

**MASTER PROGRAMME  
EUROPEAN  
INTELLECTUAL PROPERTY LAW  
MODULE 1  
2010**

**HOME EXAM**

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**You are not supposed to have special knowledge of national law for the purpose of the exam. You should, thus, give your answers with references to European directives and regulations and, if relevant, to European and international conventions/treaties.**

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**Send the assignment to Henning Albertsson  
by mail or fax  
before 9:00 am (Swedish time)  
on March 30, 2010**

**Name the file after your last name!**  
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Master Programme in European Intellectual Property Law 2009  
Stockholm University  
Module 1

### **Your task**

Your task is to write a memorandum of law that identifies the legally significant facts and legal issues, references the relevant sources of law, applies the law to the relevant operative facts, and draws logical and well-documented conclusions.

The memorandum should be objective and should identify both the strengths and weaknesses of your conclusions. Any further legally relevant observation is welcome! Each issue should be treated separately. Excessive overlapping of thought in the discussion indicates that you have not identified the issues with sufficient precision.

The teaching staff will take into consideration both the substantive treatment of the facts and issues as well as the more formal aspects of the memo, namely, the correct treatment of sources, the use of clear and concise legal language and brevity.

Do not exceed 6 000 words, *including footnotes!*

Good luck!

*Marianne Levin*  
Stockholm, 26 March 2010

Sweden is a country full of health freaks. For the past 13 years, the Swedish firm, Pharmagoodlife (AB), has been successfully selling a health drink under the trade mark MIVIGOOD. MIVIGOOD is a complete and balanced nutritional supplement in liquid form. MIVIGOOD has received the award dietary supplement of the year not less than six times since it was launched, i.e. in 2008, 2006, 2002, 2001, 1998, and 1997.

Pharmagoodlife has steadily expanded its market in the Nordic countries by selling the drink in specialized health shops and pharmacies. Recently, Pharmagoodlife has taken a crucial step and entered into the big retail chains, by selling the drink in Norway through RIMI, a large Norwegian low price retail chain. Pharmagoodlife has been planning an expansion to RIMI Baltic, which operates low price retail stores in Lithuania, Latvia and Estonia.

Pharmagoodlife has reached a turnover of around 6 million euro in Sweden, and about as much in total in Denmark, Finland, and Norway. The sales figures for MIVIGOOD in Sweden correspond to a market share of approximately 38 per cent in the nutritional supplement sector (equivalent to 9.4 per cent of the total market for vitamins and minerals).

MIVIGOOD is based on carbonaceous shale which is rich in minerals. Shale is a type of sedimentary rock, which originates from plant material accumulated in wetlands and swamps. Through time, the plant debris was buried with mud and more plant material, which accumulated heat and pressure, a process which resulted in the hardening of the material into a carbonaceous shale type. One of the secrets behind the allegedly fantastic MIVIGOOD is its method of preparation, where pulverized shale is soaked in water; a process which allows some of the shale's organic matter to dissolve, creating a liquid that is termed a shale leachate, very rich in so-called colloidal minerals.

Thus, MIVIGOOD contains more than 70 minerals in colloidal form, as well as alfalfa and psyllium, which lower cholesterol. In addition, it contains antioxidant vitamins, amino acids, and bioflavonoids, which protect vitamins and prolong their effects in the body. Production of the drink takes place under strict pharmaceutical control. The taste is citrus. The product is sold in a bottle which has been especially developed for the company by the well-known design firm DesignBridge Ltd. in London.

Pharmagoodlife had been very content with its progress so far until last October, when the large multinational Austrian based company, Multiroth (GmbH), launched a competitive drink. The drink is produced at Multiroth's production facility in the beautiful German town of Baden Baden. The drink is sold under the trade mark MULTIGOOD and according to its label, it contains basically the same components of minerals and vitamins. Multiroth's drink not only has a similar citrus flavour, scent and colour; it is also presented in a more or less identical dark compact bottle as MIVIGOOD.

Moreover, unbeknownst to Pharmagoodlife, MULTIGOOD was registered as a Community trade mark in May 2009. Pharmagoodlife holds national registrations of MIVIGOOD in **Sweden**, Denmark, Finland and Norway. MULTIGOOD's brand has started eating away at MIVIGOOD's market in Sweden, Denmark, Finland, Norway, and is also selling well in Lithuania, Latvia and Estonia.

The big company Multiroth seems fairly uninterested in discussing the question of confusing similarity and possible plagiarism. They argue that aside from the fact that their MULTIGOOD brand carries part of their company name, they have a registered trade mark. Moreover, Multiroth maintains that MIVIGOOD is just descriptive for the content (minerals and vitamins)

and thus cannot claim any protection, apart from identity. Also, Multiroth claims that the dark bottle is necessary to save the content from ultraviolet rays and that similar healthy mixtures have been known for hundreds of years in traditional Chinese medicine.

In 1996, Pharmagoodlife was granted national patents for the health drink in Denmark, Estonia, Finland, Latvia, Lithuania, Norway, and Sweden. The patent consists of a method claim for the process of production of the drink:

1. A method of preparation of a health drink composition useful as a nutritional supplement, characterized in that it contains 20-90 % wt. of shale extracts containing more than 70 % of minerals in colloidal form, 5-50 % wt. of vitamins, 20-70 % wt. of alfalfa leaves and 10-50 % wt. of physillium seed husks, said method comprising:

- (i) soaking of pulverized shale in distilled water;
- (ii) adding extracts of vitamins C, B1, B2, B3, B6, D and E to the shale solution;
- (iii) mixing alfalfa leaves and physillium seed husks;
- (iv) adding the mixture of step (iii) to the mixture of step (ii);
- (v) adding preservatives and colouring agents to the formulation in step (iv).

When Pharmagoodlife analyzes the contents of the MULTIGOOD drink, they learn that it contains basically the same components of minerals as MIVIGOOD, indicating that Multiroth uses the identical process of shale soaking. MULTIGOOD also contains the same vitamin extracts and physillium seed husks. The main difference between the drinks is, however, that MULTIGOOD contains soybean extract instead of alfalfa leaves.

Pharmagoodlife prepares to take legal action and sue Multiroth for patent infringement and consequently sends them a cease and desist letter, in which Pharmagoodlife demands an immediate cessation of the importation and sale of the MULTIGOOD brand in Sweden, as well as in Denmark, Finland, Norway, Lithuania, Latvia and Estonia.

Multiroth are hardly worried about the upcoming patent infringement lawsuit. As far as their lawyers are concerned, the drinks are not nearly identical. In addition, they simply state that Multiroth will counterclaim for invalidity of the patents, claiming that shale soaking processes have been known for thousands of years. For instance, they are frequently used in traditional Chinese medicine. Multiroth's lawyers refer to the ancient book of Shen Nong's Herbal Classic, which was first compiled some time during the end of the Western Han Dynasty (ca. 206 BC to 25 AD), and lists various medicinal herbs roots, grass, woods, furs, animals and stones at given grade and rarity ratings, among those the relevant shale types. According to Multiroth's legal team, the patent is clearly not novel, and in addition, definitely lacks inventive step.

From the moment Multiroth entered the market, it seems as though heaven has turned to hell for Pharmagoodlife. The company is not only confronted with the problem of maintaining their positive market expansion and effectively fighting the big company Multiroth, but additional problems have turned up.

In Finland, the famous Dr. Finn has published on his website an article which discusses the risks associated with health drinks containing colloidal minerals. He states that many such drinks contain an abundance of minerals such as silver and aluminium, which can be toxic in large amounts. The article claims that when colloidal silver was given to experimental animals, it produced death due to pulmonary edema (fluid accumulation and swelling in the

lungs). The article is supported by scientific data and references to a number of scholarly journals.

Dr. Finn has however a personal interest in the production and sale of health drinks; he sells his own health drink on the Finnish market under the brand name DR. FINN'S FIT. This part of the website is in Finnish and informs consumers where in Finland the drink is available for retail purchase. His website contains a comparison (also in Finnish) between DR. FINN's FIT and MIVIGOOD under the headline "Totuus MIVIGOOD" (i.e. the truth about MIVIGOOD).

Pharmagoodlife publishes on its own website a response to Dr. Finn's claims. Pharmagoodlife's response is also supported by scientific data, including tables copied from printed and on-line scientific journals (of which 3 are published under open source licences).

Pharmagoodlife also receives a hostile letter from the CEO of DesignBridge, who has observed that MIVIGOOD is no longer exclusively sold in specialized health stores and Pharmacies but also in retail chain stores. According to DesignBridge, this distribution channel was not agreed upon when they licensed the copyright in the bottle. The license agreement between DesignBridge Ltd. and Pharmagoodlife stipulates that the applicable law is U.K. law.

*Pharmagoodlife contacts you, an internationally renowned intellectual property specialist, and asks you to make a legal analysis. The analysis should discuss which claims it may assert in order to protect its legal rights and what claims and/or defenses may be asserted against it. The analysis should discuss also which fora have jurisdiction and what law(s) may be applicable. Pharmagoodlife informs you that it wants justice quickly but it has a limited budget.*

