

Case Details

Case Details

National ID	17 Ob 2/11k
Member State	Austria
Common Name	17 Ob 2/11k
Decision type	Supreme court decision
Decision date	23/03/2011
Court	Supreme Court
Subject	
Plaintiff	Velux
Defendant	Unknown
Keywords	comparative advertising, trade mark, unfair commercial practices, unfair competition

Directive Articles

Misleading and Comparative Advertising Directive, [Article 3](#) Misleading and Comparative Advertising Directive, [Article 4, \(a\)](#) Misleading and Comparative Advertising Directive, [Article 4, \(d\)](#) Misleading and Comparative Advertising Directive, [Article 4, \(f\)](#)

Headnote

- (1) Comparative advertising may constitute an infringement of a trademark if the comparative advertising does not fulfil the requirements set out in Directive 2006/114/EC.
- (2) The indication of trademarks or other signs of competitors within comparative advertising is only permissible if it is necessary and appropriate to fulfil the purpose of objectively informing consumers about advantages of different products and services.

Facts

The plaintiff and defendant are both manufacturers of skylight windows and are offering them on the Austrian market, but the plaintiff has a market share of about 85 % and is known for his high-quality windows. The windows manufactured by the plaintiff have different measurements as those of competitors. The defendant started to produce special standard renovation windows with the same measurements as those of the plaintiff and advertised these products on the internet. The following text was included in the advertisement:

"Typical R***: Always the perfect solution. [...] Regardless of whether you want to replace an old R*** skylight window, a Velux skylight window or a window made to measure: With a renovation window of R*** you choose premium quality and sophisticated technique."

Part of the internet appearance is a presentation of a size chart with the note "Velux size identification" including a comparison with the defendant's products.

The plaintiff filed a cease and desist order based on trademark law (as the defendant used trademarks of the plaintiff).

The court of first instance dismissed the requested order because of the different writing of the trademark (in uppercase letters) which is apparent for average consumers; because of it, there is no danger of confusion.

The appellate court confirmed the decision of the court of first instance.

Legal issue

According to the court, it makes no difference for the identity of a trademark which letters (uppercase or lowercase) are used to display the trademark.

Further, the court made a reference to the ECJ decision C-487/07 (L'Oréal) saying that comparative advertising may also constitute an infringement of a trademark if the comparative advertising does not fulfil the requirements set out in Directive 2006/114/EC.

The court decided that in this case the defendant has violated article 4(f) of Directive 2006/114/EC (implemented into Austrian law by § 2a Unfair Competition Act) by using the reputation of the plaintiff's trademark in an unfair way to advertise for his own products. Under the present circumstances, it was not necessary for the defendant to state the trademark of the market leader (plaintiff's trademark) to communicate to the opposite market side essential information, as every skylight window may be replaced by the defendant's products.

In the opinion of the court, the defendant attracts attention unreasonably by using the reputation of someone else's trademark, which the defendant's products would not have attracted on their own.

Thereby it is not important that the trademark use is also violating article 4(a) and (d) of Directive 2006/114/EC on misleading and degrading comparative advertising.

The court determined that the indication for trademarks or other signs of competitors within comparative advertising is only permissible if it is necessary and appropriate to fulfil the purpose (stated in Directive 2006/114/EC) to objectively inform consumers about advantages of different products and services. In this case, the indication of the plaintiff's trademark was not necessary to advertise the products of the defendant.

Decision

(1) May comparative advertising also constitute an infringement of a trademark?

(2) Under which circumstances is the indication of trademarks or other signs of competitors permissible as comparative advertising?

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Result

The appeal was partly granted.