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Press and Information

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Judgment of the Court of Justice in Case C-102/07

adidas AG and Others v. Marca Mode CV and Others

**THE GENERAL INTEREST IN LEAVING CERTAIN SIGNS AVAILABLE TO ALL
DOES NOT RESTRICT, AS SUCH, THE EXCLUSIVE RIGHTS OF A TRADE MARK
PROPRIETOR**

The trade mark proprietor cannot, however, prohibit third parties from using descriptive indications, provided that such use is fair

Adidas AG is the proprietor of figurative trade marks composed of three vertical, parallel stripes of equal width which are featured on the sides of sports and leisure garments in a colour which contrasts with the basic colour of those garments. Adidas Benelux BV is the holder of an exclusive licence for the Benelux countries granted by adidas AG.

Marca Mode, C&A, H&M and Vendex are competing undertakings who also market sports garments featuring two parallel stripes, the colour of which contrasts with the basic colour of those garments.

Adidas brought an action before the Netherlands courts asserting its right to prohibit the use by any third party of an identical or similar sign which would cause confusion. Marca Mode and others submit, on the other hand, that they are free to place two stripes on their sports and leisure garments for decorative purposes. They rely on the requirement of availability (stripes and simple stripe motifs are signs which must remain available to all) in order to use the two-stripe motif without the consent of adidas.

The Hoge Raad der Nederlanden (Supreme Court of the Netherlands), before which the case was finally brought, raises the question of the scope of protection of the trade mark at issue. The Hoge Raad asks the Court of Justice of the European Communities whether the requirement of availability is an assessment criterion for the purposes of defining the scope of the exclusive rights of the trade mark proprietor.

In its judgment delivered today, the Court finds, first, that the requirement of availability of certain signs is not one of the relevant factors taken into account in the assessment of the likelihood of confusion. The answer to the question as to whether there is that likelihood must be based on the public's perception of the goods covered by the mark of the proprietor on the one hand and the goods covered by the sign used by the third party on the other. The national court must determine whether the average consumer may be mistaken as to the origin of sports and

leisure garments featuring stripe motifs in the same places and with the same characteristics as the stripes motif of adidas, except for the fact that they consist of two rather than three stripes.

Secondly, the Court turns its attention to the specific protection granted to trade marks with a reputation. It notes that the implementation of that protection does not require the existence of a likelihood of confusion between the sign and the mark. The mere fact that the relevant section of the public establishes a link between the two is sufficient. Since the requirement of availability is extraneous both to the assessment of the degree of similarity between the mark with a reputation and the sign used by the third party and to the link which may be made by the relevant public between that mark and the sign, it cannot constitute a relevant factor for determining whether the use of the sign takes unfair advantage of the repute of the mark.

Finally, the Court states that, even though the proprietor of a trade mark cannot prohibit a third party from using descriptive indications in accordance with honest practices, the requirement of availability does not constitute in any circumstances an independent limitation of the effects of the trade mark. In order for a third party to be able to plead the limitations of the effects of a trade mark contained in the directive on trade marks and to rely on the requirement of availability, the indication used by it must relate to one of the characteristics of the goods. The purely decorative nature of the two-stripe sign pleaded by the companies in question does not give any indication concerning one of the characteristics of the goods.

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Languages available: EN FR DE NL

The full text of the judgment may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-102/07>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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