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Denmark: Editorial use or use as a trademark – the Commercial Court is overruled by the High Court

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Two years ago the Danish Maritime and Commercial Court (the Commercial Court) ruled in favor of the international flower distributing company Interflora in a case concerning a women's magazine's use of Interflora's famous slogan SIG DET MED BLOMSTER (in English SAY IT WITH FLOWERS) (case no. BS9384/2017). The magazine had used the sentence in connection with an article in the magazine and the Commercial Court found this use to be an infringement of Interflora's trademark rights. In April this year the appeal case (BS-51195/2018) was decided by the Danish Eastern High Court (the High Court) which found that the magazine's use of the slogan was not an infringement of Interflora's rights as the use did not constitute use as a trademark.

Interflora is the owner of a Danish collective mark which was registered in 1937 in relation to goods and services in various classes, including in class 31 (fresh flowers) and class 39 (delivery of flowers). Twice in 2017 the Danish women's magazine, Femina, featured articles in which the slogan SIG DET MED BLOMSTER (in English SAY IT WITH FLOWERS) appeared. The slogan appeared as a sort of headline in relation to collections of various products with different types of flower print, for instance clothing and bags.



The magazine argued that the use was not trademark use, but merely to be seen as use in an editorial sense and that the use was therefore not an infringement of Interflora's trademark rights.

As a further defense, the magazine argued that SIG DET MED BLOMSTER (in English SAY IT WITH FLOWERS) had become a generic term since the phrase was used in various connections – also in other magazines in editorial contexts. As a consequence of this use, it was argued that SIG DET MED BLOMSTER (in English SAY IT WITH FLOWERS) did not serve as an indicator of goods and services originating from Interflora.

Interflora on the other hand argued that the use of the slogan in the magazine would be perceived as a recommendation or an advertisement in relation to the products displayed in the article. It was argued that these products would therefore get an unfair advantage by riding on the coattails of Interflora's trademark and the goodwill connected thereto. Interflora argued that the use of the slogan was consequently to be considered as commercial use and use as a trademark and therefore constituted an infringement of Interflora's rights.

In the decision from 2018, the Commercial Court found the use of the slogan in the magazine to be an infringement. In this regard the Commercial Court found that it did not matter that the magazine did not receive any financial compensation from the producers of the products displayed together with the slogan, or that the selection and display of the products was an expression of a journalistic and editorial choice on the magazine's part.

The decision was appealed to the High Court which agreed with the Commercial Court that SIG DET MED BLOMSTER (in English SAY IT WITH FLOWERS) due to the long term use and high knowledge in the relevant public, was well-known in relation to sale and distribution of flowers. The High Court furthermore agreed that SIG DET MED BLOMSTER (in English SAY IT WITH FLOWERS) had not become a generic term and that the slogan therefore was to be considered as distinctive. The High Court also found that since the publication of the magazine was commercial, the use of the slogan in this connection, would also be considered commercial.

However, contrary to what the Commercial Court had found, the High Court found that the actual use of the slogan could not be considered use as a trademark which would infringe Interflora's trademark rights.

The High Court underlined that even though the magazine had used the slogan in connection with the display and publicity of various products, these were not products marketed by the magazine itself and the magazine had apparently not received any financial compensation for displaying the products in the magazine. Furthermore the editorial use of SIG DET MED BLOMSTER (in English SAY IT WITH FLOWERS) in relation to the products shown, which all had flower prints, would not be perceived as an indication that the products originated from Interflora or that there was an economic link between the products and Interflora. Furthermore the actual use did not appear to take unfair advantage of Interflora's trademark or goodwill related thereto or to be damaging to its distinctive character or reputation.

The decision is considered to be good news for the publishers who had been concerned that if the editorial use of the slogan in question would have been considered a trademark infringement, this would have been a restriction of the freedom of speech. In this regard it should be noted that the High Court did not state that use of trademarks and slogans in editorial connections in general will never constitute infringements, but merely that the specific use in question was not an infringement.

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