

6 U 77/ 11
31 O 402/10 LG
Cologne

Annex to the
announcement protocol of
November 25, 2011;
announced on November
25, 2011
[REDACTED] court official in
charge of documentation

REGIONAL HIGH COURT OF COLOGNE

VERDICT

IN THE NAME OF THE PEOPLE

With regard to the lawsuit filed by
Mr. M [REDACTED] Austria,

defendant and appellant

Legal representative: attorneys of [REDACTED]

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

plaintiff and cross-appellant

Legal representative: Attorney Sosalla, St. Ingbert

The 6th Civil Senate of the Regional High Court of Cologne
with regard to the oral procedure conducted on October 28, 2011

with the contribution of Members [REDACTED]

has **approved** as follows:

- 1.) The senate rejected defendant's appeal against Verdict 31 O 402/10 of the civil chamber of the Regional Court of Cologne.
- 2.) The costs of the appeals procedure shall be borne by the defendant.
- 3.) The verdict is provisionally executable.

However, the defendant may obviate the prohibition by implementing a deposit unless the plaintiff deposits the same amount before the execution begins. The amount of the deposit in terms of the prohibition is 50,000 EUR, and 20,000 EUR in terms of the reporting liability. The defendant may obviate the execution of the cost reimbursement claim by depositing an amount equal to 110% of the sum collectable based on the verdict, unless the plaintiff deposits an amount equal to 110% of the collectable sum before the execution.

4.) The decision is final, it may not be appealed.

Explanation

A

The verdict on the appealed decision is issued based on Subsection 1 of Sentence 1 of Section 1 of Article 540 of the Judicial Procedure Code (ZPO).

Within the framework of the appeals procedure, the defendant continues to request the action to be rejected and objects to the modification of the action after the oral procedure conducted on January 27, 2011, as well as to the contradictions related to Verdict 011 CG 225/09 i-5 of the Vienna Trade Court issued on December 18, 2009. The defendant claims that the plaintiff failed to prove that "his rights were infringed upon." The plaintiff was only dealing with muzzles in 2002, in fact. Furthermore, the dog harnesses marketed under the company name "Est Foxa" (erroneously identified as "Boxa" company in the first instance), the ones used by explorers Scott and Amundsen as well as other harnesses should also have been taken into consideration. Furthermore, it was an agency order, each variance was identified, the similarities are based on the anatomy of dogs and the assumption of business relations between the partners presented to the chamber is not correct.

The plaintiff defends the appealed verdict.

B

An appeal may be submitted, but it will not succeed in this case. Even considering Article 3, Article 4 (9a) of UWG and the statements presented during the appeals procedure, the dog harnesses marketed by the defendant still are dishonest, almost completely identical copies, justifying all legal actions filed against them.

I.

The verdict against the defendant based on the motion re-submitted by the plaintiff in a legal document dated February 8, 2011 is not erroneous in terms of procedural law just because this document was submitted subsequently to the oral procedure conducted on January 27, 2011.

The parties agreed on transferring to a written procedure during the oral procedure. Pursuant to Section 2 of Article 128 of the Judicial Procedure Code (ZPO), this procedure

is equivalent with an oral procedure. The re-submission of the motion does not justify to change the procedure form and summon further oral procedures. In fact, the presented legal approach would have better justified the plaintiff to motion for a "completely new subject matter of lawsuit" within the deadline defined by Section 2 of Article 128 of the Judicial Procedure Code (ZPO). However, it would not have succeeded, because: The newly-submitted motion does not contain a new subject matter of lawsuit, it is merely an explanation. Apart from the modified edition, it only differs from the original motion submitted in the statement of claim inasmuch that this time the images of the dog harnesses constituting the subject of the lawsuit were presented as the subject of the motion (instead of the defendant's dog harnesses), and the unchanged specimen specified in the motion was correctly represented visually this time.

II. Request for prohibition

The Regional Court recognized the effective request for prohibition, providing a proper and exhaustive explanation, which is approvingly referred to by the senate based on 9a, 8[1] and 3[1] of Articles 3,4 of UWG. The objections in the appeal only justify the following amendments:

- 1.) The dog harness bears a competitive character due to the verdict appealed. The complete description of the dog harness clearly shows that not all of the details are referable to the anatomy of dogs or the usage function (which is not claimed by the defendant either). The models presented with their environment in Annexes B48, B49 and B51 clearly prove the above, since they show a clearly different design.
- 2.) Defendant's complaint, according to which the dog harnesses offered by the plaintiff have already been distributed by other market players and the chamber got around the evidence of that, is not justified either. The only case when the plaintiff could not file an action on account of a deceptive presentation of the origin of the products would be if the dog harnesses had been distributed by a third party in Germany in such a large volume that the general public could already have formed an opinion about their origin. That is not the case at all based on the presented statements - and this has already been pointed out to the defendant during the appeals procedure.
 - a) The defendant claims that it is the dog harness of a French company "Boxa" and presents an image from the Internet website (Annex B13). This could neither be established during the first-instance procedure nor during the appeals procedure, since the defendant did not present that the harness was distributed in Germany. Neither is the excerpt from a magazine article submitted in Annex B12 an evidence of the above, since the magazine („Landbote Zürich“) was published in Switzerland. Furthermore, the picture and especially the online representation do not allow for an accurate identification of the details of the dog harness.
 - b) In Annexes B34-B45, defendant refers to such photos which depict dogs with harnesses during Scott and Amundsen's historic polar expedition in 1911-12, and in military deployment and later military operations in peacetime. The above fail to support the success of the appeal. The charts do not prove that the plaintiff took over these harnesses in a rate of 1:1. The particular

significance of competition law could only be disproved by such models that would have been available in the German market before the plaintiff's entry into the market. However, even if the plaintiff's models showed recognizable similarities to the dog harnesses used by the military, the claim would still be justified, because in that case customers would consider plaintiff's models as such harnesses that are not available in the market yet, but have (only) been used by the military.

- c) Defendant's other objection in the first instance was that plaintiff's product was a copy of the dog harness manufactured by the German company "Dogs and Horses". However, this statement fails to meet the requirements for factually supported evidence, since the actual presentation of the image of those alleged dog harnesses is missing. Furthermore, the German sales data that could potentially prove that the product has been widely known are also missing - even in the second instance. It has not even been specifically stated that the harness had ever been available in the German market.
- 3.) Furthermore, there is no sufficient evidence for the defendant's second-instance motion claiming that witness ██████████ could prove that the plaintiff was not dealing with dog harnesses in 2002, but only with so-called punching bags. This may be assumed since it is not at all disputed that the plaintiff has only been dealing with the dog harnesses constituting the subject of the lawsuit since 2009. Therefore, it does not matter that the motion is new and the senate cannot base the decision on Section 2 of Article 532 of the Judicial Procedure Code (ZPO).
- 4.) It is an almost completely identical copy. At the moment of purchase, the difference detectable only through the different labels shall be disregarded, since (as known by the customers) these labels are accessory elements that customers can select and replace at their own discretion. The aspects listed in the appeals procedure, beginning on page 13 of the explanation of the appeal, do not have any impact on the fact that (as already explained in detail by the senate during the oral procedure) the customers interested in buying dog harnesses believe that these are almost completely identical copies.
- The aspects listed in Subsections a) and c) are irrelevant for the question, since they do not relate to the solely decisive optical recognition;

The objection presented in Subsection b) is not correct, because when the appropriate harness sizes are compared, it can be clearly recognized that the handles are not fixed in a different manner;

The zigzag design mentioned in Subsection d) belongs to the numerous identical features of the harnesses. Public opinion does not attribute any significance to the fabric being light-reflecting;

The difference defined in Subsection e) is indeed real, however. Therefore the copies are not identical, but nearly identical. However, the variance cannot be noticed unless one is specifically looking for it. It is so insignificant that it cannot disprove the accusation of dishonest imitation.

The importance of the less rectangular breast belt referred in Subsection f) is insignificant, since it can neither be seen nor detected - as explained during the court procedure.

The statement that the dog harnesses constituting the subject of the lawsuit have a "more beautiful overall image" (as explained by the defendant in Subsection g) cannot be considered as a statement of facts, and the senate also refused to accept it due to the nearly identical impression.

- 5.) The statements of the chamber on the dishonest, almost completely identical copies explained in Subsection c) of Page 9 are correct as well. The fact that the defendant has altered the design in order to avoid the impending case of imitation is due to the circumstance that (as the market environment shows) dog harnesses suitable for grabbing and/or lifting the dog can also be designed in other forms - without a loss of functionality.

Therefore the chamber has ruled that the indication of the "Doxlock" brand on the dog harnesses constituting the subject of the lawsuit is not enough for distinction. The same applies to the verdict of the Vienna Trade Court, which was approved in the first instance and which specifically points out this consideration (see Page 10). It may be assumed that some of the interested potential buyers may be able to distinguish the brand. However, it may not be considered certain that they can (still) remember, when making their decision to buy, that plaintiff's products, which the buyers remember for their design and not for their label, are not identical with this brand. Furthermore, even the customers noticing the different labels are dishonestly misled as well. Due to the quasi identical nature of the products, (as pointed out by the chamber), customers are expected to assume existing business relations in spite of the different labels. These customers will not conclude that the manufacturer of "Dolock" harnesses copies the original harnesses without authorization, the similarity of the harnesses will probably make them assume that the original manufacturer has approved of them.

III.

Further claims

The action to establish the information and indemnification liability has grounds. Therefore, the senate's appeals verdict refers to the proper explanation of the regional court, to which they add nothing as the appeal did not contain any objection to that, either.

C

The resolution on the costs of the lawsuit was made on the basis of Section 1 of Article 97 of the Judicial Procedure Code (ZPO).

The resolution on the provisional enforceability is based on Section 10 of Article 708 and Article 711 of the Judicial Procedure Code (ZPO).


Based on Article 543 of the Judicial Procedure Code, the conditions for revision are not given. The senate applies solid legal principles for the particular case.

Pursuant to Subsection 2 of Section 4 of Article 12 of UWG, the case value of the appeals procedure shall be defined as 100,000 EUR, based on the defendant's presented income and property status and his intention to change the resolution.



Prepared by:

Signature

 court official
in charge of documentation