

# World Trademark Review *Daily*

Relationship between free speech and trademark rights explored  
Switzerland - meyerlustenberger

Confusion  
Unfair use

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In a dispute involving a parody of a well-known logo for cigarettes, the Civil Court of Basle has considered the boundaries between free speech and trademark rights.

The respondent, a non-profit organization, set up an anti-tobacco website under the domain name 'daveathswissindoors.ch'. The website criticized the fact that a tobacco brand, Davidoff, was sponsoring a sports tournament ("Using tennis to sell death"). The website featured a parody of the official DAVIDOFF SWISS INDOORS logo mark, which required close inspection to distinguish it from the original.

Davidoff & Cie SA obtained an *ex parte* injunction against the further dissemination of the website. However, the injunction was subsequently lifted.

Davidoff had based its [complaint](#) on both trademark law and unfair competition law, but had not sufficiently substantiated the trademark claim. Under Swiss law, a trademark owner can enjoin only the commercial use of its mark by a third party. However, the website at issue did not offer any goods or services for sale.

Davidoff's main argument was that use of the modified logo was "needlessly disparaging" under the Federal Unfair Competition Act. The act applies whenever a behaviour has an influence on the market, and does not require the existence of a competitive relationship between the petitioner and the respondent.

The Civil Court of Basle agreed that the act was applicable in this case, but found that no violation had occurred. The court held that attempting to change the public's perception of certain behaviour is permissible under the law. Since Davidoff used emotionally charged images in its communication, the critics were allowed to do the same. Exaggeration and distortion are not against the law, as long as no impression of a non-existing relationship is created. In the present case, the relationship between tobacco and death was well established and not misleading.

Further, the court distinguished this case from a September 13 1988 decision of the Austrian High Court (Case 4Ob48/88). According to the Austrian High Court, the fact that tobacco critics had singled out a specific brand to condemn tobacco products in general was unfair ("Only a camel would go a mile for a cigarette"). In the present case, the respondent specifically criticized the fact that a tobacco brand was sponsoring a sports tournament, and Davidoff had engaged in the type of behaviour that was criticized. Therefore, the criticism was fair.

Davidoff has chosen not to initiate proceedings on the merits.

*Mark Schweizer, meyerlustenberger, Zurich*

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