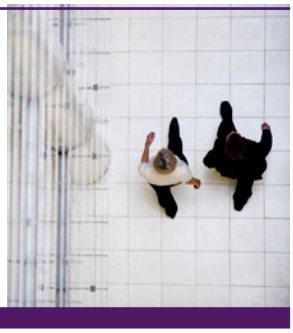
2 July 2009

Review

Intellectual Property and Marketing Services



RFU fails to tackle Fuller's rugby advertising

A recent Advertising Standards Authority (ASA) adjudication has tested whether official rights holders can effectively control and prohibit advertising from those without official sponsor status. The ruling will be of interest to advertisers and rights holders alike and raises important questions about the extent of the exclusivity enjoyed by official sponsors of events, as well as broader issues of intellectual property law and the right to free speech.

What are the limits to the ability of the organisers and official sponsors to prevent rival advertising around a popular sponsored event?

FACTS

The Rugby Football Union (RFU), which administers commercial sponsorship for the England rugby team brought a complaint through the ASA about an advertisement which had been run by Fuller's Fuller, Smith & Turner P.L.C. ("Fuller's") during the period of the Six Nations Championship. Fuller's is not an official sponsor of the team, but the RFU complained that the Fuller's advertisement gave the impression that it was and should be banned as a result.

The advertisement, for Fuller's London Pride ale, featured some rugby goalposts together with the copy "Once more into the breach dear friends once more", "Support English Rugby" and the strap line for which the Fuller's product is well known "Whatever you do. Take Pride". The RFU complained that the timing of the advertisement and the statement of support for "English Rugby" would be taken as a support for "England Rugby" (which is the designation used by the England Rugby team) and would further imply that Fuller's were supporting in an official capacity.

However, the ASA rejected the RFU's complaint. They relied on the following facts and findings:

- The advertisement had run in various forms for over a decade, without evidence of complaint or confusion;
- Advertisements by official sponsors have a number of characteristic elements – such as explicit references to the team, the logos and trade marks of the event and use of the words "official sponsor" or "official partner". The advertisements did not contain any such references and, in the absence of such distinguishing features, the public would not consider that the advertisement was from an official sponsor; and
- Fuller's could justify its claim to be a supporter of English Rugby (as opposed to "England Rugby") because it was a financial supporter of numerous aspects of the game of rugby played in England, supporting teams, tournaments and events.

The ASA's adjudication is available by clicking here:
http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_46480.htm

ANALYSIS

Whilst Fuller's emerged from the scrum victorious, the case raises very interesting and difficult questions for all those in the sports sponsorship sector. What are the limits to the ability of the organisers and official sponsors to prevent rival advertising around a popular sponsored event?

Rights holders in relation to sporting events obtain crucial financing by the designation of official partners and sponsors for different product categories. Because those rights are so valuable, they are also jealously guarded and the contracts by which official sponsors obtain their status

often carry with them obligations on the rights holder to protect the rights against infringers. Clearly, if rival advertisers can benefit from the event through well positioned advertising, they elevate their own status and dilute the exclusivity of those who have paid for the privilege of being an official sponsor.

But there must be limits. Major sporting events (and other events such as coronations, jubilees and general elections) attract massive publicity and evoke a general interest in the public which is a legitimate subject for discussion and comment, even if that comment is in the form of a commercial advertisement.

Where a rival advertiser uses or imitates the trade marks or other distinguishing signs and logos of a rights holder, or makes a misrepresentation that they are officially connected with the event, the natural recourse is to make a legal claim for trade mark infringement or passing off, seeking an injunction to stop the campaign. This was not possible in the Fuller's case since it was hard to point to any use of a trade mark or any attempt to confuse. This may have been the reason that the RFU opted for the alternative means of a complaint to the ASA.

The ASA oversees the voluntary Codes on Advertising Practice (CAP) relating to advertising. It should be said that the ASA recognises that it is not a legally qualified body and recommends that legal disputes are referred to the courts. Indeed, the ASA will normally refuse to take a case where the parties are already in litigation but, provided the complainant confirms that they are not presently in litigation, the ASA may still investigate. Some commentators have criticised this approach on the grounds that (i) the ASA does not have legal expertise but (ii) it has the de facto power to seek the removal of an advertising campaign, and (iii) its decisions are only subject to a very limited right of appeal (except through the medium of judicial review, which does not consider the merits of the decision but merely the way that the decision has been arrived at).

Whatever the merits of that debate, in this case, the ASA seem to have arrived at the correct decision. In the midst of the Lions tour and the Wimbledon tennis championships, on the eve of the Ashes series and looking ahead to the London 2012 Olympics the case is a timely reminder to official and unofficial sponsors alike about the potential limits to sponsorship rights.

FURTHER INFORMATION

If you would like more information about the decision, or about our clearance and advice services for advertising campaigns, or if you are a rights holder with concerns about protecting the exclusivity of your event, please feel free to contact the authors below.

Carl Rohsler
Partner, London
T: +44 (0) 20 7655 1662
E: carl.rohsler@hammonds.com

Robert Wegenek
Partner, London
T: +44 (0) 20 7655 1534
E: robert.wegenek@hammonds.com