

CASE TRANSLATION: FRANCE

Case citation:

Groupe Philippe Bosc/MMT

Name and level of the court:

**Tribunal de grande instance de Mulhouse
1ère chambre civile (Court of First Instance
of Mulhouse, 1st civil division)**

Date of decision:

7 February 2007

Members of the Court:

**Mrs Marie Liesse Guinamant
(Presiding Judge)**

Lawyer for the plaintiff:

Me Thierry Burkard

Lawyer for the defendant:

Me Olivier Iteanu

France; brand; web site; finding; search engine; parasitism; brands; source code; meta tag; proof; nullity

Facts, proceedings and claims

By a writ of summons served by a bailiff on 3 February 2005, Groupe Philippe Bosc, newly named Viadom Group, filed a claim before the court against MMT.

In its latest brief dated 10 January 2006, Groupe Philippe Bosc, newly named Viadom Group, concluded that MMT committed:

- acts of infringement of trademarks it owns,
- acts of parasitism to its detriment,

Therefore, Groupe Philippe Bosc, newly named Viadom Group, requests that the court:

- prohibit MMT from using, in any form whatsoever, the names Bosc and Bosc Office, under penalty of €150 per violation per day as of this judgment,
- sentence MMT to pay the sum of €800,000 in compensation for its loss, plus interest at the legal rate from the date of this judgment,
- publish this judgment in three newspapers or magazines at the expense of MMT as an addition to damages,
- insert on the home page of the shiva.fr web site an extract from the judgment,
- sentence MMT to pay the sum of €700,000 in respect of unfair competition,
- sentence MMT to pay the sum of €4,000 on the basis of Article 700 of the ncp (French Code of Civil Procedure), in addition to costs to the benefit of Me Thierry Burkard.

Finally, it requests that the court dismiss MMT of all its claims and order the provisional execution of this judgment.

In support of its claims, Groupe Philippe Bosc, newly named Viadom Group, contends that it owns several brands including 'Philippe Bosc' and 'Groupe Philippe Bosc' and enjoys recognized expertise in the field of human services.

Groupe Philippe Bosc, newly named Viadom Group, claims that the web site operated by MMT, i.e. 'shiva.fr', included in the source code the names Bosc and Bosc Office while proposing similar services.

It bases its claim for infringement on articles 713-1 et seq. of the French Intellectual Property Code. It relies, to establish the facts, on a bailiff's official report dated 23 August 2004.

Regarding unfair competition, Groupe Philippe Bosc, newly named Viadom Group, explains that MMT is newly incorporated and has no reputation, unlike the plaintiff; it claims that a user seeking information on Bosc found the defendant's web site among the results and that parasitism is thus established. It recalls, regarding its damage, that its turnover amounted to €31 million.

In defence, in its latest brief recorded on 21 April 2006, MMT requests that Groupe Philippe Bosc, newly named Viadom Group, be dismissed of all its claims, be ordered to pay the sum of €5,000 in damages for abuse of process, and the sum of €5,000 on the basis of Article 700 of the ncp, in addition to the costs of the proceedings, including the costs of the official report dated 1 March 2005.

In support of its defence, MMT states that it offers under its 'Shiva' trade name, household and ironing services at home.

MMT claims that the writs of summons served by a bailiff on 23 and 27 August 2004 are denied of any probative value. It claims that the report prepared at its request on 1 March 2005 proves the opposite of what is alleged by the plaintiff.

It also excludes any prejudice suffered by Groupe Philippe Bosc, newly named Viadom Group, which has only been communicating under the name Viadom, since June 2004, and which does not prove the amount requested. Finally, MMT claims that Groupe Philippe Bosc, newly named Viadom Group, cannot use the same allegations as those developed in support of its infringement claim to justify its claim for unfair competition.

By post-hearing submissions dated 10 January 2007, Groupe Philippe Bosc, newly named Viadom Group, informed the court that it had changed its corporate name and legal form, currently Viadom Group.

DISCUSSION

Considering the Closing Order dated 14 November 2006;

Considering the documents of the case and attached documents;

Regarding the request based on the existence of infringements;

Whereas it results from article 9 of the ncp that it is up to each party to prove according to law the facts necessary for the success of its claim;

Whereas in the present case, to justify its claims, Groupe Philippe Bosc, newly named Viadom Group, basis itself on a bailiff's official report dated 23 and 27 August 2004;

Whereas it results from that report that, on 23 August 2004, a bailiff proceeded 'to search the web through the Google search engine, by mentioning "Bosc Office"'; the bailiff indicates he was able to identify the following result: 'shiva, cleaning, ironing at home, house staff, cleaner ...' which includes the names 'Bosc' and 'Bosc Office' on the third line: 'Bosc gardening bosc household bosc household bosc household office DIY at home ...'; the bailiff specifies having edited such page and attached it to his report;

Whereas, however, this result refers to the search leading to the 'www.voileadventure.net' web site; this web site has no connection with Shiva's web site; indeed, MMT establishes the fact that the domain name was registered by Bernard W., residing in the

Gard; in any event, the fact that the link was not clicked on and the web page was not printed makes the online search incomplete and does not allow us to appreciate the reality of the alleged grievances;

Whereas, regarding the search performed under the name 'boscoffice', the bailiff does not mention it at all in its report, in its findings or in the annexes thereto;

Whereas, as part of its findings, the bailiff only mentions the search he performed himself in his study under the name 'Bosc Office' and not a search under the name 'Boscoffice';

Whereas, in the context of the annexes submitted by the plaintiff's SEO analyst, the bailiff mentions 'two search leaflets edited in Google by the name "Bosc Office"'; he does not refer at any time to annexes on the search conducted under the name 'Boscoffice', without a space; in addition, it is not established that he attended to this search; it is therefore impossible to know in what circumstances this page was found and printed, even though the bailiff's stamp is affixed thereto;

furthermore, unlike the only search performed by the bailiff, a search under the name 'Boscoffice' was performed on the English version of Google and not on the French version of the site; the method is different and confirms that it was not performed by the bailiff but in totally unknown conditions; finally, the web site page was not printed;

Whereas, finally, concerning all the findings made on 27 August 2004 within Activis, the bailiff does not specify whether he emptied the computer memory cache used to draw up the report; he does not claim to have checked whether the connection to the internet was made or not through a proxy server;

Whereas all these inconsistencies or omissions deprive the findings of any probative value;

Whereas, however, by producing a perfectly regular report drawn up by a sworn officer of the Agence pour la Protection des Programmes (Agency for the Protection of Programmes), MMT proves that as of 1 March 2005, a few weeks after the summons were served, the terms 'bosc' or 'bosc office' were not found in the source document of the <http://www.shiva.fr> web site; the defendant cannot be reproached for having failed to draw up this report earlier as the defendant only acknowledged the facts alleged by the plaintiff by way of a summons and requested such report almost immediately thereafter;

Whereas, accordingly, Groupe Philippe Bosc, newly named Viadom Group, does not produce proof of the facts it alleges; it will therefore be dismissed of all its claims, whether its infringement claim or its unfair competition claim;

Whereas, furthermore, it should be noted that the action for unfair competition is admissible only if based on facts other than those said to constitute an infringement; in the case at hand, Groupe Philippe Bosc, newly named Viadom Group, bases both its infringement and unfair competition claims on the same facts and the same findings;

Whereas, moreover, the action for unfair competition is grounded in articles 1382 and 1383 of the French Civil Code, which imply not only the existence of a fault committed by the defendant, but also damage suffered by the plaintiff;

Whereas, in the case at hand, Groupe Philippe Bosc, newly named Viadom Group, does not prove any loss of business or profit, and merely indicates its turnover, without specifying whether there is a direct loss attributable to the hypothetical acts of unfair competition; it does not prove any commercial problems either; moreover, in 2004 it conducted a communication name change by adopting that of Viadom; if harm was established, which is not the case, it would in any case be minimal; the amount requested, i.e. a total of €1.5 million, is quite disproportionate to the allegations, assuming that they are real, which is not proved;

Whereas, it results from the foregoing that, in any event, the request can only be rejected;

Regarding the counterclaim for abuse of process

Whereas MMT requests that the plaintiff be sentenced to pay it the sum of €5,000 in damages for abuse of process;

Whereas, however, the incorrect assessment that a party makes of its rights cannot constitute a fault; in any event, MMT does prove that it has suffered a prejudice; it will therefore be dismissed of its claim in this respect;

Regarding costs of the proceedings and article 700 of the ncp

Whereas, pursuant to article 696 of the ncp, Groupe Philippe Bosc, newly named Viadom Group, the losing party in the proceedings, shall bear the costs thereof, including costs related to the preparation of the

report dated 1 March 2005, on production of the invoice;

Whereas, pursuant to article 700 of the ncp, Groupe Philippe Bosc, newly named Viadom Group, will be ordered to pay compensation to MMT in the amount of €4,000;

Regarding the provisional execution

Whereas, pursuant to article 515 of the ncp, the provisional execution appears compatible with the nature of the case and necessary given the duration of the dispute; it is therefore appropriate to order such provisional execution;

DECISION

The court, ruling publicly, in the presence of both parties, at first instance,

- Dismisses Groupe Philippe Bosc, newly named Viadom Group, of all its claims;
- Sentences Groupe Philippe Bosc, newly named Viadom Group, to pay the costs of the proceedings, including costs related to the preparation of the report dated 1 March 2005, and to pay MMT €4,000 under article 700 of the ncp;
- Dismisses MMT of its request for damages for abuse of process;
- Orders the provisional execution of this judgment;
- Dismisses all other requests.

The court: Mrs Marie Liesse Guinamant (Presiding Judge)

Lawyers: Me Thierry Burkard, Me Olivier Iteanu

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