

FOCUS IP

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DISPARAGEMENT: SANCTION OF A CEASE-AND-DESIST LETTER INFORMING RESELLERS OF A “POSSIBLE INFRINGEMENT”



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IMPACT: *By this ruling, the Court of Cassation held that information communicated by a copyright holder to third parties regarding the existence of a “possible infringement of its own products and acts likely to fall within the scope of unfair and parasitic competition” constitutes disparagement where it is not based on a prior court decision.*

Accordingly, the Court of Cassation censured the sending of a cease-and-desist letter stating that the marketing of the disputed products was “liable to constitute an act of copyright infringement” or that such sales were “at the very least, likely to be characterised as acts of unfair and parasitic competition.”

➤ The facts

By an order dated 22 September 2022, served and enforced on 9 November 2022, the company KOSHI was authorised to carry out a copyright infringement seizure to the detriment of the company MANUFACTURE DU MARRONNIER, which had

entrusted the company VBV INTERNATIONAL with the manufacture, storage and distribution of wooden wind chimes.

On 15 November 2022, KOSHI sent a cease-and-desist letter to several distributors of MANUFACTURE DU MARRONNIER and VBV INTERNATIONAL, demanding that they immediately cease offering these chimes for sale and promoting them on their website, and further requiring them to provide all related contractual documentation.

The letter stated in particular that the “Heola” range of chimes reproduced “the essential characteristics of KOSHI chimes”, which was “liable to constitute an act of copyright infringement”, and further asserted that such acts were “at the very least, likely to be characterised as acts of unfair and parasitic competition”.

The recipients were invited to “immediately cease offering [the products] for sale” and to “communicate all necessary information” in order to determine the quantities purchased, sold and in stock, failing which KOSHI and its director indicated that they would “regain full freedom of action, including by taking all necessary measures, in particular legal action”.

MANUFACTURE DU MARRONNIER and VBV INTERNATIONAL initiated summary proceedings against KOSHI seeking an order to cease the manifestly unlawful disturbance constituted by the sending of this letter and the payment, by way of an advance, of damages for disparagement of the products manufactured and marketed by their companies.

By a judgment dated 9 November 2023, the Montpellier Court of Appeal dismissed their claims, leading MANUFACTURE DU MARRONNIER and VBV INTERNATIONAL to lodge an appeal before the Court of Cassation.

➤ ***Disparagement arising from informing third parties of a “possible infringement”***

On the basis of Article 1240 of the French Civil Code, the Court of Cassation reiterated that disparagement is established *“where, in the absence of a judicial decision confirming the existence of acts of copyright infringement, the mere fact of informing third parties of a possible infringement of such rights amounts to disparagement of the products alleged to be infringing.”*

Therefore, informing a third party to a legal proceedings of a “possible infringement” may therefore now constitute disparagement.

In the present case, KOSHI sent a cease-and-desist notice to twelve retailers of MANUFACTURE DU MARRONNIER and VBV INTERNATIONAL. KOSHI set out what it presented as factual elements relating to the existence of its copyright and asserted that the sale of the products in question was *“liable to constitute an act of copyright infringement”*, or that such sales were *“at the very least, likely to be characterised as acts of unfair and parasitic competition”*.

It further informed them that it reserved the right to take any legal action against them to protect its rights and seek compensation for its loss.

The Court of Cassation held that, in ruling that these statements were measured and not coercive and therefore did not constitute disparagement, the Montpellier Court of Appeal had breached Article 1240 of the Civil Code.

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