

Home Exam 2010, submission deadline March 30 09.00 AM –
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For the purpose of this exam I have taken the liberty of focusing on the final part of the exam question – pretending that there is an existing client relationship with Pharmagoodlife – which is why the legal analysis is modelled after a letter to the client, rather than a theoretical legal brief. I hope that this highly practical approach is acceptable.

Dear John,

Thank you for your letter, describing the situation and the potential threats to your continued business development. The overall picture is very complex and there are many aspects and various rights that we must consider. Knowing that speed is of the essence, the most obvious way to start the attack on Multiroth, and given the speed with which they have managed to work their way onto the market, would be file for injunctions. This would in cases have to be done on a country by country basis which is why you should consider choosing your most relevant markets, and also consider the markets where the new contender is doing most harm. For the benefit of your company lawyer, Carl, I also enclose some footnotes so that he may find references to what I write.

For added clarity please be aware that the reply to your question, as to the possible actions available to you and the possible risks that you and your company face follow the below plan, in all cases dealing with the matter of legal actions under the relevant heading:

Patent
Trademarks
Interim Injunction
Design
License agreement
Overall appearance
Dr Finn
Abuse of dominant position
Recommendations

Below I will go through the various rights involved with suggestions as how to handle it all. I would like to point out that the fact that you already have sent a cease-and-desist letter to Multiroth, and their subsequent silence, means that we must follow up with further actions without waiting too long. Should you ignore a follow up, you risk to be seen as having been passive, meaning that you in some jurisdictions could loose the right to act against Multiroth. A swift follow up is equally important as a means to showing that you are willing to take whatever steps necessary to protect your product and trademark in any way possible. Time is also of the essence to secure your right to file for interim injunctions¹, should you wish to do so since this is another measure to prove that you are not passive in this infringement matter.

PATENT –

Though not a patent attorney, I understand that your patent² lies in the method for the process leading up to the drink MIVIGOOD. As you informed me, the use of dissolved shale for health purposes has been known for quite some time, however the shale as such is not the patented method, just one ingredient in it. What makes up the patent, is the five step process

¹ Under the Enforcement Directive 2004/48/EC, Art. 9 (1)(a), incorporated in EU national laws and actionable under national laws.

² A 'normal' patent, i.e. that the plant variety directive is not applicable here since it refers to new plant varieties. It is also not a matter of a biotechnological invention, Art 3 and 4. See also L. Bentley B.Sherman, Intellectual Property Law, 3rd Ed., pp. 420-423.

as described in the patent claim³, arriving at the finished product, the MIVIGOOD drink. If the analysis that you have sent me is correct, that is to say that the competing product MULTIGOOD does indeed differ from your own product in the composition, using soybeans instead of alfalfa leaves in step (iii) of your letter, this would indicate that there is no patent infringement in the sense of the patent as written, a verbatim interpretation. However, we may be able to attack the product by using the equivalence doctrine⁴, i.e. looking to the whole picture rather than the claims as written. The equivalence doctrine focuses on three issues, if the product or procedure consist of substantially the same result, same way and/or same means, then it a matter of an infringement. This means that unless the act of exchanging alfalfa leaves for soybean extract radically changes the end-result or the procedure, then we may be able to claim that Multiroth's product infringes the patent and we should have a good chance of stopping the product on the markets where you have patent registrations. For other territories you will have to compete without the benefit of the patent protection.

I notice that Multiroth has given the patent issue some thought and is threatening to invalidate your patent on grounds of lack of novelty. I have seen the reference that the process of extracting healthy components from shale is a well-known and age old process. However, the shale-process is just a part of your product. The shale dissolution is but one step, and though essential to the product, it does not make up the entire patent and I can not see that your competitor should be able to invalidate your patent for this reason.

The shale soaking product and its derivative product should be a matter which you are free to use and exploit. The shale soaking process has been used for centuries and is thus, as mentioned above, neither novel nor protected. The health benefits from the ensuing derivate in the legal sense amounts to a discovery⁵ and not an invention, the discovery again being free for use. The thing that I recommend that we look closer into, is the matter of whether or not Multiroth may have a chance of invalidating your patent due to lack of inventive step⁶.

Inventive step – In order for an invention to be patented it must contain an 'inventive step'. The result, a product, process or other, must not be obvious for "a person skilled in the art"⁷. In this instance it basically means that an ordinary nutritionist or person of similar skills would not find it obvious that mixing the shale derivative with some vitamins, additional extracts etc. would produce a healthy and beneficial drink. I am not in position to determine the situation based on the information which you have provided, but as mentioned above I strongly recommend that we have a specialist look into this, in order to not be unawares as to the actual situation should Multiroth initiate invalidation proceedings.

Such invalidation proceedings must be brought on a national level.⁸ Whether or not the patents were granted the under the EPC, all granted patents constitute national rights⁹ and there is at the moment no European Patent Court where invalidation proceedings may be cumulated. Thus Multiroth must take the matter to all of the national courts where they wish

³ EPC Art. 69(1), protection "determined by the claims", but description and drawings shall be used to interpret these.

⁴ The doctrine of equivalents is referred to in among other documents, Art.2 in the Protocol on Interpretation of Art. 69 in the EPC 2000. Also L. Bentley, B. Sherman, Intellectual Property Law, 3rd Ed., pp. 562-563.

⁵ EPO Guidelines, 2.3.1.

⁶ EPC Art. 56.

⁷ G. Tritton, Intellectual property in Europe, 3rd Ed., pp. 103-105.

⁸ Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and... (Brussels Regulation), Art. 22(4). L. Bentley B.Sherman, Intellectual Property Law, 3rd Ed., page 1092.

⁹ EPC Art. 64.

for the patent to be invalidated, a costly and time-consuming process for both them and us. There are certain courts within the EPC that have more far-reaching effects, such as the Netherlands, where an invalidation from one European country is basically taken as prima facie evidence for a corresponding decision in the court, but to the best of my knowledge this is not the case in any of the countries involved in this case. Multiroth will have to take the pains to go to all of the national courts where you have patents, fighting the same battle in different languages, as will we have to do.

You on the other hand have the opportunity of suing Multiroth for infringement (both patent and trademark) either in the place of their business domicile¹⁰, Austria, or in Germany where we should be able to argue that the harmful event¹¹ has taken place, i.e. the manufacture of the product. If we do we should also be aware that though we can bring most cases together in one court and one proceeding (with the exception of Denmark and Norway¹²) Multiroth will most certainly counter with the claim that your patents are invalid. This is not something that either the Austrian or the German court can handle, and thus the proceedings will have to be put in abeyance pending the decision on the matter of validity of the patent or trademarks with the national courts.¹³ Thus this option, attempting to bring many cases together look very appealing on paper, in real life I fear that it will not help much in situations such as this.

As a back-up plan, should we have asserted that we are confident that there is no risk of invalidating the patent due to, for instance, lack of inventive step, we may under national law in one of the countries where you have patents, apply to either the national Patent Office or the designated court¹⁴, request re-examination of the patent. By introducing a new piece of prior art, we can have the patent and its validity re-examined on the basis on this new Prior Art. This kind of action would have two purposes. One to be able to delay and disturb the opponent, since we will be first to go to court, showing confidence in the patent and postponing the threat of the attack for lack of novelty or inventive step. Second is that we wind up in a proceeding where we have the power, i.e it is us v. the national patent office or court. Multiroth is in no way involved in the proceedings and we can thus more or less control the material as presented, since we are the ones introducing the new prior art. Please note that this is only recommendable if we are very certain of the patent and its validity. I thus recommend a thorough overview of the patent and its various aspects before taking any further step with regards to the patents.

Since we are dealing with a method/process patent, the burden of proof is upon you, meaning that you will have to prove/make it probable that the process used as the same as the one for your patent.¹⁵ This obviously will make the matter more difficult and costly on your part.

As a note please remember that patent invalidation processes, as well as infringement processes, are expensive and tend to take time.

¹⁰ Brussels Regulation Art. 2(1).

¹¹ Brussels Regulation Art. 5(3).

¹² Denmark and Norway are not party to the Brussels regulation in this matter. Instead it will be possible to use the Lugano Convention, with basically the same legal effect.

¹³ C-4/03, Gat v. LuK

¹⁴ The appropriate authority is decided under national law and differs from country to country.

¹⁵ "Where the subject matter of a patent is a process for obtaining a product, whether new or old, the burden of establishing that an alleged infringing product was made by the patented process shall always be on the person alleging such infringement." The Anell Draft regarding the burden of proof, November 29, 2004.

TRADEMARKS –

As you have pointed out the trademarks, the word marks MIVIGOOD / MULTIGOOD, are similar and there is the question of the trademarks being at risk of being confused by the consumers. After all the consumers will find both products in the same kind of shops, probably even in the same area of the shop. Given the similarity between the marks it should be possible to request an invalidation¹⁶ of the Community Trade Mark (hereinafter referred to as a CTM) MULTIGOOD with the OHIM¹⁷, since it would appear that the opposition period is over¹⁸. One possibility that we may also want to explore, is trying to have the registration cancelled on absolute grounds, i.e. the trademark is inherently unregistrable.¹⁹ The basis for my reasoning here is that a trademark for nutritional supplements, containing minerals and vitamins by the name of MULTIGOOD, might be at risk of being seen as descriptive and void of the necessary distinguishing elements required to be registered and used as an indication of origin, since it may well be seen just as a slogan or a general praising of the product. I can not promise that this will be successful, but it is a comparatively inexpensive way of attacking your competitor and one of the points in its marketing which is detrimental to you.²⁰ Though fairly easy to initiate and not overly expensive, this way is not very quick since we will have to wait some time for the decision.

Naturally we can also try to invalidate the CTM on relative grounds²¹, i.e. using your national registrations to attack Multiroth's CTM on the basis of you having a prior right, and that this new trademark infringe on these rights. This option is available irregardless on the manner of your trademark registrations, national or through the Madrid Protocol.

Despite the action chosen, we should focus on claiming that your trademark enjoys a wider scope of protection, on the basis of it being well-known, or that it has a reputation in the Community.²² Evaluating the claim that your trademark is well-known²³ involves, among others, the following factors: degree of recognition of the mark, extent and duration of use of the mark, extent and duration of advertising and publicity geographical extent of these factors and extent of commercial value of the mark.²⁴ It speaks to your advantage that you have been active for thirteen years and that you for six out of those years, the latest being 2006 and 2008 and the first being 1997 have received the award dietary supplement of the year. Painting the picture of a trademark and product, which for a long period of time has been established the minds of your relative consumer group. There are no absolute figures as to how to determine the necessary level of penetration into the consumers mind for a trademark to be seen as well-known. However here we are talking about a fairly specialized product, one used by people who I take it, are very particular about what they ingest. In this group you have 38 percent of the market for nutritional supplements, something which may well be seen as being well-

¹⁶ The Community Trade Mark regulation 207/2009 (CTMR) Art. 52 and/or 53 depending on the basis for the request for invalidity. This request is subject to the payment of a fee.

¹⁷ OHIM – the Office for the Harmonisation of the Inner Market, the European Trademark Office.

¹⁸ The opposition period, the right to oppose against the registration of a trademark by a third party, expires three months after the publication of the trademark registration, CTMR art. 41(1).

¹⁹ The CTMR, preamble para. 7 and Art. 7(1)(b) and (c), followed by Art. 52.

²⁰ As an example of similar cases before the OHIM I refer to case T-461/04, PURE DIGITAL, which was refused for various goods in class 9, i.e. electronic equipment.

²¹ CTMR Art. 8(1)(b), 8(2) followed by Art. 53.

²² , CTM Regulation Art. 9 (1)(c).

²³ For further information on what makes a trademark 'well-known' can be found in the Paris Convention art. 6 bis, TRIPS art. 16(2) and the Directive 89/104/EEC Art. 5(2). For case law refer to C-408-01 and C-102/07, both concerning Adidas' trademark.

²⁴ G. Tritton, Intellectual Property in Europe, 6th Ed., page 230–231.

known. In addition to that you have also managed to get been over nine percent of the total market for vitamins and minerals. Though there are no official references to which level of market penetration that must attain in order to be able to claim being well-known, "... , it cannot be inferred from the legislation that the trade mark must be known by a given percentage of the public..."²⁵. I am hopeful that we should be able in arguing for this in the present case, should you choose to go in this direction.

The possible problem with this approach is a recent ruling from the Swedish court of appeal²⁶, where the two trademarks MIVITOTAL and MULTI TOTAL were found not to be similar enough to risk confusion in the minds of the consumers. This case is very similar to your situation, with highly similar/identical goods and with market shares practically identical to yours. In view of this Swedish decision, there would be a risk of this negative outcome should we try to cancel Multiroth's trademark registration before the OHIM. On the other hand it should be noted that the decision was not by the Swedish Supreme Court, nor was there, as far as I have been able to see, any use of the Advocate General, meaning that the decision may well have gone the other way under the Supreme Court or with an opinion of one of the Advocate Generals. Naturally the Swedish court's decision stands, but the Swedish legal practise does not guide the OHIM in its decisions since they, as indeed do Swedish courts, rely on the ECJ and their decisions and the ensuing case law.

The CTM owned by Multiroth is not valid in Norway, which is why you should stand a good chance of keeping your Norwegian market fairly intact, since Multiroth would not appear to have any rights on that market as of yet.

Naturally Multiroth may try to counter this attack with a similar move of its own, i.e. cancellation requests of your national trademark registrations on absolute grounds. Since I assume that your trademarks were registered about the same time as you put your products on the market, and they have evidently been used in commerce, it should not be possible for Multiroth to use its registration against you claiming non-use. Your registrations should also be prior to Multiroth's CTM so they have no claims for prior rights. This means that I see no way that Multiroth should have no hope of attempting to invalidate your national trademark registrations.

As with the patents above I can offer the possibility to, instead of suing Multiroth in the various national courts where you have trademark registrations for infringement, you may wish to sue Multiroth in Austria, where it's based or in Germany where the harmful event occurred (which would here, as far as I can see it from the given information, be the fixation of the infringing trademark onto the product).²⁷ Again as with patents you risk having the proceedings stayed in case of an invalidation request by Multiroth. Given the actual situation I think it far better to use this possibility for the trademarks since any national handling of the trademark invalidation question should be quick and easy. Multiroth not really having any actual chance of being successful in trying to invalidate your trademarks.

²⁵ C-301/07 PAGO, Opinion of Advocate General para. 17.

²⁶ T 3341-09, MIVITOTAL / MULTI TOTAL.

²⁷ Regulation 44/2001, The Brussels Regulation on Jurisdiction and..., Art. 2 and 5(3). Please note that it will be possible to sue Multiroth for the various national trademark infringements in all states where you have registered rights with the exception for Norway, not party to the Convention. Norway can be added under the Lugano Convention, Art. . Materially the same contents though not the same legislative instrument. Examples of application of this C-4/03, *GAT*

I also take it that there is no existing 3D trademark registration for the bottle as such.²⁸

The citrus smell might be considered for a scent mark. Scent marks have been up for debate a number of times but at present there seems to be little chance of obtaining registration of a scent mark.²⁹

On the subject of the bottle label, I wonder who has designed the label used on the bottle? It was designed by yourselves, or if you have acquired all rights to the label from DesignBridge should they be the designers, then you may do well to consider filing for trademark protection, CTM, of the label as a figurative mark and another application for the word-mark MIVIGOOD.³⁰

INTERIM INJUNCTION –

“An injunction... It can be granted after a trial establishing infringement of the claimant’s right, when it is called “final” or “perpetual”. However, it may also be sought in “interim” form, not to enforce an established right but to maintain the status quo until a trial on the merits can take place.”³¹

Since I note that you are looking for some quick action, I would recommend that you consider using your trademark rights as a basis for requesting injunctions.³² This way you may be able to more or less put an immediate stop to the marketing and sale of MULTIGOOD by Multiroth. The downside is that such a massive action, in terms of stopping Multiroth from doing further business on the market where you request the injunction, will mean that you most likely will be requested to come up with economic security, should we lose the ensuing court case and having to compensate Multiroth for loss of sales and business. However, it is the quickest way to results in this situation. It is also an action that shall be undertaken with speed since delays in requesting this action may lead to loss of this opportunity and remedy.³³

I recommend that you aim for your absolutely strongest market. If that would coincide with the market where Multiroth is at its ‘newest’ stage, then that would give you a better chance of succeeding in obtaining the injunction. If Sweden is chosen the MIVI/MULTITOTAL case may work against us but as mentioned before, there is room for uncertainty given the fact that it is not a decision by either the Supreme court or the ECJ.

I strongly recommend that you consider the question of injunction due to its quick results, naturally given that the injunction is granted.

DESIGN –

The bottle and label of the product MULTIGOOD, are basically identical with the one you use. I do not know for how long you have used the bottle on the market. Knowing that there is

²⁸ CTMR Art. 7(1)(e), for instance C-238/06 P, Develey Holding (an application based on a German national registration for a plastic bottle), the application refused due to lack of distinctive character, and C-144/06 P, Henkel.

²⁹ The Opinion of the Advocate General in C-273/00, Sieckmann. The Advocate general’s conclusion being that olfactory signs were unsuitable as trademarks. Among other reasons because they are difficult to submit in a proper graphic representations, CTMR Art. 4. Also C-

³⁰ CTMR Art. 4.

³¹ Cornish & Llewelyn, Intellectual property: patents, copyright..., 6th Ed., page 69.

³² TRIPS 41 (1). Enforcement directive 2004/48/EC, Art. 1 and 3, who may apply for injunctions Art. 4, and finally Art. 9 and Art 11 on the matter of injunctions.

³³ Cornish & Llewelyn, Intellectual property: patents, copyright..., 6th Ed., page 70.

no design-registration for the bottle or the label, you have no remedies in any registrations here. There is the chance that you may rely on the 3-year protection for unregistered designs.³⁴ This means that if the bottle, and/or the label, have not been available on the market for a period amounting to three years, counted from the time when the bottle was first introduced on the market whether by you, Designbridge or any of their other customers, you may have a chance of attacking the use of the bottle or the label. Please note that it is the design of the bottle which is important, not the functional part of the dark glass. If DesignBridge has not granted you rights to prosecute design infringements, should we find that such exists, then it is up to them to act on the possible infringement. You may also be able to prosecute Multiroth, should DesignBridge have sold the rights to the bottle to you. Given that you are under license agreement with DesignBridge, I presume that they are still the owners of all of the copyrights as per law.

The physical appearance of the bottle is most likely protected under copyright law, though the protection afforded this shape is most likely very narrow and of little value to your company without the help of DesignBridge. Should the bottle be protected as an unregistered design there are special provisions for you as the licensee.³⁵

LICENSE AGREEMENT –

You appear to be bound by a license agreement between yourselves and DesignBridge. Not having seen the agreement I can only make very general remarks, and I would need to look at the agreement in order to make any detailed comments on its validity and contents. Basically speaking I can say that DesignBridge, as owners of the copyright (or possibly design as per above) of the bottle, are within their rights to decide where the product may be sold.³⁶ I am curious as to whether or not your license is exclusive and whether or not you are the only user of this bottle “especially developed for” you. If you have been granted exclusive rights to the bottle and its shape, and if DesignBridge is selling the bottle to another customer, Multiroth, then you may well be in a position to sue DesignBridge for breach of contract. Again I would need further information as to this background to make further assessments on this avenue.

DesignBridge’s threat to sue for breach of the license agreement may be countered through reference to Anti-competitive law³⁷. Norway is not a part of the European Union’s internal market and the act of forbidding sale to the low-price company RIMI in Norway may not affect the internal market as referred to in the rules on competition. However, since RIMI and yourselves evidently plan further development and sales into the EU Market, then the restriction may have the effect as referred to in Articles 101 and 102 and the prohibition in the license agreement may be dealt with in terms of the prohibition having anti-competitive effects on the inner market.³⁸

OVERALL APPEARANCE AND PASSING OFF –

There is no doubt that the overall appearance of Multiroth’s bottle and label is highly similar, if not in most aspects identical, to yours. Even the shape of the label is identical to the one you use. The practise may be illegal under the term ‘passing-off’ or simply ‘unfair marketing practice. There has recently been a new EU-directive passed on this area³⁹, targeting both

³⁴ Community Design Regulation, Art 9.

³⁵ The regulation on community designs, 6/2002, Art. 32.

³⁶ General rules for freedom to agree on business related matters.

³⁷ Art. 101 and 102 of the Treaty of the European Union.

³⁸ See also Art. 4 of the transfer of technology block exemption regulation, TTBER, on market regulations.

³⁹ Directive 2005/29/EC concerning unfair business-to-consumer commercial practices...

unfair or misleading commercial practises⁴⁰. Since the member states, until mid-2013, are allowed to keep their internal national rules on this area⁴¹, sometimes being more encompassing than the new directive, it can well pay off to indulge in a little forum-shopping. This may allow us to pinpoint and pick the country/ies with the strictest rules, in order to make the continued sale of Multiroth's potentially confusing packaging as difficult as possible. If we are successful, we may even be able to bar the continued sale of the product in its present shape in one or more countries.

DR. FINN –

Here you have a competitor who uses, what at first glance appears to be comparative advertising, referring to various scientific studies, at the same time as he is also marketing a competing product, different from yours and with other components.⁴² There is nothing in either the Trademark Directive or the CTMR which explicitly permits comparative advertising.⁴³ Regulations regarding comparative advertisement from business to consumers state that comparative advertising is permitted when it, among other requirements, is not misleading, compares goods or services meeting the same needs or intended for the same purpose, objectively compares, does not discredit or denigrate the trade marks, does not take unfair advantage of the reputation of a trade mark.⁴⁴

Dr. Finn on his webpage makes use of your registered trademark MIVIGOOD, which basically amounts to trademark infringement, however use of another company's or person's trademark is accepted in allowed and 'fair' comparative advertising.⁴⁵ "Such use of another's trade mark, trade name or other distinguishing marks does not breach this exclusive right in cases where it complies with the conditions laid down by this Directive, the intended target being solely to distinguish between them and thus to highlight differences objectively."⁴⁶

As part of his attempts at comparing the products, and boosting his own, Dr. Finn has a section on his webpage called "The truth about MIVIGOOD". You mention that the part "The truth about..." is in Finnish and that Dr. Finn here refers to scholarly articles. This I interpret as indicating that the website as a whole, and the scholarly articles under the Finnish-language section, may well be in English, strengthening my impression that the website might be harmful to you and your business not only in but also outside of Finland.⁴⁷ This is especially the case should a non-Finnish speaking person see and recognize only the trademark MIVIGOOD and the potentially damaging content in the articles on the website, the English parts.

From the above I would say that Dr. Finn's advertising has nothing whatsoever to do with any comparative advertising, the contents on his webpage possibly even amounting to slander in the way the headline reads "The truth about..." along with references to articles that refer to

⁴⁰ Directive 2005/29, Art. 5 and Art. 6.

⁴¹ Directive 2005/29, Art. 3(5).

⁴² We may also be able to refer to the e-commerce directive on this issue.

⁴³ G. Tritton, *Intellectual Property in Europe*, 3rd Ed. page 361.

⁴⁴ Directive 2005/29/EC on unfair business to consumer practises..., Art. 5, 6 and 14., Directive 2006/114/EC concerning misleading and comparative advertising, Art 3(a). C-44/01, *Pipig Augenoptik*.

⁴⁵ G. Tritton, *Intellectual Property in Europe*, 3rd Ed., page 362. C. Poncibo, R. Incardona, *The EU Unfair Commercial Practises Directive, A faltering first step*, October 2005.

⁴⁶ Directive 2006/114/EC, the recitals, para. 15.

⁴⁷ Compare the *Cristal* case, Court de cassation, December 9, 2003. This involved a French site, in the French language, which was deemed to have effect even though the trademark owner had no direct sales in France. The action against Dr. Finn will be guided by WIPO's guidelines.

harmful effects of the kind of material included in MIVIGOOD. Also there are no references to the tests as carried out in terms of the level of concentration, and the words “colloidal silver resulting in death” has in no way any indication as to concentration of the various compounds etc., and thus can not be said to be either objective, fact based or comparative, all in order to support Dr. Finn’s statement that his is the better product.

This makes it even more important to stop this as soon as possible.⁴⁸ For this we need to decide in which country the damage occurs⁴⁹, and also act to have the damaging material removed from the website. If the webpage is mainly directed at the Finnish market, then Finland is the country where we attack this problem. If the webpage is primarily English speaking (or any other language) and you estimate a risk of the webpage and its material being damaging for your business in several countries, then we may be able to bring all of these concerned issues in under one act.⁵⁰

As regards your own homepage and the battle against Dr. Finn I should caution you that using material found on the Internet for commercial purposes most likely constitutes a violation of Copyright and the Berne Convention, unless you have obtained the authors acceptance for the use. Also please be careful what you present on your own webpage, so that you do not yourself fall into the trap of violating the guidelines for comparative advertising and possibly even slanderous statements. The open source mentioning only refers, as far as I understand the circumstances, to the computer software allowing the material to be seen accessed and nothing to do with any license agreement or copyright in this respect.

QUESTIONS OF ABUSE OF DOMINANT POSITION, Anti-competitive laws –

We have already concluded that you hold a substantial part of the market for nutritional supplements and a more modest but still impressive part of the overall sale of vitamins and minerals. I would most definitely not be doing my job if I did not consider whether or not your actions against Multiroth were at risk of being caught under the prohibition against abuse of dominant position or if your actions were to put you at risk of violating the anti-competition laws.⁵¹ A dominant position has been described as , “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers”⁵². Since there appears to be a functioning competition in your market segments with competitors having viable businesses, since Multiroth has not asked for any license or other concession from your company and since the use of the shale derivate, and its health benefits, is still available for use, I can not see that you need to consider these factors in your further efforts to stop, in my view, infringing activities on Multiroth’s side.

TO CONCLUDE –

In view of the information you have provided me with, and against the background of the above overview of the situation, I suggest the following actions:

That we immediately arrange for a review of your patent and its inherent registrability in terms of inventive step, possibly also novelty.

⁴⁸ Using Rome II, 864/2007, Art. 6.

⁴⁹ Rome II, Art. 4.

⁵⁰ Rome II, Art 6(3)(b).

⁵¹ Art. 101 and 102 of the Treaty of the European Union.

⁵² From the decision by the Court of Justice in the United Brands case 27/76, 2008, Summary Art.2.

That we immediately file for the cancellation of the CTM MULTIGOOD.

That we identify your strongest market and that we contact a local representative to prepare an interim injunction against Multiroth.

That you provide me with the license agreement between yourself and DesgnBridge, so that I may assess what options we have in order to circumvent the possible action regarding your sale of the product to RIM, the Norwegian market and onto the European supermarket level.

That we act against the website Dr. Finn in order to stop the potentially damaging material and marketing.

That we assess the chances of acting against the confusingly similar bottle and label as sold by Multiroth.

And finally, should we win a national infringement process based on your national trademark registration or on your patent, we may initiate border measures, having the future possibility to stop the goods already at the border.⁵³

I look forward to hearing from you to discuss the further steps in order to protect your business.

⁵³ Council regulation 1383/2003, concerning customs action against goods suspected of infringing certain intellectual..., Art 2(c).