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The use of advertising slogans similar to those of a competitor constitutes free riding

A company may not use advertising slogans similar to those that have been used by a competitor for several years, for which promotional efforts and investments were made by that competitor, and that are well known to the general public.

This is the finding of a decision rendered on June 9, 2015 by the *Cour de Cassation* (French Supreme Court) which opportunely recalled the concept of parasitical competition.

Just like unfair competition from which it is derived, free riding is a court-developed concept punishable by Article 1382 of the French Civil Code that deals with tort liability.

As recalled by the *Cour de Cassation* in the decision commented herein "*free riding consists, for an economic operator, in riding on the coattails of a company by unduly benefiting from its repute or investments, regardless of any risk of confusion*"[1].

This concept is, however, more widely applied than unfair competition as it does not necessarily require the existence of a competition between the relevant parties. This is illustrated by the few court decisions recalled below (cf. **1/** and **2/**). In addition, the decision commented herein provides a new example of parasitical competition (cf. **3/**).

1. Free riding in a competitive situation

Wherever there is competition, free riding consists in adopting a behavior of a follower – if not a chaser – of a competitor, notably by developing activities, products or services that resemble those of that competitor.

In order to establish the existence of parasitical competition, judges analyze and focus on the facts of each case.

As such, they have condemned a designer of board games who had copied the services of a competitor, manufactured products which "imitated" those of such competitor, and marketed them at a much lower price. The designer was thus riding on its competitor's coattails and unduly benefited from the investments made by the latter[2].

In another case between parties operating in another industry, judges have held that a company that had used the names "Cirque de Monaco" and "Monaco, le Cirque" to designate circus activities – thereby trying to benefit from the reputation of the festivals organized in the Principality of Monaco through another company specifically dedicated to this business – was guilty of free riding[3].

Conversely, French courts have dismissed charges of free riding brought against a retailer of furniture and elements of decoration who had distributed a catalogue, the presentation of which was similar to that of a competitor. Indeed, judges took into account the fact that these catalogues were inspired by the then-current trends, that resembling slogans were commonly used in the distribution industry and that the selection of several identical items out of thousands of references resulted from the method of prospecting suppliers to select items in line with fashion trends, a method that was common to the two retailers.[4]

Similarly, the *Cour de Cassation* recently held that should not be considered as free riding the fact of making a shoddy and low-end imitation of a well-known product (a Ferrari race car in the form of car toy) in the absence of risk of confusion in the mind of the customers and without any diversion of such customers, as the party who made the imitation had not indeed ridden on the coattails of its competitor to benefit from its reputation[5].

2. Free riding outside a competitive situation

Outside a competitive situation, free riding is more difficult to establish, but its existence can be demonstrated if there are disloyal actions between economic operators.

Free riding often takes the form of a damage to the renown or to the reputation of an economic operator. French courts require proof of the reputation of the damaged element, as well as proof that the free rider had the objective of deriving income from his actions.

Free riding is also often established when a party uses/benefits from the intellectual efforts and investments made by others, it being specified that intellectual efforts and investments must be interpreted broadly (technicality, advertising investments, research, etc.).

For example, in the framework of a lawsuit brought by French National Sports and Olympic Committee, the *Groupement d'achat des centres Leclerc* (group-purchasing association comprising owners of Leclerc stores) was condemned for having used the trademark "Olymprix" in connection with the organization and advertising of an annual promotional campaign at reduced prices in Leclerc stores. The trademark "Olymprix" imitated and, thereby, damaged the trademark "Jeux Olympiques" and the renowned sporting event associated with

such trademark[6].

In addition, the use of the advertising slogan "*Dessine-moi*" (Draw me) was considered as constitutive of free riding as this phrase evoked the book "The little Prince" and the judges held that the choice of this phrase was not a coincidence insofar as the use of the imperative mood was not imposed by applicable syntax rules and reflected a desire to benefit from the renown of the book[7].

3. Facts of the commented decision: The use of advertising slogans similar to those of a competitor held to be free riding

In the commented decision, a mass retailer (Cora) that had been using in its advertising campaigns the advertising slogan "*gros volumes = petits prix*" (large volumes = low prices) – a slogan that it had created – for twenty five years, sued a competitor (Auchan) who distributed catalogs bearing the slogans "*prix mini sur gros volumes*" (tiny prices for large volumes), "*gros volumes à prix mini*" (large volumes at tiny prices) and "*gros volumes grosses économies*" (large volumes large savings).

The *Cour de Cassation* upheld the in-depth and factual analysis of the Court of Appeals, and focused its attention on the following points:

- The combination of two groups of three-syllable words "*gros volumes*" and "*petits prix*", each of them placed on an equal footing, was a distinctive feature of Cora since it was established that this slogan was well-known by the general public, and identified by customers and mass retail industry operators as associated with the Cora brand;
- This slogan had benefited from promotional actions and investments by Cora that had conducted numerous advertising actions to launch this slogan and strengthen its reputation;
- The syntax structure used by Auchan was identical to that used by Cora, regardless of the fact that the sign "=" had been replaced by a coma, as the juxtaposition of two groups of words was equivalent to an equal sign;
- The wording used by Auchan "*prix mini sur gros volumes*" and "*gros volumes à prix mini*" had a consonance and a resonance that were equivalent to those of Cora, except for the slogan "*gros volumes grosses économies*" that was held too much dissimilar and, therefore, excluded from the court discussions;
- The plagiaristic use of the slogan could not be a coincidence as Auchan could design numerous other ways to express the same idea and had been warned by Cora on several occasions.

As such, consistent with the decisions recalled above (in particular the "The Little Prince" decision[8]), the *Cour de Cassation*, following a **syntax, visual and phonetic analysis** of the slogans – an analysis similar to that carried out in trademark infringement cases – established **(i)** the **renown** of the imitated slogan, **(ii)** the –

primarily financial – efforts made by Cora, and **(iii)** Auchan's **necessarily malicious intent**, and confirmed that the latter had engaged in a free riding behavior.

[1] Commercial Chamber of the *Cour de Cassation*, June 9, 2015, n°11-11242.

[2] Commercial Chamber of the *Cour de Cassation*, July 8, 2003, n°01-13293.

[3] Court of Appeals of Paris, December 17, 2003, n°2003/08994.

[4] Court of Appeals of Versailles, January 16, 1997, n°95-6068.

[5] Commercial Chamber of the *Cour de Cassation*, March 3, 2015, n°13-25055.

[6] Commercial Chamber of the *Cour de Cassation*, March 11, 2003, n°00-22722.

[7] Court of Appeals of Paris, April 2, 2003 n°2000/08859.

[8] Court of Appeals of Paris, April 2, 2003 n°2000/08859.