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Parody and abuse

by Liézal Mostert

A long-running legal dispute in the USA involving the brand Louis Vuitton is interesting. Not only does it deal with parody as a defence to trade mark infringement, but it also deals with trade mark bullying.

What happened here was that Louis Vuitton sued a company called My Other Bag for selling cartoon-style tote bags bearing the name Louis Vuitton, claiming trade mark and copyright infringement. The case failed, with the alleged infringer successfully raising the defence of parody. The right to take the mickey is taken very seriously in the USA, it's up there with the right to bear arms! Louis Vuitton took this issue as far as the US Supreme Court but still lost, notwithstanding its impassioned plea that a defeat would leave it "vulnerable to widespread dilution through the production of imitation products marketed under the guise of parody."

Despite this, Louis Vuitton successfully contested the order to pay all of My Other Bag's legal costs, which eventually came in at close to USD1-million. The court rejected My Other Bag's claim that Louis Vuitton had been guilty of bullying and abusive behavior. In particular, it rejected the claim that Louis Vuitton had taken "advantage of its huge size and litigation budget to try to grind an obviously much smaller company into submission." The court said that the mere fact that My Other Bag was able "to cite a few isolated examples of arguable overreach" did not "provide a statistically significant basis to conclude that Louis Vuitton has engaged in litigation abuse on a systemic level."

The issue of parody is quite rare in intellectual property but it does come up from time to time. In the US case of LL Bean, the court said this: "Denying parodists the opportunity to poke fun at symbols and names which have become woven into the fabric of our daily life, would constitute a serious curtailment of a protected form of expression."

In Europe, there was the *Deckman* case, where the issue was alleged parodic use by a Belgian political party of a comic in which there was copyright. The court there said that in order for a parody defence to succeed, the following requirements need to be met: the parody must be original; it must target another work but it must also be noticeably different from it; it should involve humour or mockery; and it should not be contrary to the fundamental values of EU states.

In South Africa, we have a particular interest in the issue of parody in the context of trade marks because of the Constitutional Court's decision in the landmark case of *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another*.

This case involved parodic use of the famous Carling Black Label beer logo, in which the words Black Label were replaced with Black Labour. The court found for the satirist on the basis that there was no risk of economic harm to the owner of the beer brand, but Judge Sachs handed down a separate judgment in which he discussed the issue of parody in great detail.

The judge said that parody is "inherently paradoxical...original and parasitic, simultaneously creative and derivative." The mere fact that the parody has a commercial element is not decisive, because the issue is whether it's primarily commercial or primarily expressive. The lower court, the Supreme Court of Appeal, had "failed to appreciate why the parodic use of the

trademark in the milieu in which Laugh it Off operated was central to its critical project", and had given "far too little regard to the uniquely expressive weight of the parodic form used."

According to the judge, the parody doesn't have to relate to the product itself. It can refer to something else, like the power of branding: "The challenge is to the power of branding in general, as exemplified by the particular trademark." Nor is the parody's quality an issue: "The question is not whether the parody succeeds in hitting the mark...what matters is that it was part of a genuine attempt to critique the status quo in our society."

So much for parody. When it comes to trade mark bullying, South African courts may well also take the view that, whereas robust or even aggressive trade mark enforcement is fine, abuse of power is not. But sometimes the bad publicity that can go with aggressive enforcement takes care of the matter. We saw this during the 2010 FIFA World Cup, when the heavy-handed action of the authorities against a group of rather striking-looking Dutch women in orange at a match involving Holland (ejection from the stadium and even arrest) – seemingly to prevent perceived ambush marketing on the part of the beer brand Bavaria – made FIFA look bad.

More recently, one of South Africa's best-known politicians, Julius Malema (leader of the EFF party), took care of the threat issued by local musician (Cassper Nyovest) to enforce his trade mark registration for the trade mark #FillUp against another musician (Benny Mayengeni) by making the matter very public. Malema issued this public statement: "We will defend you ... (Benny Mayengeni), don't be scared of bullies who are threatened by talent...we have the best in town, let them bring it on."

In some things, South Africa likes to follow foreign trends. In others, it prefers to deal with things in its own way!

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