

# Kluwer Trademark Blog

## Portugal: Injunctions against “low-cost” perfumes with comparative lists granted.

João Paulo Mioludo (CMS Rui Pena & Arnaut) · Tuesday, March 1st, 2016

The Portuguese market has been recently overrun by new brands and stores of “low-cost” perfumes. Their business relies on the idea of selling low-cost versions of the original perfumes, identified only by the olfactory families; the business model implicitly and explicitly presupposes that such perfumes are marketed as corresponding to the bestselling perfumes, in terms of quality and fragrance. Also, the prices are several times lower than the price of the original perfumes.

Examples of those brands and stores are EQUIVALENZA, EKYVAL or YDENTIK, among others. The low-cost brand names are self-explanatory of the concept behind this business, especially in the Portuguese and Spanish markets.

How can you choose a perfume in one of these stores? Perfumes are identified by numbers, therefore it is almost impossible to know which is the fragrance of your preference.

Trademark owners became aware that their trademarks were used in comparative lists and/or correlation tables, through which the numbered perfumes are compared, or matched, with the trademarks of the original perfumes – a situation much like the one underlying the June 2009 judgment of the ECJ in the matter *L’Oréal v. Bellure*. Such lists were, in some cases, given to the consumers. In other cases they were exhibited in the stores, together with the perfumes, however, in the large majority of the cases, the employees are specifically instructed to avoid providing the lists to the consumers. According to the investigations carried out in Portugal, it was possible to understand that the lists were kept hidden for personal consultation or in the computers.

Several injunctions were filed before the Intellectual Property Court, as the trademark owners sustained that same practices constituted trademark infringement, unfair competition and illicit comparative advertising.

The IP Court mainly rejected the argument of trademark infringement, as it sustained the idea that the consumer is not misled or induced into error when he chooses to buy a “low-cost” perfume.

However, it has sustained that the comparative lists, whose existence was proved, do not show the comparison of the essential characteristics of the perfumes, but only a direct correspondence to trademarks. Quoting the aforementioned *L’Oréal* decision, the IP Court concluded that comparative advertising is admissible when the comparison respects one or more essential, relevant, verifiable and representative characteristic of the goods, among which one can include the

price, but not to present goods or services as being imitation or reproduction of a trademark or commercial designation.

The IP Court has also sustained that the parties are in direct competition, as they sell identical goods. The “low-cost” perfumeries behavior (use of comparative lists), by offering to the consumer in alternative to the trademark perfumes, a “low-cost” solution with lower prices (sometimes ten times lower), is contrary to the standards and the honest practices of the economic activity of the respective agents. Furthermore, it constitutes an undue use of third parties trademarks, susceptible to origin a fraudulent diversion of costumers and business.

The IP Court has accepted the arguments of illegal comparative advertising and unfair competition and all injunction proceedings were granted.

Generally, the “low-cost” perfumeries were condemned to refrain from using in their business activity the name of the Plaintiff’s or their trademarks with the purpose of comparison with their own goods, including references that “they are the same”, “equivalent” or “similar expressions”; they should also refrain from using and exhibiting any comparative list with their own perfumes and the Plaintiff’s trademarks; they were forbidden to use the Plaintiff’s trademarks by any mean, namely in websites and promotion brochures. The Defendants were finally condemned into a penalty payment in case of infringing the Court’s decision.

The main court actions are still pending and running their normal course of action, and final decisions are expected later this year.

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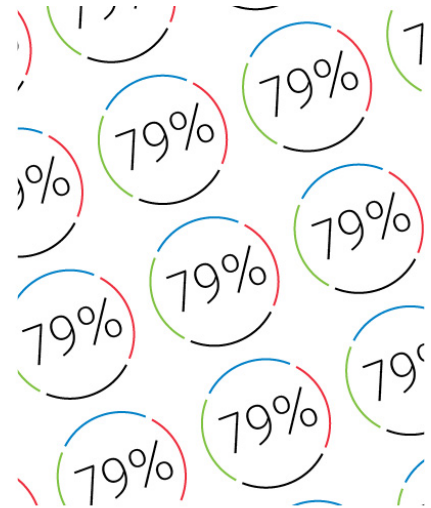
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