

Fair play – the ASA's role as referee in Ambush Marketing disputes

Although lacking the formal clout of a court of law, the Advertising Standards Authority of South Africa (the ASA) provides one of the most commercially-effective weapons within FIFA's anti-ambush marketing arsenal, at a fraction of the cost and time spent in pursuing the traditional legal route.

The ASA Self-Regulation System

South Africa is one of the many countries worldwide to favour self-regulation of the marketing and advertising industry, due to the cost-efficient, fair and accessible nature of the system. Self-regulation is carried out through the mechanism of the ASA, an independent body established and funded by organisations within the marketing and advertising industry, as well as media owners. These organisations are bound by the guidelines set by the ASA, namely the ASA Code of Advertising Practice and the ASA Sponsorship Code. Alleged breaches of the codes are swiftly and effectively adjudicated upon by the ASA, and errant marketers ordered to withdraw offending advertising. Because its members include all significant media owners, the possibility of suffering this and other penalties is a very real testimony to the might of the ASA.

The Advertising Code

In brief, the Advertising Code requires that advertisements meet certain criteria in order to be acceptable. These criteria include, for example, that advertising should be honest, responsible and not misleading, should not imitate other adverts, or exploit the advertising goodwill in the trade name, symbol, or advertising property of another, without permission.

The Sponsorship Code

While alleged breaches of the ASA Advertising Code could arguably form the basis of a complaint involving ambush marketing, the Sponsorship Code incorporates provisions specifically designed to address this practice, within the framework of South Africa's already beefy anti-ambush marketing legislation. The Code defines ambush marketing as follows:

"The attempt of an organisation, product or brand to create the impression of being an official sponsor of an event or activity by affiliating itself with that event or activity without having paid the sponsorship rights-fee or being a party to the sponsorship contract."

Specified sanctions are visited upon those parties whose conduct amounts to ambush marketing.

Of the Unacceptable Sponsorship Practices identified in the Code under the broad umbrella of ambush strategies, the most commonly used practices fall under the prohibitions relating to *Media Strategies*, and *Sales promotions before and after an event* (Section 10, Article 11). The former category prohibits non-sponsors from directly or impliedly creating an impression that its communications relate to a specific event, or creating an impression that it is an official sponsor of the event. The latter category prohibits non-sponsors from launching event-related sales promotions to give the impression of sponsoring the event.



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In addition, the Code provides that "imitation of the representation of other sponsorships should be avoided if this misleads or generates confusion, even when applied to non-competitive products, companies or events" (Section 10, Article 3). Although not dealt with under the ambush marketing provisions, the ASA Appeal Committee has held that the imitation provision does apply to ambush marketing by association.

Laduma: SAFA Scores an Early Goal

In recent years, a number of organisations have successfully relied on these provisions of the Code, halting ambush marketers in their tracks. The South African Football Association ("SAFA") is one such complainant which has effectively and astutely used the Code to establish precedent which will no doubt serve it well as the 2010 FIFA World Cup approaches, notwithstanding that the ASA did not address the merits of the matter in each case.

During the course of 2009, SAFA lodged three complaints against respondents which it alleged were seeking to create the impression that they were official sponsors of the national men's soccer team, Bafana Bafana. Hyundai was on the receiving end of the first complaint, which centred around an advertisement offering a promotional ticket to the FIFA Confederations Cup game between South Africa and Brazil, and featuring a Bafana Bafana player wearing the official kit. The advert appeared on the popular Soccer Laduma website, located at www.soccerladuma.com.

Basing its complaint on the unacceptable Sponsorship practices of the Code, SAFA alleged that the advert constituted ambush marketing by Hyundai, since the latter was not a Bafana Bafana / SAFA sponsor, regardless of it being a FIFA Confederations Cup sponsor.

Hyundai responded that it had engaged an agency to design the advert in conjunction with Soccer Laduma, and apologised for any confusion caused. It furthermore undertook not to flight the advert again, or any advert depicting a Bafana Bafana player or the Bafana Bafana trade mark without SAFA's approval.

The Directorate noted the ASA's established principle that, where an advertiser provides an unequivocal undertaking to withdraw or amend its advertising in a manner which addresses the concerns raised, the undertaking is accepted without considering the merits. On this basis, the Directorate indicated that it was satisfied with Hyundai's undertaking, subject to the latter withdrawing the advert within 7 days of the ruling and not using it again in future.

Metrorail was next on SAFA's list, the offending print advert having appeared in the Sowetan of 24 June 2009. The advert showed a group of soccer fans, clad in official Bafana Bafana merchandise and clutching FIFA Confederations Cup tickets, positioned in front of the window of a train. The tagline of the advert read: *"Metrorail. Getting South Africa to the Confederations Cup!"*

Although it addressed the merits of the matter in its response, Metrorail, like Hyundai, opted to take a prudent approach, apologising for its unintentional infringement of SAFA's rights and undertaking not to use the advert again in the near future. The Directorate found that Metrorail's undertaking adequately addressed SAFA's concerns, and accepted the undertaking on condition that the offending advert was withdrawn within the applicable time frames, and would not be used again in the near future.



McCarthy ValueCentre ("McCarthy's") followed in the contrite footsteps of Hyundai and Metrorail, indicating that the dealership responsible for the advert in question was unaware of the infringement involved, and had no intention of violating SAFA's rights or promoting 'sabotage' advertising in any way. The advert, which featured a McCarthy's promotion, was published in a Volksblad supplement of 19 June 2009, and depicted a Bafana Bafana player wearing the official kit. SAFA alleged that the advert amounted to ambush marketing, since McCarthy's was not a sponsor of Bafana Bafana. McCarthy's apologised for the advert which, it transpired, was a once-off supplement designed by an advertising agency on the instruction of a single dealership, and had not been subject to scrutiny beyond the level of the local dealership. McCarthy's indicated that the dealer concerned had undertaken not to publish the advert again, and undertook to ensure that all future advertising would not be published without proper scrutiny.

Countdown to the 2010 FIFA World Cup

Although at this stage there is no real certainty as to whether ASA will adopt a robust or a laissez-faire approach in dealing with ambush marketing complaints, my money is on the former. One thing is clear: sponsors and rights-holders such as SAFA have shown that they will not hesitate to call upon the ASA to act as referee in bouts with ambush marketers, which are sure to increase as the 2010 FIFA World Cup draws near. South African and foreign spectators alike will enjoy a front row seat to disputes played out in this arena, with the ASA's dispute resolution mechanism under the Sponsorship Code taking centre-stage.

Published in WOP, March 2010 edition

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