



Free riding and denigration

搭便车和诋毁

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There are two kinds of people, those who do the work and those who take the credit.

Try to be in the first group; there is less competition there.

世上有两类人，一类人完成工作，另一类接受荣誉。努力成为第一类人，那里竞争会少一点。

Indira Gandhi
英迪拉·甘地

The legal frame

法律架构

The Marketing Practices Act

营销行为法

- *Misleading and undue marketing*
- 误导性及不适当营销
- *Section 3. Traders may not use misleading or undue indications or omit material information if this is designed to significantly distort consumers' or other traders' economic behaviour on the market.*
- 第3条。如若交易者的目的是明显歪曲消费者或其它交易者在市场上的经济行为，交易者不得使用误导性或不适当指示或省略重要信息。
- *(2) Marketing whose content, form or method used is misleading, aggressive or subjects the consumers or traders to undue influence, and which lends itself to significantly distorting their economic behaviour, is not permitted.*
- (2) 不允许在市场上进行所使用的内容、形式或方法具有误导性、攻击性或会使消费者或交易者受到不当影响并且有可能明显歪曲其经济行为的营销。
- *(3) Where factual statements are made, these must be capable of being substantiated by documentation.*
- (3) 但凡作出事实陈述，这些陈述必须能够通过文件予以证实。
- *(4) The Minister for Economic and Business Affairs lays down more detailed regulations for specific forms of marketing which, pursuant to EU regulation, are considered in any circumstances to be unfair in respect of business to consumer matters.*
- (4) 经济与商务部部长就根据欧盟条例在任何情况下被视为在企业对消费者事务方面系属不公平的特定营销形式制定了更为详细的法规。

The legal frame

法律架构

- **5.-(1) Comparative advertising means any advertising which explicitly or by implication identifies a competitor or products or services offered by a competitor.**
- 5.- (1) 比较广告是指明确或含蓄地标识竞争对手或由竞争对手提供的产品或服务的任何广告。
- (2) *Comparative advertising, cf. subsection (1), is permitted under this Act when the following conditions are met:*
- (2) 当下列条件得以满足时，根据本法案允许进行第(1)款中的比较广告：
- (i) it is not misleading,
- (i) 不具有误导性，
- (ii) it concerns products or services meeting the same needs or intended for the same purpose,
- (ii) 涉及满足相同需求或旨在用于相同目的的产品或服务，
- (iii) it objectively compares one or more specific, relevant, verifiable and representative features of these products and services, which may include price,
- (iii) 客观地比较了这些产品和服务的一个或多个特定、相关、可验证和有代表性的特征，其中可以包括价格，
- (iv) it does not create confusion in the market, between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, products or services and those of a competitor,
- (iv) 不会在市场上造成广告主与竞争对手之间或广告主与竞争对手的商标、商号、其它区别标记、产品或服务之间的混淆，
- (v) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, products, services, activities, or circumstances of a competitor,
- (v) 不损害或诋毁竞争对手的商标、商号、其它区别标记、产品、服务、活动或情况，
- (vi) for products with designation of origin, it relates in each case to products with the same designation,
- (vi) 对于具有原产地名称的产品，在每种情况下均涉及具有相同名称的产品，
- (vii) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products, and
- (vii) 并未不公平地利用竞争对手的商标、商号或其它区别标记的声誉或竞争产品的原产地名称，以及
- (viii) it does not present products or services as imitations or replicas of products or services bearing a protected trade mark or trade name.
- (viii) 所展示的产品或服务并非带有受保护商标或商号的产品或服务的仿制品或复制品。

The core provision

核心条款

The General clause

一般条款

Article 1

第1条

Good marketing practice

良好营销行为

- *1.-(1) Traders subject to this Act shall exercise good marketing practice with reference to consumers, other traders and public interests.*
- 1.- (1) 受制于本法案的交易者应当参照消费者、其他交易者和公众利益实施良好营销行为。
- What does it mean, that we have a general clause, and how do we use it?
- 一般条款对我们来说意味着什么，我们应如何使用它？

Case law under the general clause 一般条款项下的判例法

- Product imitation
- 产品模仿
- Trade dress
- 商业外观
- Other free riding
- 其它搭便车
- A general clause of loyalty
- 一般忠诚度条款

Product imitation # 1: the coffee pot
产品模仿#1: 咖啡壶



Juwel



Royal Classic 5090 Oval Krom

Product imitation coffee pot

产品模仿 – 咖啡壶

- The Supreme Court found (ruling in case U 2012.256 H):
- 最高法院认为（案件U 2012.256 H中的裁定）：
- There is no doubt that the original products have such distinctive character that they are protected against product imitation by the Marketing Practices Act § 1.
- 毫无疑问的是，原产品具有显著性特征，而这些特征是受到营销行为法第1条中针对产品模仿之规定的保护。

There is a likelihood of confusion between the claimant's and the defendant's thermos, and some of them are almost slavish imitations.

原告与被告的保温壶之间存在混淆可能性，其中一些几乎是完全照搬的模仿。

The similarity is of such a nature that it must be held that it is intentional and sought.

有着此等性质的相似性必须被认为是蓄意和刻意寻求的。

Under these circumstances, the Marketing Practices Act § 1 has been violated.

在这种情况下，已经违反了营销行为法第1条。

The defendant must pay damages for lost sales with 100,000 DKK and compensation for disturbance with 50.000 DKK.

被告必须支付100,000丹麦克朗的销售损失赔偿和50,000丹麦克朗的干扰补偿。

Please note: there was no IP Infringement.

请注意：并不存在知识产权侵权。

Product imitation

产品模仿

Lego vs Byggis

乐高与Byggis



Lego vs byggis

乐高与byggis

- The court's ruling (U 1995.92 S):
- 法院裁定（U 1995.92 S）：
- The Lego brick's position in the Danish market today is the result of many years of extensive product development and marketing. The result of this effort should be protected by the Marketing Practices Act § 1, so that very close product imitations should be stopped unless the similarity of the products depends on technical, functional relationship.
- 乐高积木在当今丹麦市场中取得的地位是多年来大量产品开发和营销的结果。这一努力的结果应该受到市场行为法第1条的保护，因此，除非产品的相似性取决于技术性功能关系，否则，非常接近的产品模仿应被叫停。The Byggis brick appears in its basic forms as identical to the Lego brick. It can be assumed that this is intended, and that Byggis has produced its block without significant independent effort. The technical differences are few and appearance wise insignificant. The technical idea underlying the Lego brick is specified in the patent claims 1 and 2, and this idea may freely be reproduced. However, this may not lead to Byggis ipso facto being entitled to shape its bricks so identical with Legos's that they can substitute Lego's and be built together with them. It must be assumed that Byggis could have implemented the described idea in many other ways keeping the brick's function but making it different to the Lego brick.
- Byggis积木的基本形式看起来与乐高积木完全相同。可以假定这是刻意的，并且Byggis未经明显的独立努力，就已经生产了它的积木产品。技术差异很少，外观上只有无关紧要的差别。在专利权项1和2中，指明了支撑乐高积木的技术理念，这一理念可以自由地再现。然而，这不可以使得Byggis在事实上有权将其积木的外形做成与乐高完全相同的样子，从而能够替代乐高的积木，并与乐高积木一起进行搭建。必须假设Byggis能够以许多其它方式实现所描述的理念，在保持积木功能的同时使它有别于乐高积木。
- In addition, the marketing from Byggis' side has directly or indirectly indicated that the Byggis brick could be build together with the Lego brick. And Byggis has on several packages in a clear way presented the brick in a way, that brings associations to Lego's trademark.
- 此外，Byggis一方的营销直接或间接地表明Byggis积木可以与乐高积木一起搭建。而Byggis在数个产品包装上以一种清晰的方式呈现了带有乐高商标的积木。
- The Court finds, that Byggis' bricks are marketed in such a way, that Bygis is taking unfair advantage of Lego's position in the Danish marked.
- 法院认为，Byggis积木的营销方式是不公平地利用乐高在丹麦市场中的优势地位。

Trade dress
商业外观

- Transformers –
- 变形金刚 -



= not a trademark infringement but from an overall assessment:
parasiting or free riding in violation of the general clause on good marketing practice.

= 不是商标侵权，但从整体评估来看：
是寄生或搭便车，违反了关于良好营销行为的一般条款

Parasiting (no trademark infringement) example 2
寄生（非商标侵权）实例2



Illustrates the necessity for an overall assessment
说明了整体评估的必要性

The general clause and loyalty

一般条款和忠诚度

- The Danish case law shows that a general unwritten clause of loyalty in contractual relations expands the use of the general clause. This is shown on case law in relation to e.g.
- 丹麦判例法表明，合同关系中的一般不成文忠诚度条款扩展了一般条款的使用。这显示在涉及以下方面的判例法上，例如：
 - Negotiations that do not result in cooperation
 - 并未导致合作的谈判
 - After termination of contract or cooperation
 - 合同或合作终止之后
 - For subcontractors or suppliers
 - 针对分包商或供应商

The result in case law of this unwritten requirement of loyalty is e.g.:

在判例法中，这种不成文的忠诚度要求的结果是例如：

Less requirements to distinctiveness in cases of product imitation

减轻在产品模仿案例中对显著性的要求

Less requirements as to the doctrine on slavish or very close imitations

减轻关于完全照搬或非常接近模仿学说的要求

Injunctions on not using informations, even though no trade secrets has been revealed or obtained.

关于禁止使用信息的禁令，即使没有透露或获得商业秘密。

Loyalty leading case # 1

忠诚度主要判例#1

- Health tablets (U 78.305 S)
- 保健药片 (U 78.305 S)
- The Court finds that the defendant through his business, which offers assistance in marketing has a special duty to confidentiality about a product that is sought marketed in collaboration with his business. A possible partner must often at an early stage before an agreement may be entered, have to inform the other party about matters which he precisely because he approached a consultancy firm must be able to count on not exploited by the advisory business. The defendant must bear the risk that it is not clear to what extent the defendant's new partner has used the information received from the defendant. Conclusion: General Clause infringed.
- 法院认为，被告通过其业务，即提供营销协助，对与其进行业务合作寻求市场销售机会的产品负有特别的保密义务。可能的合作伙伴通常在可以订立协议之前的早期阶段，必须知会另一方其确切关心的问题，因为他所接洽的咨询公司必须能够依靠未被咨询业务所知的信息。被告必须承担一定的风险，即不清楚被告的新合作伙伴在多大程度上使用了从被告处获得的信息。结论：违反一般条款。

Loyalty leading case # 2

忠诚度主要判例#2

- U 82.449 S (roller transport system)
- U 82.449 S (滚筒式输送系统)
- The Court did not find a likelihood of confusion for the knowledgeable purchaser, but because of the defendant's former status as a distributor with the resulting depth knowledge of the claimant's product, the court found that the defendant's product was in violation of the general clause on good marketing practice.
- 法院没有发现会对有见识的买家造成混淆的可能性，但是由于被告原来是经销商，因此能够深入了解原告的产品，法院认定被告的产品违反了关于良好营销行为的一般条款。

Denigration – case law

诋毁 – 判例法

- # 1: A car dealer wrote:
- # 1: 一位汽车经销商写道:
- "My customers are more satisfied now – after I no longer sell Toyota but has switched to Mazda. Come and get a test drive and understand why I changed." Clear violation.
- “我的客户现在感到更加满意，今后我不再销售丰田并且已转为销售马自达。来试驾吧，您就知道我为什么做出这样的改变。” 清除违规。
- # 2: A telecompany in competition with the national company wrote:
- #2: 一家电信公司在与国有公司竞争时写道:
- "Which new costs has TDC (Danish national telecommunications company) incurred? Many of their new price increases are on automated services. The prices should actually fall in line with technological development, but it just does not work that way when you have a monopoly."
- “TDC（丹麦国家电信公司）产生了哪些新成本？许多新的价格上涨都是在自动化服务方面。价格实际上应该与技术发展保持一致，但是当他们处于垄断地位时，这一点就不管用了。”

The court found that the opinion on the monopoly was unfair in relation to TDC "whose company name and trademark is being discredited by these highly subjective grossly simplistic and condescending statements."

法院认为，关于垄断的意见对于TDC是不公平的，” TDC的公司名称和商标由于这些非常主观、过分单纯化和态度居高临下的说法而遭到质疑。 “

ICC code of conduct

国际商会行为守则

- Article 12 on Denigration
- 关于诋毁的第12条
- Marketing communications should not denigrate any person or group of persons, firm, organisation, industrial or commercial activity, profession or product, or seek to bring it or them into public contempt or ridicule.
- 营销传播不应诋毁任何个人或群体、公司、组织、工业或商业活动、专业或产品，或试图使其被公众蔑视或嘲笑。



Thank you
for your attention
感谢您的关注！

