

RA. Rainer Munderloh – Donnerschweer Str. 210 – 26123 Oldenburg

Landgericht Braunschweig
Münzstr. 17
38100 Braunschweig

Oldenburg, 24.08.2010

In the matter of

Forest Stewardship Council AG
RA. Pauly pp.

./.

eurobinia, Gerriet Harms
RA. Munderloh

the written pleading of the plaintiff from 10.06.2010 is commented on with the application

**to dismiss the plaintiff's applications of the written pleading from
10.06.2010 as well.**

A. Preliminary remark:

The impression that the defendant crusades politically against the plaintiff is absolutely appropriate, where to the defence pleading has argued already in detail.

It is also correct that the defendant informs the public about the open civil case currently pending in the District Court of Braunschweig.

Indeed, the conclusion is appropriate that the plaintiff hopefully unsuccessfully tries in turn to silence the defendant with his objectively justified complaints about the certification systems established under the FSC label.

As far as the defendant offers expert evidence among others in regard to his complaints about the plaintiff's certification system, this concerns a central conflict in the legal case because the defendant refers to justifying reasons in consideration of the article 5 of the federal constitution and to the perception of legitimate interests in regard to the explicitly and reasonably reported deficiencies in the certification system and the violation of the principles set up by the plaintiff itself.

Without acknowledging according legal obligations the defendant discloses obligingly to the pleading to section 2, that the flyer added as attachment K1 to the statement of case was distributed in the print run of 0. The flyer does not exist in a printed form. The flyer is merely offered in the English version for download in the internet. Accordingly, there is no existent special distributor at which the flyer was distributed.

As far as the plaintiff should now declare the pleading of digit 2 as not proceeding to judgement, such a declaration of mootness is now explicitly objected because the pleading was objectively not justified.

B. Facts

1. Address compatible for summons and legal form of the plaintiff:

The plaintiff does now name as address compatible for a summons:

Calle Margarita Maza de Juárez Nr. 422
Col. Centro
68000 Oaxaca, Oaxaca
Mexiko

This can impossibly be the plaintiff's address compatible for summonses, because at the given address only a not build-up and fenced plot of land is located.

Evidence: Extract from "Google maps", dated to 05.07.2010, added as a photocopy (Attachment B 9)

The shot depicted in the attachment is a print-out from the application "google street view". It should be obvious that on the location at the given address no even approximately usable object can be seen in which the plaintiff could be accommodated how so ever. Not even a letter box can be found at the object.

It has to be denied that the address given by the plaintiff is actually the address compatible for summonses.

Therefore it also has to be denied that the plaintiff is an internationally acting not-for-profit organization with headquarters in Oaxaca, Mexico. It is further denied that the plaintiff runs national work groups in more than 50 countries all around the world. It is further denied that the plaintiff keeps several regional offices (where?). Pleading ignorance, it is denied for the rest that the plaintiff is a registered society. The reference to any homepage in the internet should hardly be sufficient for the verification of the legal capacity and legal form of the plaintiff, the more so as the attachments K 8 and K 9 are documents written in English. In this respect, the question must be raised where the plaintiff is now registered and in which legal form it shall exist.

In fact the translation of the certificate added as attachment K 10 presented for this purpose only reveals that powers of attorney were given here in reference to Mexican legal rules. It is however not obvious that these powers of attorney refer to declarations of intent or to actions outside Mexico, especially no reference to carrying legal actions in Federal Republic of Germany.

At last, it is a certificate presented as a copy which authenticity has to be denied.

The same applies for the power of attorney for the process, presented as attachment K 11.

Pleading ignorance, it is denied that the signature under this power of attorney is the signature of an organ of the plaintiff authorised to represent.

Insofar it has to be denied while pleading ignorance that the plaintiff is actually effectively managed by a board which consists of nine members. Further it has to be denied that effective general powers of attorney for cases were given here. The certificate presented as attachment K 10, dated to 01.08.2008 is little meaningful in this context and does not prove any legal forms and agency relationships of the plaintiff in a sufficient way.

In this respect the effective power of attorney of the process attorneys of the plaintiff is certainly doubtful and is denied for reasons of precaution.

2.

Regarding the plaintiff's ownership concerning the label "FSC" registered under the registration number 002974905, initially merely the conclusion is allowed that inspection objects in the form of photocopies were presented with the statement of case in this regard. Insofar it needs to be denied for precautionary reasons that the plaintiff is actually the owner of such a trademark. For the rest, considerable doubts about an effective legal entity certainly arise as long as the legal capacity of the plaintiff is not resolved.

Pleading ignorance, it is denied that the plaintiff uses the here disputable figurative trademark itself. Pleading ignorance, it is denied that the plaintiff is commercially acting itself in any way. It is further denied that the plaintiff performs with the mentioned trademark in business connections. Anyway, the reference to a website "www.fsc.org" does not get anywhere because a research has found that the registered owner of the website is not the plaintiff but an enterprise "FSC International Center gGmbH" with headquarters in Bonn.

It is denied that the plaintiff itself uses the mentioned trademark for advertising its activities (which?) as well as for advertising the products to be released with the FSC label by its members. Which members are meant here?

Pleading ignorance, it is denied that the plaintiff has licensed the figurative trademark FSC. It is only undisputed that there are several enterprises which advertise with this trademark. On which basis this occurs, is still unclear. In addition the plaintiff refers on the one hand to the attachment K 13, a website which is not owned by the plaintiff, and on the other hand to an extract from the website "www.fsc-deutschland.de" whose owner is the FSC work group Germany e.V..

All in all the asserted licensing system remains unclear. Solely the document presented as attachment K 15 may indicate that a licence contract was concluded with an enterprise FSC Global Development GmbH with headquarters in Germany. But this contract is to be denied for precautionary reasons because the document is not signed. Under provision of § 1 is furthermore recognizable that the contract was to achieve its validation on 01.01.2010.

3.

At first it sticks to the fact that the prints of a flyer presented as attachments K 1 and K 4 will only be published on the website "www.fragen-an-den-fsc.de". This portal is a merely privately run portal of the defendant. The owner of the domains "www.fragen-an-den-fsc.de" and "www.fragen-an-den-fsc.info" run under the portal is the defendant in private and not in his capacity of a registered merchant. The ownership is not thereby going to be commercial just because there is an address identity between the enterprise of the defendant and his private address. The defendant runs the enterprise Eurobinia in his private house.

It is not to be denied that the disputed logo is used in the flyer released as attachment K 1 and attachment K 4, namely in connection with the product mark of the defendant "eurobinia". Further it is not denied that on the commercially run internet portal "www.eurobinia.de(.net)" and "www.robinie.de(.net)" the logo of the plaintiff is depicted in the accordant appearance, however with the explicit comment "better without".

It is finally undisputed that on the website "www.fragen-an-den-fsc.de" the slightly distorted form of the FSC logo, namely composed of a check mark with an animated deciduous tree, though with a question mark depicted directly next to it as well as with photographs of clear-cuttings certificated by the FSC in the background.

C. Legal Appraisal

I. Trademark Lawful Claims

It is again denied that the defendant uses the picture trademark:



The defendant in fact uses, and that exclusively on the non-commercial website www.fragen-anden-fsc.de, the symbol:



A trademarked danger of confusion cannot be discovered which indeed remains in the result to the appraisal of the court. The same applies for the symbol:



The conditions for the asserted injunctive relief are not given. Insofar it is referred to the defence pleading in favour of an avoidance of repetitions.

1. Use of the trademark FSC by the plaintiff:

It is referred to the previous pleading:

2. Use of the trademark FSC by the defendant:

a.)

The symbol



is not used by the defendant in any business connections. It relates to the website “www.fragen-anden-fsc.de” which raises critical questions in the context of the plaintiff's certification system. The web presence supports exclusively the political aims of the defendant in the conflict with the certification system of the plaintiff.

In regard to the distorted FSC logo it is as well left to the appraisal of the court whether and to what extent an action in trading is to affirm here. It is not to deny indeed that the distorted logo appears in the flyer with the title "eurobinia: Gutes Holz aus transparenter Produktion", which is published by the defendant. This flyer is directly linked to the wood business of the defendant.

b.) Use for goods and services:

Contrary to the opinion of the plaintiff, the defendant does not use the disputed logo in any way for his goods and services. The defendant rather recognizably and exclusively pursues the intention not to put the FSC logo in context with the wooden products sold by himself.

c.) trademark-like use:

The argument of the plaintiff that the defendant would use the distorted logo for advertising purposes is wrong. The contrary is the case. The defendant aims to express its criticism on certification system with the concretely conducted alienation of the FSC logo. The defendant distances itself recognizably and clearly from such products distributed with the logo of the plaintiff.

It is to be denied that the figurative trademark registered in favour of the plaintiff is a common trademark in terms of § 14 Abs. 2 Trademark Act.

3. Danger of confusion:

Here also it remains to the appraisal of the court whether a danger of confusion can be assumed. This in fact is denied by the defendant.

Due to the unambiguous appearance of the distorted logo a danger of confusion is impossible. Rather the sustained criticism of the defendant on the certification system behind the logo becomes apparent.

The defendant does not use the tree animated with a check mark in the way presented by the plaintiff, which needs to be pointed out again. Here the insofar animated tree is used explicitly in the connection with a question mark. The use does not occur in business connections but exclusively in the internet appearance "www.fragen-an-den-fsc.de".

Due to all this, a danger of confusion cannot be detected.

4. Publicity

It is again denied that this is the case of a common trademark. Thereto the plaintiff does not argue sufficiently reasonably. It is to deny that the plaintiff or the logo used by it are commonly known and internationally regarded as one of the most important initiatives for the advancement of a responsible forestry. It is denied that the FSC label possesses an independent high profile world-wide. Pleading ignorance, it is denied again that the plaintiff is organized in altogether 50 international work groups and is therefore known around the world. Pleading ignorance it is denied that the plaintiff had expended large advertising tactics to popularize the self-developed FSC label.

5. Reference to article 5 of the Federal Constitution

In favour of avoidance of repetitions it can be referred to the explanations in the defence pleading.

The alienation conducted by the defendant is an unambiguous, internationally accepted and well-understood symbolization of the criticism of the defendant on the FSC certification system. It is immediately clear to any beholder which message the defendant wants to get across with the concrete alienation. Contrary to the opinion of the plaintiff, this becomes clear to the beholder without the need of recourse to the criticism on the plaintiff's certification system uttered reasonably in the remaining text of the flyer.

For the rest the claim of the plaintiff that the defendant would brand its products with the distorted symbol is wrong.

The defendant does also not aim to advertise own black locust wood products and use the plaintiff's logo for this purpose. Predominantly the defendant aims at the dealing with the justified criticism on the certification system of the plaintiff.

As long as the plaintiff thereto refers to the flyer "eurobinia: Gutes Holz aus transparenter Produktion", this is a concretely event-driven flyer to which creation the defendant felt provoked. It was a concrete construction project at which criticism on the black locust wood delivered by the defendant was uttered and indicated to the suggested sustainability of the wooden products traded with the logo of the plaintiff.

Summing up it can be said that the demonstrations of the plaintiff are not adequate in any way to justify a demand for omission. The claim is wrong that the aim of the defendant would be to use the logo of the plaintiff merely commercially for the purpose of bringing own products to the market. It is the recognizable and exclusive purpose of the alienation of the FSC logo conducted by the defendant to critically analyse the plaintiff's certification system, which is massively flawed and, apart from misleading consumers and public authorities, furthermore provides enterprises certificated with the label with unjustifiable advantages in competition.

II. and III.

It is referred to the defence pleading in favour of avoidance of repetitions.

Munderloh
Advocate