



**NATIONAL ASSOCIATION OF BROADCASTERS
SUBMISSION TO THE PARLIAMENTARY PORTFOLIO
COMMITTEE ON TRADE AND INDUSTRY ON THE
MERCHANDISE MARKS AMENDMENT BILL**

(28 October 2002)

1. INTRODUCTION

1.1. The National Association of Broadcasters (“NAB”) is a body established by the broadcasting industry to look after the interests of broadcasters in South Africa. The NAB is the leading representative of the South Africa’s broadcasting industry, representing:

- all television broadcasters;
- the SABC;
- all commercial radio stations
- approximately 30 community radio stations;
- both the common and the selective and preferential carrier signal distributors; and
- a variety of businesses associated with broadcasting.

1.2. Last year the NAB made representations to this Portfolio Committee in respect of “needletime”, the royalty which will become payable for the public performance of sound recordings and the performances by actors on audio-visual fixations.

1.3. The NAB’s constituency has expressed concern in respect of the proposed amendments to the Merchandise Marks Act No 17 of 1941 which have been proposed in the Merchandise Marks Amendment Bill which was published in Government Gazette No 23958 of 18 October 2002. The NAB wishes to put numerous salient and critically important matters before the Portfolio Committee to ensure that to the extent that legislation is passed, it properly reflects not only the needs of event organisers and sponsors, but also the needs and the businesses of broadcasters in South Africa.

2. BACKGROUND

- 2.1. Broadcasters have no issue with the fact that marketing by way of intrusion also known as “ambush marketing” has the power to dilute the effect or brand power of sponsors on certain events. Broadcasters are aware that this is an area of growing concern.
- 2.2. At the outset, the NAB wishes to make it clear that its objections are not in respect of the principles which the legislation seeks to uphold, but rather in respect of the mechanism which it seeks to use in upholding these principles. Importantly, the NAB is concerned about the confusion which the legislation may create and the effect that the legislation may have on South African broadcasters if passed in its current form.
- 2.3. It is against this background, one of constructive engagement rather than a dismissive approach, that the NAB makes these submissions.

3. THE SUBMISSIONS

- 3.1. The Memorandum on the objects of the amendment are quite correct when they state that the global sponsorship market “amounts to millions and sometimes billions of rands”. There is also no doubt that the organisers of events should be able to protect their intellectual property. However, there is more than one reason why the sponsorship market has grown so remarkably in recent years. The first and most obvious is the fact that sporting events with international interest have grown in scale and scope beyond expectations and they have taken on a greater significance globally as time has progressed. However, what the Bill does not appear to take account of is that the growth in respect of these events, is also in large part, due to the “globalisation” of these events,

which has been made possible through broadcast media. In other words, without the advent of terrestrial and satellite broadcasting opportunities on a larger scale than ever before, the scale of the events would not be as remarkable and would not attract as significant amounts of interest or money to generate the same types of access. It cannot be contested in our view, that broadcasting activities play a major role in growing events. By inserting the new definition into the amendment, it creates more mischief than was probably ever contemplated.

- 3.2. While broadcasters have no difficulty with the acts relative to a consideration of ambush marketing in its broader sense, the insertion of the words “any broadcast of” at 1(a)(c) appears to have much wider ramifications than may have been intended.
- 3.3. Furthermore, the amendment makes broadcast rights secondary rather than ancillary to the “event” right in respect of any event. This should not be and is often not the case. It is in fact the broadcast rights themselves which give rise to the huge amounts of income generated by events. What the Bill does in effect, is to grade rights, so that sponsors of the event take significant precedence over, for example, the sponsors of a broadcast. This is clearly the case if an event is designated to be a “protected event”.
- 3.4. There is no copyright which subsists in an event itself. So, a cricket match played at the Wanderers does not in itself have as an essential element, a copyright element. Rather, copyright exists as a right which flows from that event in relation to various activities. This could be remedied by the introduction of what is referred to by some as an “arena” or a “stadium” right. The NAB understands that this practice is in place in certain South American countries. It is not a right which exists in North America, most of Europe, Asia or South Africa. It is our view that among

other things, what the amendment to the Merchandise Marks Act seeks to do, is to try to create some type of “arena” right, which gives a special right to the party hosting an event at that venue and that consequently, the party sponsoring that event will benefit too. This is a skewed interpretation and could cause significant and substantial financial prejudice to the broadcasting industry in South Africa.

- 3.5. The amendment does not indicate at all as to what is excluded and included in respect of any possible limitation which may be envisaged by the designation of an event as a “protected event”. There is also no clarity as to the meaning of the words “in relation to” which are stipulated at 15A(2).
- 3.6. By way of illustration, the effect of the Bill could be that if, for example, Bank “A” sponsors a sporting event, then Bank “B” may be prevented from sponsoring the broadcast of that event without the consent of Bank “A” or the organisers depending on contractual arrangements. This may occur in an environment where Bank “B” has obtained broadcast rights from the rights holder in and to the event. The direct effect of this is that if Bank “A” does not seek to pay for the broadcast rights to the event, then not only will any other sponsor or particularly, probably, any banking sponsor be unable to sponsor the event, but the broadcaster in question will not be entitled to raise broadcast sponsorships in respect of that event. It may well have acquired the right to broadcast, but without a sponsorship, these rights become unaffordable and to the extent that the rights were destined to generate profit for any broadcaster, they become unprofitable.
- 3.7. Sponsorship payable by broadcasters can be insignificantly small but valuable to a small community radio station or massive for a television

broadcaster. The legislatively imposed “restraint” can mean the difference between making an event available to the public or not by a broadcaster.

3.8. The NAB submits that in respect of matters which might be regulated in relation to broadcasting, this should be regulated between the rights holder and the broadcaster by way of contract rather than by way of legislation. A broadcaster is not able to broadcast a sporting event without obtaining the rights to do so. The contractual arrangement between the rights holder and the broadcaster can be substantive and exhaustive in relation to the regulation of matters related to “ambush marketing” or marketing by intrusion. Negotiations may stand or fall by the broadcaster’s commitment or otherwise to stamping out ambush marketing on its broadcast. However, by legislating in this regard, while the intentions may be good, certain absurd situations may occur where, for example, following the trajectory of a cricket ball or a soccer ball, using our previous example, a spectator wearing a Bank “B” T-shirt may be filmed, and the broadcaster may fall foul of the legislation. Matters which may be included in a contract for a broadcaster may include a limitation on the use of marks, a clear direction as to how a broadcaster should observe all regulations and instructions and a limitation on the association which a broadcaster may create for its sponsors.

3.9. Another absurd situation which may arise is that Bank “B” may be the sponsor of all radio sporting reports on a particular station for a particular period. During that year, it is conceivable that a specified event occurs sponsored by Bank “A”. So, for example, a radio announcement may say:

- “This sports report brought to you by Bank ‘B’”,

and then, item 3 of the report for example, may contain an item in relation to the “protected event”.

The announcer may during the broadcast say:

- “In the Bank “A” competition ...”

This type of example may well lead to an infringement of the legislation. It may even be that Bank “A” is simply a sponsor and not a named sponsor of a “protected event” but still, it may hold certain rights which limit the participation of other sponsors. The effect of this type of unforeseen circumstance could have a devastating effect on broadcasters.

- 3.10. The other possible difficulty which the legislation could present is that a broadcaster could, in the middle of a five year rights deal with a rights holder, find itself in contravention of the legislation because its broadcast sponsorship arrangement could be considered to be derogating from the rights of an event sponsor which in the current climate presents no difficulties, but which could become problematic once an event is designated as a “protected event”.
- 3.11. The proposed amendment is in our view, also anti-competitive. It relegates broadcasters in their rights position to a secondary role. The event organiser or sponsor is placed in a dominant position vis-à-vis a broadcaster and a broadcaster would not be able to negotiate fairly because broadcast rights have been made ancillary by the provisions of the definition of “the event”.

4. CONCLUSION

- 4.1. The NAB is of the view that matters related to broadcast should be deleted from the definition section of the amendment.
- 4.2. To the extent that this suggestion is not acceptable, it is suggested that it is closely circumscribed so that broadcast sponsorships as they currently exist do not become affected. A solution may be that an element of intention by broadcasters is brought into the wording where the broadcaster only falls foul of the legislation if it intentionally includes audio or audio-visual elements which promote a third party who seeks to obtain an advantage by intrusion.
- 4.3. The failure by this Committee to recognise the failure of the legislation to limit its impact and scope would have devastating effects on broadcasters and broadcast sponsors and the massive business that broadcast sponsorship currently occupies in South Africa.
- 4.4. While broadcasters recognise the rights of event holders and event sponsors, these rights must be seen as part of a basket of rights and not occupying a more significant position than other rights in the basket. The current legislation fails to do that and it is designed to prejudice broadcasters from successfully running their business.
- 4.5. As a side issue, it may well be that the enactment of this legislation forces all broadcasters to reconsider rights issues in relation to the conclusion of agreements with events holders which will in turn prejudice the entire rights package which event holders have. The result of this might be devastating and the NAB wishes to most strenuously persuade this Portfolio Committee that the legislation in its current form should not be passed. The NAB would be prepared to assist in the redrafting of the

necessary elements to attempt to obtain the desired effect and hopes that the Committee will not be led by certain events rights holders who seek to protect only their own domain while ignoring the domain and important commercial obligations and interests of broadcasters.

NAB
28 October 2002