

International League of Competition Law

Works 2007 – question B "Ambush Marketing"

The situation in Switzerland

1. Introduction

The present report has been elaborated by some members of the Swiss Group of the LIDC. It attempts to give a clear picture of the situation prevailing in Switzerland with regard to ambush marketing. This picture is based on a report which a task force of the Swiss Group of AIPPI conducted by Dr K. Troller elaborated in August 2006 with regard to a project to legislate on ambush marketing in Switzerland.

2. Ad 1.1 to 1.6

In principle: No-

Switzerland has not enacted specific legislation aimed at expressly prohibiting ambush marketing. In this context it is interesting to note that in 2006 the Swiss Department of Economy (and not the Swiss Department of Justice, as this is normally the case) had proposed to amend the unfair competition law with a new article 3e *bis*, i.e. an article in addition to the article prohibiting unfair comparative advertising, with the following wording:

*"Acts in an unfair way who:
refers without sufficient reason in a parasitic way to third parties to their products,
works or achievements and thereby exploits their reputation."*

This addition to the unfair competition law had been proposed by the Federal Department of Economy upon request of UEFA, who wanted to protect the European Football Championship which shall take place in Switzerland and Austria in 2008 from being commercially exploited by parties who had not been expressly authorized to do so by UEFA.

The Swiss economic and legal circles were quasi-unanimously of the opinion that a general prohibition of a referral to third parties was not desirable in Switzerland and the project for amending the unfair competition law was dropped.

Besides political grounds (mainly that it is not the Swiss legislator's task to increase the income of an international organization like UEFA at the charge of the Swiss economy), there was the legal reasoning that a party trying to create wrongly the impression to be in a particular (sponsoring) relation with a sports event could be hindered from doing so based on the one hand on the general clause of article 2 of the Unfair Competition Act (UCA) or on the other hand, based on the specific clauses of

the UCA against passing off (article 3, lit. d), against deceiving statements (art. 3, lit. b) or against unfair comparative publicity (art. 3, lit. e).

Furthermore, all professional legal circles agreed that in the proposed amendment, the terms "refers" or "parasitic way" or "without sufficient reason" were not precise enough in order to reach the attempted goal.

The experts of the Swiss AIPPI Group had proposed a clause against ambush marketing limited to events in the fields of sport, of culture or of economy and aiming at protection the organizers of such events (and not the sponsors). The Swiss AIPPI Group suggested the following clause:

"Acts in an unfair way the party which offers merchandises, works or performances in connection with an event taking place in the fields of culture, sport or economy, and thereby gives the wrong impression to be in a commercial, legal or organizational relationship with the organizer of such event."

This suggestion has not yet been commented by any of the concerned political or economic circles.

Ad 2.1 to 2.2

Ad 2.1.

UCA protects the interests of three parties, namely the interests of competitors, the interests of consumers, and the interests of the general public. The first two are private interests, the third is public.

Ad 2.2

There are no specific rules to arbitrate ambush marketing conflicts. As a general rule, common sense shall be applied. There is no possibility to stop use of generic terms, and references to public events are allowed as long as they do not mislead the public.

More than often, athletes or teams have separate sponsors, different from the sponsor of the organizer. Therefore, the athletes and teams cannot be stopped from showing the logos etc. of their sponsors, and spectators and fans would know that the sponsors of the event are not identical to the ones of the teams or athletes. Therefore, organizers of events have no other choice than to accept double sponsoring unless they would risk to lose the best teams and athletes.

The entry tickets do – to the best of our knowledge – not contain any terms prohibiting the holder from displaying an advertisement. Such contractual obligations would most probably violate the personal freedom of the spectator and will hardly get enforced.

The deposit of a trademark confers no better position to the sponsor or organizer of an event. Trademark and copyright law will help against trademark or copyright infringement, but it will not help in an unfair competition claim against free-riders.

3. Ad 3

Ad 3.1:

The Unfair Competition Act contains several clauses which can be invoked to prevent unfair marketing practices. Simple parasitic behavior is not considered to be illegal to the extent that it is limited to take advantage in a general way of the reputation of someone or something and as long as this reputation does not enjoy the protection of a special law like trademark law or that such referral does not violate the private sphere of someone or the aura of his personality.

According to article 3, lit. a UCA is considered an unfair behavior the slandering of a market participant (competitor, customer or any other economic actor) and the goods or works or performances of such actors by making statements which are incorrect, deceiving or unnecessarily injuring.

According to article 3, lit. b UCA, is also considered to act in an unfair way the market participant who gives wrong or deceiving indications about himself, his enterprise, his goods, his works, his performances, his prices, his stocks, his sales methods or his business in general or who by doing so creates an advantage for third parties over their competitors.

According to article 3, lit. d UCA, it is unfair to take measures which create a risk of passing off of the goods, the works or the performances or the business of someone else.

Finally, according to article 3, lit. e UCA, the fact to compare in a way which is not exact, deceiving, unnecessarily injuring or parasitic, his person, his goods, his works, his performances or his prices with those of a competitor or, by acting in such a way, to create an advantage for third parties over as compared to their competitors, is considered to be unfair behavior.

Ad 3.2 and 3.3:

The remedies against such behavior are available to every economic actor, like competitors and consumers. They can choose to start a civil action for injunction and damages, and/or a criminal action leading to imprisonment or fine. No administrative sanctions are available.

Both, civil and criminal actions are judged by the ordinary courts.

4.

Ad 4.1:

In Switzerland, ambush marketing is not forbidden as such (compare above). Referring to an event within a certain radius is basically not considered to be unfair competition. Even if an event is protected by trademark registrations, the use of such a trademark is only protected against use as a trademark for the event, not against any references. E.g., if EURO 08 is protected as a trademark, a butcher may put an ad in the newspaper saying "I am going to sell frankfurters at every match at the EURO 08".

Ad 4.2:

The athletes themselves may most probably freely refer to the events. However, a third party may not use the name of the athlete. The latter may be protected by the rights to his personality.

Ad 4.3:

If the reference does not lead the public to the assumption that the advertiser is an official sponsor of the event, there is no unfair competition and no prohibited ambush-marketing.

Ad 4.4:

If the event designation is protected as trademark for all kinds of goods, such as pastry, food products, shoes or tee-shirts, etc. (most event organizers will organize such a protection), then the use of the logo will be forbidden by trademark law and since it is unlawful under trademark law, will at the same time constitute unfair competition.

Ad 4.5:

As ambush marketing as such is not deemed unfair and unlawful, there is no need for disclaimers.

Depending on the circumstances, a disclaimer might be helpful to clarify that the advertiser is not an official sponsor. If, however, the logo of an event is registered as a trademark then a disclaimer will not heal any illegitimate use of such logo.

Ad 4.6

No; any sponsor is free to congratulate its team/athlete for its performance.

Ad 4.7:

If the team/athlete is obliged by a contract with the sponsor to display the respective logo/name, there is unfair competition since the team/athlete is induced to break a contract or at least to act contrary to its duty.

Ad 4.8:

No, organizers or sponsors of an event cannot ban parallel events, even in the same town, region or country. It goes without saying, however, that logo and campaigns of parallel events have to differ clearly from the ones of the initial event.

Ad 4.9:

If available, anybody is free to purchase TV slots for advertisements around the broadcasting of the event.

Ad 4.10:

At present, this would certainly not be considered as unfair behavior.

5. Ad "Fundamental questions":

Ad 5.1:

This question has been answered above, under 3. Since there are no anti-ambush marketing provisions, this is not applicable in Switzerland.

Ad 5.2:

It has been argued by certain organizations that powerful sport associations like UEFA might use their power to enforce their exclusive rights. However, no such cases have been decided in Switzerland.

Ad 5.3:

Since there are no anti ambush-marketing provisions in Switzerland, no additional exclusive rights are created.

Ad 5.4:

In Switzerland, it is argued that economy is fostered by referring to such an event and that the event itself may be additionally promoted by such references as well. Many small and medium-sized businesses are not able to sponsor big events. Under such

circumstances it is neither desirable nor efficient to allow the organizer or a sponsor to internalize all positive externalities created by the event.

Ad 5.5:

In Switzerland, UEFA requested specific legislation. As an organizer, UEFA is interested to obtain exclusivity over the event. This does not exclude, however, that it supports its sponsors in maximising their visibility.

Ad 5.6:

In Switzerland there is a "Commission pour la loyauté dans la publicité", which can be approached by market participants who want to complain about the behavior of other market participants.

Geneva/Zurich/Lucerne, 19. April 2007

Dr Kamen Troller

Dr Lucas M David

Dr Gallus Joller