant

- (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or*
- (b) reproduce, counterfeit, copy or colorably imitate a registered mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for the remedies*

¹⁹ § 32 (15 U.S.C. §1114) *Remedies; infringement; innocent infringers by printers and publishers.*

hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive.

Section 32 (1) dan 43 (a) Lanham Act²⁰

a) Civil action.

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(a) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(b) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Furthermore, Section 44 Lanham Act regulates legal protection of international treaties relating to trademark law, to which the United States has entered into a treaty (Paris Convention for the Protection of Industrial Property).²¹

c. **England**

The Consumer Protection from Unfair Trading Regulation 2008, which regulates unfair trading. The rule implements the obligations set forth in the EU Directive 2005/29 / ec, containing some basic provisions that prohibit ambush marketing actions. In particular, Regulations 5 and Regulation 6 which prohibit misleading / deceitful acts or acts, including:

(1). Regulation 5 (3)(a): Practices that “concern any marketing of a product ... which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor”²² or

(2). Regulation 5 (2)(a) Practices that convey an “overall presentation in any way deceives or is likely to deceive the average consumer in relation to [a range of matters including those below], even if the information is factually correct”²³

²⁰15 U.S.C. §1125 False designations of origin and false descriptions forbidden.

²¹15 U.S.C. 1126, 1127.

²²Regulation 5 (3) (a). The Consumer Protection from Unfair Trading Regulation 2008

²³Regulation 5 (2) (a) The Consumer Protection from Unfair Trading Regulation 2008

- (3). *Regulation (6)(e): any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product” or “the nature, attributes and rights of the trader (including approval, affiliations or connections)*

The London Olympic Games and the Paralympics Games Act 2006 which regulates the subject related to the 2012 London Games (Summer Olympics of London 2012), which includes the question of marketing (commerce and advertising). In Section 19 (1), the secretary of state makes rules about advertising in certain areas of the London Olympics. The provisions are then set forth in the legislation about The London Olympic Games and Paralympic Games (Advertising and trading) (England) 2011. The legislation designates "Event Zones" and certain routes around where the Olympic event is held, during and before the Olympic events, and requires those wishing to trade or place ads in the area that would otherwise have received permission Of the London Organizing Committee of the Olympic and Paralympic Games (LOCOG).

d. *New Zealand*

In the face of Ambush Marketing, New Zealand has passed legislation to protect sponsors of the big event, The Major Event Management Act, 2007 (MEMA 2007). The purpose of MEMA 2007 itself is to prevent the exploitation of commercial activities without the permission of the event organizers. MEMA 2007 specifically prohibits activities that:

- (1). Represent / promote the brand, goods, or services that associate with a particular event activity.
- (2). The act of advertising (without permission) on certain event activities and attract the attention of visitors to the event in question.
- (3). Use of certain symbols and words regarding Olympic Games and Commonwealth Games (and other events) without permission.²⁴

e. *Germany*

One strategy to counter ambush marketing in Germany is to apply the brand law, called Markengesetz (MarkenG):

Article 3 (1):

“any sign capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging,

²⁴ Ironside S, *Major events Management act 2007, Managing Intellectual Property*, <http://www.managingip.com/article/2041356/Major-Events-Managing-Act-2007.html> (Diunduh 23 April 2017)

provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.”

Article 14:

The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

- (a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered;*
- (b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark*

The following, therefore, may be permitted under the Act:

- (a) affixing the sign to the goods or to the packaging thereof;*
- (b) offering the goods, or putting them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder;*
- (c) importing or exporting the goods under the sign;*
- (d) using the sign on business papers and in advertising.*

It then draws attention here regarding the practice of ambush marketing, that in the provisions of Article 14 MarkenG and Article 5 (1) of the European Trade Marks Directive, that is, the absence of an element "which can lead to confusion" of the origin of goods or services. Therefore, MarkenG refers to the explanation of the opening of the European Trade Marks Directive which specifies that the function of the trademark is to either provide trade guarantees or the origin of the goods (indication of origin). It must be registered in order to obtain an identity as a form of guarantee / warranty of the trademark.

In the fight against ambush marketing, Germany also did so through the law on unfair competition law. The German Unfair Competition Law is called by the name Gesetz gegen unlauteren Wettbewer (UWG). UWG is the implementation of the Directive 2005/29 / EC of the European Parliament and of the Council, concerning unfair business-to consumer commercial practices in the internal market, promulgated on May 11, 2005.

In Section 3 (3) this law describes the types of unlawful acts, which become the scope of unfair acts. With regard to ambush marketing, whereby ambush marketing actors acting as if they are the official sponsor of an event, are acts / actions that fall within the types of unlawful acts referred to above:

“Making the false statement that an entrepreneur, a commercial practice by that entrepreneur, or goods or services have been approved, endorsed or authorised by a public or private body; or making the false statement that the terms of the

approval, endorsement or authorisation have been complied with- is considered to be an illegal commercial practice.”

However, the above provisions become ineffective, this is because in practice the perpetrator ambush marketing will never make a false statement as a sponsor of an event. Other provisions as a form of protection against ambush marketing are set forth in Section 5 (1) UWG:

“Unfairness shall have occurred where a person uses a misleading commercial practice. A commercial practice shall be deemed to be misleading if it contains untruthful information or other information suited to deception regarding the following circumstances...any statement or symbol in relation to direct or indirect sponsorship or approval of the entrepreneur or of the goods or services.”

The provisions of Section 5 (1) have a wider scope for dealing with ambush marketing acts, either directly or indirectly (making impressions), this is expressed in the phrase "untruthful information or other information suited to deception of the following circumstances". In addition to these countries, South Africa still uses the Trade Practices Act No. 76 of 1976 and the Merchandise Marks Act, 1941 amended by the Merchandise Marks Act, 2002 to counter ambush marketing. Similarly China, which uses as a form of opposition to ambush marketing, the Advertisement Law and The Law against unfair competition, and specifically through Decree No. 345 of The State Council of the People's Republic of China.

2. Ambush Marketing Setup Projection in Indonesia

The formation of the legal system in the future, is closely related to the formation of its legal politics. The manifestation of the legal political view which then forms a particular legal system, which in the end by the institution which has authority is poured into the legislation. Where legislation is aimed at behavior. In general, all rules express the existence of collective decisions, that society or elements of power require that behavior leads to a particular purpose.²⁵

As a result of the influence of legal relationships that have occurred extensively, even beyond the borders of the state, or better known as the term globalization, the influence of legal philosophy in shaping legal politics and legal system of a country, can also be said as one element that affects Mindset in the formation of the law. As explained by CFG. Sunaryati Hartono, that there are legal philosophies that affect the development of national law both past and present.²⁶ If examined through the Trademark Act 2001, it is known that the current legal protection of the brand does not include provisions regarding the prohibition of ambush marketing activities.

²⁵Lawrence M. Friedman, *The Legal System. A Social Science Perspective*, [Pent. M. Khozim], Bandung: Nusamedia, 2011., hlm. 50.

²⁶ CFG. Sunaryati Hartono, *Politik Hukum Menuju Satu Sistem Hukum Nasional*, Bandung: Alumni, 1991, hlm. 52.

Similarly, the emergence of the Law on Prohibition of Monopolistic Practices and Unfair Business Competition, has not provided the right meaning, even substantially not at all about ambush marketing. However, if following the pattern of unfair competition in the field of brand in the world of sponsorship as adopted by some countries in the world, the competition of fraud has been regulated by the provisions of the Paris Convention, Article 10 bis about unfair competition which in fact has been ratified by Indonesia. In chapter 10 bis verses (1) and (2) it says that:

“(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition. (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.”

In Article 10 bis paragraph (3), emphatically stated, the Paris Convention Prohibit:

- a. Any action that may generate 'confusion' in any way about the competitor's commercial goods or activities;
- b. False allegations to discredit a competitor's company, goods or commercial activity or a competing industry;
- c. Mislead appointments or statements about the manufacturing process, character, purpose of use or quantity and goods.

The law provides protection against the orderly association in the business world, therefore the fraudulent Competition by itself is unlawful. In Indonesia, the term cheating competition (*oneerlijke concurrentie / oneerlijke mededinging*) is contained in Article 382 bis of the Criminal Code (KUHP), as follows:

"Anyone committing a deceitful act to mislead a crowd or a person, certain with the intention of establishing or raising the proceeds of his trade or his or her own company or any other person's property, is punished for fraudulent competition with a prison sentence of four months or a fine -the amount of Rp.13.500, -, if it can cause any harm to his own rival or rival someone else."

With the acceleration of ASEAN Economic Community 2015, then demanding Indonesia to, in the end, adjust to the interests of ASEAN, as has been agreed. This will then become a factor for the shift in the legal and political legal system in Indonesia.

Therefore, we should look closely together that the development in society due to globalization has affected the national legal order of nations. Globalization has had an impact in many areas, there is a tendency for the emergence of a state without border. Ultimately the existing legal norms must be able to adapt to the changes that occur, but then it does not mean to abandon the values held, such as the views of life, ideology and the basis of the state of Pancasila which has been the source of all sources of law.²⁷

²⁷Endang Sutrisno, *Bunga Rampai Hukum dan Globalisasi*, Bandung: Genta Press, 2011, hlm. 90-91.

Speaking of ambush marketing, not only the interests of the state, whether bilateral or multilateral, and economic actors, but also foreign interests that influence the formation of criminal law politics in Indonesia, which should be a special feature of an independent and independent state.

As a result of the emergence of these factors, one option in developing the national legal system, the emergence of the choice of the use of foreign legal models. However, Mochtar Kusuma-Atmadja explains that sometimes there are advantages side, but should still pay attention to obstacles to the use of foreign legal model has been done adaptation or in the form that has been changed according to conditions.²⁸

When examined from MPR Decree Number IV / MPR / 1999 on the Guidelines of State Policy of 1999-2004, the criminal law system should be able to reject foreign notions contrary to Pancasila to enter Indonesia, with standard parameters that is not contradictory With the vision of the nation's mission to implement Pancasila consistently in the life of society, nation and state.

Thus, in relation to the formation of future criminal law (*ius constituendum*) in the domain of intra-ASEAN trade, as a study of legal politics, currently has two main parameters, namely the Indonesian philosophy, in this case the Pancasila; And agreements that have been made among ASEAN members.

3. Conclusion and Recommendations

- a. Until now, Indonesia is not familiar with ambush marketing terms, both in Law no. 20/2016 as well as Anti-Monopoly & Unfair Competition Law. However, under the Penal Code, in particular Article 382 bis, there is a similar behavior with ambush marketing, which is based on the meaning of misleading the public view for the purpose of personal gain / business. However, if referring to the ratified Paris Convention, the same meaning as ambush marketing is also found in Article 10 bis verse (3) of the Paris Convention. So according to the author, ambush marketing can be qualified as a crime in the criminal law system in Indonesia.
- b. The formation of a criminal law politics against ambush marketing if associated with ASEAN Community 2015, the establishment of future criminal law (*ius constituendum*) in the domain of intra-ASEAN trade, as a study of legal politics, currently has two main parameters, namely the philosophy of -Indonesia-an, in this case is Pancasila; And agreements that have been made among ASEAN members. Recommendations for this research Immediately revoke the Presidential Decree Number 15 of 1997, and subsequently replace it with the Law-level regulation, and To conduct a more

²⁸*Ibid*

in-depth study on the possibility of a shift in criminal law system and criminal law politics as a result of the ASEAN Economic Community 2015.

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