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The OAMI Users Group Meeting – March 2007

The fourteenth meeting of the OAMI Users' Group was held at the Office for Harmonization in the Internal Market in Alicante on 9th March, 2007, where a number of matters relating to Community trade mark and registered Community design matters were discussed. Delegations from the trade mark and design NGOs AIM, AIPPI, APRAM, BUSINESS EUROPE, CNIPA, ECTA, EFPIA, FICPI, ICC, INTA, MARQUES, UNION met with OHIM management and a representative from the European Commission for a one day session.

The meeting dealt with a number of topics, ranging from the current state of play of the OHIM's e-business projects and a presentation on the latest Office developments to classification matters, CTM examination and opposition guidelines, the Madrid Protocol and the future implementation of an optional search system.

Also discussed was the recent user satisfaction survey, the results of which were explained to those present by a representative of GfK Emer Ad Hoc Research, the company which carried out the survey on the OHIM's behalf. The Office's new Service Charter was also presented by the Office as was a rundown on the recent quality control checks currently being implemented at examination and opposition level.

In relation to the EU Commission proposal on a possible OHIM fee revision mechanism, the Commission representative explained that the objective of this proposal is to allow the users to pay fees that reflect reasonable costs involved in the granting of their IP rights through a regular revision of fee levels based on the number of filings received and projected income.

The Commission representative then reminded all present that the Commission is interested in getting the views of the users of the CTM system. A number of position papers had been submitted prior to the meeting in which the views of five of the attending NGOs were expressed: AIM, Business Europe, ECTA, INTA and MARQUES. In these papers, it was agreed in principle that the idea of reducing the current fee levels was a positive one, and that the budgetary surplus generated should be reinvested back into OHIM operations.

Comments contained in these papers included one observation that *'right-holders have a continued need for efficient and well functioning offices, both at national and Community level, and expect to pay fees that reflect the fair and reasonable costs involved'*, and the assertion from another of the NGOs that *'surplus funds beyond a level in line with normal business practice should be addressed by means of reduced fees'*. In terms of the quality of service offered by the OHIM in relation to the fee revision, it was also noted that *'any approach to the OHIM's financial management should closely be linked to an outstanding performance of the Office'*.

The intervention by the EU Commission representative explaining the fee revision proposal was followed by comments and observations from all of the delegations present. All of the user organisations agreed on the principal that a fee revision mechanism and subsequent reduction of CTM fees would be beneficial for industry in general and positive for the international IP and business communities.

Though the official position of APRAM will not be confirmed until its Administrative Council meeting in mid-April, they expressed their support for the Commission's proposal, while at the same time stressing the risks involved in the instability that would ensue from altering the fees too frequently. They insisted that any final agreement would be dependent on a detailed understanding of exactly how the fee-setting and revision system would work.

This opinion was shared by CNIPA, who made it clear that the specific details of how the fee revision mechanism would work would be of fundamental importance and would have to ensure that there was sufficient time between a fee reduction being implemented and its communication to users.

This would be especially important due to the impact it would have on company decision to defer filings or renewals, for example, of their CTMs. The Office's response to this was that the planned period for notification would be three months.

Though positively perceived by the Users' Group on the whole, FICPI expressed their concerns that the fee revision proposal seemed to be aimed exclusively at application, registration and renewal fees. It is FICPI's opinion that the primary factor is maintaining a balance within the system between the owners of the Community trade mark rights and those third parties who may be in conflict or competition with these rights. For this reason, FICPI maintained that opposition and cancellation fees should also be reviewed to ensure that the above-mentioned balance is achieved.

GRUR was of the opinion that there is a general interest in industry to reduce the fees and that such a reduction would, from their point of view, have no impact on the work of the national IP offices of the European Union.

Expanding on the points raised in its position paper, INTA stressed that, while welcoming a reduction in fees, any excess revenue still generated should only be reinvested in OHIM operations and not diverted into national budgets on which EU Member State IP offices depend. Such a reinvestment should concentrate particularly on financing improvements in performance and quality.

MARQUES was also in favour of this idea and added that these funds should be directed at improving the Office's performance and quality in the areas which the recent user satisfaction surveys highlighted as being in need of improvement.

Despite agreeing in principle with the idea of fee revision, a more cautious tone was sounded by the representative from ECTA in relation to the negative effects that excessive fee reduction could have on the prestige of the Community trade mark as a valued IP asset. The OHIM's sound financial management over the years was praised, but caution was advised before bringing fees down to levels that would cheapen the mark not only economically, but could also damage its prestige.

In a similar light, INTA pointed out that the risk of examiners granting more trade marks simply to cope with an increasing workload, brought about by more filings due to reduced fees, is a real one and must be avoided. This eventuality could, in theory, lead to the CTM becoming a weaker right and to inconsistency between examiners' decisions, and it should be carefully analyzed prior to any fee reductions.

The UNION representative also stressed that the most important issue to be dealt with was that of ensuring the high standards of quality expected of the Office, something which is already the focus of much attention and great efforts at the Office, with the implementation of the action plan on quality and a number of other improvements aimed at increasing quality and performance in line with the recommendations of the recent user satisfaction survey.

In response to questions as to the exact level of reductions foreseen, the Office informed the meeting that 2006 saw a €70 million surplus on an income of €200 million, with an expected increase on further revenue due to CTM renewals. This represents a budgetary excess of 35%, and this would be the starting figure for any initial fee reduction undertaken to balance the Office's budget. Any future modifications would

then be minimal adjustments to ensure that the budget was balanced and would not be likely to represent significant decreases in any of the fees.

The EU Commission representative concluded the exchange of opinions by observing that the overwhelming majority of CTM users had expressed their conformity with the principle of revising CTM fees regularly while at the same time recognizing that the details of any mechanism finally agreed on would be of fundamental importance and would have to be thoroughly thought through before implementation. He invited the Users' Group representatives to transmit their observations and arguments to their respective Member States, whose job it will be to ultimately approve any proposal made.

The James Nurton interview

James Nurton is a specialist intellectual property journalist from the UK and is currently the managing editor of the leading global magazine for IP owners, *Managing Intellectual Property*. He has collaborated with the OHIM for many years in the preparation, drafting and revision of editorial content for a number of the Office's publications and, as of March 2007, he will be publishing a monthly Alicante News interview with CTM and RCD users, giving readers a first hand insight into how the OHIM and its services are perceived by those dealing directly with the Office.

This month, James interviews John Olsen, a partner of Field Fisher Waterhouse in London and head of its trade mark and brand protection group, which consists of 42 people, including 18 fee earners. Mr. Olsen manages brand protection programmes for global brands such as Apple, Logica, Time Warner and Laura Ashley, and has also edited books on trade marks and domain name law.

The James Nurton Interview with John Olsen

How long have you been working in trade marks?

About 30 years. I started in Los Angeles, California with Ladas & Parry. Trade marks had two things going for it: even then it was very international, and at the highest levels it was intellectual. About 27 years ago I moved to Europe and worked for Ritz Hotels Ltd in Paris before coming to England in 1984.

How many trade marks do you file with OHIM on average?

We have about 400 to 500 applications a year, and growing. We are increasing about 10% to 15% a year in terms of classes, or about 8% a year in terms of applications.

Why are you filing applications in more classes?

Because of the very important strategic uses and defensive capabilities of the CTM, especially for big multinationals.

Are you satisfied with the quality of examination at OHIM?

Yes, generally speaking. Having said that, nobody beats the



UK office for time: it has gone from being a basket case to being exemplary. At OHIM, we get an examination report within about two months. It was slow initially, when it was like a gold rush. But it's been getting better.

But the rate of appeal decisions is very slow, and the continental-type system means there is little role for oral argument. So most decisions are rather formulaic. A mathematician could almost calculate the chances.

There is also the question of *de novo* examination at every level, which will be addressed in the *Kaul* case at the ECJ. We support OHIM's position that you should have to file all the evidence at the very beginning, which is sensible. Otherwise you can just keep appealing.

Have you seen any improvements in the appeals process?

They haven't come through to us yet. We're still waiting for one appeal over 14 months on - which is not good.

Would you like to see changes in any of the OHIM fees?

The OHIM filing fees coming down is a crowd-pleaser. But OHIM should invest money in the appellate system and open it up a bit more. It would be good if you could bring more arguments to bear than just on paper. Where a party wants to provide oral argument and the Board agrees it is worthwhile to emphasize certain points, that would make it better. OHIM would be more of a leader in the world for thoughtful decisions.

How important is pan-European trade mark protection for your business/clients?

By and large it is essential, even if they are only a small business or only doing business in one or two countries.

Is there still a role for national offices?

There are some disadvantages to the CTM: your eggs are pretty much all in one basket, even though you can convert keeping your priority date. In certain cases, for geographical reasons you might want national rights. For example, a UK registration gives you a route to the Caribbean, while a Danish registration covers other territories such as Greenland. But for nine out of ten people you don't need to worry.

Do you file non-traditional marks?

This is a good thing about the CTM. A non-traditional mark requires the demonstration of acquired distinctiveness – which is very difficult to achieve throughout the EU except for the most famous marks, such as KitKat. But these kinds of marks make up less than 10% of what we file. Even many well-known marks have been refused, so you need very substantial evidence of acquired distinctiveness. So for these kinds of marks the Madrid Protocol might be better, or a national registration or even a design.

Do you use the Madrid Protocol?

Only in cases I mentioned or where clients have a new brand and want to get their rights in the Madrid Protocol countries. It is always worth considering if it is going to be beneficial given the cost implications. But more clients are rolling out things that are already extant in other parts of the world. The

Protocol could become more useful, for example if the South American countries join.

How good is communication with OHIM?

It's fine. Once you know the examiner, you can call them. You have to go through the switchboard now but once you reach them they are very helpful generally.

What is the most unusual trade mark you have filed at OHIM? Has it been registered?

One of the most unusual was for a gold band on a rifle scope. A particular manufacturer had a gold band that goes round a rifle scope: today that would be very difficult to register but we got it through based on use in Germany, the UK, France and Spain. It was not challenged and formed the basis of an enforcement programme.

What do you think of the Community design?

It's a great undersold procedure or right. It is not understood at all in the US because there is no real analogue. We have filed quite a few but it is mostly only the enlightened clients who understand them. It is especially a benefit where the product's appearance is important to repeat business.

Who has undersold it?

We could do more as practitioners to promote the design and describe the place it has in the range of IP protection in Europe. It is very wide ranging and can cover everything from logos to automobile parts to ornamentation.

What do you like most about working in trade marks?

Trade marks are the engine of globalization and at the highest levels there is an intellectual challenge. It's to do with the theory of brands in the economy, the intersection with competition law and other IP rights and the policies in various countries about what they should do to protect these rights. Trade marks are not monopolies – their value can easily be lost over a period of just a few days.

What is the biggest challenge facing trade mark owners?

It can only become more multinational. And, as patents recede in terms of the ability to market products, brands will become more important for repeat sales. Branding enables you to do things that are unusual and memorable: look at the iPod.

What do you look for in a trade mark lawyer?

You want someone who is good on paper, has good experience and is good in person. A good trade mark lawyer is likely to be language-oriented, someone who likes linguistics and understands how language works; someone who likes crossword puzzles, scrabble and things like that.

What are the biggest challenges for the future?

The Madrid Protocol may grow. Other influences will be India and China, especially in exporting their consumer goods. It will also become much more difficult to have an international brand than it used to be. It is already virtually impossible and very few companies can afford that kind of money. So we will probably see more national or regional brands. There should be sub-classes or something like that at least for Class 9.



Community Trade Mark

Decision of the Cancellation Division of 29/11/2005 in the proceedings for a declaration of invalidity

OHIM reference number: 510C 000707 836/1
Community trade mark: 707 836 "SHOOTBALL"
Language of the proceedings: English

APPLICANT
Joaquín Benitez Peña
Calle Juan de Mena, 23 9º 2ª
08035 Barcelona
Spain

REPRESENTATIVE
Henson & Co.
Calle Fortuny, 7
28010 Madrid
Spain
Fax: 914315701

against

COMMUNITY TRADE MARK PROPRIETOR
Brookdale Tool Company Limited
Brookdale House
18 Old Hall Road
Gatley, Cheadle, Cheshire
SK8 4BE United Kingdom

REPRESENTATIVE
Harrison Goddard Foote
Orlando House
11c Compstall Road
Marple Bridge
Stockport SK6 5HH
United Kingdom
Fax: 00441614277026

THE CANCELLATION DIVISION

composed of: Wouter Verburg (Member), Alvaro Sesma (Member) and Julio Laporta (Member)

has taken the following decision on 29/11/2006 :

1. The registration of Community trade mark No 707836 is declared invalid.
2. The Community trade mark proprietor shall bear the fees and costs of the applicant.

And fixes the costs as follows:

The amount of the costs to be paid by the CTM proprietor to the applicant pursuant to Article 81(6) CTMR in conjunction with Rule 94(3) IR shall be: 1150 Euro (450 Euro - representation costs - and 700 euro - invalidity fee -).

FACTS AND ARGUMENTS

(1) The Community trade mark No 707836 "SHOOTBALL" (word mark) was filed on 17/12/1997 and registered on 19/05/1999 for

toys, games, playthings, sporting articles, bags adapted for carrying sporting articles, and parts and fittings for all the aforesaid goods in Class 28 (class 28).

- On 17/12/2002, Joaquín Benítez Peña ("the applicant"), filed a request

for a declaration of invalidity based on relative grounds against Community trade mark No 707 836.

(3) The applicant bases his request on Article 52(2) (c)CTMR claiming a copyright protected under Spanish law. Reference is made to Article 9 and 52 of the Spanish Trade mark law 17/2001 of December 7 Th. By virtue of these provisions the owner of a copyright is entitled to file the corresponding request for obtaining invalidity of a Spanish trade mark registration on the basis of a copyright. In this regard reference is made to the refunded text of the Spanish Intellectual Property Law (Real Decreto Legislativo 1/1996 de 12 de abril – Royal decree), particular reference is made to its Article 1 and 2. It is claimed that Mr. Joaquin Benítez Peña registered a literary work with drawings at the Spanish Intellectual Property Registry on April 12 th 1996. This work includes several elements: title "Shoot-ball" and subtitle "a great sport: rules". The title and the subtitle are part of the registered work with the text containing the Rules.

(4) The following evidence has been submitted:

- A copy of the copyright registration No 1996/15388 before the General Industry Property Registry, as literary work with drawings and the registered work (doc I and II);
- A scholar report of the year 1995-1996 of Martistes Sant-Les Corts which shows on page 39 the agenda of activities for 09/06/1996 referring to "Shootball finals" (doc III);
- A Declaration undersigned by the principal of the School Martistes Sant-Les Corts certifying that "Shoot-ball" and its rules are a creation of Mr. Joaquín Benítez Peña, who has been developing the same for 17 years (doc IV);
- A Declaration undersigned by TV3 and the corresponding videotape where a program is recorded called "Tot l'esport" broadcasted on 21/05/1996 said programme talks about the existence of a sport called "shootball" that was created by Mr. Joaquín Benítez (doc V);
- A Declaration made by two gym teachers at the public college INEFC (Instituto de Educación Física de Cataluña – Institute of Physical Education of Cataluña) declaring that Mr. Benítez started with the "shootball" project at the end of the academic course 1994-1995, and that he has been working on its diffusion and practice ever since. This project is based on a popular game called "balontiro" , to which enough modifications have been added so as to be considered a new sport game (doc VI);
- A Declaration undersigned by Mr. Joan Durá i Riera, President of the Barcelona Scholar Sporting Council,

which states that in the magazine (PORTANVEU) in the first semester of 1996 the Rules of the Sport "Shoot-ball" created by Joaquín Benítez Peña were published (doc VII and VIII).

(5) On 06/05/2003 the Community trade mark proprietor was notified of the request and a time limit of three months was allowed in which to submit observations. Later some formal deficiencies were remedied by the applicant upon request of the Office. Therefore, on 27/02/2006 the CTM proprietor was requested to submit observations in reply. The proprietor did not file any observations within the given time limits. The representative informed on 06/03/2006 that they believe that Brooksdale Tool Company Limited were no longer existence and therefore they were unable to obtain instructions.

(6) On 26/07/2006 the parties were informed that a decision would be taken in due course.

GROUNDS FOR THE DECISION

On the admissibility of the request

(7) The request complies with the formalities prescribed in the CTMR and the Implementing Regulation and is, therefore, admissible.

On the substance

(8) The request is well founded.

(9) Pursuant to Article 52(2) CTMR, a Community trade mark shall be declared invalid on application to the Office where the use of such trade mark may be prohibited pursuant to the national law governing the protection of any other earlier right and in particular, under (c) a copyright.

(10) As the copyright invoked has been claimed only for Spain and reference has only been made to the Spanish Law, it has to be analysed whether under Spanish Law a copyright is vested in the applicant for cancellation.

(11) In the Spanish Intellectual Property Royal Decree 1/1996 of April 12 th the following provisions should be taken into account in order to define whether in Spain the title "SHOOT-BALL" is protected as a copyright and can prohibit the use of the CTM:

Art. 1 . The intellectual property in a literary, artistic or scientific work shall belong to the author thereof by virtue of the sole fact of its creation.

Art. 2. Intellectual property shall comprise rights of personal and economic character which shall confer on the author the full control over and the exclusive right to the exploitation of the work, without any limitations other than those specified in the Law.

.....

Art. 10 .-(1) The subject matter of intellectual property shall be all **original**, literary, artistic or scientific creations expressed in any manner or medium, whether tangible or intangible, that is known at present or may be invented in the future, including the following:

(a) books, pamphlets, printed matter, correspondence, writings, speeches and addresses, lectures, court pleadings, academic treatises and any other works of the same nature;

(b) musical compositions with or without words;

(c) dramatic and dramatico-musical works, choreographic and mimed works and theatrical works in general;

(d) cinematographic works and any other audiovisual works;

(e) sculptures and works of painting, drawing, engraving or lithography, picture stories, cartoons or comics, including drafts or sketches therefor, and other works of three-dimensional art, whether applied or not;

(f) projects, plans, models and drawings of architectural works and works of engineering;

(g) graphs, maps and figures relating to topography, geography and science in general;

(h) photographic works and works expressed by a process analogous to photography;

(i) computer programs.

(2) The title of a work shall be protected as part of the work when it is original"

(12) Article 10(2) of the Spanish Intellectual Property Royal Decree states that "the title of a work shall be protected as part of the work when it is original". Mr. Joaquín Benítez Peña registered a literary work with drawings at the Spanish Intellectual Property Registry. This work includes several elements: the "Title: "Shoot-ball" and subtitle: "A great sport: Rules." Both, the title and the subtitle, are part of the registered work jointly with the text containing the Rules. Between the title of the literary work, i.e. "Shoot-ball" referring to a specific type of sport and the sign "Shootball" there is hardly no difference. The hyphen, lessens by no means, the identity between these two signs: "SHOOT-BALL" and "SHOOTBALL". Both signs are confusingly similar. The CTM proprietor has not (filed any observations) to the cancellation request. The applicant has argued and submitted evidence that the sign/title "SHOOT-BALL" is an original creation of Joaquín Benítez Peña; there is no evidence to the contrary. In these circumstances it is not up to the Cancellation Division to question the originality of the title "SHOOT-BALL" and its developed sport game. In accordance with Article 74 CTMR the Office in proceedings related to relative grounds for refusal of the registration shall be restricted in this examination to the facts, evidence and arguments provided by the parties.

(13) A trade mark "SHOOT-BALL" that protects "sporting articles and bags adapted for carrying sporting articles" would damage to the owner of the intellectual property rights on the title "SHOOT-BALL" applied to a literary work referring to a sport developed by Joaquín Benítez Peña. The same applies to "toys, games, playthings and parts and fittings for all the aforesaid goods in class 28" which are extremely connected with the field of sports, since any toy or game sold bearing the trade mark "SHOOTBALL" would be immediately and directly connected to the "SHOOT-BALL" sport. Article 2 of the Spanish Intellectual Property Royal Decree confers exclusive exploitation rights to the author of a creation protected under copyright, being thus allowed to prohibit the use of the sign "SHOOT-BALL" for the challenged goods.

(14) In view of the above, as the Cancellation Division considers that as the title "SHOOT-BALL" of the literary work of Joaquín Benítez Peña deposited in April 1996 before the Spanish Intellectual Property Registry is subject of intellectual property rights according to the Spanish Law, the Community trade mark has to be cancelled on the basis of Article 52(2) CTMR.

COSTS

(15) Pursuant to Article 81(1) CTMR and Rule 94 IR, the party losing cancellation proceedings shall bear the fees and costs of the other party.

THE CANCELLATION DIVISION

WOUTER VERBURG	ALVARO SESMA	JULIO LAPORTA
Member	Member	Member

Notice on the availability of an appeal:

Under Article 58 of the Community Trade Mark Regulation any party adversely affected by this decision has a right to appeal against this decision. Under Article 59 of the Regulation notice of appeal must be filed in writing at the Office within two months from the date of notification of this decision and within four months from the same date a written statement of the grounds of appeal must be filed. The notice of appeal will be deemed to be filed only when the appeal fee of 800 euro has been paid.

Notice on the review of the fixation of costs:

The amount determined in the fixation of the costs may only be reviewed by a decision of the Cancellation Division on request. Under Rule 94 (4) of the Implementing Regulation such a request must be filed within one month from the date of notification of this fixation of costs and shall be deemed to be filed only when the review fee of 100 euro (Article 2 point 30 of the Fees Regulation) has been paid.

Register Improvements

Following the recent findings of the OHIM user satisfaction survey, the Office has undertaken a number of initiatives aimed at improving both the quality of the work carried out and the time taken to do it.

An area of particular note has been the Register, where significant improvements have taken place in all aspects of its daily work.

The Register itself is divided into four main sections, each of which is responsible for a series of specific tasks. In each of these sections there has been a noted improvement in output, pendency times and backlog removal, and the ongoing work is expected to produce even better results over the coming months.

Registration and Representatives Section

Among other things, this section deals with the key-in of data relating to professional representatives who act before the OHIM and the updating of their personal data when requested. Most requests of this type are dealt with in less than 48 hours.

As for other requests to introduce, update or modify data on the Register there has been a notable reduction in the time taken to deal with them. The month of January figure of over 1,100 pending requests now stands at less than 500, and the target for the end of this quarter is to have less than 300 pending requests in the mail queue. Requests now being dealt with date from January 2007 at the latest, whereas only one month ago there was still correspondence from May 2006 which had not yet been treated. By April it is expected that no mail requesting action on the Register will be left untreated for more than three weeks and as from May the definitive target is set at two weeks maximum.

These results have been achieved by an increase in the levels of automation of some of the tasks as well as re-organisation and the use of 1 additional member of temporary staff to help reduce the backlog. The cross training of existing staff has also been carried out to increase their ability to carry out multiple tasks and therefore cover for colleagues when they are unavailable.

Owners and Records Section

The recordal of transfers, seniorities, errors, etc. was another area where the backlogs were significant and in need of improvement. Pending requests not yet executed currently stand at less than 150 whereas in July of 2006 there were over 2,100 requests which had not been dealt with. Pendency times are now under two weeks in all activities. The result is achieved by re-organisation and better staff training in handling requests more efficiently.

Translation, Publication, Inspection & Certificates Section

The publication of CTM data is generally working well with marked improvements over the past year in the number of publications carried out. However, not all aspects of the CTM process which are subject to the requirement of being published in the bulletin actually appear in it, and the Office is now working to ensure that this is remedied.

In terms of backlog reduction, the inspection of files requests are now being handled in less than two weeks as opposed to over three months in July 2006, with the total number of pending requests not dealt with down from more than 2,000 to just 200. The re-organisation of the working procedures have largely contributed to this improvement as has the temporary addition of staff.

Quality, Renewals an IT Section

The main bulk of this section's work involves the processing of renewal requests, currently around 65% of registered CTMs filed ten years ago. Due to the largely automated procedures and the high incidence of the use of electronic filing of renewal applications, there have been no significant backlogs in this area of the Register's work. The procedures are being streamlined and preparations are on-going to prepare for the first renewals of RCDs later this year.

In conclusion, the Office – in a period of a growing level of activity in the Register – has managed to reduce overall pendency times in the Register's operations due to a combination of automation, re-organisation, training and increasing the number of staff on a temporary basis.

The improvements are worthy of note, but the Office aims to reduce waiting time and backlogs further in this field and is working to establish definitive, publicly announced levels in the second quarter of 2007.

Looking into the near future, it is also worthy of note that a number of further improvements with regard to e-business of the Register are foreseen. In the second quarter of 2007 users will be able to update their own data (FindRep) and to inspect files themselves (Online Access to Files).

Country Overview Greece & the Community Trade Mark

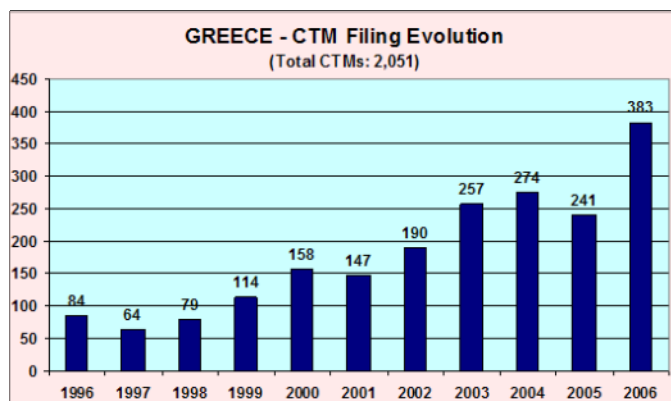


Greece has a population of over ten and a half million people and became a member of the European Union in 1981.

In economic terms, the Greek economy is primarily service based (74%) followed by industry (20%) and then agriculture (6%).

Tourism, food and tobacco processing, textiles and chemicals are important industrial sectors in Greece. Popular agricultural products are wheat, corn, barley, sugar beets, olives, tomatoes and wine.

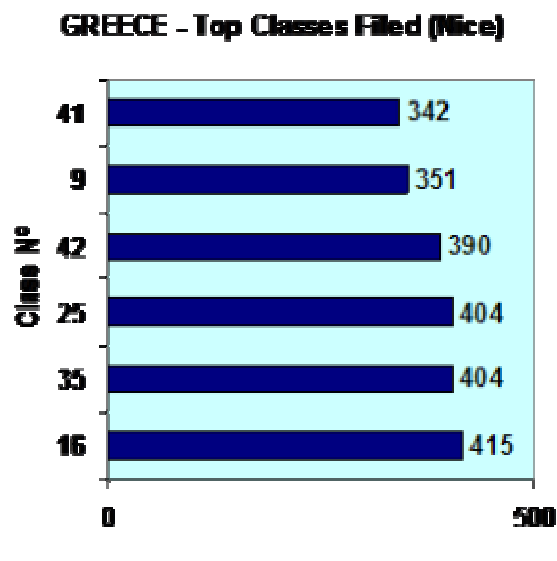
To date just over 2,000 Community trade mark applications have been received by applicants based in Greece.



Word	Figurative	3-D	Colour
35.15%	63.97%	0.78%	0.10%

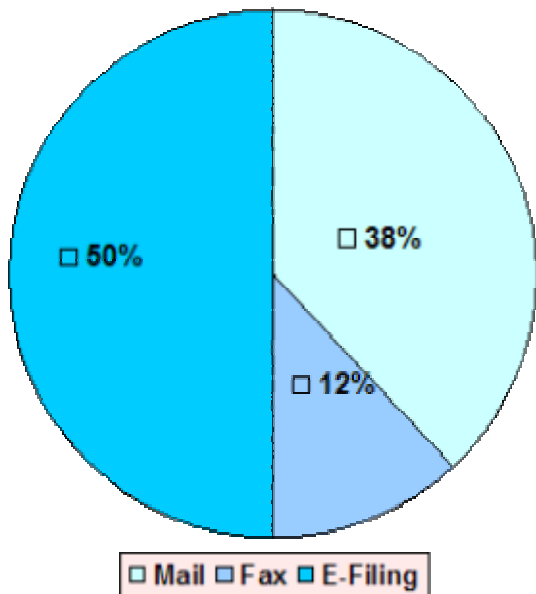
Greek-based Community trade mark applicants file more figurative marks than any other kind - over 60% - and the remaining filings are principally for word marks (35%).

Goods in Class 16 of the Nice Classification can be found in over 400 CTM applications coming from Greece, accounting for around 20% of all filings. Services in Classes 35 follow closely behind, with goods in Class 25 in 3rd place.



Greek-based CTM filers prefer to use OHIM's online filing interface when applying for CTMs, with nearly 50% of all Greek filings arriving at the Office in this way.

Mail filings are on the decrease but still represent around 38% of all CTM applications received, while faxed filings come in at a rate of around 12%.



Top 10 Greek-based owners by number of CTMs filed

Company	CTMs
Cosmote-Mobile	48
Megval	34
Dynamik Zoi	30
Infote Plirofories Gia Olous	21
Ion	16
Touristikon Epichiriseon	15
Frigoglass Commercial Refrigeration	14
E.J. Papadopoulos	13
Ethniki Trapeza Tis Ellados	13
Gr. Sarantis Anonymi Viomichaniki & Emporiki...	13

Top 10 representatives by number of CTMs received from Greek-based applicants

Representative	CTMs
Thanos Masoulas & Partners	64
Vayanos Kostopoulos	58
Dyllerakis & Associates	57
P.D. Theodorides · H.G. Papaconstantinou	55
Nikoladi	45
Sakellarides Law Offices	42
Siotou	33
G.S. Kostakopoulos & Collaborateurs	32
Seloulis	31
Malamis & Malamis Law Offices	29

Community Design

Quality control for the RCD bulletin for 2006

Quality management of the RCD procedures has been carried out since the early days of the Designs Department, with the establishment in 2003 of quality control concerning the designs published every week in the Bulletin. This control is based on the revision of 5% of designs published, checking 15 'attribute' areas (for example, the filing date, the name and address of the representative, holder or designer, the indication that a description was filed, etc.) as defined by the 'Quality Manual' of the Department.

The resulting analysis gives information about weak points and possible improvements that the OHIM can make. For this reason, in 2007 the Designs Department decided to look for, and to study in more detail, other common errors in a bid to tackle their causes directly.

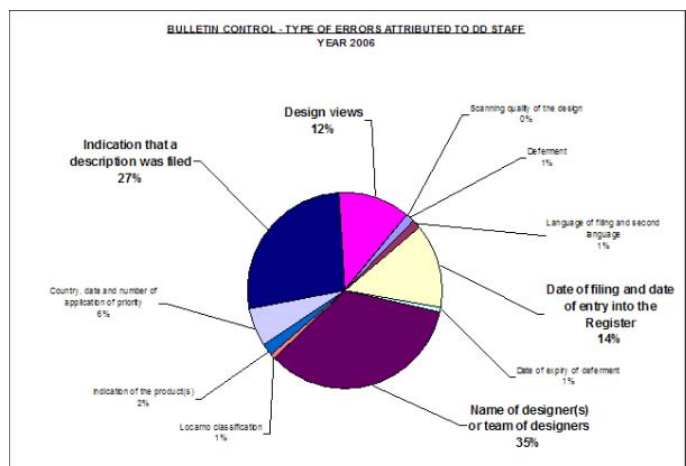
A detailed analysis has been carried out on all the Bulletin publications of 2006, consisting of:

- Controls done: 3650 designs (a random sample of 5% of published designs – 25 per Bulletin)
- Checked criteria: 15

In 2006, 214 errors were detected, corresponding to a total rate of 5.90%¹.

In order to carry out an analysis to establish actions necessary for improvement, and to reduce the error rate, the Office has undertaken a detailed study of each type of error.

It also analysed the annual distribution and the evolution during the year of errors which constitute more than 7% of the annual total, and which were directly attributable to examiners in the Designs Department.

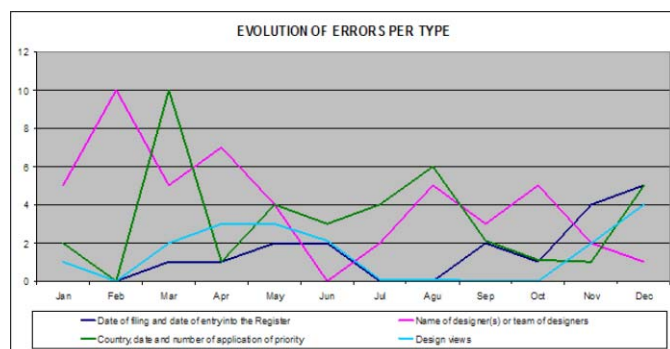


This resulted in the identification of the following areas for further scrutiny:

- date of filing and date of entry into the Register;
- design views;
- indication that a description was filed;

- name of designer(s) or team of designers

A month-by-month analysis of the evolution of these types of errors was conducted for 2006.



The elements that needed special attention and a deeper analysis for the improvement of results were:

the error that involved countertendency, even though a less percentage, and significantly increased in the last month of the year, relate to the filing date.

the rate of errors relating to design views, after improving in the second half of the year, increased in December.

the rate of errors relating to the name of designer(s) or team of designers in the last months of the year has improved. Nevertheless this rate is still higher than expected and the Office has to continue to control it.

Subsequently, the OHIM has collected all the information about the causes of these errors, both objective and subjective, in order to draft a list of proposed solutions for changes in working methodology, IT tools and other organisational improvements.

An example of one proposed improvement is the modification of the RCD application form to make it better and more user-friendly for both the examiners and the clients. The same conclusions were reached in the OHIM User Satisfaction Survey 2006. These proposals will be subject to specific actions of the Quality Circle of the Designs Department during 2007.

The follow-up of the derived actions will be quarterly, based on the analysis of the errors found in the Bulletin and taking the necessary steps to correct the detected deviation of expected results.

The annual revision of the next year will include more analysis, such as the quality control of deficiency and refusal letters with the aim of covering all the tasks undertaken by the Designs Department.

¹ Divided between 3.95 % errors attributed directly to the Designs Department and 1.95% due to other factors.

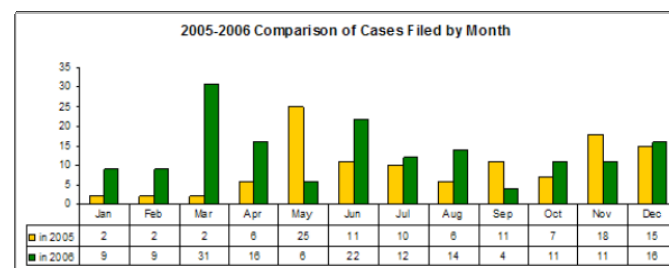
Invalidity proceedings for designs: performance during 2006

QUANTITATIVE EVOLUTION

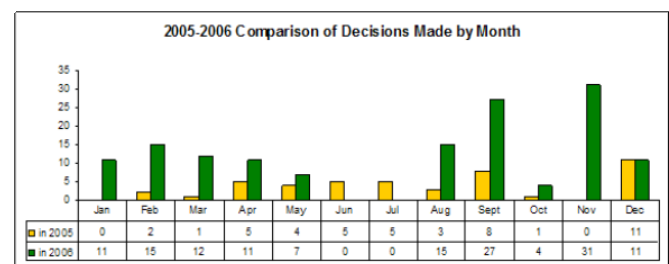
The year 2006 saw an impressive upturn of the invalidity cases, both in terms of filings and in terms of resolution (both with and without decision).

Total	2006	2005	Variation 2006/2005
Invalidity applications received	161	115	+ 40%
Invalidity cases closed	156	64	+ 244%
Invalidity cases closed by decision	144	44	+ 327%
Invalidity cases closed without decision	12	20	- 40%

Invalidity applications in 2006 and 2005 fluctuated quite significantly over the months. The average per month in 2006 was 13 new cases.



Decision-taking has shown a huge increase: from 44 in 2005 to 144 in 2006. Examining this increase, an approximate calculation shows that about 80 out of the 144 decisions related to multiple designs. This does not, however, mean that taking decisions in such cases requires no efforts. It is necessary to correspond with users, evaluate evidence and draft the decision in every case.





QUALITATIVE EVOLUTION

The process timing (from reception to ready for decision and decision-taking)

Average time taken (in months)	2006	2005	Variation 2006/ 2005
Invalidity decisions taken	144	44	+ 327%
From reception to commencement of proceedings	1.0	1.2	- 16.7%
Adversarial part	6.2	8.3	- 25.3%
Decision-taking	1.5	3.4	- 55.9%
Total process time	8.7	12.9	- 32.5%

In 2006, the shortest time to take a decision in invalidity proceedings was 2.1 months (6.3 months in 2005), whereas the longest it took was 21.4 months (18.4 months in 2005). 65.3% of the cases were settled in 10 months or less (27.3% in 2005), 25.0% of them were settled between 11 and 15 months (34.1% in 2005) and 9.7% of the cases took more than 16 months (38.6% in 2005).

Appeals against invalidity decisions

The rate of appeals is not the most appropriate indicator of the quality of invalidity decisions, but it is the only one available for the moment (and, in all likelihood, for the midterm future) other than feedback on a number of concrete decisions made by the design expert group.

As the number of decisions, and the number of appeals, is not very high, it should not be forgotten that any conclusion based on the statistical data related to the appeal rate is therefore only of a limited value.

From 2004 until October 2006, a total number of 160 invalidity decisions were taken. Taking into account the two-month delay for filing an appeal, these decisions generated a total of 31 appeals by the end of December 2006. This represents an appeal rate of 19.4%.

The appeal rate fluctuated considerably during 2006, from 8.8% at its the lowest level, to 19.9% at the highest level.

Country Overview: Greece & the Registered Community Design

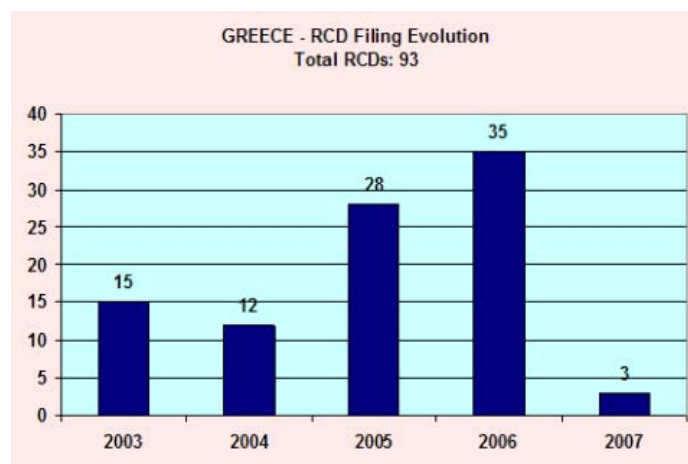


Greece has a population of over ten and a half million people and became a member of the European Union in 1981.

In economic terms, the Greek economy is primarily service based (74%) followed by industry (20%) and then agriculture (6%).

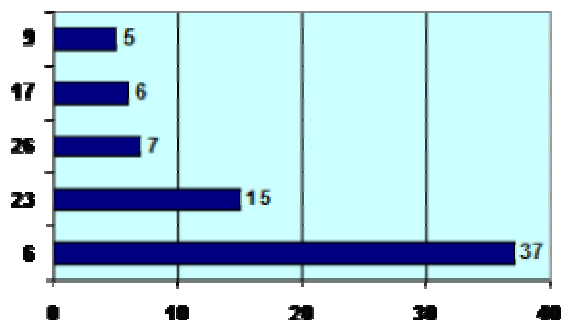
Tourism, food and tobacco processing, textiles and chemicals are important industrial sectors in Greece. Popular agricultural products are wheat, corn, barley, sugar beets, olives, tomatoes and wine.

In terms of RCD filings, Greece has filed a total of 93 designs since the inception of the registered Community design system in 2003.



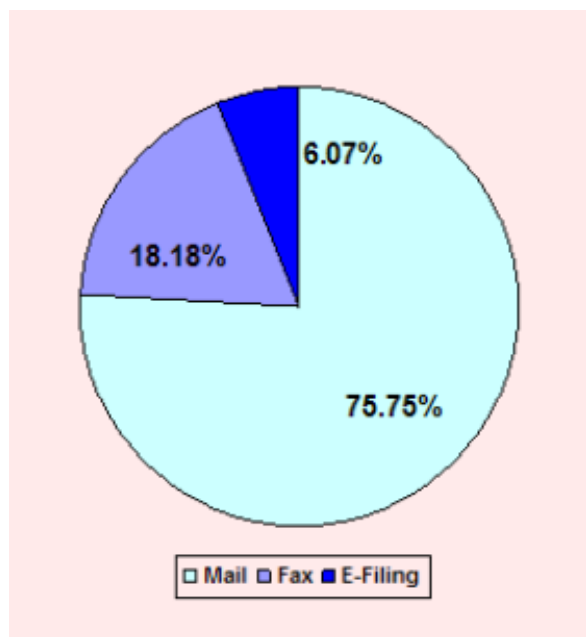
Design filings coming from Greece are dominated by goods in Class 6 of the Locarno classification, with almost 40% of designs including such goods. Class 23 goods are in second place, making up around 16% of the total number of designs filed by Greek-based applicants.

GREECE - Top Classes Filed (Locarno)



Sending paper copies of Community design applications via mail is still the preferred option for the vast majority of Greek-based RCD applicants, over 75% of whom use this method.

Fax filings follow at around 18%, and electronic filings of designs account for only 6% of all Community designs received from Greece.



Top 10 Greek-based owners by number of RCDs filed

Owner	RCDs
Paziouros	19
Pyramis	11
Dimitracas	10
et Plast Anonymi Viomichaniki Emporiki Etairia Plastikon	6
Giokas	6
Ward	5
Gerardis	4
Elviplas AE Elliniki Biomichania Plastikon Siskevasias	3
Giannakopoulos Mobilux	3
Kraft Foods Hellas	3

Top 10 representatives by number of RCDs received from Greek-based applicants

Representative	RCDs
Heussen Rechtsanwaltsgesellschaft	11
Valtoudis Law Office	6
Bureau Gevers	3
Zafeiropoulos	3
Sakellaridi	2
Sasse	2
Vayanos Kostopoulos	2
Hatzigiannis	1
Thanos Masoulas & Partners	1
Meissner, Bolte & Partner	1

Case-law

LATEST TRADE MARK AND DESIGN NEWS FROM LUXEMBOURG

A: European Court of Justice ("ECJ"): Appeals from decisions of the Court of First Instance ("CFI"), Article 63 CTMR

A-1: ECJ Judgments and Orders

(-)

A-2: ECJ: Developments in pending cases

Armafoam/Nomafoam : C-514/06-P – Appeal from T-172/05; Office response filed.

Keywords: CFI procedure: representation by a German Patentanwalt - CFI procedure: legal argument raised for the first time before the court – Opposition/earlier CTM: likelihood of confusion only in part of the EU (Article 7(2) CTMR by analogy) – Comparison of marks: language aspects.

The initial appeal concerned a decision of the 1st Board of 23 February 2005 in R0552/2004-1 relating to a conflict between CTM application “Armafoam” (word mark) applied for a range of products in class 20. The invoked earlier right, word mark “Nomafoam”, is registered for a range of products in classes 17, 19, 20, 27 and 28. The Board had allowed the opposition on the grounds that there exists a likelihood of confusion.

(a) As regards assessment of likelihood of confusion and territorial aspects, the CFI had stated: “ (33) Finally, it follows from the unitary character of the Community trade mark laid down in Article 1(2) of Regulation No 40/94 that an earlier Community trade mark is protected in the same way in all Member States. Earlier Community trade marks may therefore be relied on in opposition to any subsequent application to register a trade mark which infringes their protection, even if it does so only in the perception of the consumers of part of the Community. It follows that the principle laid down in Article 7(2) of Regulation No 40/94, according to which it suffices, in order for registration of a



trade mark to be refused, that an absolute ground for refusal exists only in part of the Community, also applies by analogy to a relative ground for refusal under Article 8(1)(b) of Regulation No 40/94 (Case T-6/01 *Matratzen Concord v OHIM – Hukla Germany (MATRATZEN)* [2002] ECR II-4335, paragraph 59; *ZIRH*, paragraph 36; Joined Cases T-117/03 to T-119/03 and T-171/03 *New Look v OHIM – Naulover (NLSPOORT, NLJEANS, NLACTIVE and NLCollection)* [2004] ECR II-3471, paragraph 34; and Case T-185/03 *Fusco v OHIM – Fusco International (ENZO FUSCO)* [2005] ECR II-715, paragraph 33).“

(b) As regards the issue of presentation for the first time, by the parties, of legal arguments; presentation, by the Office, of legal arguments different from the Board, the CFI had held: “(37) OHIM, whilst sharing the Board of Appeal’s conclusion that the goods are similar, arrives at that conclusion with different reasoning. Unlike that body, it takes the view that it is not the goods in the trade mark application that encompass certain goods covered by the earlier mark but, rather, it is the goods covered by the earlier mark, in particular ‘products [listed in Class 20] of plastic not included in other classes’ – a category which, according to OHIM, is unlimited both as to the kind of plastic used and as to the use to which the goods made of plastic are put – that encompasses the goods covered by the trade mark application.

...

(39) With regard, firstly, to whether the applicant’s arguments concerning the goods are, as alleged, inadmissible, it is to be borne in mind that the purpose of an action brought before the Court pursuant to Article 63(2) of Regulation No 40/94 is to obtain a review of the legality of decisions of the Boards of Appeal (see Case T-247/01 *eCopy v OHIM (ECOPY)* [2002] ECR II-5301, paragraph 46, and Case T-311/01 *Éditions Albert René v OHIM – Trucco (Starix)* [2003] ECR II-4625, paragraph 70 and the case-law cited). Pursuant to Article 74 of Regulation No 40/94, the review must be carried out in the light of the factual and legal context of the dispute as it was brought before the Board of Appeal (Case T-194/01 *Unilever v OHIM (Ovoid tablet)* [2003] ECR II-383, paragraph 16, and Case T-57/03 *SPAG v OHIM – Dann and Backer (HOOLIGAN)* [2005] ECR II-287, paragraph 17). Furthermore, under Article 135(4) of the Rules of Procedure, the parties’ pleadings may not alter the subject-matter of the proceedings before the Board of Appeal.

(40) It is therefore necessary to consider whether, by claiming for the first time before the Court of First Instance that the goods covered by the marks are different, the plaintiff has altered the subject-matter of the proceedings.

...

(42) That is also the case even where OHIM, or one of the parties to the proceedings, considers it unnecessary to examine whether the goods or services in question are identical or similar because of the considerable differences between the marks, which, in any event, rule out a likelihood of confusion. Next, the fact that, in the present case, the applicant agreed in the proceedings before the Opposition Division that the goods covered by the marks may potentially be identical, since it stated before the Board of Appeal that

the question whether the goods are similar could be left undecided on account of the alleged differences between the marks, did not in any way divest OHIM of the power to adjudicate on whether the goods covered by those marks are similar or identical. Likewise, therefore, that fact has not deprived the applicant of the right to challenge, in the factual and legal context of the dispute before the Board of Appeal, the findings of that body on this point (see, by analogy, Case T-360/03 *Frischpack v OHIM (shape of a cheese box)* [2004] ECR II-4097, paragraphs 32 to 35).

(43) Clearly, the applicant’s arguments relating to the comparison of the goods before the Court of First Instance do not depart from the context of the dispute as it was brought before the Board of Appeal. Indeed, the applicant merely questions that body’s findings and its reasoning on this point. It follows that the applicant has not altered the subject-matter of the proceedings by those arguments, which are therefore admissible before the Court. “

Metro/Metro : C-493/06-P - Appeal from T-191/04; Office response filed.

Keywords: CFI proceedings: procedural status of the OHIM – Opposition/formalities: validity of the invoked earlier right at the point in time the decision on the opposition is taken (CFI: must be present)- For details see Alicante News October 2006.

Initially, the action had been directed against a decision of the 1st Board of 23 March 2004 in R0486/2003-1. The opposition group in charge of the case had been aware that the initial term of the invoked earlier right would expire while proceedings were pending. In consequence it had informed the opponent that it had to show renewal. The opponent did not react and, in consequence, the opposition had been rejected. The 1st Board had upheld the appeal brought by the opponent on the grounds that the decisive point in time as concerns validity of the invoked earlier right would not be the date on which the decision is taken but the date on which the respective notice of opposition is lodged. Before the CFI, in T-191/04, the Office itself had pleaded in favour of the CTM applicant, a stance which had been accepted by the Third Chamber (Jaeger, Tiili, Czócz).

B: ECJ Preliminary Rulings

B-1: Rulings

(-)

B-2: Developments in pending cases

(-)

C: Court of First Instance (CFI): Judgments and Orders on appeals against decisions of the OHIM, Art. 63 CTMR

C-1: Judgments and Orders



Royal : T-501/04 - Judgment of 15 February 2007 (ES); EN version not yet available (action allowed; implications for Office practice are being considered).

Keywords: Opposition: comparison of goods – Opposition: comparison of marks – Likelihood of confusion: assessment.

The action had been directed against a decision of the 1st Board of 25 October 2004 in R0513/2002-1 relating to CTM application “Royal” (word) applied for “wine from Rioja” in class 33. It had been opposed on the basis of CTM “Royal Feitoria” for “wine from Oporto”, the national Portuguese mark “Royal Brande” (fig.) for brandy, and on an international registration with effect in several Member States (Royal Oporto Wine Company), in class 33. The Board had rejected the CTM application on the basis of the earlier CTM. In contrast, the 4th Chamber of the CFI (Legal; Vadapalas, rapporteur; Moavero Milanesi) held that the marks at issue are dissimilar and, thus, had allowed the action.

Hairtransfer : T-204/04 - Judgment of 15 February 2007 (action dismissed; Office practice confirmed). – Not yet available in EN.

Keywords: OHIM proceedings: amendment of legal grounds (adding Article 7(1)(c) CTMR to Article 7(1)(b) CTMR an introduction of a new legal basis: no) - Absolute grounds for refusal – Descriptiveness.

The action had been directed against a decision of the 2nd Board of 1 April 2004 in R0435/2003-2 relating to CTM application *Hairtransfer* (word) applied for a range of goods and services in classes 3, 8, 10, 21, 22, 26, 41 and 42. It had been rejected for part of the list of goods and services, namely to everything relating to treatment of hair, including specific shavers and other apparatus in class 8. Whereas the examiner had based her decision solely on Article 7(1)(b) CTMR, the Board had added Article 7(1)(c) CTMR to the grounds on which it had based its rejection of the appeal. The 5th Chamber of the CFI (Vilaras; Martins Ribeiro; Jürimäe) confirmed that decision. Case-law cited: case T-16/02, *Audi v OHIM* (TDI), ECR II-5167, para.24; Cases T-367/02-T-369/02, *Wieland-Werke v OHIM*, ECR II-47, para. 31.

Curon/Euron : T- 353/04 - Judgment of 13 February 2007 (action dismissed; particular case; no direct impact on Office practice).

Keywords: Opposition: likelihood of confusion (LOC). - LOC: interdependence of factors. - Opposition: comparison of goods. – Comparison of goods: medicinal goods and apparatus (class 10: relevant consumers). – Comparison of marks: is presence of one criterion (visual, phonetic or conceptual) sufficient to assess similarity?

The action had been directed against a decision of the 2nd Board of 5 July 2004 in R0022/2004-2 relating to CTM application “Curon” (word mark), applied for a range of goods and services in classes 10, 41 and 42. The class 10 goods are described as follows: ‘Surgical, medical, dental and veterinary apparatus, instruments and devices except X-ray apparatus as well as their parts for use within the medical field, in particular X-ray tubes and X-ray screens, exposed

and unexposed X-ray films, cartridges and other containers for the transportation of unexposed and exposed X-ray films and apparatus and devices for developing exposed X-ray films; excluding orthopaedic appliances and instruments, prostheses, apparatus and instruments for the external fixation and stapling of prostheses, power-tool apparatus for use in surgery, parts and fittings for the excluded goods, bone cement; and not including disposable articles and products other than for use in connection with catheters, radio frequency electro-surgery, gastroesophageal reflux disease, surgical treatment of faecal incontinence and gastroenterological disorders’. An opposition had been lodged based on Community word mark “Euron”, registered in classes 5, 10, 16, 24 and 25. The protected goods in class 10 are: surgical, medical apparatus and instruments, and the opposition had been directed against all goods in class 10 in the CTM application. Whereas an opposition group had allowed the opposition, the Board had rejected it on the grounds that there is no likelihood of confusion owing mainly to the fact that the signs at issue are not similar enough. The 5th Chamber of the CFI (Vilaras, Dehousse, rapporteur; Svábý) confirmed the findings of the Board.

(a) Relevant public

"(58) The Court finds, in that regard, that the definition of the relevant public by the Opposition Division, implicitly adopted by the Board of Appeal, is correct. Taking account of the relatively broad description of the goods in question in this case, it is appropriate to state that the relevant public is indeed composed of both average and specialist consumers.

(59) However, it must be observed that, in answer to a question from the Court during the hearing, the applicant estimated the proportion of goods in question which could be purchased by the average consumer at a percentage not exceeding 20% of all those goods. Therefore, the applicant itself acknowledges by its comments that the great majority of the relevant public is a specialist public and that only a limited part of that public consists of average consumers.

(60) The Court also finds that the goods concerned are, by virtue of their nature (see paragraph 3 and 5 above), designed particularly for specialists working in the surgical and medical spheres. It follows that the main body of the relevant public consists of a specialist public, which is likely to take greater care than the average consumer in the selection of the goods in question (see, to that effect, Case T-211/03 *Faber Chimica v OHIM – Nabersa (Faber)* [2005] ECR II-1297, paragraph 24).

(61) Therefore, if the applicant's argument concerning the Board of Appeal's failure to take account of the viewpoint of the average consumer is to be taken to mean that the relevant public is composed solely of those consumers, that argument must be dismissed since it is based on an incorrect premiss.

(62) If the applicant's argument must be understood as meaning that the Board of Appeal failed to give enough weight to the viewpoint of the average consumer, that argument must be dismissed as it is factually incorrect."

(b) Comparison of marks



"(64) It must be stated, as a preliminary point, that the two marks at issue are each composed of two syllables. They each contain five letters, the last four of which are identical, and are arranged in the same order and in the same position. That gives the signs at issue some degree of visual similarity.

(65) Nevertheless, in order to assess the general visual impression given by the two signs, it is also appropriate to take account of the fact that the first letter of each is different..

(66) The Board of Appeal did not commit a manifest error of assessment by finding, in that regard, that the vowel 'e' is, in visual terms, sufficiently different from the consonant 'c'. It must be noted, in that connection, that, unlike the consonant 'c', the vowel 'e' contains a central horizontal line which makes its written form more complex.

(67) Consumers will notice the difference between the initial first letters more easily as they normally attach more importance to the first part of words (MUNDICOLOR, cited in paragraph 38 above, paragraph 81). The first part of the earlier mark is also distinguished by the fact that it is constituted of the juxtaposition of the two letters 'e' and 'u', which attracts the attention of consumers used to seeing the abbreviation 'eu', which usually refers to the European Union.

(68) It must be pointed out that although, strictly speaking, the visual impression of a sign consists of the overall impression it produces, the fact that some of its constituents produce a greater or lesser visual impact cannot be ruled out. That is also true in a case such as the present, in which the sign consists of a single word. The sequence 'e-u-r-o' of the earlier mark immediately attracts the visual attention of consumers. That is due to the multiple repetition, in consumers' everyday life, of situations in which they are led to perceive various words constituted by that sequence of letters, including, in particular, the word 'euro', relating to the single currency, or even the words 'Europe' and 'European'. The visual attraction of the sequence in question is instinctive. It does not, therefore, depend on a conceptual analysis of the earlier mark by consumers or on the fact that they attribute a specific meaning to it.

(69) The sequence 'e-u-r-o' is therefore visually dominant in the earlier mark, particularly because the latter is distinguished from it only by the last letter 'n'. The corollary to that is that the sequence 'u-r-o-n', common to both marks, is not the most attractive component of the earlier mark. –

(70) It should also be noted that the brevity of the marks at issue enables consumers to better grasp the variations in their spelling.

(71) Having regard to all of the foregoing considerations, it must be held that the Board of Appeal did not commit any manifest error of assessment by concluding that, visually, the general impression given by the signs at issue differs considerably because of the first letter of each sign."

(c) Likelihood of confusion

"(97) As stated in paragraph 71 above, the marks are markedly different from the visual perspective because of

their respective first letters. From the phonetic perspective, despite a certain undisputed similarity, a noticeable difference in their overall pronunciation results from their respective first letters (see paragraph 87 above). Conceptually the marks are different (see paragraph 94 above).

(98) Although it is possible that, in general, only the auditory similarity of the marks is liable to give rise to a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94, the existence of such a likelihood must be determined in the context of an overall assessment as regards the conceptual, visual and auditory similarities of the marks at issue. In that connection, auditory similarity or dissimilarity constitutes only one of the relevant factors in the context of the overall assessment. Therefore, it cannot be held that there is necessarily a likelihood of confusion each time that the auditory similarity alone between two signs is established.

(99) It must further be observed, in that connection, that the degree of phonetic similarity between two marks is of less importance in the case of goods which are marketed in such a way that, when making a purchase, the relevant public usually perceives visually the mark designating those goods (BASS, cited in paragraph 91 above, paragraph 55). In the light of the type of goods in question, it is highly improbable that consumers will be able to distinguish them after having heard only the name of the mark which designates them, without having seen the goods themselves. Furthermore, at the hearing, the applicant did not deny the statement made by OHIM to that effect.

(100) Taking account of the substantial visual and conceptual differences between the marks at issue, and of the fact that the degree of phonetic similarity between them cannot be regarded as particularly conclusive because of the phonetic differences resulting from the first letters, and in the light of the relevant public in this case, it must be held that the degree of similarity between the marks in question is not sufficiently high to conclude that there is a likelihood of confusion.

...

(102) Given the differences between the marks at issue, that finding is not invalidated by the fact that the goods covered by the mark applied for, and referred to in the applicant's opposition, are identical to the goods designated by the earlier trade mark on which the opposition was based (see, to that effect, BASS, cited in paragraph 91 above, paragraph 57, and Case T-301/03 Canali Ireland v OHIM – Canal Jean (CANAL JEAN CO. NEW YORK) [2005] ECR II-2479, paragraph 64).

(103) It must be further stated, in that connection, that, contrary to the applicant's submissions, the Board of Appeal did not fail to take account of the principle of interdependence between the various factors considered and, more specifically, of the identity of the goods concerned. First, it relied on the case-law on the principle of interdependence in its findings on the likelihood of confusion (paragraph 17 of the contested decision). Second, it declared, in paragraph 20 of the contested decision, that "[n]otwithstanding the identity of the goods ... the marks are clearly distinguishable from one



another', which indicates that it had in fact applied that principle in this case.

(104) Finally, contrary to the applicant's submissions, the earlier mark cannot be regarded as being particularly distinctive in character. It is attenuated by the sequence 'e-u-r-o', because of its frequent use in the trade mark field, and in various trade names. Furthermore, that sequence includes a strong evocative element as regards the geographic origin of the goods that it designates. In any event, since the marks at issue do not have decisive visual, phonetic or conceptual similarity, the potentially distinctive aspect of the earlier mark cannot affect the overall assessment of the likelihood of confusion (see, to that effect, *Starix*, cited in paragraph 49 above, paragraph 61, and *CANAL JEAN CO. NEW YORK*, cited in paragraph 102 above, paragraph 62)"

Respicur/Respicort : T-256/04 - Judgment of 13 February 2007 ; action allowed. The clarifications as regards the issue of categorisation and proof of use (general category/sub-categories of goods) are of importance for the Office's practice.

Keywords: CFI procedure: references to statements made before the OHIM (inadmissible) – Opposition: proof of use – Proof of use: scope of determination – Proof of use: general category and sub-categories - Proof of use: categorisation: pharmaceutical products - Opposition: likelihood of confusion (LOC) – LOC: definition of the relevant public/pharmaceuticals – Consumer awareness: level of attention/specific pharmaceuticals.

The action had been directed against a decision of the 2nd Board of 19 April 2004 in R1004/2002-2, relating to CTM application "Respicur" (word), applied for in class 5 for therapeutic preparations for respiratory illnesses. It had been opposed on the basis of the earlier German word mark "Respicort", registered for pharmaceutical preparations and plasters in class 5. An opposition group had rejected the opposition on the grounds that the opponent had failed to show ownership and use of the invoked mark, and that in any event there is no likelihood of confusion (LOC). In the contested decision, the Board found that the opposition should not have been dismissed on grounds of lack of proof of ownership of the earlier mark. It went on to hold that the opponent (plaintiff) had not succeeded in proving use of the earlier mark, to the extent necessary, and that account should be taken only of the use for 'multi-dose dry powder inhalers containing corticoids, available only on prescription', proof of use of which had not been requested by the CTM applicant. As to the issue of whether there is LOC, the Board found that the goods in question were identical and that there was a certain similarity, offset however by marked differences between the two opposing signs. It found that the relevant public groups in respect of the earlier mark and the mark applied for overlapped only in the professional sector, which was thus the relevant public in the present case. In the light of the differences found, the Board had held that overall there was no likelihood of confusion.

(a) References made to statements in proceedings before the OHIM

"(13) In their submissions, both the applicant and the intervener refer explicitly to the written pleadings lodged by them in the opposition proceedings before OHIM. The intervener has also referred to the grounds contained in the decisions of the Opposition Division and the Board of Appeal.

(14) The Court observes that, under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rule of Procedure of the Court of First Instance, the application initiating the proceedings must contain a summary of the pleas in law relied on. According to the case-law, the summary of the pleas relied on must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. The Court has further held that, while the body of the application may be supported and supplemented by references to certain passages in extracts from documents annexed to it, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in the application, and it is not for the Court to place itself in the parties' position and seek the relevant information in the annexes (see order in Case T-56/92 *Koelman v Commission* [1993] ECR II-1267, paragraphs 21 and 23, and judgment in Case T-231/99 *Joynson v Commission* [2002] ECR II-2085, paragraph 154, and case-law cited). That case-law can also be transposed to the response of the other party to opposition proceedings before a Board of Appeal who intervenes before the Court of First Instance, pursuant to Article 46 of the Rules of Procedure, which, by virtue of the second subparagraph of Article 135(1) thereof, applies in matters of intellectual property (Case T-115/02 *AVEX v OHIM – Ahlers (a)* [2004] ECR II-2907, paragraph 11).

(15) The intervener's application and response, in so far as they refer to the written submissions lodged by the applicant and the intervener before OHIM and to the decisions delivered by OHIM in the opposition proceedings, are inadmissible because the general reference they contain cannot be linked to the pleas in law and arguments developed in the intervener's application and response."

(b) Determination of scope of proof of use

"25 The Court notes that although, in the present case, the applicant has not demonstrated genuine use of the earlier mark for any goods, the fact remains that the intervener has not requested that proof of such use be adduced with respect to 'multi-dose dry powder inhalers containing corticoids, available only on prescription'. Moreover, as the Board of Appeal observed in paragraph 25 of the contested decision, because under Article 43(2) of Regulation No 40/94 proof of use of the mark on which the opposition is founded need be furnished only when requested by the applicant, it is for the latter to determine the scope of its request for proof. Accordingly, since the intervener's request for proof did not cover the 'multi-dose dry powder inhalers containing corticoids, available only on prescription', it is not necessary to explore whether the earlier mark has been put to genuine use in Germany for those products. "



(c) *Definition of a possible sub-category within a general category of goods*

"(26) Next, it should be borne in mind that the earlier mark was registered for 'pharmaceutical and sanitary preparations; plasters'. That category of goods is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently. Consequently, the fact that the earlier mark must be regarded as having been used for 'multi-dose dry powder inhalers containing corticoids, available only on prescription' confers protection only on the sub-category within which those goods fall.

(27) In the contested decision, the Board of Appeal held that the earlier mark was to be taken into consideration only in so far as it covered goods the genuine use of which was not contested. It thus defined a sub-category corresponding to those goods, namely 'multi-dose dry powder inhalers containing corticoids, available only on prescription'.

(28) That definition is incompatible with Article 43(2) of Regulation No 40/94, as interpreted in the light of *ALADIN*, and applicable to earlier national marks pursuant to Article 43(3) of that regulation.

(29) The Court notes in this respect that, since consumers are searching primarily for a product or service which can meet their specific needs, the purpose or intended use of the product or service in question is vital in directing their choices. Consequently, since consumers do employ the criterion of the purpose or intended use before making any purchase, it is of fundamental importance in the definition of a sub-category of goods or services.

(30) The purpose and intended use of a therapeutic preparation are expressed in its therapeutic indication. However, the definition employed by the Board of Appeal is not based on that criterion as it does not state that the goods in question are intended for the treatment of health problems and does not specify the nature of those problems.

(31) Moreover, the criteria chosen by the Board of Appeal, namely the dosage form, the active ingredient and the obligation to obtain a doctor's prescription, are, as a rule, inappropriate for defining a sub-category of goods as contemplated in *ALADIN*, as the application of those criteria does not fulfil the abovementioned criteria of purpose and intended use of the goods. In fact, a given medical condition can often be treated using a number of types of medication with different dosage forms and containing different active ingredients, some of which are available over-the-counter whilst others are available only on prescription.

(32) It follows that, in failing to take into account the purpose and intended use of the goods in question, the Board of Appeal made an arbitrary choice of sub-category of goods.

(33) For the reasons set out in paragraphs 29 and 30 above, the sub-category of goods covering those the genuine use of which has not been contested must be determined on the basis of the criterion of therapeutic indication.

(34) The sub-category proposed by the intervener, namely 'glucocorticoids', cannot be accepted. That definition is based on the criterion of the active ingredient. As discussed in paragraph 31 above, such a criterion is not generally appropriate by itself for defining sub-categories of therapeutic preparations.

(35) By contrast, the definition proposed by the applicant and OHIM, namely 'therapeutic preparations for respiratory illnesses', is appropriate in two ways: first, it is based on the therapeutic indication of the goods in question and, second, it allows for the definition of a sufficiently specific sub-category, as contemplated in *ALADIN*."

(d) *Relevant consumers; awareness of consumers of specific pharmaceuticals*

"(42) As a preliminary point, it must be borne in mind that, in the global assessment of the likelihood of confusion, account should be taken of the average consumer of the category of products concerned, who is reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (see, by analogy, Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraphs 25 and 26).

"43" Next, first of all, as OHIM observes, the relevant public comprises German consumers, since the earlier mark was registered in Germany .

"44" Second, it has not been disputed in the present case that the relevant public for the goods covered by the mark applied for, namely therapeutic preparations for respiratory illnesses, is made up of patients in their capacity as end consumers, on the one hand, and health care professionals, on the other.

(45) As to the goods for which the earlier mark is deemed to have been registered, it is apparent from the parties' written submissions and from their answers to the questions put at the hearing that some therapeutic preparations for respiratory illnesses are available only on prescription whilst others are available over the counter. Since some of those goods may be purchased by patients without a medical prescription, the Court finds that the relevant public for those goods includes, in addition to health care professionals, the end consumers.

(46) Third, as pointed out by the intervener, since many respiratory illnesses are serious conditions, patients suffering from those illnesses are generally well informed and particularly attentive and circumspect in the choice of the medication that is appropriate for them.

(47) The Court thus finds that the relevant public comprises German health care professionals, on the one hand, and German patients suffering from respiratory illnesses, on the other, the latter generally showing a higher than average level of attention."

Guitar (3D) or Shape of a guitar: T-317/05 – Judgment of 7 February 2007 (action allowed) - New Office practice: evidence relied on by the Boards will be transmitted to the



parties concerned at the same time as the identification of the Internet links. The date of extraction from the Internet will also be shown on each piece of material. The Trade Mark departments will apply the same practice; the respective practice note was published on 14 March 2007 .

Keywords: CFI procedure: admissible claims - Procedural law: rights of the defence, Article 73 CTMR (material used in the decision but not been made available to applicant) – Absolute grounds for refusal: three-dimensional signs – 3D-signs: shape of the product.

The action had been directed against a decision of the 2nd Board of 7 June 2005 in R1035/2004-2 relating to a 3D CTM application (shape of a guitar, as shown below), applied for stringed instruments, namely guitars, in class 15.



On substance, the appeal had been dismissed on the grounds that a guitar player is used to seeing a large number of models of electric guitars with a variety of extravagant shapes and, in particular, numerous shapes of 'pointy' guitars, so that he will not see an indication of origin in a shape which is not significantly different from that of other electric guitars, but will perceive the shape in question as ornamentation. On formal grounds, the plaintiff had criticised the Office for having made extensive reference in the examiner's decision and in the contested Board decision to internet pages, without having disclosed the precise content of those pages in the form of a hard copy. In that regard, the plaintiff had noted that several of the websites cited by the examiner had not been available when it had sought to access them. It submitted that communicating only references to websites does not furnish proof of the original website material in question but merely the examiner's account of what that website had contained. As regards the references to websites which the plaintiff successfully accessed, it maintains that there is no guarantee that the material contained there was the same as the material upon which the examiner had based his conclusions, since the internet pages are regularly updated. The 3rd Chamber of the CFI (Jaeger, Tiili, Czúcz) held that the plaintiff's rights to defence had been infringed.

(a) Admissible claims

"(11) As regards the third head of claim, seeking an order that OHIM publish the Community Trade Mark application, the applicant explained at the hearing that it was not asking for

the mark applied for to be published, but for the Court of First Instance to order OHIM to re-examine the mark applied for in the light of the judgment of the Court.

(12) Under Article 63(6) of Regulation No 40/94, OHIM is required to take the measures necessary to comply with judgments of the Community judicature. Accordingly, it is not for the Court of First Instance to issue directions to OHIM. It is for the latter to draw the appropriate inferences from the operative part and grounds of judgments of the Community judicature (Case T-331/99 *Mitsubishi HiTec Paper Bielefeld v OHIM (Giroform)* [2001] ECR II-433, paragraph 33; Case T-34/00 *Eurocool Logistik v OHIM (EUROCOOL)* [2002] ECR II-683, paragraph 12; Case T-164/03 *Ampafrance v OHIM – Johnson & Johnson (monBeBé)* [2005] ECR II-1401, paragraph 24; and Case T-202/04 *Madaus v OHIM – Optima Healthcare (ECHINAID)* [2006] ECR II-0000, paragraph 14).

(13) The applicant's third head of claim is therefore inadmissible."

(b) Reference material and scope of Article 73 CTMR

"(24) It should be pointed out, at the outset, that, pursuant to the second sentence of Article 73 of Regulation No 40/94, decisions of OHIM are to be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments.

(25) In accordance with that provision, a Board of Appeal of OHIM may base its decision only on matters of fact or of law on which the parties have been able to set out their views. Consequently, in a case where the Board of Appeal assembles of its own motion facts intended to serve as a basis for its decision, it is under an obligation to notify the parties of those facts in order that the parties may submit their views thereon (*KWS Saat v OHIM*, cited in paragraph 21 above, paragraphs 42 and 43, and *TOP*, cited in paragraph 21 above, paragraph 59).

(26) The general principle of protection of the right to defend oneself is enshrined in the law of Community trade marks by that provision (Case T-320/03 *Citicorp v OHIM (LIVE RICHLI)* [2005] ECR II-3411, paragraph 21). According to that general principle of Community law, a person whose interests are appreciably affected by a decision taken by a public authority must be given the opportunity to make his point of view known (Case 17/74 *Transocean Marine Paint v Commission* [1974] ECR 1063, paragraph 15; *EUROCOOL*, cited in paragraph 12 above, paragraph 21; and *LIVE RICHLI*, paragraph 22).

(27) The right to be heard extends to all the factual and legal material which forms the basis of the decision, but not to the final position which the authority intends to adopt (Case T-16/02 *Audi v OHIM (TDI)* [2003] ECR II-5167, paragraph 75).

(28) As regards the present case, first, OHIM sent internet links, without providing the applicant with hard copies of their content, in two letters dated 23 February 2004 and 13 May 2004 respectively, informing the applicant, pursuant to Rule 11(1) of Regulation (EC) No 2868/95 (...).



(29) In the first notice of grounds for refusal the examiner considered that the shape applied for was common within a category of instruments colloquially referred to as 'pointy guitars' and, therefore, did not constitute an indication of origin. He added that 'a brief search of the internet [had] shown that a large number of major guitar manufacturers all produce[d] similar shape guitars'. In that regard, the examiner mentions the applicant's website and also two internet pages belonging to other manufacturers. He concludes from that that 'in light of the evidence found, the mark is considered to be devoid of any distinctive character'.

(30) In the second notice of grounds for refusal the examiner states that '[the] internet findings submitted to the applicant have formed the basis for [OHIM's] rejection of the mark'. He then makes reference to links to five internet pages of guitar manufacturers and concludes that those findings 'indicate that ... shapes very similar to that applied for are being used by third parties in the relevant sector'.

(31) In his decision the examiner rectified his position as regards the role and the importance of items of evidence consisting of the internet links which constitute the internet research mentioned in the notices of grounds for refusal. He states: 'Internet references ... can never form the sole basis for an objection raised. Having considered all the facts of the case, [OHIM] has decided that acceptance of the mark applied for would contravene Article 7(1)(b) [of Regulation No 40/94] and has provided reasons for doing so. These reasons are supported by some internet references found by [OHIM], but do not rely solely on them.'

(32) The Court notes, however, that the examiner's decision does not mention any new evidence constituting the factual basis of the analysis and replacing the internet research sent to the applicant in the form of those links.

(33) In paragraph 20 of the contested decision the Board of Appeal states the following: 'The shapes of guitars actually offered in the market are practically unlimited ... Firstly, (...) it appears that this [pointy] style is commonly found in various other [shapes of] electric guitars in the actual market place (...). The Board of Appeal then gives 'some examples from the sites cited by the examiner' and lists seven internet links.

(34) According to paragraph 21 of the contested decision, 'the websites cited by the examiner revealed an assortment of guitar models with a great variety of ... pointy design ... more or less similar to the one applied for, marketed by various guitar manufacturers'. In order 'to give only some examples from the websites cited by the examiner', the contested decision specifies eight internet links.

(35) In paragraph 22 of the contested decision, the Board of Appeal adds that 'the websites already quoted by the examiner feature several models of "pointy guitars" ... very similar, if not identical, to the shape applied for' and mentions another five internet links.

(36) The applicant's first ground for complaint relating to the right to be heard concerns the seven internet links belonging to the other guitar manufacturers which were sent, before the adoption of the contested decision, in the notices of grounds for refusal. In that context, the applicant criticises the fact that

no hard copies were provided of the pages to which those links led at the time when they were taken into account by the examiner and the Board of Appeal. By its second ground for complaint relating to the right to be heard, which concerns the 19 links which were transmitted for the first time in the contested decision, the applicant complains not only that no hard copies were provided, but also that the Board of Appeal took those internet links into account, even though they were facts on which it was not able to define its position before the adoption of the contested decision. –

(37) As regards the applicant's first ground for complaint, which it already raised in the proceedings before the Board of Appeal (...), the Board of Appeal states the following in paragraph 39 of the contested decision: 'It is true that when reference is made to ephemeral web pages, a hard copy thereof should be available for the applicant [for a Community trade mark], upon request. However, in the present case, ... the examiner made clear reference to websites which are not ephemeral, but are those of well-established guitar manufacturers.'

...

(40) As regards OHIM's argument that the applicant, being a professional in the sector at issue, must have been aware of the guitar shapes referred to by the examiner and the Board of Appeal, it should be pointed out that OHIM admitted at the hearing that the only means of identifying the guitar shapes to which the examiner and the Board of Appeal referred would have been to open the links at issue.

(41) However, it is clear that this means of identifying the shape in question is ineffective if the link at issue is inaccessible and it does not preclude the possibility that the given link could lead, at a later date, to a guitar other than that taken into account by the examiner or by the Board of Appeal.

(42) In relation to certain accessible links which lead to several guitar shapes, OHIM affirmed, at the hearing, that identification of the specific shape taken into account by the Board of Appeal was possible only by getting into contact with the rapporteur of the Board of Appeal.

(43) Therefore, as regards the applicant's first ground for complaint relating to the right to be heard, the Court finds that the mere communication of the internet links in the two notices of grounds for refusal, without the provision of hard copies of the pages to which those links led, did not enable the applicant to identify, before the adoption of the contested decision, the guitar shapes taken into consideration by the Board of Appeal.

(44) As regards the applicant's second ground for complaint, it must also be pointed out that the applicant could not, even theoretically, have accessed the 19 links before the adoption of the contested decision, since those links were first sent to the applicant only in the contested decision (...).

(45) Consequently, it must be concluded that the Board of Appeal took into account, at the time of the adoption of the contested decision, facts which were not communicated to the applicant prior to the adoption of that decision.



(46) In so doing, the Board of Appeal infringed the second sentence of Article 73 of Regulation No 40/94.

...

(55) Consequently, the Court finds that the conclusion in the contested decision that the mark applied for should be rejected is based on facts which were not communicated to the applicant prior to the adoption of that decision. Therefore, the infringement of the applicant's right to be heard vitiates the very conclusion reached in the contested decision.

(56) For the sake of completeness, it should be noted that, under the first sentence of Article 73 of Regulation No 40/94, decisions of OHIM are to state the reasons on which they are based. That duty has the same scope as that enshrined in Article 253 EC (Joined Cases T-124/02 and T-156/02 *Sunrider v OHIM – Vitakraft-Werke Wührmann and Friesland Brands (VITATASTE and METABALANCE 44)* [2004] ECR II-1149, paragraph 72).

(57) In that regard, it is settled case-law that the duty to give reasons for a decision has two purposes: to allow interested parties to know the reasons for the measure so as to enable them to defend their rights and to enable the Community judicature to exercise its power to review the legality of the decision (see, in particular, Case C-350/88 *Delacre and Others v Commission* [1990] ECR I-395, paragraph 15; Case T-188/98 *Kuijjer v Council* [2000] ECR II-1959, paragraph 36; and Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 59). Whether a statement of reasons satisfies those requirements is a question to be assessed with reference not only to its wording but also to its context and the whole body of legal rules governing the matter in question (Case C-122/94 *Commission v Council* [1996] ECR I-881, paragraph 29, and *VITATASTE and METABALANCE 44*, cited in paragraph 56 above, paragraph 73)."

TDK : T-477/04 - Judgment of 6 February 2007 (action dismissed; Office practice confirmed).

Keywords: Opposition: earlier right with reputation, Article 8(5) CTMR – Reputation mark: criteria of reputation – Reputation mark: criteria of dilution – Dilution: textiles (class 25) and apparatus for recording transmission or reproduction of sound (class 9).

The action had been directed against a decision of the 1st Board of 7 October, 2004 in R0364/2003-1 relating to CTM application "TDK" (word), applied for in class 25. It had been opposed on the basis of 35 earlier national trade marks "TDK" fig., registered in class 9.



The opposition had been allowed in full pursuant to Article 8(5) CTMR since it had been demonstrated that the earlier

signs enjoy reputation and that there is a risk of dilution within the meaning of Article 8(5) CTMR.

(a) *Scope of Article 8(5) CTMR*

"(43) For an earlier mark to be afforded the broader protection under Article 8(5) of Regulation No 40/94, a number of conditions must be satisfied. First, the earlier mark which is claimed to have a reputation must be registered. Secondly, that mark and the mark applied for must be identical or similar. Thirdly, it must have a reputation in the Community, in the case of an earlier Community trade mark, or in the Member State concerned, in the case of a national trade mark. Fourthly, the use of the mark applied for must lead to at least one of the two following conditions being satisfied: (i) unfair advantage would be taken of the distinctive character or the reputation of the earlier trade mark, or (ii) it would be detrimental to the distinctive character or the reputation of the earlier trade mark. Lastly, such use of the mark applied for must be without due cause. –

(44) In the present case, it is not in dispute that the mark applied for is identical to the earlier marks or similar to them (paragraph 25 of the contested decision) and that those marks are registered.

(45) Moreover, since the Board of Appeal held that the use of the mark applied for would take unfair advantage of the distinctive character or the reputation of the earlier marks, and since the conditions for the application of Article 8(5) of Regulation No 40/94 are alternative, it did not consider whether the condition referred to at point (ii) of paragraph 43 above was satisfied. It is also a matter of agreement that the applicant has not put forward any plea based on due cause within the meaning of Article 8(5) of Regulation No 40/94.

(46) In those circumstances, it is necessary to determine, first, whether the earlier marks enjoy a reputation and, secondly, whether the use of the mark applied for would take unfair advantage of the distinctive character or the reputation of the earlier marks."

(b) *Assessment of reputation*

"(48) Article 8(5) of Regulation No 40/94 does not define 'reputation'. However, it is clear from the case-law of the Court of Justice relating to the interpretation of Article 5(2) of First Council Directive 89/104/EEC (...), the substantive content of which is, in essence, identical to that of Article 8(5) of Regulation No 40/94, that, in order to satisfy the requirement of reputation, the earlier national mark must be known to a significant part of the public concerned by the goods or services covered by that trade mark.

(49) In examining that condition, it is necessary to take into consideration all the relevant facts of the case, in particular the market share held by the mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it (*General Motors*, paragraphs 26 and 27). The Court of Justice stated in *General Motors* that it cannot be inferred from either the letter or the spirit of Article 5(2) of the directive that the earlier mark must be known by a given percentage of the relevant public



(paragraph 25) but that that reputation must exist in a substantial part of the territory concerned (paragraph 28). Two judgments of the Court of First Instance adopt, either expressly (Case T-8/03 *El Corte Inglés v OHIM –Pucci (EMILIO PUCCI)* [2004] ECR II-4297, paragraph 67), or by implication (Case T-67/04 *Spa Monopole v OHIM – Spa-Finders Travel Arrangements (SPA-FINDERS)* [2005] ECR II-1825, paragraph 34) the criteria thus laid down by the Court of Justice in that judgment.

...

(52) The Board of Appeal was right to take into consideration, in paragraph 27 of the contested decision, Annexes A to R as a whole, with particular reference to the intensity, the duration and the geographical coverage of the use of the earlier marks in question.

(53) The Board of Appeal states, in paragraph 29 of the contested decision, that the intervener had demonstrated in the course of the procedure before the Opposition Division that: [it had] had a commercial presence in Europe since 1973; - [it had] manufactured audio and video tape components in Europe since 1988; - [it had] sales offices in Germany, France, Austria, Sweden, Poland [and] the United Kingdom; - in addition to a Community trade mark, [it had] national registrations of either or both the word mark TDK and the mark TDK and device in 12 of the Member States of the European Community, the earliest of which dates from 1969; - [it had], between October 1998 and September 1999, using its TDK trade marks, achieved a share in the 8 mm camcorder tape market of 49.5% in Great Britain and 22.1% in Europe; [and had], during the same period, achieved a share in the audio tape market of 64.1% in Great Britain and 39.3% in Europe; - [it had] sponsored, using its marks, five European musical tours/events featuring the Rolling Stones (1990), Paul McCartney (1991), Phil Collins (1994), Tina Turner (1996) and Janet Jackson (1998); every one of the World Championships in Athletics since 1983; at one time or another, the Finland national team in athletics and ice hockey, the Italian football club Milan AC, the Netherlands football club Ajax Amsterdam, in Spain, TDK Manresa, basketball club, in Sweden, the Uppsala Gators basketball team and, in the United Kingdom, Crystal Palace football club; - the mark appear[ed] either printed on the competitors' event number or directly onto the players of competitors' sports clothing; this clothing [had] been available for purchase bearing the TDK mark and consist[ed] principally of sports clothing, including football shirts and shorts, basketball vests and shorts, track suits and the like; - the marks appear[ed] around stadiums, on billboards, balloons and the like .

(54) In paragraph 30 of the contested decision, the Board of Appeal found that both the commercial and sponsorship activities referred to in the preceding paragraph extended throughout Europe and required the investment of substantial amounts of money, time and effort. It also held that the sponsored events were often televised or recorded, thereby ensuring wider exposure of the earlier marks to the public.

(55) In paragraphs 31 and 32 of the contested decision, the Board of Appeal went on to consider the evidence put forward by the intervener and concluded that the earlier marks possessed a reputation and distinctive character. It stated as

follows: "In the Board's estimation, the material referred to above represents the results of a significant amount of investment both in effort, time and money which has been maintained over an unusually long and significant period of time in respect of the opponent's audio and videotape goods and the promotion of the mark. The fact that market surveys are included together with actual sales figures and information about advertising, supports all the claims which the opponent has made in respect of the reputation and goodwill which attaches to its marks.

The material points to the establishment and maintenance of a reputation in connection with sponsorship over a significant period of time and to the creation and existence of goodwill of considerable public interest and of a particular commercial value, justifying continuing investment. From the material filed, and the investment made by the opponent in promoting its mark by way of sponsorship, it is clear that the mark enjoys a reputation of significant value which must be founded upon the fact that it is known by a significant part of the public concerned in the Community. Since activities such as athletics, basketball, football and musical events attract the devotion and loyalty of "fans", ardent admirers of pop stars and football teams and devotees of the particular sport in question, the Board is persuaded that the connection of the opponent's mark with those activities will have attracted a very substantial amount of goodwill and reputation which goes beyond that which would simply attach to the goods which bear the mark. Accordingly, the opponent is entitled to claim for its mark the broader protection referred to above for the purposes of Article 8(5) [of Regulation No 40/94] as concluded by the Opposition Division. It follows that the mark, in addition to whatever distinctive character it has *per se*, the letters TDK having no connection with any of the goods at issue, has an enhanced distinctive character because of the reputation which has accrued to it."

(56) Having regard to the documents before the Court, the findings made in paragraphs 29 to 32 of the contested decision must be upheld. The intervener has, on the basis of Annexes A to R, taken as a whole, established the nature and scope of its commercial activities in Europe since 1988, as regards the production, marketing, sponsorship and advertising of the earlier marks in question; this extends to heavily populated Member States."

(c) Criteria of risk of dilution ("the taking of unfair advantage of the distinctive character or the reputation of the earlier marks")

"(61) The Board of Appeal set out in that regard (paragraphs 33 to 39 of the contested decision) the bases on which such an unfair advantage would arise and stated in particular as follows: '37. In the Board's estimation, the material provided by the opponent shows that the reputation which has accrued to it is perceived by a substantial part of the public, not only as a manufacturer of certain goods but also as reflecting the nature of its sponsorship activities which fall predominantly in the field of sports and in the staging of large musical events. 38. It is also undoubtedly the case that, as part of these sponsorship activities, the opponent produces or arranges for the production of clothing bearing its mark. Although the principal purpose of the goods is to promote the mark, it is nevertheless the case that the relevant public is used to seeing the mark on such goods in connection with sporting or

musical events. 39. The applicant proposes to use the mark in respect of clothing, footwear and headgear without any restriction. This means that the specification includes every type of clothing including that which is suitable for sports. There is no reason to suppose that the applicant might not use the letters TDK upon T-shirts, shorts or track suits or similar sporting apparel. The same considerations must apply to footwear and headgear used in sports events. Since the mark applied for is identical to one of the opponent's marks, the relevant public will assume that the clothing, footwear and headgear is produced by or under licence from TDK in connection with its sponsorship activities. This will mean that the applicant will attract to its goods all the goodwill currently associated with the opponent as a sponsor of world famous athletics and European musical events and in which the opponent has invested enormous amounts of time, effort and money as noted by the contested decision. This is both free-riding on the coat-tails of renowned marks and an attempt to trade on their reputation. In the Board's estimation, this would amount to taking unfair advantage of both the distinctive character and repute of the earlier marks.'

(62) Thus, the Board of Appeal essentially based its conclusion on the following considerations. The reputation, as established, of the earlier marks and their distinctive character extended to the intervener's activities of promotion and advertising in sponsoring sporting and musical events. As regards, more particularly, sporting events, the public is accustomed to seeing the TDK mark on clothing associated with such events. In addition, the use of the mark applied for by the applicant on clothing in general and, in particular, on clothing habitually used by the intervener in its sponsored sporting events, could lead the public to believe that such clothing was manufactured by, or under licence from, the intervener. On the basis of the evidence available to it, the Board of Appeal found that use by the applicant of the mark applied for could encourage the public to buy the applicant's goods by reason of the association it would be likely to make between the TDK mark and the commercial value attached to the reputation and distinctive character of the earlier marks.

(63) The applicant essentially calls into question the evidential value of the documents in the case on which the Board of Appeal's conclusion was based. It maintains in particular that the fact that the goods it proposes to sell to the public will be sold through very different distribution channels and that the earlier marks, which appear on athletes' identification numbers and on branded T-shirts (for example, Adidas) are associated in the mind of the public only with the intervener's sponsorship activities (see paragraphs 33 and 21 above).

(64) The Court would point out that the Board of Appeal is not required to establish actual and present harm to an earlier mark. It must simply have available to it *prima facie* evidence of a future risk, which is not hypothetical, of unfair advantage (SPA-FINDERS, paragraph 40).

(65) It must also be noted that the concept of taking unfair advantage of the distinctive character or the reputation of the earlier mark must be understood as encompassing instances where there is clear exploitation and free-riding on the coat-tails of a famous mark or an attempt to trade upon its reputation (SPA-FINDERS, paragraph 51). The stronger the earlier mark's distinctive character and reputation, the easier it will be to accept that detriment has been caused to it

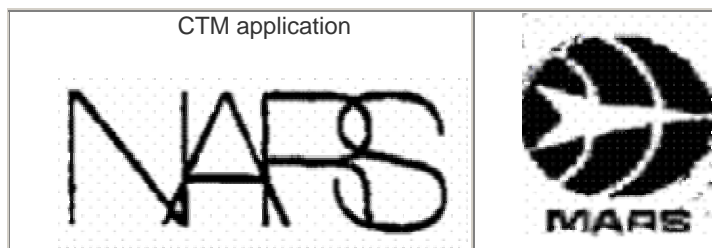
(General Motors, paragraph 30, and SPA-FINDERS, paragraph 41)."

Nars/Mars : T-88/05 - Judgment of 8 February 2007 (action dismissed; Office practice

confirmed).

Keywords: Opposition: proof of use – Proof of use: criteria – Opposition: likelihood of confusion (LOC) – LOC: comparison of marks.

The action had been directed against a decision of the 2nd Board of 17 December 2004 in R0379/2004-2 relating to CTM application "Nars" (fig.), applied for bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices (class 3) and for leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery (class 18) and for clothing, footwear and headwear in class 25. It had been opposed on the basis of two earlier marks, identical in form, registered for a range of goods in class 25.



Upon request, the opponent submitted as evidence of use of each of the marks relied on in the opposition two statutory declarations relating to its annual turnover between 1995 and 2000 from the sale of sports footwear and of sports trousers, and also two pages of extracts from catalogues and two pairs of sports trousers. Whereas the opposition group concerned had rejected the opposition on the grounds of lack of proof of use, the 2nd Board had allowed the appeal in this respect upon submittal of further evidence. Overall, however, it had rejected the appeal on the grounds that there is no likelihood of confusion owing to the evident dissimilarities of the marks at issue. The 4th Chamber of the CFI (Legal., Wyszniowska-Bialecka, Moavero Milanese) confirmed these findings.

C-2: Developments in pending cases

Encuenta : T-49/06 - Office statement submitted (ES).

Keywords: CFI proceedings: formalities (entitlement to appeal) - OHIM appeal proceedings: formalities – Opposition: likelihood of confusion.

The action is directed against a decision of the 2nd Board of 16 December 2005 in R1116/2005-2 relating to CTM application 2.534.584, applied for in classes 16, 36 and 38. It had been rejected on the basis of an opposition based on an earlier right in "ecuenta" (fig.; shown below). The Board had

rejected the appeal on formal grounds (filed out of time). The subsequent appeal to the CFI had been lodged by the representative of the CTM applicant in his own name, i. e. not in the name of the CTM applicant.



Alba Moda : T-224/06 - Office response filed (IT).

Keywords: Opposition: likelihood of confusion (LOC) – LOC: comparison of marks.

The action is directed against a decision of the 2nd Board of 16 June 2006 in R0793/2005-2, relating to CTM application 1.030.279, "l'Altra Moda" (fig.; shown below). It had been applied for a range of products in classes 3, 18 and 25.



Subsequently, it had been opposed on the basis of an earlier national right in the trade mark "Alba Moda" (fig.), registered in class 25. The opposition had been rejected on the grounds that the marks at issue are dissimilar.

Torre de Gazate/Torres : T-286/06 - Office response filed (ES).

Keywords: Opposition: likelihood of confusion (LOC) – LOC: conceptual comparison of marks.

The action is directed against a decision of the 2nd Board of 27 July 2006 in R0421/2004-2, relating to CTM application 1.632.017, word Torre de Gazate, for wines, spirits and liquors in class 33. Miguel Torres S. A. had lodged an opposition based on a range of national earlier rights in the word Torres, registered in class 33. The opposition had been rejected on the grounds that there is no similarity of signs and, thus, no likelihood of confusion.

Torre Albéniz/Torres : T-287/06 - Office response filed (ES).

Keywords: Opposition: likelihood of confusion (LOC) – LOC: conceptual comparison of marks.

The action is directed against a decision of the 2nd Board of 27 July 2006 in R0597/2004-2 relating to CTM application 1.191.683 (shown below), for a range of goods and services in classes 32, 33 and 39. It had been opposed on the basis a range of earlier rights, amongst which an earlier CTM,

figurative mark Torres (shown below), the latter registered for alcoholic beverages in class 33.



Whereas the opposition group concerned had allowed the opposition as regards the scope of protection of the invoked CTM, leaving aside the other invoked earlier rights, the 2nd Board had revoked the decision and had held that there is no likelihood of confusion because the conflicting marks are dissimilar.

Torre de Frias/Torres : T-285/06 - Office response filed (ES).

Keywords: Opposition: likelihood of confusion (LOC) – LOC: comparison of marks – LOC: impact of enhanced recognition of the earlier mark on the relevant market.

The action is directed against a decision of the 2nd Board of 27. 7. 2006 in R1069/2000-2 relating to CTM application 305.151, word "Torre de Frias", for wines in class 33. It had been opposed on the basis of a multitude of national trade mark rights in the words "Torres" and "Las Torres", all registered in class 33 for wines and spirits. The opposition group concerned had dismissed the opposition, despite an admitted enhanced recognition of at least some of the invoked national earlier rights, on the grounds that the marks are dissimilar, and the 2nd Board subsequently had confirmed that finding.

Bud/Bud : T-225/06 - Office response filed.

Keywords: Opposition/earlier right: effect of a negative national decision at pending opposition proceedings. - Opposition: earlier rights within Article 8(4) CTMR – Article 8(4) CTMR: scope – Article 8(4) CTMR/scope: impact of a national court decision – OHIM practice: effect of an Office decision on subsequent proceedings.

The action is directed against a decision of the 2nd Board of 14 June 2006 in R0234/2005-2 relating to CTM application 1.603.539, word BUD, applied for by Anheuser-Busch Inc. for beers in class 32 and for alcoholic beverages in class 33. The Czech company Budejovický Budvar had lodged an opposition based on an earlier international registration Bud (fig., as shown below) with effect in Austria, the Benelux and Italy for all types of light and dark beer in class 32, and on two alleged appellations of origin.





The first appellation of origin is BUD, registered for beer under the Lisbon agreement, with effect in France, Italy and Portugal. The other one is BUD, registered for beer in Austria under the respective bilateral agreement between that country and what then was Czechoslovakia.

The opposition had been dismissed mainly on the following grounds: the international registration had been cancelled in Austria and Italy, and there is no proof of use as regards the Benelux. Whereas, in principle, a formally protected denomination or appellation of origin may be invoked within Article 8(4) CTMR, the denomination at issue must have been genuinely used in trade. That requirement had not been complied with as regards Portugal, Italy and France. It does not matter that, as regards France, another opposition group of the Office had held differently in a parallel case. Further, the French appellation had been cancelled at pending OHIM proceedings by a decision handed down by the Tribunal de Grande Instance de Strasbourg. It does not matter that that national decision had been appealed. As regards Austria, the Handelsgericht Wien had held, subsequent to the ECJ decision in C-216/01, that the plaintiff's mark does not make up a geographical indication of origin within the meaning of the bilateral treaty.

Ominicare : T-277/06 - Office response filed.

Keywords: CFI procedure: scope of pleas in law submitted by the Office – Office procedure: restitutio in integrum, Article 78 CTMR – Article 78 CTMR: scope after amendment under Regulation 422/2004 - Opposition/similarity: goods and services on the one hand and services on the other.

The action is directed against a decision of the 2nd Board of 24 July 2006 in R0446/2006-2 relating to CTM application 284.067, word Ominicare, filed on 26 June 1996 for a range of goods and services in classes 16 and 42. It had been opposed on the basis of the earlier right shown below, registered for services in classes 35, 41 and 42. The opposition group concerned had allowed the notice of opposition in full.



After expiry of the time limit for lodging an appeal, the CTM applicant, the plaintiff in the current action, had filed a statement of grounds for an appeal within which he had indicated a date on which he claimed to have filed the appeal. Upon notification of non receipt of the appeal, the plaintiff filed "the appeal", again the statements of grounds and also gave instructions as regards debiting the appeal fee. Upon further communication from the Registry of the Boards, the plaintiff filed a request for restitutio in integrum. The 2nd Board rejected the request as unfounded on the grounds that restitutio is not available if the missed time limit is that within Article 59 CTMR.

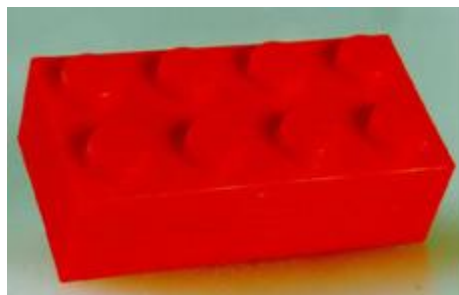
The Office response contained the following considerations: "The wording of Article 78 CTMR as amended by Regulation 422/2004 is not completely clear – and especially the inter-

references made between the provisions- and leaves space for contrasting interpretation. This having been said, the Office is prone to give some credit to the position of the Applicant and especially the arguments it sets forth in its writ. It must be borne in mind that said provision subsequent to its amendment treats two different situations, on the one hand restoration of rights following some type of force majeure-like situation and on the other, continuation of proceedings. It is logical to assume that these situations, although having some features in common, cannot and should not be treated in an identical manner. Whereas it is clear that failing to introduce an opposition in time cannot be mended (as explicitly stated in Article 78(5) CTMR) it is not as clear that the same applies for a belated lodging of an appeal. One may be rather certain that the Legislator's will was that the numerous references in Article 78a(2) all relate to the impossibility of continuing proceedings; however it is not at all as clear that they are meant to also cover Restitutio in Integrum. For the latter to be excluded, it is more likely that the Legislator would unambiguously have said so, as he has done for opposition cases, hence leaving no doubt as to the state of affairs for the situations enumerated therein. This interpretation would seem to be in line with the contents of Communication No 6/05 of the President of the Office of 16 September 2005 on restoration into missed time-limits (published in OHIM OJ 2005, p. 1402, Annex B1)."

Lego brick : T-270/06 - Office response filed.

Keywords: Cancellation: invalidation on absolute grounds – Invalidation on absolute grounds: relevant point in time for a declaration – Absolute grounds of refusal: technical functionality, Article 7(1)(e)(ii) CTMR.

The action is directed against a decision of the Grand Board of Appeal of 10 July 2006 in R0856/2004-G relating to cancellation proceedings 63C 107.029/1. It concerns the shape of a Lego brick (as shown below); the colour red had been claimed.



The CTM had been applied for a range of goods in classes 9 and 28, namely: scientific, nautical, surveying, electric, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments, all included in Class 9; apparatus for recording, transmission or reproduction of sound or images; magnetic and electronic data carriers, recording discs; recorded computer programs and software; automatic vending machines and mechanisms for coin operated apparatus; cash registers, calculating machines, data processing equipment and computers; recorded computer programs and software; fire-extinguishing apparatus (class 9), and games and playthings; gymnastic and sporting articles



(included in class 28); decorations for Christmas trees (class 28).

In reply to objections raised by the examiner, the CTM applicant had submitted written observations and evidence of acquired distinctiveness through use. The applicant had also been given the opportunity to present its views in an oral hearing held at the premises of the Office on 3 April 1998. In view of the applicant's submissions, the Office withdrew the objection under Article 7(1)(e)(ii) CTMR and considered that the evidence of acquired distinctiveness through use was sufficient for the purposes of Article 7(3) CTMR. On 19 October 1999, the application had finally been registered as a three-dimensional mark for all goods for which protection was sought, with the mention 'acquired distinctiveness'. Subsequently, a request for invalidation was filed.

On 8 December 2000, the Cancellation Division decided *ex officio* to stay proceedings, pending the judgment of the Court of Justice in Case C-299/99, Koninklijke Philips Electronics NV v Remington Consumer Products Ltd., due to the evident connection between the legal issues involved in the respective cases. The judgment of the Court was delivered on 18 June 2002 (case C-299/99, Philips, ECR I-5475) and the invalidity proceedings were resumed on 31 July 2002. On 30 July 2004 the Cancellation Division adopted decision No 63 C 107.029/1, holding that Article 7(1)(e)(ii) CTMR applied and, consequently, declaring the CTM invalid with respect to 'construction toys' in class 28. The Cancellation Division found that all the elements of the shape of which the brick consists, namely the knobs, their number, their diameter, their height, their symmetrical placement on the upper side of the brick, as well as the height, width and length of the brick itself, are essential for the result achieved, namely to interlock with other like bricks for constructing other, more complex, toys and playthings. The same applies to the juxtaposition of those elements, since it is precisely through the way in which the various elements are configured and interact with each other, that the result is achieved.

The CTM proprietor appealed and requested the case be transferred to the Grand Board. On 7 March 2006, pursuant to Article 1(b)(3) of Commission Regulation (EC) No 216/96 of 5 February 1996, laying down the 'Rules of Procedure of the Boards of Appeal', the Presidium of the Boards of Appeal, on proposal by the President of the Boards, allowed the request and referred the appeal to the Grand Board. The referral was regarded justified due to the economic significance of the case, given the considerable turnover generated by the relevant products. By the challenged decision dated 10 July 2006, the Grand Board rejected the appeal as unfounded, upholding the cancellation decision in its entirety and confirming the invalidity of the registration for the goods 'construction toys' in class 28, under Article 7(1)(e)(ii) CTMR.

NEW DECISIONS FROM THE BOARDS OF APPEAL

The cases can be [found in our website](#).

Please note that the full number including slash has to be entered in our database under 'Appeal N°', without the letter

'R'.

e.g. Case R 219/2004-1 has to be entered under 'Appeal N°' as: 219/2004-1

Ex-parte – Article 7(1)(b)

Examination proceedings – absolute grounds for refusal – distinctiveness – shape – internet searches

Decisions of the Fourth Board of Appeal of 2 February 2007 in Cases R 1273/2005-4 and R 1274/2005-4 (German)

R 1273/2005-4 and R 1274/2005-4 -



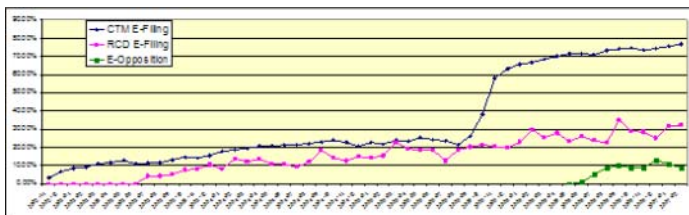
and (DRALLDURCHLASS I and II – part of heating/air conditioning devices) – **(de)** – the shape applied for was the exterior side of a rotating vent through which air will be conducted into the room for the purpose of heating, cooling or aeration. The mark was applied for as a figurative mark but actually it is a two-dimensional representation of the shape of a product which is barely visible from the outside once installed. These rotating vents are substantial parts of the goods and services applied for, and will be purchased by a specialized public, i.e. by persons who will decide which air condition system should be used and by persons who are able to install it. They will possess a certain know-how and experience. The applicant referred to expert evidence from a Professor, who confirmed that the form of rotating vents has a significant influence in the air stream, and that there is much experimental research behind the development of such rotating vents. Internet searches by the examiner showed that there are several forms of these rotating vents on the market. The Board held, however, that this form was not significantly different from other vents on the market: as a simple form, showing blades formed in a circle, it is only a variation of other representations found on the internet. The Board could not agree with the argument of the applicant that this form was an indication of the commercial origin, since there was nothing written in the Professor's expert evidence to substantiate this statement, nor did the applicant prove any distinctiveness acquired through use. The appeal was dismissed.

E-Business at OHIM

The OHIM E-Business Roundup (2006)

Statistical summary

- The use of the CTM e-filing web form is maintained at around 75%.
- More than 10% of oppositions against CTM applications are received electronically.
- The number of MYPAGE users has increased to over 1900, accounting for some 78% of e-communication users.



State of play of future projects

Service - B2B e-filing CTM:

The objective of this service is to set up a system allowing the direct exchange of CTM applications from the IP management software used by the applicants and the OHIM systems. This tool will use a TM-XML (www.tm-xml.org) format and offer a web service for the transmission of data.

Status - The OHIM has set up its system.

Service - New version of E-Communication:

Electronic communication will be enhanced to more official communications of the OHIM.

Status - The development has started.

Service - New version of CTM E-filing:

The current CTM e-filing service will be significantly improved.

Status - The OHIM has completed the requirements.

Service - Electronic filing of RCD applications:

The current RCD e-filing service will be significantly improved with a view to solving the problem of large attachments, among other things. RCD e-filing will also be accessible through MYPAGE and changes will be made to harmonise it with CTM e-filing.

Status -The OHIM has completed the requirements.

Service-E-renewal RCD:

The objective is to provide an electronic tool for renewing Registered Community Designs.

Status - The OHIM has started the analysis phase.

Service - Search for a representative for CTM or RCD procedures (FindRep):

The current CTM-AGENT database will be improved offering enhanced search criteria. MYPAGE users will have the possibility to change personal details directly.

Status - This service will soon be in production

Service - Online access to CTM files:

CTM file documents will be viewable through CTM-ONLINE. A restricted access is applied to documents of unpublished CTM. Mechanism has been put in place to ensure confidentiality of documents indicated as such.

MYPAGE users will also have the possibility to request inspection of files electronically.

Status - This service is being tested

Service - E-Caveat:

The objective is to provide an e-mail notification tools when specific CTM status changes.

Status - The OHIM is drafting the project requirements.

Service - Online handling of opposition procedures:

Opposition proceedings will be handled electronically via My Page. It will be possible for the parties to exchange documents via this new tool..

Status - The OHIM has completed the requirements.

More News

Monthly Statistical Highlights February 2007

Monthly Statistical Highlights* - February 2007

Community trade mark applications received	6,847
Community trade mark applications published	6,981
Community trade marks registered	3,654
Community trade mark renewal applications	1,150
Registered Community designs received	6,264
Registered Community designs published	6,571

* Statistical data for the month in course is not definitive. Figures may vary slightly after consolidation.