

Ambush Marketing : Denmark

Legal Background

In Denmark, there are no specific regulatory or law provisions covering the issue of ambush marketing; one of the reasons for this fact is very likely that so far, ambush marketing has not been a major issue as Denmark, being a small country, has hosted very few big sports events, sports events being the major subject of ambush marketing attempts.

Most issues concerning ambush marketing can in Denmark basically be addressed through the general laws regulating intellectual property, competition and marketing, mainly the Danish Marketing Practices Act (DMPA) and the Danish Trademark Act (DTA).

Not very many big sports events are held in Denmark – so the attraction for ambush marketers is low. The few large events hosted in Denmark have generally been very well branded by their sponsors and organizers. One of the larger single, recurring sports events – the cycling event Tour of Denmark – is sponsored by the national postal service, who has managed to brand its name – Post – as a part of the name of the tour “Post Danmark Rundt” – “Postal Tour of Denmark”. Few other sports events are big enough to attract any ambush marketers.

The DMPA holds provisions (Sections 1, 3 and 18) covering fair marketing practice, misleading advertising, derogation, misuse of goodwill belonging to third parties as well as the improper use of the characteristics of other businesses.

Section 1(1): Traders subject to this Act shall exercise good marketing practice with reference to consumers, other traders and public interests.

Section 3 (1): Traders may not use misleading or undue indications or omit material information if this is designed to significantly distort consumers’ or other traders’ economic behaviour on the market.

Section 18: Traders must not use business signs and similar devices that do not belong to them, nor use their own business signs in a manner likely to cause confusion with others.

Actions against ambush marketing will most likely be based on one or more of these provisions of the DMPA, although also actions based on the DTA provisions may prove to be successful, more specifically Section 4:

Section 4(1): The proprietor of a trade mark right shall be entitled to prohibit any person not having his consent from using any sign in the course of trade if

(i) the sign is identical with the trade mark, and the goods or services for which the sign has been put to use are identical with the goods or services for which the trade mark is protected, or

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(ii) the sign is identical with or similar to the trade mark, and the goods or services are identical or similar, if there exists a likelihood of confusion including a likelihood of association with the trade mark.

(2) Irrespective of the limitation in subsection 1 to goods or services being identical or similar, the proprietor of the trade mark shall be entitled to prohibit the use of the trade mark also in relation to goods or services which are not identical or similar if the trade mark has a reputation in this country and the use would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the trade mark.

(3) Use in the course of trade means in particular

(i) affixing the sign to the goods or to the packaging thereof,

(ii) offering the goods for sale, putting them on the market or stocking them for these purposes under that sign or offering or rendering services thereunder,

(iii) importing or exporting the goods under that sign or

(iv) using the sign on business papers and in advertising.

It is possible to obtain injunctions, compensation and damages both under the DMPA and the DTA. Furthermore, activities contrary to the provisions of the DMPA or the DTA are liable to legal sanctions such as issuing of a fine or in more serious cases even imprisonment. Also, the Bailiff's Court can quickly suspend an infringing activity – also when the activity is in the form of ambush marketing.

In general the requirements imposed by the DMPA on the proprietor of infringed rights are not as high as the “core” intellectual property laws, such as the DtA. Hence, the DMPA will often be the preferred tool also in relation to ambush marketing.

Case Law

Very few examples of ambush marketing have been heard by the Danish courts. The Danish Supreme Court did, however, in the NOMA-case issue a very important decision about the use of a third party trademark in advertising. The Court found that Sections 1 and 18 of the DMPA as well as Section 4(2) of the DTA had been violated since NOMA's well-known brand had been used in advertisements for a competition without the consent of NOMA. The Supreme Court did not expressly mention ambush marketing in its decision, but the same legal considerations would very likely apply in an ambush marketing case.

Most cases relating to sports are dealt with outside the courts and are normally settled as the sports organizations lack the money to fight the ambush marketers in court, especially as the damages awarded are in general not very high. Some sports organizations in Denmark have, however, rendered administrative decisions in a few ambush marketing cases.

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One of Europe's most active ambush marketers, Irish betting company Paddy Power, has also found its way to Denmark, however. In a World Cup qualification game between the Danish and Portuguese national teams back in 2012, the Danish player Nicklas Bendtner after scoring a goal displayed the upper part of his underwear with an advertisement for the Irish betting company Paddy Power; the Danish national team was sponsored by a competing betting company, Ladbrokes, who was understandably not amused. Bendtner was fined by The Danish Football Association, DBU, as well as by the European Football Association, UEFA; rumor has it that Paddy Power allegedly paid the fines for him.

In connection with the European handball championship tournament in Copenhagen earlier this year, a very large group of spectators wore identical t-shirts with a company logo. The European Handball Federation – in an attempt to protect its sponsors, but under loud protest by the spectators – had the speaker request the group to turn their t-shirts inside out so as to remove the logo.

Conclusion:

Ambush marketing in relation to sports is indeed a factor to reckon with also in Denmark, although the level of instances is still not very high. The authors believe that the present Danish legal regime is sufficiently equipped to deal also with these issues and that there is no need for special legislation in Denmark at this point in time.

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