

FOCUS IP

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PARASITISM – FRENCH SUPREME COURT CLARIFIES THE NOTION OF “INDIVIDUALIZED ECONOMIC VALUE” TO BE PROVED BY THE VICTIM



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- **Cass. Com., 26 juin 2024, n° 23-13.535 : Maisons du Monde c./ Auchan ;**
- **Cass. Com., 26 juin 2024, n° 22-17.647 et 22-21.497 : Decathlon c./ Intersport**

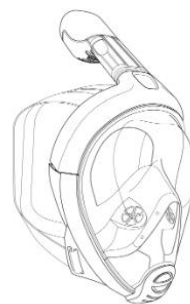
IMPACT: In two judgments issued on the same day, the French Supreme Court reiterates that, in matters of parasitism, the claimant must identify both the individualized economic value invoked and the defendant's intention to follow in his footsteps.

Above all, it clarifies the definition of the individualized economic value by emphasizing that “the search for a cost saving to the detriment of a competitor is not inherently wrongful”, reinforcing claimant's burden of proof.

➤ **Facts of the cases**

In the case Maisons du Monde v. Auchan, Auchan had marketed cups and bowls featuring “vintage” images designed by third-party providers. Maisons du Monde (MDM) then sued Auchan for unfair competition and parasitism, claiming that the products reproduced a decor similar to its poster “Pub 50's”, designed in 2010 by its styling department. Following the dismissal of its claims by the Rennes Court of Appeal, an appeal was lodged before the Supreme Court.

In the case Decathlon v Intersport, Decathlon marketed a diving mask “Easybreath” protected by a Community design, while Intersport marketed a similar mask under the trademark Tecnopro, acquired from the German company Phoenix Group.



EasyBreath – Decathlon



Tecnopro – Intersport

Following an action for infringement and parasitism brought by Decathlon against Intersport, the Paris Court of Appeal has rejected the infringement of the model, but recognised the capture of the identified and individualized economic value of the Decathlon companies and condemned Intersport for parasitism.

The French Supreme Court took up both cases, reiterating the criteria for parasitism, which ultimately

led to a conviction in the Decathlon case and a rejection of the claims in the Maisons du Monde case.

The Court published these decisions in its “Bulletin” and announced that they would be featured in its Annual Activity Report which means there are important judgements. More generally, it is in line with the tendency of the courts to seek a better definition of the notion of parasitism, as shown by the recent publication of a [fact sheet on compensation for damage](#) due to parasitism by the Paris Court of Appeal in January 2024.

➤ **A reminder of the criteria for parasitism**

In both judgements, the Supreme Court issued several reminders:

- **the principle of freedom of trade**, emphasizing that *“since ideas are free, the mere fact of using a competitor's concept in a different way does not in itself constitute an act of parasitism”*¹
- **the traditional definition** of parasitism as *“a form of disloyalty, constituting a fault within the meaning of Article 1240 of the Civil Code, which consists, for an economic operator, in placing himself in the wake of another in order to profit unduly from his efforts, his know-how, the reputation acquired, or the investments made”*².
- **the evidence to be provided by the claimant**: *“identifying the individualized economic value he is claiming” and “the willingness of a third party to placing himself in the wake of another”*³.
- **the notion of individualized economic value**, which *“cannot be deduced solely from the longevity and marketing success of the product”*⁴.

It added a further clarification in the Decathlon case, stating that *“seeking to make savings to the detriment of a competitor is not in itself wrongful, but stems from the freedom of trade and free competition, subject to respect for fair trade practices”*. The Supreme Court therefore seems to be reinforcing the claimant's evidentiary burden, given that demonstrating the defendant's cost savings from adopting the plaintiff's idea or concept would not be sufficient.

➤ **The application of parasitism criteria by the Supreme Court to the cases**

After recalling the principles of parasitism, the Supreme Court made a highly factual assessment of the facts of the cases to ensure that they were correctly applied, and on this occasion provided several clues as to the evidence to be produced to demonstrate individualized economic value.

In Maisons du Monde v. Auchan, MDM argued that its Pub 50's poster was the result of a unique combination of visual elements representing the 1950s and demonstrated promotional efforts.

However, the Supreme Court rejected the appeal on the grounds that there was no evidence of the existence of an identified and individualized economic value, as shown by a number of indicators listed and detailed by the Court:

- the absence of slavish copying by the Auchan company of the Pub 50's painting created by the MDM company, which simply consists of a *“composite of different pictures, freely available on the Internet”*;
- the marketing of the Pub 50's poster over a *“limited period”* and *“never having been promoted as emblematic of the vintage collection”*;
- the use of a genre that the claimant was neither the only one to exploit, nor characteristic of its own universe;
- the absence of claimant's intellectual property rights in the elements of these decors, which may seem surprising given the distinct ground of parasitism;
- the absence of any variation of the Pub 50's poster on other products;
- the ordinary nature of the combination of pre-existing images freely available on the Internet, which have never been promoted as emblematic of the claimant's universe.

¹ 1re Civ., 22 juin 2017, pourvoi n° 14-20.310

² Com., 16 février 2022, pourvoi n° 20-13.542 ; Com., 10 juillet 2018, pourvoi n° 16-23.694 ; Com., 27 juin 1995, pourvoi n° 93-18.601

³ Com., 26 juin 2024, pourvoi n° 23-13.535 ; Com., 20 septembre 2016, pourvoi n° 14-25.1316 ; Com., 3 juillet 2001, pourvoi n° 98-23.236, 99-10.406

⁴ Com., 5 juillet 2016, pourvoi n° 14-10.108

The Supreme Court thus provides numerous examples of how to characterize an individualized economic value which, in their absence, are indicators that should lead to the exclusion of the existence of parasitism.

In Decathlon v. Intersport, it is interesting to note that the claimant's action for infringement of its design was dismissed as the product's characteristics were dictated by its technical function, while its action for unfair competition was rejected on the grounds that there was no likelihood of confusion between the products.

In this case, the claim of parasitism was successful. As in the *Maisons du monde* case, the Supreme Court identified a list of clues that led it to consider the existence of individualized economic value:

- the high profile of the mask Easybreath, supported by advertising investments of over three million euros and sales of 73 million euros between 2014 and 2018;
- the design and development work carried out over a three-year period at a total cost of 350,000 euros;
- the innovative nature of Decathlon's approach, as evidenced by the absence of proof that *"equivalent products would have existed on the French market at the time the mask Easybreath was launched"*.

The Court also took the defendant's point of view, stressing that Intersport and its economic partner had *"not provided any development work or costs incurred in relation to their own product"*, and that the launch of their mask took place *"at a time when the Decathlon companies were still investing in the broadcasting of advertising spots"*.

Finally, with regard to the intention to place himself in the wake of its competitor, the Court confirmed the arguments of the Court of appeal, which seemed to deduce this from the *"strongly inspired appearance of the Decathlon mask"*, the *"link between the two masks due to their overall appearance"* and the fact that Intersport marketed its mask at a time when Decathlon was broadcasting its advertising spots.

Intersport and its economic partner were ordered to jointly pay 100,000 euros as damages to Decathlon. However, no prohibition order was issued, given that the mask Easybreath was marketed for over 3 years without any competing versions on the market.

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