

# **Arguments that could – and should not – have been presented by the Claimant**

## **1. Patent infringement**

### *1.1 Marketing of products on the web-site*

The marketing of the Respondent's products on its web-site does not constitute an infringement in DK based on the granted patent according to the DPA section 3, as argued in the appendix 4, 5.1. Neither should it be considered as an infringement in FI, NO or SE if the patent applications are granted in these countries according to PA section 60 and section 3.

Several cases in the European court of Justice ("ECJ") has stated that the mere marketing of a product on a web-site doesn't mean that the marketing is "directed to" all markets where the web-site can be reached.<sup>1</sup> The ECJ stated that the marketing has to be "directed to" the specific market where the Claimant claims its rights. The ECJ stated some examples of what can constitute a direction to a specific market. One of the examples was to use a top-level domain name for a specific country.<sup>2</sup> In the case at hand the Respondent only has one web-site, which has the top-level domain name .com. The top-level domain name .com is considered to be neutral according to the ECJ.<sup>3</sup> Since the Respondent only has this top-level domain name it cannot be considered that the marketing on the Respondent's web-site is directed to the markets in DK, FI, NO or SE based on the top-level domain name.

The ECJ stated that a way to direct the marketing to a specific market is to make it possible for consumers to see the web-site in the language of the market or to pay for products in the markets currency.<sup>4</sup> The Respondent's web-site is in English and there are no options to change the language on the web-site to any of the Nordic languages. Nor is it possible to get information or buy products in any other currency then US-dollars. Therefore the Respondent has not directed its marketing to the markets in DK, FI, NO or SE by making it possible to gain information on its web-site in the relevant languages or with the relevant currencies for these countries.

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<sup>1</sup> Joined cases C-585/08 and C-144/09, p. 74 (Pammer and Hotel Alpenhof) and C-324/09, p. 64 (L'Oréal SA v. eBay International AG).

<sup>2</sup> Pammer, p. 83.

<sup>3</sup> Pammer, p. 83.

<sup>4</sup> Pammer, p. 84.

WIPO also has stated that the criterions stated above should be considered when determining the commercial effects in member states where a sign is used.<sup>5</sup> These criterions can be used to determine if a marketing has been “directed to” the specific market also in the case at hand. The same conclusions should be drawn by consulting these criterions as has been drawn above.

The above stated leads to the conclusion that the Respondent’s marketing is not “directed to” the DK, FI, NO or SE markets due to the facts that the Respondent has not made any efforts to direct its marketing to these markets, in accordance with the ECJ statements. Neither has the Respondent shown any intent or acted negligent in the marketing of the products to the markets in DK, FI, NO or SE through their web-site. Thereby the Respondent cannot impose any claims based on the Respondents marketing based on DPA section 3 and section 57, and if patents are granted in FI, NO and SE it cannot base any claims on PA section 60 and 58 either.

### *1.2 Preparation to infringe*

The Claimant argues that the Respondent has taken preparatory actions to infringe the Claimant’s patent in DK by entering an agreement with the SE company Hagfjäll and by delivering the Respondents products to the company Hagfjäll, in accordance with appendix 4, 5.2.

Initially, it has to be stated that the Respondent cannot in any way infringe the Claimant’s patent in DK due to the facts presented in 5.2 which states that the Respondent’s product is another innovation than the Claimant’s.

If the Tribunal should come to the conclusion that the Respondent’s product is within the scope of protection of the Claimant’s patent, the Respondent is or has nevertheless taken any actions of preparation to infringing the Claimant’s patent in DK.

According to the Claimant the Respondent has entered the agreement with the company Hagfjäll with the intent for Hagfjäll to put out the products out on the market in DK which would be a violation of the Claimant’s patent in breach of DPA section 3.

The Respondent has entered the agreement with Hagfjäll in order for Hagfjäll to distribute the Respondent’s products in Europe. The Respondent has had the strong confidence that Hagfjäll would distribute the products to countries where the products are not infringing anyone’s rights. The Respondent turned to one of Europe’s largest distributors of mountaineering gear

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<sup>5</sup> WIPO, Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet, art 3.

which has a good reputation, therefore it should be considered that by doing so the Respondent could rely on that the company Hagfjäll would not distribute the products in a way that would infringe anyone's rights. Therefore the Respondent cannot be considered having the intent or in any case had been negligent when contracting with the company Hagfjäll.

Secondly, the Claimant means that the Respondent has had the intent for Hagfjäll to put the protected products out on the DK market when delivering the products to Hagfjäll. As stated above the Respondent has not had the intent required to be liable for preparatory acts to infringe the Claimant's patent when delivering the products to Hagfjäll.

The Respondent and the company Hagfjäll never discussed exactly to which countries Hagfjäll was supposed to deliver the products to. Since the Respondent, as stated above, had the confidence that Hagfjäll was such a well-known and skilled distributor and that Hagfjäll as such company had the knowledge of what kind of products were protected where. Therefore. The Respondent should be considered to have taken necessary measures to ensure that the agreement and the delivery of the products would not come to infringe anyone's rights.

Thereby, it should be stated that the Respondent has not taken any actions with the intent to infringe the Claimant's patent in DK in breach of DPA section 3 (1) (i) and the Tribunal can therefore not impose any injunctions based on the DIRECTIVE 2004/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the enforcement of intellectual property rights art 11 and the Swedish Penal Code chapter 23 section 1 and 2.

## **2. Unfair business practice**

The Claimant argues that the Respondent has made copies of the Claimants product and that the consumers due to this risk being confused about the origin of the products in breach of the Norwegian Marketing Control Act ("NMA") section 6 and section 25,<sup>6</sup> and that the Respondent is exploiting the Claimants economic efforts unfairly in breach of NMA section 30.

### *2.1 Misleading products*

Firstly, the claims based on NMA section 6 and section 25, in the appendix 4, 7.1, will be addressed. These sections aims to protect consumers from being distorted in their economic behavior or to protect them from making economic decisions which they would not otherwise have made.

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<sup>6</sup> Appendix 4, 7.1.

The Claimant argues that the Respondent has made products that look so much alike the Claimant's that the reasonably well-informed and reasonably observant consumer would believe that the products actually are produced by the Claimant. When determining the risk the whole situation has to be taken in to account. For instance the way the products are made available and the surrounding information has to be reviewed.<sup>77</sup> The Claimant means that by using the function of Google AdWords for the search "tougkvas" and the fact that the braiding of the ropes looks similar to the Claimant's, the consumers are lead to believe that the products presented on the Respondent's web-site are produced by the Claimant.

The Respondent's ropes differs when it comes to the shininess of the ropes due to the use of nylon instead of polyester as the Claimant is using. This is clear already from the presentation of pictures on the web-site. The fact that the braiding looks the same cannot in itself be considered misleading of the origin of the ropes.

The web-site where the ropes are presented has the Respondent's business name clearly presented both on the top of the web-site and in association with each rope presented on the web-site. There is no mentioning of the Claimant's business name or any references made to the Claimant's products on the web-site.

When using Google AdWords with the Claimant's business name "tougkvas" the link to the Respondent's web-site is posted under a clear heading stating "sponsored links". No references to the Claimant's business name is made in or in association the link. The link only presents the URL to the Respondent's web-site and the Respondent's business name.

Therefore, it should be concluded that the products presented on the Respondent's web-site are not misleading the consumers to believe that the products are originating from the Claimant. Thereby it can be concluded that the Respondent is not acting in breach of NMA section 6 and section 25.

## *2.2 Copying of Claimant's products*

The Claimant argues that the Respondent is copying the Claimant's products and thereby unfairly exploits the Claimant's economical efforts in the appendix 4, 7.2.

The Respondent is not copying the Claimant's products due to the fact that the Respondent is using nylon in the product instead of polyester. As argued above in 5.2 the Respondent has created a new product based on general knowledge and the fact that the Claimant's patent

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<sup>77</sup> MD 2005:12 (Swedish Match).

became public. The Respondent has by itself invested money in developing the product to come up with the rope that its now producing and selling.

The Respondent's products differ from the Claimant's products as described above also by the looks the ropes.

Therefore, it should be concluded that the Respondent is not unfairly exploiting the Claimant's product and that the looks of the products the Respondent is producing is not leading to a risk of confusion amongst the consumers. Thereby the Respondent's marketing is not in breach of the NMA section 30 and can thus not suffer any consequences based on this.

### **3. Negotiations**

The Respondent contest that it has acted disloyal in conjunction with the negotiations as Claimant argues according to the appendix 4, 9. The Respondent has negotiated with care and has not led the Claimant to act to his detriment in conjunction with the negotiations.

As a main rule each party bears its own costs and acts at its own risk when entering into negotiations with another party. The Claimant as a commercial actor shall be considered to be fully aware of this. Furthermore each party has the right to end negotiations at any time as long as no clear duty can be referred upon that party.

The Respondent was thus free to end the negotiations in December 2013 and did not have to state any reason for ending the negotiations, which the Respondent however did, which was "to pursue other priorities for the moment". It is however irrelevant for which reason a party ends a negotiation. According to common basic principles of contract law the line between permissible and impermissible behavior is clear. As long as there's a chance - albeit small - that the negotiations could have resulted in a contract being concluded between the parties, there is nothing that can be considered as disloyal in the Respondent's behavior. The Respondent contests that it has taken the Claimant's time and resources without there being any real chance that the negotiations would result in a contract. The Respondent had a real intention of entering into a deeper co-operation with the Claimant which the entering into the NDA also clearly shows. As the Claimant has spent time and resources, the Respondent has done the same.

The Respondent moreover wishes to emphasize that no clear obligation other than "discussions regarding a possible future business co-operation" can be referred upon the Respondent. The Respondent claims that the Tribunal declares that the Respondent has acted in a loyal way in connection with the negotiations. Since the Respondent has acted in a loyal way and

with care in conjunction with the negotiations, the Claimant shall not be entitled to compensation amounting to one hundred thousand (100.000) Euros.

#### **4. Sanctions**

##### *Penalty of fine*

The Claimant argues that the Respondent's use of the trade mark "mountain safe" and the business name "tougkvas" in Google's referencing service "AdWords" has affect the functions of these according to the appendix 4, 6.10.1.

Since the Respondent's use of the trademark "mountain safe" and business name "tougkvas" in Google's referencing service "AdWords" does not affect any of the functions of the trademark or the business name the Claimant's claim for prohibition by a penalty of fine of one hundred thousand (100.000) Euro to use the trademark and business name shall be dismissed.