



BELGIUM
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Country Report

BELGIUM

October 2002

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| 1. Topic | Comparative and Disparaging Advertising |
| Who: | Leonidas vs. Ovidias: Belgian chocolates & hedonism |
| When: | 18 June 2002 |
| Where: | Court of Appeals, Brussels |
| What happened: | <p>A publication in the economic section of the newspapers “La Libre Belgique” and “Le Soir”, in the fall of 1999, about the company Ovidias, accompanied the launch of a new distribution and packaging method for pralines (in canned boxes through distribution automats). One of the quotations of Ovidias in the newspaper article concerned the reason for the choice of the brand “Ovidias”. The brand referred to the Roman poet Ovidius, promoter of the philosophic stream that aims at maximising pleasure, hedonism. This quotation was immediately followed by the remark that this had no link whatsoever with the Belgian chocolates Leonidas.</p> <p>Competing praline producer and distributor Leonidas considered that the interview was disparaging advertising within the meaning of the Trade Practices Act. The consumer could deduct from the declarations of the Ovidias managing director that the chocolates Leonidas has nothing to do with hedonism and consequently would not give pleasure.</p> <p>The Court of appeals first decided whether or not the newspaper articles were advertising under the Trade Practices Act. The Court decided that the articles were advertising since Ovidias had invited the journalists for a talk and had freely provided the information for the publications, information about the new method of distributing pralines. Both texts were undoubtedly commercially favourable for Ovidias and were made to endorse sales of the</p> |

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| | <p>chocolates.</p> <p>The Court ruled that the advertising was not disparaging. The litigious explanation by Ovidias was only made because of the similarity in sound between Ovidias and Leonidas in an effort to clarify that both are distinct trade marks from different companies. One cannot deduct from this phrase, according to the Court, that product that are offered under brands that are not deducted from the poet Ovidius, such as Leonidas, are not reconcilable with hedonism. A side remark by the Court was that it is hard to imagine how the chocolates consuming public would have a message from references to the concept “hedonism”.</p> <p>Leonidas also alleged that its’ competitor derived undue advantages within the meaning of the Trade Practices Act from the advertising through reference to Leonidas by mentioning Leonidas. The Court equally dismissed this claim because Ovidias had a valid reason to refer to Leonidas. What Ovidias pointed out in the text is that a range of chocolates was offered in the sales points that were created as those of Leonidas.</p> |
| Why This Matters: | The mere mentioning of the name of a competitor, beyond a comparing context, is allowed since objective reasons are found to do so. No necessity seems to be requested by the Court for making such explicit reference. |

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| 2. Topic: | Passing off, misleading comparative advertising, use of name, advertising for pharmaceuticals and for cosmetics |
| Who: | Pfizer vs. Air Technics Benelux ATB – “Viagra vs. Viacrème” |
| When: | 27 May 2002 |
| Where: | President of the Court of Commerce, Brussels |
| What happened: | <p>Viacrème is a gel for use by women to help creating orgasm and is distributed by ATB. A press conference of 7 December 2001 is the official launch of Viacrème and the subsequent presentation in media, helped by ATB, is Viacrème as the “Viagra for women”.</p> <p>Pfizer is the developer of i.a. the erection drug Viagra. Pfizer went to court to stop the further commercialisation of the product under the name Viacrème. Pfizer claimed, i.a., passing off, misleading comparative advertising, illegal use of the name Viacrème and infringement of the rules on advertising for drugs and cosmetics.</p> <p><u>Passing-off.</u> Passing off is the behaviour pursuant to which a company obtains a competitive advantage by saving on development and promotion</p> |

costs through excessive copying of a competitor.

ATB considers that its' advertising for Viacrème is not comparable with the ads for Viagra and therefore cannot be passing off through excessive copying because of the different target groups (women vs. men). There is no passing off of clients, promotion remains necessary. The reference to the blue pill and to Viagra in the media is the result from the freedom of journalism and fantasy of the public, beyond ATB's control. Further to ATB, the companies do not compete and – as both drugs are definitively associated with sexual pleasure, a reference to Viagra is unavoidable.

Pfizer contests all of these defences: Pfizer considers this defence as false and remarks that in the press files, websites and interviews, ATB makes the link itself to the blue pill and Viagra. Also the use of Viagra as metatag in the HTML code of Viacrème website shows the unfair exploitation of Pfizer's goodwill with Viagra. A metatag is a digital name card, attached to the website and through which the site is recognized and found by search engines on the internet. Passing-off is also possible without a context of competition, as the competitive advantage is not the only element to be considered. There is also passing-off in case of a seller who does not have to do the slightest effort to distinguish his own accomplishment from the copied seller. ATB anticipated that its' sales would boost by depicting Viacrème as the other side of Viagra, for women without even mentioning that both products are produced by different companies. This exploitation of the goodwill and repute of Pfizer and of its' product is undue and shameless.

The President of the Court of Commerce ruled on 27 May 2002 by referring to an English judge who once wrote: "I will not try to define pornography, but when I see it, I know it is". This instinctive form of reasoning appeared to be the adequate one for the President in the delicate field of passing-off. He found the use of the words Viagra and blue pill in the press file, in an interview and on the website of ATB as a school example of passing-off. He ordered ATB to cease and desist forthwith these practices. The restraining order is accompanied by a daily penalty.

Misleading and prohibited comparative advertising. ATB suggested that Viacrème is the female counterpart of Viagra. This would be misleading for the consumer, according to Pfizer, while he thinks that he buys a product from Pfizer when he purchases Viacrème. Therefore, the ad is misleading; confusion can rise about the identity of the supplier or his activity. Further, the references were not necessary as there exist several products on the market with the same function as Viacrème (several creams), without there having been campaigns launched for those products that compare with the one of Viacrème. ATB also omitted any comparison with those products; "comparisons that however are evident if one wants by all means to make comparative advertising".

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| | <p>ATB defended that the impression has not been wilfully provoked that both products are made by Pfizer. Such impression is unavoidable. Although both products are entirely different (gel versus pill, destined for women versus for men), both have sexual connotations. ATB alleged that the current society gives a lot of attention to the human body and realising all potentials inclusive sexual and that such topics are no longer taboo. Allusions to Viagra that is the only drug to date for erection problems is therefore normal.</p> <p>The judge ruled that the advertising is indeed misleading as Viacrème is wrongfully depicted as the counterpart of Viagra and with the subtle creation of the impression that both drugs have the same producer. The President continued that the comparison is illegal because the products are not similar as satisfying the same needs; they are not substitutable.</p> <p><u>Distribution of drugs without license.</u> ATB claims that Viacrème is only a cosmetic product and that the Health Ministry had approved the product as such, a license was not necessary. Pfizer qualifies the product as a drug, as it claims to have an immediate effect on the sensitivity of parties of the human body by work of vascular processes. The presentation towards the public is Viacrème as a drug. With reference to a 16 April 1991 ruling of the European Court of Justice (matter Upjohn), a product is a drug if it is presented as a drug through reference to organic or physiologic functions. The judge followed this claim.</p> <p><u>Wrongful presentation of Viacrème as cosmetic product.</u> A royal decree defines cosmetics depending on the function of a product: to clean, perfume, change the outlook, protect maintain the shape or correct the small of the body. Viacrème accomplishes none of those functions. The qualification “cosmetics” therefore is false, according to Pfizer. This claim was dismissed by the President.</p> <p>ATB appeals against this stop order.</p> |
| <p>Why this matters:</p> | <p>The borderline between necessary references that create a degree of goodwill that is passed-off and illegal passing-off is not easy to make. A second borderline that is drawn in this matter is between interchangeable products and products that satisfy different needs and the consequences that this has on the possibility to compare in advertising.</p> |

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| <p>3. Topic:</p> | <p>Illicit chain sales</p> |
| <p>Who:</p> | <p>Euphony Benelux vs. Belgacom</p> |

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| When: | 27 June 2002 |
| Where: | Court of Appeals of Antwerp |
| What happened: | <p>Euphony gives telephone time to customers and advertised with lower tariffs than those of Belgacom. Euphony commercialises its' services through a network of sales people who attract clients and who look for further sales people themselves.</p> <p>Belgacom sued Euphony on 9 February 2001 before the President of the Court of Commerce of Antwerp. One of the grounds was the exploitation of an illicit sales practice: chain sales. An illicit chain sale is the making of a network of professional or non-professional sales people, pursuant to which each seller expects more advantages through the enlargement of the network that he causes than through his sales to consumers.</p> <p>On 31 May 2001, The cease and desist Judge ordered the stop of the practices of chain sales. Euphony appealed and alleged i.a. that Belgacom abuses its' dominant position by approaching Euphony clients directly through contact information that only Belgacom enjoys, which equally constitutes an infringement on the privacy rules and the telecom act.</p> <p>On 27 June 2002, the Court of Appeals confirmed the illicit character of the chain sales network as it was clearly more advantageous for sellers to enlarge the network than the very low commissions on communications that clients make.</p> |
| Why This Matters: | <p>An interesting part of the judgement deals with the evidence that a telecom operator needs to have when price comparisons are made and the degree of information to be given to the consumer.</p> <p>The court found, that a normally informed consumer knows that any telephone operator has different tariffs with each time different tariff units depending on the time and distance of phoning. Comparisons do not need to mention all tariff structures, all tariffs of the competitor. What matters is that the comparison is fair; this is not the case if a special advantageous tariff is compared to a competitors' regular tariff.</p> |

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| 4. Topic: | Advertising bans for medical doctors and competition law |
| Who: | Medical doctors vs. Board of Medicine Doctors |
| When: | 2 May 2002 |

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| Where: | Supreme Court (“Cour de Cassation”) |
| What happened: | <p>In July 1999, the provincial Board of the Medicine Doctors Bar of Limburg interrupted the license of two German doctors because their name was mentioned in a brochure of the company “Laser Aesthetic, alias Transhair”. The doctors cooperated with this company for hair transplants in a hospital in the city Hasselt.</p> <p>The Board decided that the doctors had made illicit advertising for their practice by soliciting patients. They had provoked the impression of the public that their medicine activity was a commercial enterprise for them. In the eyes of the Board, this is not in line with the honour and dignity of the profession. The disciplinary sanction was interruption of their license.</p> <p>The defence was that the sanction is restrictive of competition against the Competition Act. The Board dismissed this defence by mentioning that the prosecution of advertising does not limit the possibility for medicine doctors to exercise their profession: <i>“Medicine doctors practice medicine and not commerce and therefore the rules on economic competition cannot apply without limits or nuances.”</i> In June 2001, the Board of Appeals of the Medicine doctors confirmed the interruption sanction. One of the sanctioned doctors (interruption for 21 days) appealed before the Supreme Court (“cour de cassation”).</p> <p>In a ruling of 2 May 2002, the Supreme Court decided that medical doctors who pursue an economic purpose in the long run, even though they are not merchants and in stead have a public function in the society. A doctor therefore is “a company” within the meaning of Article 1 Competition Act. Although the fact that the legislator has given a regulatory task to the Board of Medicine Doctors, this Board nevertheless remains an “association of companies” within the meaning of Article 2 Competition Act. Consequently, the Board can make decisions that infringe competition. The decisions have to be in line with the requirements of the Competition Act.</p> <p>A prohibition of advertising has to be annulled if the measure has rather as purpose or effect to be beneficial to certain material interests of doctors or to maintain an economic system.</p> <p>The Supreme Court is of the opinion that the Board has pronounced the professional sanction on the basis of the general prohibition of advertising without precisely evaluating the general interest, namely public health and the balancing of this with the right to compete.</p> |
| Why this matters: | The ruling of the Supreme Court obviously has a coercive precedent value on the limits of professional bans on advertising in the so-called “free and intellectual service professions”. Clear precedent on the applicability of Competition Law in matters of professional ethics. |

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| 5. Topic: | Price Indication – Misleading advertising and sales promotion for PC's |
| Who: | PC Micro Center vs. Fujitsu Siemens Computers |
| When: | 19 April 2002 |
| Where: | President of the Court of Commerce, Brussels |
| What happened: | <p>On 20 December 2001, Fujitsu Siemens Computers was summoned to appear before the President of the Brussels Court of Commerce.</p> <p>Fujitsu had advertised in the magazines Humo, Knack, PC Magazine, Bizz and others with the theme “remarkable sportsmen”. The prices did not contain the environmental tax (recubeltax) and mentioned wrong VAT tariffs on costs for leasing.</p> <p>According to Fujitsu, the environmental tax was well included in the advertising as separate item and the really interested purchaser would easily add the taxes, since “a child can do this without pen and paper”. As for the leasing, this is not an obligatory cost because leasing is not obligatory.</p> <p>The President of the Court of commerce held that the price indication was illegal as it was not included in the total price. VAT has to be inserted in the leasing cost.</p> <p>A stop order was pronounced.</p> |
| Why this matters: | The decision is a strict application of the rule that prices have to be all-inclusive. Separate mentioning of additional costs have to be carefully screened. |

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| 6. Topic | The use of products of competing ad agencies to show the “book” of a creative person and to approach prospects |
| Who: | Two Belgian advertising agencies |
| When: | June 2002 |
| Where: | President of the Court of Commerce, Brussels |
| What happened: | An ad agency used recent and successful creations of a competitor to show the “book” of a new creative director and attached these campaigns in a |

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| | <p>mailing to clients and prospects.</p> <p>The defence was that it is customary in the ad sector to show a “book” with past creations of particular persons who contributed to the campaigns.</p> <p>The President of the Court of Commerce ordered the cease of this practice on the grounds that this use was an illegal passing-off.</p> |
| Why this matters: | <p>It is customary in the sector to present new senior hires to prospects and clients. As part of the résumé of the persons involved, reference to accomplishments in the career are entirely normal. The border line is that this communication cannot serve as a tool to market an ad agency with the products of a competitor.</p> |

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| 7. Topic | Copyright – prior authorisation of reproduction - |
| Who: | SABAM vs. SCHLEIPER |
| When: | 10 May 2002 |
| Where: | President of the Court of First Degree, Brussels |
| What happened: | <p>In December 1998, Schleiper edited a brochure ‘Schleiper Design’ with reproductions of works of Matisse, Chagall, Dufy and others.</p> <p>In January 1999, Schleiper edited a folder with reproductions in small font of Magritte, Delvaux and Lebasque.</p> <p>On 20 January 1999, SABAM, the Belgian Society of Authors, Composers and Publishers informed Schleiper that no prior authorisation for this use had been granted. In June 1999, SABAM sued Schleiper for copyright infringement and claimed payment of damages.</p> <p>Schleiper is a company that also sells frames. It had obtained authorisation earlier to reproduce these works for sale of frames. It has regularly purchased reproductions from editors and now has the right to show and advertise with these products (imaging the objects sold earlier by Schleiper) without new authorisation being necessary.</p> <p>The printed and copied posters, copies of the original works, so became commercial products and the reproduction, not of the original product directly, but of its’ image from an example out of an authorised series cannot qualify as a new reproduction on a distinct support.</p> <p>SABAM admits that Schleiper has regularly acquired reproduction rights</p> |

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| | <p>from editors, but Schleiper had to obtain a new authorisation from the authors for reproduction on a different support for making a publicity brochure of Schleiper. Schleiper is not the assignee of the rights for other modes of exploitation than those of the mere posters.</p> <p>The purpose of the brochures is certainly to promote the sale of frames that are produced by Schleiper and the sale of reproductions that Schleiper had acquired.</p> <p>Schleiper invokes the 4 November 1997 European Court of Justice ruling in the matter Dior vs. Evora. In this referenced matter, Dior France is the owner of trademarks for a number of perfumes and also owns the copyright on the packaging of these perfumes. Evora exploits under the name of the daughter company Kruidvat an important chain of cosmetic products and supermarkets. Kruidvat distributes the Dior products through parallel imports. In Christmas 1993, Kruidvat made a sales promotion for Dior Eau Sauvage, Poison, Fahrenheit and others and reproduces the packaging of these perfumes on folders. Dior found that this advertising was not in line with the image of its brands.</p> <p>The claim of Dior was dismissed in appeal and the matter went to the Supreme Court in The Netherlands. Evora alleged that the trademarks and copyrights could not be invoked since this would be infringing the European Treaty. The Hoge Raad referred the question to the Court of Justice and to the Benelux Court of Justice for trademarks. When products that have trademarks are put into commerce in the European Union by the trademark owner or with his consent, then a seller has not only the right to resell, he also has the right to use the brand for advertising purposes that is done for the commercialisation of these products at a later stage.</p> <p>The Judge therefore decided that Schleiper has the right to reproduce the acquired reproductions for modes that are usual in the sector at hand – brochures and folders – so that he can announce to the public the sale of the products (the reproductions) at a later stage, without having to pay new rights.</p> |
| Why this matters: | This is an interesting application of the extinction rule in the field of copyright. |

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| 8. Topic: | Regulation – Self-Regulation - Advertising & Promotions directed towards Children |
| Who: | Council for Consumption within the Ministry of Economic Affairs |
| When: | 27 September 2002 |

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| Where: | Belgian State Gazette – Official Journal – Moniteur belge |
| What happened: | <p>The Council for Consumption within the Ministry of Economic Affairs published a recommendation on 27 September 2002; the recommendation dates from 27 June 2000 and concerns Advertising preceding the Children Festivities/Parties.</p> <p>The Council for Consumption is an advisory body that consists for members who represent consumers organisations and organisations of producers, distributors and retailers. The recommendation of 2000 pertains at determining periods preceding the children festivities.</p> <p>1. No premature ads or promotions.</p> <p>Professionals are urgently requested not to conduct promotions or ad campaigns as defined under 2., neither prior to 1 November, preceding the festivities of Saint Nicolas and Christmas, nor more than 6 weeks preceding Eastern.</p> <p>Promotions that use the physical presence of St Nicolas or the Christmas men do not start before 1 December.</p> <p>2. The promotions and ads concerned are promotions that use the Saint Nicolas, the Christmas man or the rabbit for Eastern, as well as ads outside the sales point, in folders, in the press, in audiovisual media and in e-mails that target children from primary schools or from kindergartens and that refer directly to the Saint Nicolas-, Christmas or Eastern parties and which were not requested by the children.</p> <p>Not concerned are the products themselves and the promotion material in the points of sale as well as the sites on the internet.</p> |