

Ambush marketing to be prohibited

Two recent legislative amendments introduced measures to prohibit ambush marketing, ie. international conduct on the part of a person or company to obtain an unjustified promotional benefit from a sponsored event, such as sponsored sports or cultural events or other recreational activities.

The phenomenon generally referred to as "ambush marketing" occurs in the context of sponsored sports and other events, particularly such events attended by large numbers of spectators and/or participants, or events covered by live televised broadcasts. Ambush marketing has become a major threat to the attractiveness and commercial value of events sponsorship.

Sponsorship in South Africa, as elsewhere in the world, has become an important component in the promotion of a wide variety of public-oriented activities, including sport, cultural events and recreational and leisure activities. In fact, without sponsorships many sports and cultural events would not be financially viable, partly by reason of the competitive effect on spectator attendance by live television coverage, and partly by reason of the increased remuneration expectations of sports players and performing artists. Large sums of money are involved and, in South Africa, a sponsorship is often coupled to an arrangement that money also be made available for development teams to create training opportunities for persons from previously disadvantaged groups.

An event sponsor, or each of the different sponsors for that event, will usually be granted the **sole right** to display its trade mark at the venue of the event, or on the accessories provided for or used at the event. It is evident that, where there are more than one sponsor for a particular event, the different sponsors will usually be selected to supply different goods or services. It is unusual for more than one provider of the same goods or services to be awarded simultaneous sponsorships for the same event. The attractiveness to a sponsor is the unique exposure and marketing opportunity that it will enjoy, and the events organiser is usually contractually obliged to ensure that a sponsor is afforded such a unique marketing opportunity to the exclusion of its rivals.

The undermining practice of ambush marketing which has emerged internationally, including in South Africa, poses a threat to sponsorships and creates a variety of problems. It involves intentional conduct on the part of a person or company who is **not** a sponsor of an event, often a rival of the sponsor, to create a false or misleading impression of an official connection or association with the sponsored event, or with the organisers of such event,

where in fact no such connection or association exists. For example, an ambush marketer will "gate-crash" a sponsored event and set up a distribution facility for its branded goods or services at the venue of the event, and/or display its trade marks and other promotional material at the event or on the participants of the event, to be seen by the spectators attending the event or watching the event on television. Ambush marketing generally involves the unexpected appearance or display at the event, often in strategic or highly visible positions, of advertisements, promotional material or other matter or products featuring the name or trade mark of the perpetrator in such a manner as to imply or suggest, falsely, an official association or connection with the event or with the organisers of the event.

It is evident that the conduct of an ambush marketer does not usually constitute trade mark infringement, nor does it necessarily have the effect of diluting the trade mark rights of a legitimate sponsor. The unlawfulness is to be found in the fact that the ambush marketer seeks to interfere with or usurp the unique promotional position of the legitimate sponsor acquired on the basis of the sponsorship contract.

The first proposal to address this problem seeks to deal with the position under the Trade Practices Act, by way of the Trade Practices Amendment Act no. 26 of 2001.

Section 9 of the Trade Practices Act 8 of 1976 already prohibits certain advertisements, statements and the like in relation to the sale or leasing of goods, and to the rendering and provision of services which, directly or indirectly, are false or misleading in material respects. The Act also already creates offences in the event of contravention, and contains certain penalties in the event of conviction for such an offence. An amendment of section 9 is now proposed to provide that a false or misleading advertisement, statement and the like as envisaged in section 9 will include such advertisement, statement or the like which is intended, directly or indirectly, falsely to imply or suggest a contractual or other connection or association with any event or organisation by virtue of patronage or sponsorship.

The new provision probably does not extend the current ambit of section 9 but does make it clear that the false or misleading activity prohibited by the section will include activity which falsely implies a connection or association in the context of patronage or sponsorship.

The Merchandise Marks Amendment Act no. 61 of 2002, which came into effect on 17 January 2003, introduces into the Merchandise Marks Act, 1941 definitions of 'event' and 'protected event', and a new section 15A prohibiting the use of a trade mark in relation to a protected event in a manner calculated to achieve publicity for that trade mark so as to derive a special promotional benefit from the event, unless prior authority is obtained from the event organiser.

The concept of 'use' is defined to include visual or audible representation or reproduction of the work, or the use of the mark in promotional activities in a way intended to associate it with the event.

The concept 'protected event' is defined to mean a sports or other meeting or happening staged in public by an organiser, if financed to a significant extent by sponsorship, and which has been designated as such by the Minister (of Trade and Industry).

Increased penalties will also be prescribed. In the case of a first conviction a fine not exceeding R5 000 can be imposed, or imprisonment for a period not exceeding two years, or both. In the case of a second or subsequent conviction, these are increased to R10 000 and five years respectively.

These amendments demonstrate a resolve by Government to put in place effective mechanisms to address the undesirable interference in sponsorships by ambush marketers.