31 O 402/10

Announced: March 31, 2011

[redacted]

Court official

in charge of documentation

Regional Court of Cologne

VERDICT

IN THE NAME OF THE PEOPLE

With regard to the claim submitted by

Julius-K9 Partnership, represented by Mr. Gyula Sebő, partner, 2310 Szigetszentmiklós, Fás u. 11, Hungary

as plaintiff

Legal representative: the attorneys of Sosalla Attorneys-At-Law Rechtsanawaltsgesellschaft mbH, Südstr. 10 66368 St. Ingbert

against

Mr. M[redacted], Austria

as defendant

Legal representative: the attorneys of Dr. [redacted]

the 31th Civil Chamber of the Regional Court of Cologne presided by regional judge Dr. [redacted] and comprised of regional judges [redacted] and [redacted], in a written procedure, based on the documents submitted by March 3, 2011, judged the claim to be justified as follows:

1. Under penalty of a maximum fine of 250,000 EUR or a maximum custody of six months in jail if the defendant fails to comply with the resolution, the court hereby orders defendant to cease the sales and/or distribution of the dog harnesses in the territory of the Federal Republic of Germany as follows:

2. The defendant shall compensate the plaintiff for his total damages, which plaintiff has suffered as a result of defendant's actions committed in the manner defined in Section 1.

3. The defendant shall inform the plaintiff about the number of harnesses sold in the manner defined in Section 1 as well as about the income and profit thus gained. In order to identify the profit, the sales figures shall be compared to the itemized list of the transaction costs.

4. The costs of the court procedure shall be borne by defendant.

5. The verdict is provisionally enforceable, provided that a bond is deposited. The amount of the bond is 50,000 EUR in terms of Operative Clause 1 on the request for prohibition, 5,000 EUR in terms of Operative Clause 3 on the liability to provide information and 110% of the collectable amount in terms of Operative Clause 4 on the costs.

<u>Statement of facts</u>

The plaintiff is a Hungarian company, which has been distributing dog equipment since 1997, including the dog harnesses depicted below and distributed in Germany since 2000. The dog harnesses have been available all over Europe in various colours, forms of decoration and sizes, with cca. [redacted] units being sold per month.

- –- CHART (Julius K9 Powerharness) ------

Between 2004 and 2009, the defendant was distributing the plaintiff's products as his chief importer in Austria. In the meantime, he has begun manufacturing dog harnesses depicted in Operative Clause 1 of the verdict, and has been distributing them in Germany under the brand name DoxLock.

The plaintiff considers this activity as the infringement of his copyright-related rights.

The plaintiff requests the above

> **to be recognized.**

The defendant requests

> **the procedure to be suspended based on Section 1 of Article 27 of EuGWO, and the claim to be rejected.**

In defendant's view, the procedure should be suspended due to a related procedure ongoing in Austria and named below, claiming a case of pendency based on Section 1 of Article 27 of EuGWO.

The defendant disputes the unique nature of the plaintiff's dog harnesses in terms of competition law, claiming that the plaintiff's dog harnesses do not stand out of the competition environment. Furthermore, the design options for dog harnesses are limited due to technical reasons and the anatomy of dogs. Finally, it is not a case of imitation, since the opposing dog harnesses significantly differ from each other in several unique features.

The court takes into consideration the annexes attached as well as the correspondence between the parties on account of the further details of the legal dispute. The visual analysis of the opposing dog harnesses was performed in the course of the oral procedure on January 27, 2011. This was the time when the parties agreed to conducting a written procedure.

Beside the procedure conducted here, the plaintiff also filed a claim with the Vienna Trade Court (file number: 011 CG 225/09 i-5), in which he requested to cease the production, sales and distribution of the dog harnesses constituting the subject of the lawsuit in the European Community, based on the plaintiff's copyright-related rights. The plaintiff limited this claim in the course of the oral procedure conducted by the Vienna Trade Court on November 16, 2010 (see Annexes K24, K24a). In its resolution of February 25, 2011, the Vienna Trade Court rejected defendant's claim of February 8, 2011, requesting the above limitation of claim to be declared invalid and to conduct the legal dispute based on the claims originally submitted (see Annex K31).

Explanation

1. The court could pass a verdict in the framework of a written procedure based on Section 2 of Article 128 of the Judicial Procedure Code (ZPO), since the parties have agreed to that.

The conditions for suspending the procedure based on Article 27 of EuGWO are not given. The case of pendency as described in the law shall not apply. With regard to pendency, the chamber does not need to make a decision whether such case have applied before and is challenged by the chamber, since a national court may only pass a resolution on requests for prohibition on the grounds of competition law within the jurisdiction territory of the particular court; after the withdrawal of the request for prohibition based on copyright-related rights within the framework of the Austrian procedure, pendency shall not apply in any respect at all. The effect of the partial withdrawal was confirmed by the verdict of the Vienna Trade Court, dated February 25, 2011 (see Annex K31).

2. The claim is justified. The plaintiff may request the defendant to cease offering, marketing and distributing the dog harnesses constituting the subject of the lawsuit in the area of the Federal Republic of Germany, based on Sections 1,3, and Subsection 9a of Section 4 of Article 8 of UWG (Unfair Competition Act). The dog harnesses constituting the subject of the lawsuit are almost completely identical copies of the plaintiff's dog harnesses which are

unique by competition law and are generally known in the market. This may mislead customers with regard to the origin of these products.

The distribution of products manufactured by imitating products of foreign origin is considered as a violation of competition law based on Section 9 of Article 4 of UWG, provided that the imitated product has a unique character by competition law and if the special circumstances of a case of unfair imitation also occur. Therefore, there is a correlation between the unique nature by competition law, the manner and the intensity of imitation AND the special circumstances of competition law, so in the case of a higher degree of unique nature by competition law and a higher degree of imitation, the requirements are lower in terms of the special circumstances that constitute the basis for establishing the anti-competition nature of imitation and vice versa. Pursuant to Section 9a of Article 4 of UWG, the risk of misleading customers about the origin of the product qualifies as a special circumstance, and this condition applies here.

a) The plaintiff's dog harnesses, by nature, are unique by competition law, and, judged by the presented sales figures which certainly include German sales, have a proper recognition in the market. A product is considered unique by competition law if its specific design or certain features are suitable for calling the attention of the relevant group of customers to the origin or the special features of the given product. The same applies to such features that are technically pre-determined but can be optional or replaceable. In order to determine the degree of uniqueness by competition law, what we consider is not the analysis of the components, but the overall image and the degree of product awareness, which actually boosts the uniqueness that the market attributes to the given product.

Considering its specific design, into which the court had an insight during the oral procedure, the plaintiff's dog harnesses are genuine, they have a unique character by competition law, and the degree of their uniqueness is at least average by nature of the products. The plaintiff's dog harnesses significantly differ from the similar products of the competitive environment. While certain elements may be technically pre-determined, but the technical goal does not necessarily need to be obtained in the particular manner chosen by the plaintiff to design his dog harnesses, as the outlined presentation of the competitive environment clearly revealed. Therefore, the particular elements can be selected and replaced freely. The combination of the forms of the particular elements is more relevant in this case than the particular elements themselves: even if the particular elements are defined by the current level of technology and/or pre-determined by the anatomy of dogs, and thus are considered non-patentable, it shall not apply to the specific combination of these elements and the optical design of the final product, which are the sole relevant factor in this case. This is misinterpreted by the defendant, and consequently, the defendant's statements regarding the technical necessity are inherently false.

b) The visual analysis shows that the disputed dog harnesses, which constitute the subject of the lawsuit, are quasi identical. Considering their overall image, these items are identical. The assumed differences presented by the defendant are not spectacular if the products are placed next to each other. It is especially not spectacular for customers who do not normally view these products placed next to each other.

c) Due to the plaintiff's almost completely identical product design, this constitutes a case of generally identical image and, pursuant to Section 9a of Article 4 of UWG, will cause the relevant group of customers to be misled in terms of the manufacturer and the origin of the dog harnesses, which could be avoided as the competitive environment clearly shows that this product design is not the sole option available. The indication of the "Doxlock" brand name does not eliminate the risk of mistaking one dog harness for the other because, as a result of the high degree of imitation, the customers will be likely to assume business relations at least inasmuch as sales under the plaintiff's licence.

3. The additional claims presented in Sections 2) and 3) are also well-founded.

a) The 2nd claim aiming to establish defendant's compensation liability is possible and well-founded. The benefit of the establishment of the compensation value also applies, since the plaintiff, in lack of information, is unable to quantify the damage. The compensation claim is inherently well-founded as it is

based on Article 9 of UWG. Knowing the plaintiff's dog harnesses, the defendant sells almost completely identical copies, thus violating Article 3 and Section 9 of Article 4 of UWG, and the possibility of plaintiff suffering a damage cannot be excluded.

b) The demand for information defined in Claim 3 is pursuant to Article 242 of BGB. The bona fides principle requires the party acting in unfair competition to provide information if the beneficiary party, through no fault of his own, does not know his rights, is unable to reasonably obtain the information needed for wording and enforcing his claim, and the obligated party is able to provide the information in a simple manner. The conditions for this are given.

4. The resolution on the cost of the lawsuit is based on Article 97 of the Judicial Procedure Code (ZPO). The resolution on provisional enforceability is based on Article 709 of the Judicial Procedure Code (ZPO).

5. Case value: 250.000,00 EUR

Authenticated by:

court official

in charge of documentation