

Bird & Bird & Reports of Trade Mark Cases for CIPA Journal

November 2020




Trade mark decisions

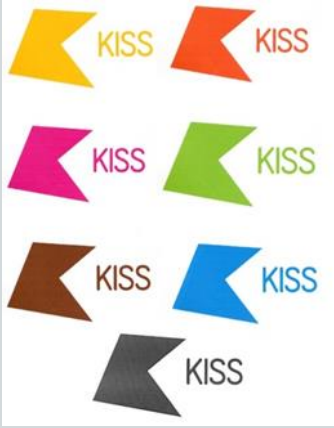
Decisions of the General Court (GC) and Court of Justice (CJ)

Ref no.	Application (and where applicable, earlier mark)	Comment
GC T-5/19	PROFI CARE	The GC upheld the BoA's decision that the mark was descriptive and lacked distinctive character pursuant to articles 7(1)(b) and (c).
<i>Clatronic International GmbH v EUIPO</i>	<ul style="list-style-type: none"> – hand tools and implements (hand operated); hair styling appliances; manicure and pedicure tools (8) – weighing apparatus and instruments; measuring apparatus and instruments (9) – medical apparatus and instruments; massage apparatus; ultrasonic cleaning instruments (10) – food and beverage cooking, heating, cooling and treatment equipment; hair dryers; tanning apparatus; saunas and spas (11) – brushes, brooms and other cleaning instruments; toothbrushes; combs; hairbrushes (21) – decorative articles for the hair (26) 	The GC held that the BoA was correct to find that the mark would be understood by the relevant public as designating personal care products with the quality of professional tools. Further, the graphic element of the mark was not sufficient to divert the attention of the relevant public from the descriptive message conveyed by the word element.
13 May 2020 Reg 2017/1001		The GC also determined that the BoA's general conclusion that the mark was descriptive in relation to all of the goods applied for, insofar as each of these were directly linked to personal care, should be considered in conjunction with the BoA's specific reasoning in relation to each category of goods. As a result, the BoA was found to have given adequate reasons to support its conclusion.
Reported by: <i>Louise O'Hara</i>		

Ref no.	Application (and where applicable, earlier mark)	Comment
GC T-533/19	sflooring	The GC annulled the BoA's decision that there was a likelihood of confusion between the marks under article 8(1)(b).
<i>Artur Florêncio & Filhos, Affsports Lda v EUIPO; Anadeco Gestion, SA</i>	<ul style="list-style-type: none"> – flooring for sports and multi-use flooring, flooring for games and industrial flooring, manufactured from non-metallic materials (19) – carpets and floor coverings for sports, games and industry (27) – construction, application and maintenance of flooring (37) 	On an overall assessment of the evidence, the GC held that Anadeco Gestion had failed to prove genuine use of the earlier mark. In particular, no evidence of use had been furnished in relation to floor coverings; much of the evidence of sales in relation to parts for 'floor coverings' fell outside the relevant period, so the only sales appeared to take place during a period of eight months; and it was unclear whether catalogues dating from the relevant period had in fact been distributed to the public.
8 July 2020 Reg 207/2009		As a result, the frequency and consistency of the evidence of use was insufficient to offset the low volume of sales under the earlier mark such as to dispel the doubts as to its genuineness (following <i>HIPOVITON</i> , T-353/07).
Reported by: <i>William Wortley</i>	T-FLOORING (Spanish registration)	
	– floor coverings (27)	

Ref no.	Application (and where applicable, earlier mark)	Comment
GC T-557/19 <i>Seven SpA v EUIPO</i> 23 September 2020 Reg 2017/1001 Reported by: <i>Robert Milligan</i>	 <ul style="list-style-type: none"> - woven and knitted clothing and underwear, boots, shoes and slippers, headgear (25) 	<p>The GC upheld the decision of the BoA to reject an application for restitutio in integrum made under article 104 by Seven (the licensee of the registration). Instead, it confirmed the cancellation of the registration of the mark pursuant to article 53(2).</p> <p>The GC agreed with the BoA that the proprietor of the registration had only granted express authorisation to Seven to renew the registration after the renewal period had expired. Therefore Seven were not a party to the proceedings within the meaning of article 104.</p> <p>Consequently, Seven could not remedy the failure of the proprietor to renew the registration unless it was shown that such a failure had occurred in spite of the proprietor having exercised all due care. The GC agreed with the BoA that the proprietor had not done so, with the result that Seven, as the licensee, could not apply to have its rights re-established to renew the registration.</p>

Ref no.	Application (and where applicable, earlier mark)	Comment
GC T-738/19 <i>Clouds Sky GmbH v EUIPO; The Cloud Networks Ltd</i> 23 September 2020 Reg 207/2009 Reported by: <i>Stephen Allen</i>	 <ul style="list-style-type: none"> - electronic, electrical apparatus and instruments for the input, storage, processing and transmission of data (9) - gambling apparatus and instruments (28) - telecommunications, communications, satellite and digital communications services (38) - entertainment services (41) 	<p>In the context of invalidity proceedings, the GC upheld the BoA's decision that the mark had not been descriptive at the time of filing, and therefore did not lack distinctive character, pursuant to articles 7(1)(b) and 7(1)(c).</p> <p>The BoA was correct to find that it had not been proven that the element 'The Cloud' was descriptive of cloud computing at the time of filing. Clouds Sky had tried to rely on a single piece of evidence, a Wikipedia page entry, to show that 'the Cloud' was a common expression that had been used to refer to cloud computing since the 1970s. Since this was the only evidence submitted, it did not confirm or corroborate other sources (e.g. scientific studies). It was also dated 5 years after the filing date of the application, and so did not prove descriptiveness at the time of filing.</p> <p>Additionally, although Clouds Sky submitted that each element of the mark was individually descriptive, they did not explain how the relevant public would perceive the mark, taken as a whole, as describing the goods or services. Nor did Clouds Sky specify which of the goods or services the mark described. Since the mark was not descriptive, Clouds Sky's arguments under article 7(1)(b) also failed.</p>

Ref no.	Application (and where applicable, earlier mark)	Comment
GC T-421/18	MUSIKISS	The GC upheld the BoA's decision that there was no likelihood of confusion between the marks under article 8(1)(b).
<i>Bauer Radio Ltd v EUIPO; Simon Weinstein</i>	<ul style="list-style-type: none"> – advertising; employment agencies, in particular in connection with music for those interested in music; retailing and wholesaling, of goods and services in the music sector (35) 	The GC agreed with the BoA that the services applied for in class 45 were dissimilar to the services covered by the earlier marks in class 41, insofar as they differed in nature and intended purposes. Likewise, the BoA was correct to find that the advertising and employment agency services in class 35 differed in nature and purpose from radio broadcasting services. The remaining services applied for were similar (at least to a low degree) or identical to the goods and services covered by the earlier marks.
23 September 2020	<ul style="list-style-type: none"> – organising, coordination and provision of recreational events; compilation, gathering, management and providing of data in connection with music (41) 	
Reg 207/2009	<ul style="list-style-type: none"> – social services, namely arranging groups sharing interests and dating via social networks (45) 	
Reported by: <i>Charlotte Addley</i>		
		The GC agreed with the BoA that the 'MUSIK' element of the mark applied for would have greater hold on the attention of the relevant public, given its position at the start of the mark and its connection with the services applied for. In particular, the 'KISS' element of the mark applied for did not play an independent distinctive role within the mark.
	KISS	The GC held that there was an average degree of aural similarity and a low degree of conceptual similarity, but agreed with the BoA that there was a low degree of visual similarity and that overall the marks were similar to a low degree.
	<ul style="list-style-type: none"> – downloadable application software; computer software for use as an application programming interface (AIP) (9) – broadcasting services; radio broadcasting; radio broadcasting and transmission (38) – organisation of events for cultural, and entertainment purposes; radio entrainment services; providing use of software applications through a website; entertainment services provided via a website (41) 	As a result the BoA was correct to find that there was no likelihood of confusion between the marks and to remit the case to the Opposition Division to reconsider the opposition under articles 8(1)(b) and 8(5) in light of the claim that the earlier marks had a reputation.
	(UK registrations)	
Ref no.	Application (and where applicable, earlier mark)	Comment
GC T-602/19	NATURANOVE	The GC annulled the BoA's decision that there was a likelihood of confusion between the marks under article 8(1)(b).
<i>Eugène Perma France v EUIPO;</i>	<ul style="list-style-type: none"> – cosmetics; hair lotion; shampoo; shampoo-conditioners; hair cosmetic hair preparations; 	The GC upheld the BoA's finding that the component 'Natura' was weakly distinctive because, although it was not

SPI Investments
Group, SL

5 October 2020
Reg 207/2009

Reported by:
Laura Goold

hair-colouring preparations;
bleaching and lightening
preparations for the hair;
cosmetic preparations for
maintaining and caring for the
hair (3)


NATURALIUM


- bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices (3)

directly descriptive, the public would have understood it as being allusive of the natural origin of the goods.

However, the GC disagreed that 'Natura', placed at the start of the mark, would attract more attention than the ending. The endings of the marks were radically different and played a significant distinctive role. In view of this, despite the length and position of 'natura' in both marks, the overall degree of visual and phonetic similarity was low, not average as the BoA had found.

The GC concluded that given the low similarity between the marks, and the low overall inherent distinctiveness of the earlier mark, there would be no likelihood of confusion between them. This was notwithstanding the identity of the goods.

Ref no.	Application (and where applicable, earlier mark)	Comment
GC T-349/19	 – athletic clothes and hats (25)	The GC upheld the BoA's decision that there was no likelihood of confusion between the marks under article 8(1)(b).
<i>Decathlon v EUIPO; Athlon Custom Sportswear PC</i>	DECATHLON – clothing; caps (25) – gymnastic and sporting articles (except clothing, mats and shoes) except those relating to decathlon events and except discuses for sports, javelins, shots and discuses for throwing and poles (28)	The GC agreed with the BoA that the figurative element and the stylised 'athlon' word element were most important visually in the overall impression given by the mark applied for. The BoA was correct to find that the marks were only visually similar to a low degree, due to the additional three letters at the start of the earlier mark and the figurative element and stylisation of the mark applied for, particularly as the 3 rd , 5 th and 6 th letters could be read as 'r', 'e' and 'r' respectively, thereby differing from the earlier mark. The GC held that the marks shared an average degree of aural similarity and a certain conceptual similarity for the part of the relevant public that understood 'athlon' as meaning 'a contest' in Greek. However, the GC noted that this common word element had only a weak distinctive character in relation to the goods at issue and that the visual comparison dominated in the global assessment due to the marketing circumstances of the goods. In the absence of adequate evidence demonstrating the enhanced distinctive character of the earlier mark, the BoA was correct to find that there was no likelihood of confusion.
15 October 2020 Reg 207/2009		
Reported by: <i>Emma Ikpe</i>		

Ref no.	Application (and where applicable, earlier mark)	Comment
GC T-2/20		<p>The GC upheld the BoA's decision that there was no likelihood of confusion between the marks under article 8(1)(b).</p>
<p><i>Laboratorios Ern, SA v EUIPO; Biotec Biologische Naturverpackungen GmbH & Co. KG</i></p> <p>15 October 2020 Reg 207/2009</p> <p>Reported by: <i>Theo Cooper</i></p>	<ul style="list-style-type: none"> – chemicals used in industry; foaming agents for plastics; unprocessed plastics, in particular biodegradable unprocessed plastics, chemicals used in form of thermoplastically processable granules for pharmaceutical purposes (1) – sanitary products (included in this class), capsules (filled) for medical purposes (included in this class), excluding pharmaceutical and veterinary products (5) – scientific and technological services and research and design relating thereto; industrial analysis and research services; all the aforesaid services in particular in the field of biodegradable plastics (42) 	<p>The GC held that the fact that the goods applied for in class 1 were raw materials used in the manufacture of those covered by the earlier mark in class 5, did not make the goods similar or complementary, and that their nature, purpose, relevant public and distribution channels were different. Despite the fact that the pharmaceutical industry devoted significant time to scientific and technological research, the services applied for in class 42 differed in nature, purpose and methods of use and marketing, from the goods protected under the earlier mark. The remaining goods applied for in class 5 were similar to a low to average degree.</p> <p>The GC held that the marks were visually and phonetically similar to a low degree, due to the different final letters, the weak distinctiveness of the 'bio' prefix, and the stylisation of the mark applied for. The GC also held that the marks were conceptually similar to a low degree, as the earlier mark related generally to something of a biological nature, whereas the mark applied for would be understood as referring to biodegradable plastics. Given the high level of attention of the relevant public, the BoA was correct to rule out any likelihood of confusion between the marks.</p>
	<p>BIOPLAK</p> <ul style="list-style-type: none"> – pharmaceutical preparations (5) <p>(Spanish registration)</p>	
Ref no.	Application (and where applicable, earlier mark)	Comment
GC T-49/20	<p>ROBOX</p> <ul style="list-style-type: none"> – boxes made of plastics materials for packaging of tools and machines as well as their parts and accessories (20) <p>OROBX</p> <ul style="list-style-type: none"> – goods of plastics (20) 	<p>The GC upheld the BoA's decision that there was a likelihood of confusion between the marks under article 8(1)(b).</p> <p>Following the assessment of the evidence of genuine use of the earlier mark, it was held to have been registered for an independent subcategory within 'goods of plastic', namely 'plastic safety boxes and closures therefor'. These were held identical or similar to the goods applied for.</p> <p>There was at least an average degree of visual and phonetic similarity between the marks, most notably due to the fact they differed only by a single letter O. There was also a high degree of conceptual similarity, albeit it was considered less weighty in view of the descriptiveness of BOX.</p> <p>While the GC held the BoA had erred in law in finding the descriptiveness of</p>
<p><i>Rothenberger AG v EUIPO; Paper Point Snc di Daria Fabbroni e Simone Borghini</i></p> <p>15 October 2020 Reg 207/2009</p> <p>Reported by: <i>Lauren Kourie</i></p>		

BOX had no relevance to the assessment of visual and aural similarity, the error had no bearing on the outcome of the case and did not result in the annulment of the contested decision.

Ref no.	Application (and where applicable, earlier mark)	Comment
GC T-48/19 <i>smart things solutions GmbH v EUIPO; Samsung Electronics GmbH</i>	 <ul style="list-style-type: none"> – electrical goods, computers, smart phones, tablets, charging stations, docking stations, phone holders (9) – furniture, goods of various materials including wood, cork, reed, ivory, whale bone, shell, amber, mother of pearl and substitutes (20) – advertising, business administration, retailing and wholesaling (35) 	<p>In the context of invalidity proceedings, the GC upheld the BoA's decision that the mark was descriptive and lacked distinctive character pursuant to articles 7(1)(b) and 7(1)(c).</p> <p>The BoA was correct to find that the word element 'smart' was descriptive of all the goods and services. The term 'smart' referred to intelligent technology, which covered all goods in class 9. Furniture in class 20 could also have had intelligent functions, e.g. furniture that electronically adapted to certain conditions. Alternatively, 'smart' suggested those goods were fashionable or chic. As regards the services in class 35, 'smart' merely indicated a characteristic of the retailed goods, and that the other services could be provided in a smart way. The element 'things' was also descriptive of all the goods and services.</p> <p>The BoA was correct to find that the combination of 'smart' and 'things' was not sufficiently unusual to create a new distinctive meaning.</p> <p>The figurative element ':)' was not distinctive because it was laudatory and commonplace in electronic messaging. It did not divert the relevant public's attention from the descriptive message of the word elements.</p>
15 October 2020 Reg 2017/1001		
Reported by: <i>Sophie Stoneham</i>		

Res judicata

CEDC International sp. Z o.o., ("CEDC") v EUIPO (GC; T-796/16; 23 September 2020)

In deciding certain grounds of opposition, the Board of Appeal had incorrectly referred to its own earlier decision which had been annulled in its entirety and was therefore of no effect. As a consequence, an opposition filed in 2003 has still not been concluded. Alexander Grigg reports.

Background

In 2003 CEDC's predecessor opposed the application to register the 3D EUTM in class 33 for spirits and liqueurs (shown below). The mark was accompanied by the description: 'the object of the trade mark is a greeny-brown blade of grass in a bottle; the length of the blade of grass is approximately three-quarters the height of the bottle'.

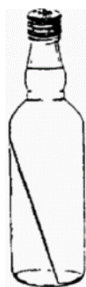
The application was opposed under Articles 8(1)(a) and (b), 8(3) and 8(4) based, in part, on a 3D French mark registered in class 33 for alcoholic beverages (also shown below). This representation was accompanied by the description: 'the mark consists of a bottle ... inside which a blade of grass is placed in the body of the bottle in an almost diagonally inclined position'.

The Opposition Division rejected the opposition in its entirety. CEDC had failed to establish genuine use of the earlier mark since, in use, the presence of a label on the bottle and the representation of a bison on that label altered the distinctive character of the mark. The Board of Appeal dismissed the appeal by CEDC (the

"2012 decision"). However, on appeal to the General Court (T-235/12), the decision was annulled in its entirety on the basis that the Board of Appeal had not exercised its discretion objectively because it had not taken into account additional evidence filed by CEDC (see below for one of the representations).



Application



Earlier mark



Additional evidence

The contested decision

The matter was referred again to the Board of Appeal and the appeal dismissed. The Board considered the evidence first submitted together with the new evidence and decided that the earlier mark simply showed a straight diagonal line and not a blade of grass. These observations were not altered by the description accompanying the earlier mark as the scope of protection of the trade mark was not defined by what CEDC had in mind when filing the mark.

CEDC had not proven use of the mark by submitting images of a blade of grass in a bottle. The blade was curved, long and inside the bottle, whereas the mark depicted a shorter straight line on a bottle. The distinctiveness and scope of protection of the earlier mark to be weak and consequently the differences in length, shape and position of the grass in the bottle altered the distinctive character of the mark and could not be used to prove use. On that basis, the opposition based on Articles 8(1)(a) and (b) failed. In relation to the Articles 8(3) and 8(4) grounds, the Board of Appeal referred to its 2012 decision and concluded that the opposition failed.

After a stay for the application to be re-examined on absolute grounds, the opposition proceedings were reopened and CEDC again appealed to the General Court.

Decision

The GC dismissed the appeal on all but one ground.

Since the 2012 decision had been annulled in its entirety and had not been appealed, it had become *res judicata*. The 2012 decision was therefore *ex tunc* and did not exist in the EU legal order. It could therefore have no effect.

It followed that the Board of Appeal in the contested decision was not permitted to refer, for certain of the grounds on which the application was opposed, to the reasoning of the 2012 decision without examining and rejecting each of those grounds.

Consequently, the Board of Appeal had failed to provide reasons for the contested decision to the requisite legal standard, which infringed Article 75 of Regulation No 207/2009. The contested decision was therefore annulled with regard to the grounds of opposition set out in Article 8(3) and 8(4).

Distinctiveness

Aktiebolaget Östgötatrafiken v Patent- och registreringsverket (CJ; C-456/19; 8 October 2020)

In a referral from the Swedish Court of Appeal (Patents and Market Court) for a preliminary ruling, the CJ held that the assessment of distinctiveness of signs applied to specific goods should not be assessed having regard to what is customary in the relevant sector. Bryony Gold reports.

Background

The appellant, Östgötatrafiken, was the proprietor of three Swedish figurative marks, registered for transport services in class 39:



(No 363521)

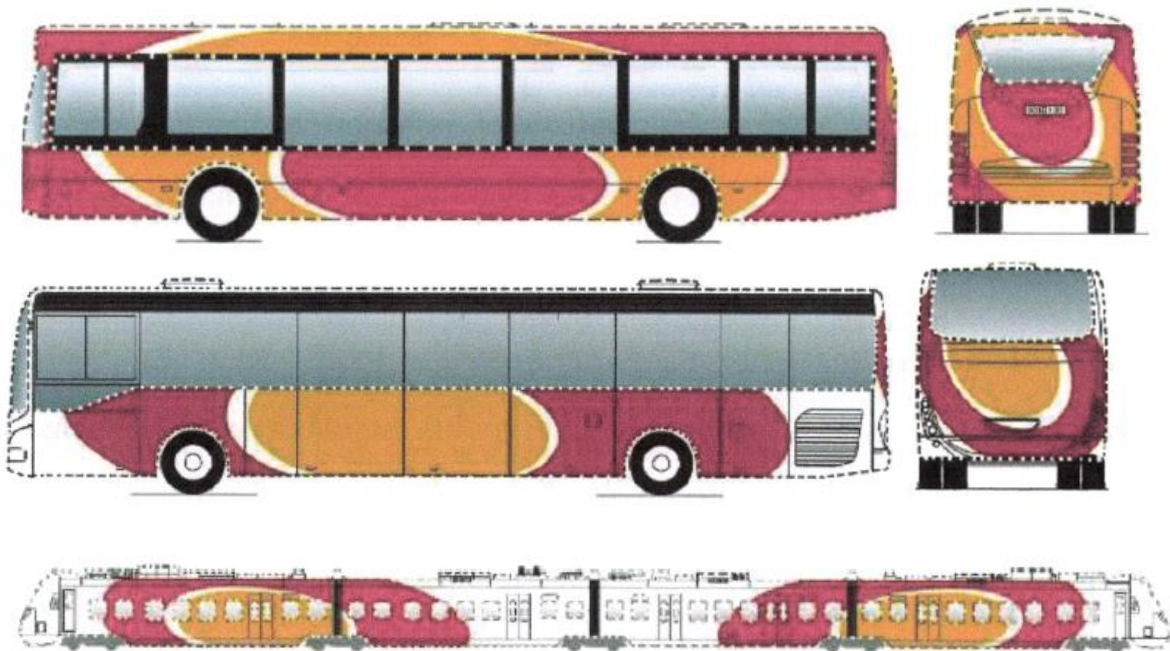


(No 363522)



(No 363523)

In 2016, Östgötatrafiken, filed applications for the following further three figurative marks for transport services within class 39:



The applicant described these as position marks; the shape of the goods (shown above) were not the object of the application, hence the use of the dotted lines. Each of the three applications were accompanied with the description 'colouring of vehicles in the colours red, white and orange, as shown'.

The applications were rejected by the Swedish Patent and Registration Office on the basis that, since commercial transport vehicles are often decorated with coloured motifs, consumers would regard them as merely decorative elements. The signs did not differ significantly enough from the norms or customs in the sector to have operated as an indicator of origin.

The applicant unsuccessfully appealed to the Swedish Patent and Market Court, and then to the Swedish Patent and Market Court of Appeal, which decided to stay the proceedings and refer to the CJ the question of whether Article 3(1)(b) of Directive 2008/95 must be interpreted as meaning that the distinctive character of a sign for which registration as a trade mark was sought for a service, which consisted of colour motifs and which was intended to be affixed exclusively and systematically in a specific manner to a large part of the goods used for the provision of that service, must be assessed in relation to those goods and by examining whether that sign departed significantly from the norms or customs of the economic sector concerned.

The CJ held that in order to assess the distinctive character of a sign within the meaning of Article 3(1)(b), the competent authority must carry out an examination taking into account all the relevant circumstances of the case, including, where appropriate, the use made of that sign. The distinctive character of the sign could not be assessed independently of the perception of the relevant public where those goods to which the sign was affixed served as their exclusive medium. Even if the goods which were used to provide the services, i.e. commercial transport vehicles in this case, were not the subject of the trade mark application, the fact remained that the relevant public perceived the colour motifs of which the sign in question consisted as being affixed to the goods which served as

their exclusive medium. In contrast, the colour combinations would be distinctive if, when applied to transport vehicles, they enabled the average customer to distinguish the transport services of a particular business.

The CJ also held that it was not necessary to consider whether there was a significant departure from the norms or customs of the economic sector concerned as part of the assessment of distinctiveness. That criterion only applied when assessing the distinctiveness of shape marks and marks consisting of a physical space.

Likelihood of confusion and unfair advantage relating to a premium product

***Sazerac Brands, LLC & Anr v Liverpool Gin Distillery Ltd & Anr** (Fancourt J; [2020] EWHC 2424 (Ch); 10 September 2020)**

Fancourt J found that low sales and marketing figures of a premium bourbon product did not reflect the level of consumer interest and concluded that a mass market bourbon product infringed on the grounds of likelihood of confusion and detriment to distinctive character. Charlotte Peacock reports.

Background

The Claimant held registered UK and EU trade marks for EAGLE RARE in class 33. The Defendant subsequently filed UK and EUTM applications for AMERICAN EAGLE in class 33. The EUTM application was opposed by the Claimant and withdrawn by the Defendant, but the UK application proceeded to registration. The Claimant applied to invalidate the Defendant's UK registration for AMERICAN EAGLE on the basis of its earlier rights and claimed infringement by the Defendant under sections 10(2) and 10(3) of the Act and articles 9(2)(b) and 9(2)(c) of the Regulation.

Since its UK launch in 2001, the Claimant's Eagle Rare whiskey was sold in the UK and EU in two expressions; 10 year old bottles at £35, and 17 year old bottles at around £120. Only very limited quantities of Eagle Rare were allocated to the UK and EU markets each year, and these bottles were sold in specialist outlets.

The Defendant's American Eagle whiskey was launched in the UK in three expressions; 4 year old bottles at £25, 8 year old bottles at £40, and 12 year old bottles at £65. The vast majority of sales were of the 4 year old bottle which were aimed at the mass market.

The average consumer

Fancourt J found that bourbon has a large mass market and is not just bought by connoisseurs. However, at both ends of the bourbon market there is a degree of brand loyalty and as such the Judge held that the average consumer would have a somewhat higher degree of attentiveness than consumers of certain other spirits.

Likelihood of confusion

The Judge found that there was a significant degree of similarity between the respective marks, but not overwhelming similarity. The main difference was that, conceptually, AMERICAN EAGLE would conjure up the image of a bald eagle.

Fancourt J found that it is common in the spirits market in the UK and EU, including in the bourbon market, for brands to have different "expressions" (i.e. different ages, or special releases), and to release different products with different names, which may or may not allude directly to a main brand. As such, the Judge found that once the 4 year old American Eagle mass market product was established and likely more widely known than Eagle Rare, consumers would then assume that Eagle Rare was a special version of American Eagle.

The Judge found that there was a likelihood of confusion on the basis that a significant proportion of the relevant public would be likely to think that the two brands were related.

Unfair advantage

Fancourt J found that although sales and marketing expenditure figures relating to Eagle Rare in the UK and EU were low, the Claimant's product nonetheless enjoyed a reputation in both markets as a premium product. In particular the Judge noted the prestigious awards won by Eagle Rare, its press coverage and the carefully targeted tastings hosted by the Claimant each month.

Fancourt J found that an association in the minds of the relevant public with the Claimant's high quality product would undoubtedly benefit the Defendant, however assuming there was no confusion between the trade marks, this would not lead to a loss to the Claimant. More likely the advantage gained by the Defendant would be at the expense of other mass market bourbon products. As such, objectively there was no unfair advantage.

Detriment to distinctive character

The Judge held that absent confusion between the marks, use of American Eagle would not cause detriment to the distinctive character of Eagle Rare, on the basis that there would be no dilution of the Claimant's trade marks. However, having found that a significant proportion of consumers would be confused as to whether the two brands came from the same or economically linked undertakings, Fancourt J held that there was detriment to the distinctive character of the Claimant's trade marks.

The Judge concluded that there was infringement of the Claimant's UK and EU marks on both grounds and declared the Defendant's UK registration invalid.

The reported cases marked * can be found at <http://www.bailii.org> and the CJ and GC decisions can be found at http://curia.europa.eu/jcms/jcms/j_6/hom

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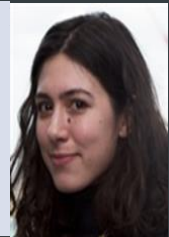
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