

THAILAND

Dealing with Ambush Marketing

Ambush marketing is one of the emerging issues wherein the boundaries of permissible unauthorized event-based advertising and promotion are being tested. In recent years, there have been numerous occasions worldwide where conflicts have arisen between organizations that stage proprietary high-profile events and various unaffiliated companies which try to benefit from the popularity and excitement surrounding these events.

While those unaffiliated companies maintain that they have a right to make references to a high-profile event in their advertising and promotional materials as long as the public does not become confused that the advertiser is an official sponsor of the event, event organizers continue to argue that these

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types of "free ride" activities constitute a violation of their exclusive rights and are thus against the law. The crux of the problem is how to distinguish between permissible references to a proprietary event and those references which infringe on an event organizer's intellectual property rights, such as trademark rights. Ambush marketing can be seen as a violation of exclusive rights and/or unfair exploitation of goodwill of others, but can also be regarded as a form of free market activity, which ought to be permissible.

In Thailand, it is fair to say that current law is not sufficiently designed to handle ambush marketing issues. The permissible scope of event-based marketing has not yet been considered by the Thai Supreme Court, and there is no concrete rule or firm guidance in this regard. Nevertheless, there are several legal grounds for which it may be possible to formulate a claim against unaffiliated companies which seek a "free ride" on the public attention and interest around a famous proprietary event.

A trademark infringement claim would be one of the main options for claims against alleged free riders. Generally speaking, registered trademarks receive much broader protection than

unregistered rights under Thai law. Pursuant to Section 44 of the Thai Trademark Act, an owner of a registered mark has "the exclusive right to its use for goods in respect of which registration has been granted." The Trademark Act criminalizes "forgery" and "imitation" of registered trademarks as well as various acts of commercial dealing in forged or imitated marks.

According to the statutory language, one could try to argue that, at least in the case of "forgery" (i.e. an unauthorized use of the exact same mark as the registered mark), since the statute does not require that there be likelihood of confusion among consumers with regard to the source of the goods, any unauthorized use of a registered trademark in connection with the goods or services covered by the registration constitutes a trademark infringement.

It follows that even when a registered mark is mentioned in a referential manner in promotional materials, a trademark owner's exclusive right is deemed violated, notwithstanding the fact that such a reference may not create any confusion among consumers as to the source of the products or services being promoted or advertised or the relationship between an event organizer and an unaffiliated company.

However, Thai courts routinely take into account likelihood of confusion among consumers as a key element in a trademark infringement case. Thus, the court may still consider whether the free riders' unauthorized use of the registered trademark may mislead or create confusion among the public, even though this is not expressly required by the trademark statute.

Conversely, if the mark is not registered in Thailand, or is registered but not in connection with relevant classes of goods or services that can provide a basis for an action under the Trademark Act, the mark owner may pursue a passing-off claim under the Civil and Commercial Code (CCC) or the Penal Code. However, unregistered rights receive very thin protection in Thailand, and in the absence of registered trademarks, Thai courts tend to adopt a very conservative approach and subject the mark owner to strict proof. A civil passing-off claim may be brought under Section 420 of the CCC, a basic torts provision in Thai law which states that "[a] person who, willfully or negligently,



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unlawfully injures the life, body, health, liberty, property, or any right of another person, is said to commit a wrongful act and is bound to make compensation therefor."

Although a passing-off claim may be formulated under this provision, and despite Thai courts' generally broad construction of Section 420, the use of this provision has never been tested in the area of ambush marketing before. It is therefore difficult to predict how Thai courts may react to such a claim. In addition to a civil passing off claim, the Thai Penal Code provides a basis for criminal action. Pursuant to Sections 273-275 of the Penal Code, forgery, passing off, and various commercial dealings in forged or imitated marks which have been registered anywhere in the world are considered criminal offenses.

Despite the availability of legal grounds for event organizers to pursue a claim against ambush marketers, it would nevertheless be difficult to prevail in such a dispute given the current stage of the law. A major court decision or regulation would offer much-needed guidance on this issue in Thailand.

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