

# Kluwer Trademark Blog

## Austria: Reseller's duty to provide information on the origin and distribution networks also applies to cases of illegal parallel imports – but the exception proves the rule

Sascha Jung (IPJ) · Tuesday, April 5th, 2016



For those who were unsure whether the duty of a reseller of imported goods to provide information is limited to cases involving unlawfully copied goods and thus does not encompass unlawfully distributed original goods the Austrian Supreme Court (“the Court”) recently provided a clear answer ([decision of 17.11.2015, 4 Ob 170/15a – Markenparfums](#)).

In the decision at issue, defendant distributed plaintiff’s original perfumes in Austria outside plaintiff’s distribution system. Defendant was not able to prove that such original perfumes had been put on the market in the Community under plaintiff’s trade mark by plaintiff or with his consent. Thus, injunctive relief was granted. Plaintiff however also wanted to obtain details about defendant’s suppliers and claimed the right to be informed about the origin and distribution networks with respect to all original perfumes at defendant’s disposal according to Section 55a (1) of the Austrian Trademark Act.

Defendant argued that the right of information solely refers to cases where the infringing goods are no original goods, but illegally copied goods featuring another’s trade mark. The Court pointed out that the applicable Section 55a (1) of the Austrian Trademark Act is based on Art 8 (1) of the Directive 2004/48/EC on the Enforcement of Intellectual Property Rights and both provisions solely require the **infringement of a trade mark right**, respectively of an intellectual property right. **In which way** such infringement occurs is **of no relevance**. Thus, even if the infringing goods are **original** goods, the right of information is **not precluded**.

This, however, was not the end of the story. The right of information is still subject to a **justified and proportionate request** of the plaintiff. According to the Court such proportionality was missing. Of course plaintiff had a reasonable interest in disclosure of defendant’s suppliers. Plaintiff’s main goal, however, was to stop defendant’s supply with exhausted (and thus lawfully tradable) original perfumes. Since plaintiff’s resellers were not allowed to provide plaintiff’s goods to distributors outside plaintiff’s distribution system it is obvious that plaintiff, after such disclosure, would **enforce** defendant’s supplier to not supply defendant with plaintiff’s original

goods anymore – and this could cause a likelihood of market foreclosure.

A likelihood of a market foreclosure itself is not sufficient for denying the right of information. However, in the present context plaintiff's interests were simply not worthy of protection – contrary to cases of copied goods or where there is no distribution system which is capable of restricting competition. Furthermore the Court took into consideration that plaintiff was able to gather information about defendant's supplier also from its own contractual partners, that plaintiff did not reveal its distributions channels and that defendant infringed plaintiff's trade mark rights for the first time with no serious economic consequences for plaintiff.

Summing up the above findings, the right of information on the origin and distribution networks also applies to **original goods** for which the exhaustion of trade mark rights did not occur. Such right of information however can be precluded due to **lack of proportionality**. This is the case if the infringement (i) takes place **for the first time**, (ii) had **no serious impact** on the trade mark owner's economic position and if furthermore (iii) the disclosure of the suppliers could cause a **likelihood of market foreclosure** with respect to **original goods for which the exhaustion of trade mark rights did occur (which makes the goods freely tradable)**.

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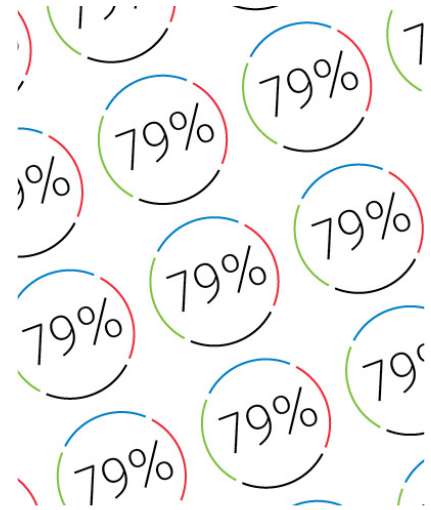
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