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OHIM reorganisation: what does it mean for you?

A number of organisational changes will take place at OHIM later this year, following an investigation of the best way to support the existing efforts being made to improve performance and quality.

The changes include the creation of a single Trade Mark Department dealing with all the procedures from receiving a CTM application to its registration, with Juan Ramón Rubio Muñoz (currently Director of the Quality Management Department) as Director.

In addition, the Department of Industrial Property Policy, under its current director Vincent O'Reilly, will take on additional responsibilities for managing all legal database tools to help deliver greater quality and consistency as well as for all processes and protocols that have an impact on the quality of examiners' work.

Juan Ramón Rubio Muñoz and Vincent O'Reilly spoke to Alicante News about what the changes would mean for trade mark users.

What is the rationale for these changes?

JRRM: The reorganisation is one of the elements of a more complex exercise to improve quality at OHIM. While there has been improvement in standards in some areas – the average length of time it takes to get a trade mark, for example – other measures of quality have been running at more or less at the same level for two years.

VOR: At present, files are not being treated equally. Some go through quickly and some get "stuck". It is possible for the same type of file to get completely different treatment in terms of time, responsiveness to correspondence, quality of decisions and so on. We set up three working groups to analyse the situation and propose recommendations on:

- Improving the quality of decisions
- Ensuring uniform and equal treatment of CTM files
- Designing an organisation that would better support the implementation of the recommendations coming from the first two groups.

Equal treatment of files is very important. If you are a trade mark user and you experience delays it doesn't matter that the office says that on aggregate, we do 80% of files in "x" weeks. The average conceals a lot of variations. We should not have big differences between files of the same sort.

How do we define "quality"?

JRRM: Quality at the office has to do with compliance with the service standards published in the OHIM Service Charter. The conclusions of the working groups suggests that those standards must be translated into measurable objectives at departmental, service and examiner level as well as serving as the basis to establish parameters on the allocation and management of files. We have introduced a new back office computer system, called Euromarc++, which will help us better identify the problem areas and respond to them.

VOR: Other recommendations have to do with further reinforcement of the "One File One Examiner" approach and with the need to make a more flexible use of resources and avoid the danger that organisational structures are obstacles for the smooth and fast treatment of files. Finally, it is recommended that the head of service and legal adviser are made more accountable for the quality produced by their service and that mechanisms for spreading good practice through services should be implemented.



Do you think we have been targeting the right things?

VOR: We have been defining and publishing our quality measures. We have also been measuring it successfully. Some people have said that the outside world is not interested in some of the things we measure, but there is no evidence of that. We have said: "Please tell us if you want something different." No-one has said that.

With regard to the quality measurements, there has been reference to some things being "less important" and not having an impact on the correct outcome. To take an example, I would say that if a client receives a file in which their name is spelt wrongly, or there are grammatical errors, this will also have an impact on the confidence the client has that we have made the correct decision.

The problem is not that the quality indicators have been measuring the wrong things, but that in some areas there has been no significant improvement.

Will there, nevertheless, be some changes to the Service Charter?

JRRM: The way in which we present the Service Charter timeliness targets will change. Up until now we have been measuring our performance with respect to a basket of all files. At present we say that a certain proportion of this "basket" is dealt with in a certain timescale. This reflects the fact that some files, which meet oppositions or have other problems, are always going to take longer for various reasons.

This approach, as Vincent says, has hidden some of the large variations in the way in which straightforward files, which don't have oppositions or are not appealed, are treated. In future we will set targets that we expect almost all the "straightforward" files to meet. If no user interaction is required (we can't completely control the time our customers take to respond) then the targets will typically be very high. One example of a target would be that examination should be completed in 25 days for 99% of such files. This approach will help us to give equal treatment for the same type of files.

What will be the most noticeable difference for trade mark users?

JRRM: There will be a single trade mark department with fewer, larger services. We will probably go from something like seven services at present, to four or five services in the future, each with 40-50 people in them. Having larger services will mean that when we identify "bottlenecks" for files we will be able to more flexibly reallocate resources within services to tackle them.

In addition to being more flexible and responsive within services, we are also going to appoint people with horizontal responsibility, across all services, for ensuring that particular stages of the examination and registration processes move smoothly and equally across services.

VOR: The reorganisation should help reduce the differences in the way in which office priorities are treated in different services. In some services, they may insist that all correspondence is issued on time. In others, the top priority may be quality, and other targets are not given the same importance. We have to ensure a consistent approach.

Our new back office system will allow us to analyse our performance in getting files to a particular stage in the process. In future, the people with "horizontal" responsibilities will intervene if we are falling behind in meeting a particular benchmark.

Note: As part of the planned reorganisation, which is expected to be completed by the summer, Beate Schmidt will become Director of a new Department dealing with CTM cancellation, RCD invalidity and IP Litigation. In addition, two functions currently carried out by the Vice-President will now have separate Directors. Hans Jakobsen will become Director of the Finance Department, and a new Director of Human Resources will be appointed.

Interviewer: Reg Rea

The James Nurton interview with Vladimir Rott, Rott Ruzicka & Guttman

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*.

This month, James Nurton interviews Vladimir Rott about changes in the Czech Republic, recent trade mark cases and the fight against counterfeiting.

How long have you been working in IP?

I've been working in IP for 25 years – I started in 1984. I was formerly a lawyer in a state company. But I had an uncle who was a professor of copyright and IP law and I used to visit him. He motivated me to start practising IP. I then worked in a state company and became head of the IP department. In 1990 I left to form my own company. Of course, it was very different – there was more responsibility for clients and staff so it was an enormous change.

We have now grown to about 40 people – 32 in Prague and eight in Bratislava.

Were there major changes in IP in the Czech Republic at this time?

Everything changed with the new laws for private undertakings. There were many new laws regarding IP for private enterprises, as well as a new Chamber of Patents and the re-establishment of the bar. I worked for about 10 years in the Board of the Patent Chamber, which helped me to look beyond the traditional rules and practice.

Later on, the laws started to be harmonised with other European countries and we had new practices with OHIM when the Czech Republic joined the EU. In the early days we had some conflicts arising from companies that owned Community trade marks but had not used them in the Czech Republic

It has taken some time for businesses here to become familiar with the CTM system but I think they now realize it offers new opportunities for enforcement. Clients always ask about cost considerations, so we propose a range of options covering national, overseas, European and international marks. We recommend one of them but of course the client is free to choose any option.



How many CTM applications do you file?

In our firm we file about 50 a year. The first one we filed was for Elektra, which was a Czech betting company. One of the most interesting was Kenvelo, for an Israeli client. I understand it means "yes/no" in Hebrew. We also file many oppositions as a result of watching services we handle for clients.

We have filed about 40 or 50 Community designs so far. This is quite a good tool for quick protection, though of course you never know how strong the protection will be until the design is enforced and others have had a chance to invalidate it.

What do you think of the CTM?

In general, it is a good system. It is questionable whether it is good for attorneys as it reduces the amount of work needed! But for clients it is very good: it saves costs, it is often quicker and it leads to harmonised provisions.

Do you welcome the fee reduction?

Yes it will certainly make the CTM system even more appealing and will improve the options available to clients. But it may lead to more applications overall, which will mean more oppositions and disputes, and that might be a bigger problem for smaller companies. One thing we have already seen since the Czech Republic joined the EU is that there are a lot more trade mark searches than before. I expect that trend will continue.

What improvements would you like to see?

The procedures could be quicker, especially in oppositions. It is good to allow the parties time to resolve their disputes, but I still think it could be quicker than it is.

The approach to have no substantive examination at OHIM is probably a better solution than offices where there is in-depth examination, such as the Czech office, which is very strict.

We are coming to the end of the Czech presidency of the EU. Have there been any major developments in the past six months?

The early part of the presidency was taken up with the Russia/Georgia dispute and then there was the global financial crisis. In the middle, our government collapsed, which I believe was a great mistake. So I didn't notice any discussions about IP. Of course, the main achievement at the EU level this year has been the fee reduction – but that was agreed before the Czech presidency.

One point to note is that following the new government, a new chairman for our PTO has been appointed this month. He is a former member of the Office and someone we know well so we expect there will be continuity.

What are the main IP issues in the Czech Republic?

There are some important disputes, for example one over a well-known disco/nightclub and an alleged fake version in Prague. There was another case where someone had registered Mamma Mia and tried to stop the first night of the musical in Prague. But eventually that trade mark registration was cancelled. And of course we have the never-ending Budwesier versus Budvar dispute, though there is a possibility that the Czech company will be privatized, which might speed up a deal between the two companies.

Finally, there was an important case between two Czech cheese markers, who had French owners and brands that

were different by just one letter. The litigation lasted eight years, and though a decision on the merits has been issued, the question of damages remains. It is a big case, with some Kr270 million at stake.

What has been the biggest change in your career?

The change from state to private practice and then the harmonisation of procedure. But we still need to see harmonisation of practices, not just regulations. I think it's important the Czech office harmonises with OHIM decisions and implements and follows them. More education would help this.

What is the biggest challenge for the future?

Counterfeiting: local companies are more and more often facing counterfeits so we need to be well prepared, have decisions from other countries and educate the courts. For six years I have served on the ECTA committee on anti-counterfeiting. We work with coalitions to support companies in tackling counterfeiting. I am looking forward to the ECTA meeting in Vilnius, Lithuania next month.

One of the problems with enforcement in the Czech Republic is that the court procedure is quite slow – maybe two years at first instance and two years on appeal. We need to speed that up to provide effective enforcement and one way to do that would be to have more specialised judges and courts.

Community Trade Mark

Community trade mark for sterilising fluid revoked for "non-use"

The Community trade mark, STERILOX, has been revoked after it was found that the mark had not been used for the classes for which it was registered.

The word mark, STERILOX, was granted to a US company in 2001 for classes 1, 5, and 10, covering chemicals, sterilising solutions and various types of medical or dental equipment.

The revocation applicant, Steritrox Ltd, from the UK, argued that the mark had been used for a machine for producing a sterilising liquid on demand, which was properly classified in class 11 of the Nice classification and not in the classes for which it was registered.

The UK company said that the CTM should be revoked under Article 50(1)(a) CTMR since within a continuous period of five years, the trade mark had not been put to genuine use in the Community in connection with the goods or services in respect of which it was registered.

The CTM owner, PuriCore International Limited, filed a witness statement and a large number of documents showing a range of uses of the STERILOX in applications including dental and food disinfectants, water treatment, and disinfecting and sterilising machines.

However, the Cancellation Division found that to fit the definition of medical apparatus in class 10, the goods should be applied directly for the treatment of humans with a medical or therapeutic purpose, such as surgery, examination or treatment. The evidence showed use of the mark for a stand alone apparatus for disinfection. The fact that the purpose was the disinfection of medical apparatus did not change the fact that disinfecting apparatus belong in class 11. Accordingly, the CTM proprietor had failed to show use of its



mark for surgical, medical, dental and veterinary apparatus and instruments in class 10.

Furthermore, the submitted evidence, such as the prospectus, the witness statement and the scientific articles, described the marketing and sale of machinery which was used for the production of disinfectants. Due to the extremely short shelf-life of the substance, it had to be produced on site and used within a few hours after its production. Accordingly, there was no evidence relating to the marketing and sale of chemicals in class 1 as such or of sterilising solutions in class 5 as such. The fact that the CTM proprietor had used its mark for the commercial utilization of apparatus, which in turn were used for the production of such substances, did not constitute use of the trade mark for such substances.

Accordingly, the mark was revoked in its entirety as of 15 June 2007, the date of the request of revocation.

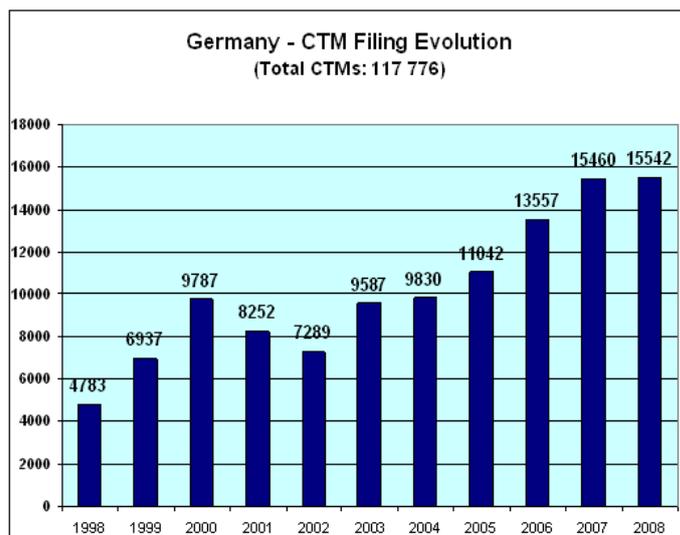
Country overview: Germany & the Community Trade Mark



Germany has the largest population in the EU (82.5m) and is also the biggest user of the Community trade mark and design systems. Its territory stretches from the North Sea and the Baltic in the north to the Alps in the south and is traversed by some of Europe's major rivers such as the Rhine, Danube and Elbe. One of the EU founder members, Germany is the world's third largest economy, producing automobiles, precision engineering products, electronic and communications equipment, chemicals and pharmaceuticals.

German figures for GDP show that growth in the final quarter of 2008 was down 3.8% compared with the previous quarter. The service sector accounts for 69% of GDP followed by industry (30%), and agriculture (1%).

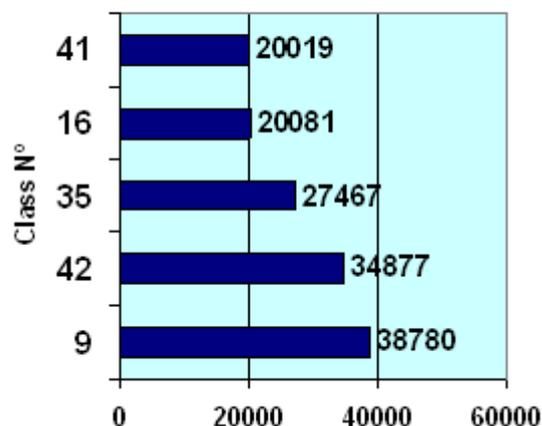
German undertakings have consistently supported CTM system with almost 118,000 filings to date. Last year over 15 500 German CTMs were filed, a slight increase on 2007 despite the global recession. This year so far, there have been more than 57 00 filings and German was the only major economy to file more CTMs in the first part of this year compared with the same period in 2008.



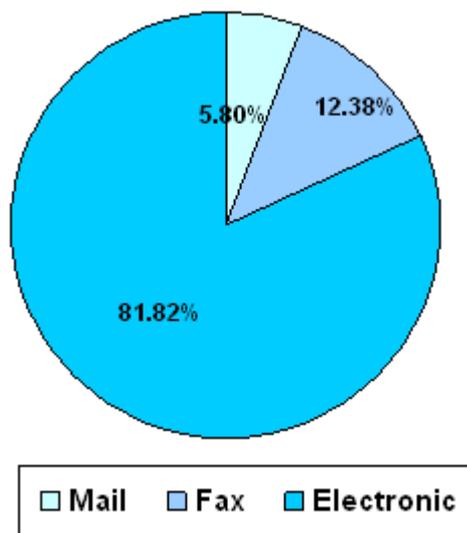
Word	Figurative	3-D	Colour	Other	Sound
67.70 %	30.29 %	0.85 %	1.02 %	0.11 %	0.03 %

Word marks are the most popular with German enterprises and account for 68% of applications, followed by figurative marks (30%). The most popular goods and services applied for are in classes 9, 42 and 35.

Germany - Top Classes Filed (Nice)



The vast majority of German trade marks (82%) are filed electronically, with fax accounting for 12% and mail for 6%.



Top 10 German-based owners by number of CTMs filed

Company	CTMs
Deutsche Telekom AG	1503
Daimler AG	1013
BASF SE	718
Lidl Stiftung & Co. KG	709
REWE-Zentral AG	670
BAYERISCHE MOTOREN WERKE AKTIENGESELLSCHAFT	528
NYCOMED GMBH	506
BSH Bosch und Siemens Hausgeräte GmbH	483
VOLKSWAGEN AG	416
BAYER AKTIENGESELLSCHAFT	390

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

Representative	CTMs
LOVELLS	2083
GRÜNECKER, KINKELDEY, STOCKMAIR & SCHWANHÄUSSER	1510
HARMSSEN & UTESCHER	1437
BOEHMERT & BOEHMERT	1154
COHAUSZ & FLORACK	1105
CMS HASCHÉ SIGLE	1076
MEISSNER, BOLTE & PARTNER GbR	1022
TAYLOR WESSING	778
VON KREISLER SELTING WERNER	777
HOEGER, STELLRECHT & PARTNER	738

Community Design

Priority Claims in Design Matters: the inverse case

One year after the Invalidity Division took a decision¹ in which the priority claim of a registered Community design (RCD) was rejected because the earlier design was shown in black & white whereas the later design was represented in colour (see [Alicante News of April 2008](#)) the inverse case² came up as follows:

In an application for a declaration of invalidity of the [RCD 748587-0001](#) the applicant requested that RCD to be declared invalid on the ground that it was in conflict with the later [RCD 828157-0001](#) which was registered and published after the date of registration of the contested RCD but claimed the priority of an earlier Chinese design application.

The later RCD has the views of the design in black & white, whereas the Chinese application and the contested RCD are in colour, as shown below:



The request of the applicant was based on Article 25(1)(d) of the Community Design Regulation (CDR), which in the present case required that the later RCD must have a valid priority claim to the date of filing of the earlier Chinese application. Therefore, the Invalidity Division was obliged to examine whether the later RCD had rightfully claimed the priority of the earlier Chinese application.

Rightfully claiming the priority of an earlier application requires that the earlier application and the later RCD concern the "same" designs (Article 41(1) CDR). The test for the "sameness" of the two designs is the so-called novelty test: where the later RCD is found to be not new in view of the earlier application, the priority claim is valid. "Not new" means that the later RCD does not contain additional design features which are not present in the earlier application. However, differences in immaterial details are not taken into consideration (Article 5 CDR).

Applying the novelty test to the present case, the Invalidity Division found that the later RCD rightfully claimed the Chinese priority because it did not contain any additional feature which was not already included in the earlier Chinese application. On the contrary, by not showing the colour of its design, the later RCD contained fewer features than the earlier design.

Interestingly, after having verified the validity of the priority claim, the Invalidity Division had to decide whether the contested RCD was in fact "in conflict" with the later RCD. According to established case-law³ a conflict arises where the contested RCD falls in the scope of protection of an earlier design right (Article 10 CDR). In the present case, the



Invalidity Division had therefore to decide whether the coloured design of the contested RCD fell in the scope of protection of the later RCD. Applying the concept that a black & white representation defines a scope of protection which includes all colours, the contested RCD was found to be in conflict with the later RCD and therefore was declared invalid.

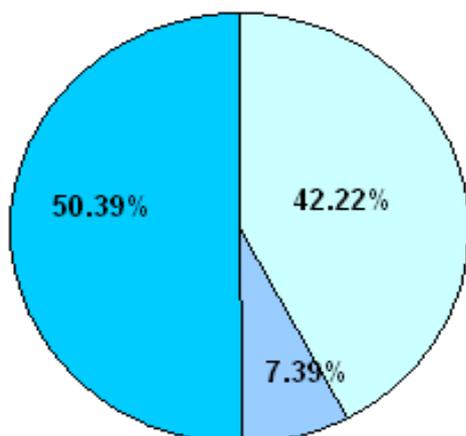
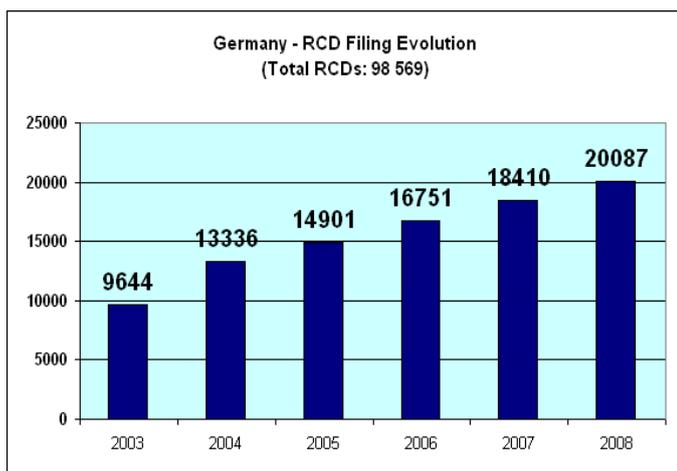
¹Decision of the Invalidity Division of 11 March 2008, in case ICD 4364

²Decision of the Invalidity Division of 19 March 2009, in case ICD 5163

³Decision of the Invalidity Division of 20 September 2005, in case ICD 396

Country overview: Germany & the Registered Community Design

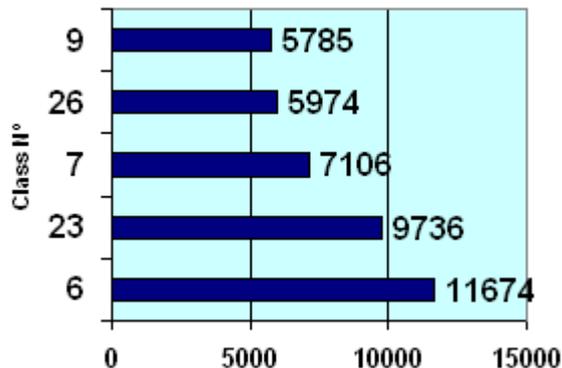
German companies starting using the registered Community design as soon as it was first made available and there have been a total of almost 99 000 German RCD filings to date. Last year 20 000 German RCDs were filed and this year so far there have been around 5 400 filings.



Mail Fax E-Filing

The most popular classes for RCDs are 6, 23 and 7. E-filing now accounts for over 50% of German RCD filings, with mail the second most popular at just over 40%. Filings by fax now account for just 7% of the total.

Germany - Top Classes Filed (Locarno)



Top 10 German -based owners by number of RCDs filed

Owner	RCDs
BSH Bosch und Siemens Hausgeräte GmbH	2769
Villeroy & Boch AG	1625
BLANCO GMBH + CO KG	1478
Daimler AG	1367
Schwinn Beschläge GmbH	1162
Gabor Footwear GmbH	965
Westfälische Textil-Gesellschaft Klingenthal & Co. mbH	910
Henkel AG & Co. KGaA	801
Lidl Stiftung & Co. KG	786
Street One GmbH	739

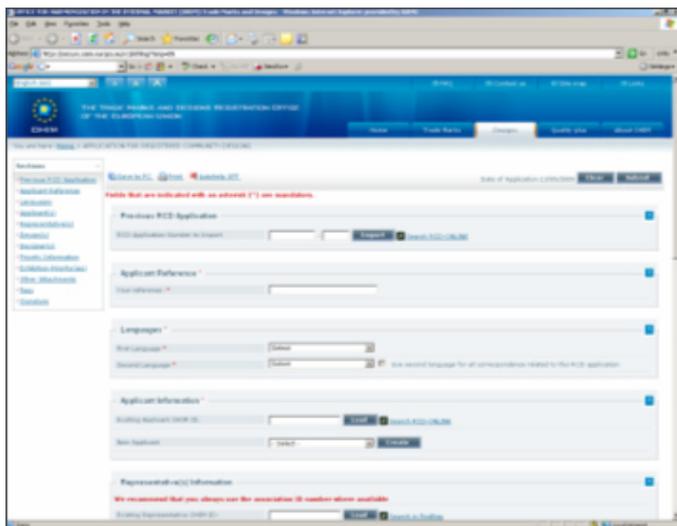
Top 10 representatives by number of RCDs received from German -based applicants

Representative	RCDs
HOEGER, STELLRECHT & PARTNER Patentanwälte	2103
Gluthe DE	1652
RAU, SCHNECK & HÜBNER	1423
GRÜNECKER, KINKELDEY, STOCKMAIR & SCHWANHÄUSSER	1252
ANDRAE · FLACH · HAUG	1143
RUFF, WILHELM, BEIER, DAUSTER & PARTNER	1052
BOEHMERT & BOEHMERT	1022
TAYLOR WESSING	975
BUSSE & BUSSE PATENTANWÄLTE	952
LOESENBECK * STRACKE * SPECHT * DANTZ	888

E-business at OHIM

New RCD E-Filing: Simply the best choice

There are currently three options for filing a design application. An RCD application can be submitted either by mail or fax, or alternatively by electronic means. The first two options, while secure, have some disadvantages. It takes up to several days for an application to reach the Office when sent by traditional mail. With fax, the submission process is much shorter, however, the quality of graphic designs and images faxed with the application leaves a lot to be desired.



With the launch of the new RCD E-Filing OHIM has taken a step towards a much easier, more reliable and faster way of submitting and registering designs. Based on users' feedback collected over the past few years, a completely new and simplified interface for filing RCD applications has been designed. Although no fee reduction is foreseen for RCD applications filed electronically, a dramatic increase of online applications has been recorded, since the new e-filing system went live on May 5, proving its growing popularity.

The simple and automatic submission process has also significantly affected the examination process. There are now cases in which RCD applications are being registered in a single day. From now on it is important to make sure that applications contain the correct details before submission as the increased speed of registration may not allow time for later corrections.

To find out more about the range of innovative features in the new RCD e-filing process, see the New RCD E-Filing webpage, which also gives access to our online tutorials.

User involvement in the e-Business design process

OHIM has launched an extensive programme aimed at providing online services to its customers. CTM E-Filing, RCD E-Filing, and MyPage are among the key services for users to interact with the Office electronically, and it is important that they are simple, reliable and user-friendly.

In order to reach those objectives, this year OHIM introduced a new usability methodology. This methodology is designed to collect user needs and obtain feedback at key stages of the

process of creating or improving online tools. To deliver this goal, OHIM is working with ETIQ, a company with more than 14 years' experience in the usability field, with a track record of projects from the banking, industry and public sectors.

Jorge Marquez Moreno, Head of Usability Service of ETIQ-Everis summarises the objective as follows: "Usability means giving users the information and tools they need to achieve their tasks, in a context that meets their needs."

The methodology is based on the use of user-centred design activities using proven means of measuring and analysing the results. Those activities have the objective of exploring users' needs (by meeting and talking to them, for example), designing with the users (acting on users' advice to make changes) and validating e-Business services (testing the end result). The results will allow OHIM to build a style guide which makes all e-Business services easier to use and more productive.

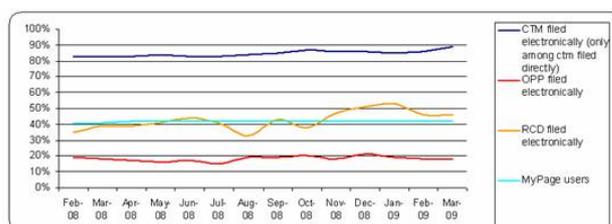
OHIM have already started organising user testing of the CTM E-Filing tool and will develop this usability methodology for all new e-Business services. We believe that this initiative will show concrete results in improving the user experience when using OHIM e-Business services, making these services more valuable, accessible, and reliable.

If you are interested in being a volunteer on the OHIM usability programme, please send us an e-mail to e-business@oami.europa.eu.

OHIM e-business roundup (2009)

Statistical summary

- The use of the CTM e-filing web form is steady at above 80 %.
- The use of RCD e-filing has decreased to 46%
- Oppositions against CTM applications received electronically account for around 18%.
- MyPage users represent around 42% of CTM Applications filed.



State of play of future projects

Service - New version of electronic filing of RCD applications

The current RCD E-Filing service will be significantly improved with a view to solving, inter alia, the problem of large attachments. RCD E-Filing will also be accessible through MyPage and changes will be made to harmonize it with CTM E-Filing.

Status - OHIM is testing the system

CTM watch:

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

Status - OHIM is going to start the testing phase

More News

Monthly statistical highlights April 2009

Community trade mark applications received	9 246
Community trade mark applications published	2 521
Community trade marks registered (certificates issued)	4 719
Community trade mark renewal applications	1 690
Registered Community designs received	3 194
Registered Community designs published	5 249

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

Case-law

Latest trade mark and design news from Luxembourg

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

A-1: ECJ Judgments and Orders

TDK/TDK: C-197/07-P – Appeal from T-477/04; action a *limine* dismissed; Order of 12 December 2008 (Office practice confirmed).

Nasdaq: C-320/07-P – Judgment of 12 March 2009 (appeal from T-47/06; action dismissed, CFI and Board confirmed).

Keywords: ECJ proceedings: arguments against the reasoning of the CFI. Opposition: earlier right with reputation. Opposition: definition of the relevant public. Reputation: risk of dilution.

By its appeal, Antartica Srl asked the ECJ to set aside the judgment of the CFI of 10.5.2007 in Case T-47/06 by which it had dismissed its action for annulment of the decision of the 2nd Board of 7.12.2005 in Case R 0752/2004-2, annulling the decision of the opposition division which had rejected the

opposition of The Nasdaq Stock Market Inc. to the registration of the figurative sign 'nasdaq' as a CTM.



The CTM application covered the following goods: in class 9 protective helmets for sports, cycling, motorcycling, motor racing, skiing, protective goggles for sports and pads for protecting body and limbs against accidents for personal use, time recording apparatus; in class 12 vehicles, in particular bicycles and mountain bikes; in class 14 clocks, chronometers, sports chronometers; in class 25 clothes, in particular sportswear, clothing for gymnastics, ski boots, and après-ski boots, sports shoes in general; and in class 28: skis, ski poles, anti-vibration plates for skis, snowboards, boards for surfing on snow and on water, ski bindings and ski wax, stationary exercise bicycles, gymnasium equipment and apparatus.

The earlier right in Nasdaq covers the following G&S: in class 9 computer programs amongst others in the field of the analysis of securities prices, stock exchange, finance; computer apparatus, in particular closed circuit apparatus for the generation and the dissemination of securities information as well as closed circuit CRT terminals for use therewith as well as computer programs for the access to securities information; in class 16 documentation and manuals related to computer programs and computer apparatus; in class 35 stock exchange price quotation services ; listings of securities for quotations for sale or information purposes; in class 36 financial services, amongst others, providing and updating an index of security values, securities, fixed incomes (such as bonds) and derivative products (such as options, warrants and swaps); as well as classification, analysis and reporting thereof; in class 38 telecommunication services, amongst others electronic transmission of messages and data related to securities, and in class 42 computerised securities information and retrieval services, being general computer services.

Whereas the opposition division had rejected the opposition on the ground that the requirements of Article 8(5) CTMR had not been sufficiently substantiated, the Board had allowed it. The Board had held, essentially, that the reputation of the earlier mark in the Community for the services in classes 35 and 36, for which it had been registered, had been substantiated, and that Antarctica's use of the figurative sign 'nasdaq' without due cause would take unfair advantage of or be detrimental to the distinctive character and repute of the earlier mark. Plaintiff *inter alia* questioned the assessment of the relevant public. The 1st Chamber of the ECJ (Jann; Ilesic, rapporteur; Tizzano; Borg Barthet; Levits; no GA opinion) dismissed the appeal and held:

(a) ECJ proceedings: arguments against the reasoning of the CFI



(54) Finally, it should be noted that it was only at the stage of the reply that Antarctica raised arguments relating to the distortion of evidence by the Court of First Instance in paragraphs 51, 58, 60 and 63 of the judgment under appeal. Those arguments therefore constitute, by virtue of Articles 42(2) and 118 of the Rules of Procedure, a new plea which is inadmissible in so far as it is not based on questions of law or fact which were raised during the proceedings (see, by analogy, judgment of 20 September 2007 in Case C-193/06 P Nestlé v OHIM and the case-law cited). Consequently, those allegations must be rejected as inadmissible.

(b) Article 8(5) CTMR and the "relevant public"

(42) Contrary to what OHIM and The Nasdaq Stock Market contend, Antarctica's argument does not concern the finding of facts undertaken by the Court of First Instance, but bears on the question whether, in the definition of the relevant public, that Court applied the correct criterion (see, by analogy, Case C-334/05 P OHIM v Shaker [2007] ECR I-4529, paragraph 29, and Case C-47/07 P Masdar (UK) v Commission [2008] ECR I-0000, paragraph 77). – (43) It should be noted that the types of injury referred to in Article 8(5) of Regulation No 40/94, where they occur, are the consequence of a certain degree of similarity between the earlier and later marks, by virtue of which the relevant public makes a connection between those two marks, that is to say, establishes a link between them even though it does not confuse them (see, as regards Article 4(4)(a) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), which is essentially identical to Article 8(5) of Regulation No 40/94, Case C-252/07 Intel Corporation [2008] I-0000, paragraph 30 and the case-law cited).

(44) In the absence of such a link in the mind of the public, the use of the later mark is not likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier mark (Intel Corporation, paragraph 31). (45) However, the existence of such a link must be subject to an overall assessment, taking into account all factors relevant to the circumstances of the case and, in particular, the degree of similarity between the marks at issue; the nature of the goods or services for which the marks at issue were registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public; the strength of the earlier mark's reputation; the degree of the earlier mark's distinctive character, whether inherent or acquired through use and the existence of the likelihood of confusion on the part of the public (Intel Corporation, paragraphs 41 and 42 and the case-law cited).

(46) As regards, more particularly, the relevant public to be taken into consideration, it should be pointed out that that public will vary according to the type of injury alleged by the proprietor of the earlier mark. (47) It is apparent from paragraphs 53 to 61 of the judgment under appeal that the injury at issue in the present case relates to the unfair advantage that has been taken of the distinctive character or the repute of the earlier mark. (48) In such a case, in so far as what is prohibited is the drawing of benefit from the earlier mark by the proprietor of the later mark, the existence of such injury must be assessed by reference to average consumers of the goods or services for which the later mark is requested, who are reasonably well informed and reasonably observant and circumspect (Intel Corporation, paragraph 36).

(49) In that respect, the CFI held, in paragraph 58 of the judgment under appeal, that, having regard to its omnipresence in the press, not only in the specialist press but also the general press, and the interest of a large part of the general public in the developments in the financial markets, the reputation of the earlier mark reaches further than the professional public specialising in financial information. (50) It is implicitly, but clearly, apparent from that assessment that, when assessing the existence of injury, the Court of First Instance included in its examination, as the relevant public, the average customer of goods and services for which the later mark, that is to say Antarctica's mark, was requested. (51) With regard to Antarctica's argument that the reputation of the earlier mark should extend to the general public and not only to the public constituted by the consumers of the goods designated by that trade mark, it should be recalled, without it being necessary to examine the differences between the concepts of a trade mark of repute and a trade mark which is well known, that it was mentioned in paragraph 49 of this judgment that the Court of First Instance held, in paragraph 58 of the judgment under appeal, that the reputation of the earlier mark reaches further than the professional public specialising in financial information. (52) It follows that Antarctica's argument relating to the relevant public must be rejected as unfounded.

Coto d'Arcis : C-210/08-P – Appeal from T-332/04. Order of 20 January 2009 (only in ES; *a limine* dismissed; CFI and Office practice confirmed).

Keywords: ECJ proceedings: appeal on points of law. Opposition: likelihood of confusion (LOC).

The case was an appeal from a judgment of the CFI of 12.3.2008 in Case T-332/04 by which the CFI had confirmed a decision of the 2nd Board of 15.6.2004 in Case R 0550/2003-2 relating to opposition proceedings initiated against CTM application Coto d'Arcis (figurative mark).



The CTM had been applied for a range of goods and services in classes 32, 33 and 39. It had been opposed on the basis of El Coto and Coto de Imaz, word marks, registered for goods in classes 32 and 33. The opposition had been partially allowed, and the CFI had confirmed the respective findings. The 5th Chamber of the ECJ (Ilesic; Levits, rapporteur, Kasel) *a limine* dismissed the subsequent appeal on the ground that assessment of LOC is an issue of fact.



A-2: ECJ: Developments in pending cases

Biovisc: C-481/08-P - Appeal from T-106/07; Office response filed.

Keywords: CFI proceedings: legal arguments presented for the first time before the court. Opposition: likelihood of confusion (LOC). LOC: comparison of marks. Comparison of marks: pharmaceutical brands.

The case is an appeal from a judgment of the CFI of 10.9.2008 in Case T-106/07 relating to an opposition case between CTM application BioVisc, word, and earlier rights in the words PROVISC and DUOVISC. The CTM had been applied for sterile solutions for intra-operative eye operations in class 5. The opposing international mark PROVISC takes effect in Germany, Spain, France, Italy, Austria, Portugal and the Benelux countries, and is registered for pharmaceutical products for use in ophthalmology in class 5. The international trade mark DUOVISC takes effect in Germany, Spain, France, Italy, Austria, Portugal and the Benelux countries, and is registered for ophthalmic pharmaceutical preparations in class 5.

Whereas the opposition division had allowed the opposition in its entirety, the 2nd Board had annulled that decision on the ground that the existence of visual, phonetic and conceptual differences between the signs at issue are sufficient to exclude any LOC on the part of the relevant public. By its challenged judgment the CFI had dismissed the appeal.

Firstly, the CFI had observed that the plaintiff's argument regarding an alleged error in the definition of the relevant public was submitted for the first time in the course of the oral hearing. This argument was considered belatedly submitted and hence inadmissible. The CFI defined the relevant public as the public located in Germany, Spain, France, Italy, Austria, Portugal and the Benelux countries, made up of health professionals who can be expected to take more care when purchasing and to notice differences which might not be perceived by a normally circumspect consumer. Eventually, the CFI considered that the compared signs displayed visual and aural dissimilarities on account of their different prefixes. The CFI found that the prefixes 'bio', 'pro' and 'duo' had different meanings which allowed a conceptual distinction between the signs notwithstanding the fact that the signs coincide in the suffix 'visc'. The CFI took care to note that 'the term "visc" may well be perceived as evoking viscosity, which is an important element in the type of ophthalmic solutions concerned'. In paragraph 42 of the contested judgment, the CFI concluded that the signs had different meanings as a whole. Regarding the assessment of the factors that are relevant for determining whether there is likelihood of confusion, the CFI concluded that 'the visual, phonetic and conceptual difference of the signs at issue were sufficient, in spite of the identity of the goods concerned, to preclude the similarities between the signs at issue from giving rise to a likelihood of confusion on the part of the specialist Community consumer as to the commercial origin of the goods concerned'. It therefore dismissed the action.

B: European Court of Justice: Preliminary Rulings

B-1: ECJ Preliminary Rulings

Schwabenpost – Volkshandy : C-39/08 and C-43/08 – Order of 12 February 2009 (only in DE, FR).

Keywords: General principles of law: self-binding effect of a certain administrative practice? TM Directive 89/104: Article 3.

The cases were references from the German Federal Patent Court (Bundespatentgericht) and related to actions brought against two negative decisions of the German office after several similar cases had been decided in favour of the respective TM applicants. The questions put to the ECJ were:

- (1) Does Article 3 of Directive 89/104/EEC (...) which seeks to secure equality of opportunity in matters of competition, require that identical or similar applications be treated in the same way?
- (2) Does Article 3 of Directive 89/104 (...) require equal treatment, with regard to the registration of trade marks, of applicants in competition with one another in order to safeguard equality of opportunity in matters of competition?
- (3) If the answer is yes, is the national court required to investigate specific indications of unequal treatment which distorts competition and, in doing so, to take account, in its analysis, of earlier decisions of the competent authority in similar cases?

In its brief *Order*, the 6th Chamber of the ECJ (Bonichot, rapporteur; Makarzyk; Küris; GA Ruiz-Jarabo) held that previous practice does not have to be taken into account.

B-2: ECJ Preliminary Rulings: Developments in pending cases

Goldhase or Lindt Goldhase or Easter Bunny: C-529/07 – Opinion of Advocate General E. Sharpston.

Keywords: Article 51(1)(b) CTMR: notion of bad faith.

The case is a reference from the Austrian Supreme Court (Oberster Gerichtshof), and it is the first case concerning the notion of bad faith before the ECJ. The national proceedings arise out of a situation in which a number of competing undertakings originally marketed similar products in similar shapes and presentations. One of those undertakings (Lindt) then registered its own particular shape and presentation as a three-dimensional CTM.

Lindt has produced and marketed chocolate Easter bunnies since the early 1950s. Their exact presentation has varied slightly over the years. Lindt first marketed its chocolate Easter bunnies in Austria in 1994. In June 2000, it applied to register as a three-dimensional CTM the form and



presentation of an Easter bunny wrapped in gold-coloured foil, with red and brown markings, wearing round its neck a red ribbon with a bell attached, and bearing on its haunch a design including the words 'Lindt Goldhase'. The mark was registered on 6 July 2001. Hauswirth has produced and marketed its own chocolate bunnies since 1962. They are usually decorated with a ribbon, but not a bell. They do not bear any identifying name, although a label is affixed to the underside, and is thus normally not seen when the goods are presented on a shelf. The referring court states that there is a likelihood of confusion between the two presentations. In addition, a number of other models have been marketed since the 1930s, bearing a greater or lesser degree of similarity with Lindt's presentation. Lindt was aware of at least some of those models before it applied to register its trade mark.

The referring court also indicates that, before the application for registration was made, the various producers, or at least some of them, had acquired 'valuable rights' to the protection of their products under Austrian competition law and German trade mark law, even though none of the presentations had been registered in any way.



Following registration, Lindt brought trade mark infringement proceedings against Hauswirth, seeking an order that it should cease producing and marketing its Easter bunnies in a presentation which Lindt claimed was likely to be confused with the registered mark. Inter alia, in reliance on Article 51(1)(b) CTMR, Hauswirth counterclaimed that the registration had been made in bad faith and the trade mark should therefore be declared invalid. At first instance, the Handelsgericht (Commercial Court) in Vienna had dismissed the main claim and upheld the counterclaim. On appeal by Lindt to the Oberlandesgericht (Higher Regional Court), that judgment was quashed, but not on grounds which gave Lindt satisfaction. According to Hauswirth, the appeal court ruled simply that, since Lindt's presentation had acquired a reputation before the mark was applied for, Lindt could not be considered to have acted in bad faith; that, however, whilst disposing of Hauswirth's counterclaim, did not uphold Lindt's main claim. Both parties have therefore appealed further to the Oberster Gerichtshof which now seeks a preliminary ruling on the following questions:

(1.) Is Article 51(1)(b) CTMR to be interpreted as meaning that an applicant for a CTM is to be regarded as acting in bad faith when he knows, at the time of his application, that a competitor in (at least) one Member State is using the same sign, or one so similar as to be capable of being confused with it, for the same or similar goods or services, and he applies for the trade mark in order to be able to prevent that competitor from continuing to use the sign?

(2.) If the first question is answered in the negative: Is the applicant to be regarded as acting in bad faith if he applies for the trade mark in order to be able to prevent a competitor from continuing to use the sign, where, at the time he files his application, he knows or must know that by using an identical or similar sign for the same goods or services, or goods or services which are so similar as to be capable of being confused, the competitor has already acquired "valuable property rights"?

(3.) If either the first or the second question is answered in the affirmative: Is bad faith excluded if the applicant's sign has already obtained a reputation with the public and is therefore protected under competition law?

Advocate General Mrs Sharpston proposed the following answer.

"In order to determine whether 'the applicant was acting in bad faith when he filed the application for the trade mark' within the meaning of Article 51(1)(b) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, a national court must take account of all the available evidence from which it is possible to conclude that the applicant was or was not acting knowingly in a manner incompatible with accepted standards of honest or ethical conduct. In particular:

- an intention to prevent others from using similar signs in respect of similar products may be incompatible with such standards if the applicant was, or must have been, aware that others were already legitimately using similar signs, particularly if that use was substantial and longstanding and enjoyed a degree of legal protection, and if the nature of the sign was dictated to some extent by technical or commercial constraints;

- however, such an intention would not necessarily be incompatible with those standards if the applicant himself had enjoyed similar or greater legal protection in respect of the mark applied for and had used it in such a way, to such an extent and over such a time that the use by others of their similar signs could be considered to derive unjustified benefit from the applicant's sign, and if those others were not constrained in their ability to choose dissimilar signs."

L'Oreal: C-487/07 – Opinion of the Advocate General of 10 February 2009.

Keywords: TM Directive: Article 5. TM infringement: through use of the TM, by a third party, in comparative advertising?

The present reference for a preliminary ruling from the Court of Appeal (England and Wales) poses questions concerning the interpretation of Article 5 of First Council Directive 89/104/EEC and Article 3a(1) of Council Directive 84/450/EEC concerning misleading and comparative advertising, as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1977.

L'Oreal is the proprietor of the following brands: Trésor, Miracle, Anais-Anais and Noa. Bellure NV, a company constituted under Belgian law, was engaged, in 1996 and 2001 respectively, in marketing on the European perfume



markets the Creation Lamis and Dorall ranges, produced on its behalf and to its design specifications in a non-Member country. Starion International Ltd purchased those perfumes from Bellure and distributed them to wholesalers and 'hard discount' stores in the UK. Starion also distributed perfumes from the Stitch range in the UK. Malaika Investments Ltd, trading under the name HoneyPot Cosmetics & Perfumery Sales, sold wholesale in the UK perfumes from the Creation Lamis range, which were supplied to it by Starion. The perfumes in those three ranges were imitations of the fragrance of successful perfumes and were sold at extremely low retail prices.

In marketing those perfumes in the UK, Starion and Malaika made use of and supplied to their retailers' comparison lists which made an analogy, in terms of similarity of smell, between each of those perfumes and a luxury perfume identified by reference to the word mark by which it is known. L'Oreal's word marks Trésor, Miracle, Anaïs-Anaïs and Noa appeared on those lists. Moreover, four perfumes from the Creation Lamis range and one from the Dorall range were sold in bottles and boxes which were generally similar in appearance to the bottles and boxes of the Trésor, Miracle, Anaïs-Anaïs and Noa perfumes, although it is accepted that that similarity was unlikely to mislead retailers or consumers as to the origin of the product. The High Court had partially allowed L'Oreal's action. In dealing with the defendant's appeal, the referring court wishes to know:

(1) Where a trader, in an advertisement for his own goods or services, uses a registered trade mark owned by a competitor for the purpose of comparing the characteristics (and in particular the smell) of goods marketed by him with the characteristics (and in particular the smell) of the goods marketed by the competitor under that mark in such a way that it does not cause confusion or otherwise jeopardise the essential function of the trade mark as an indication of origin, does his use fall within either (a) or (b) of Article 5(1) of Directive 89/104?

(2) Where a trader in the course of trade uses (particularly in a comparison list) a well-known registered trade mark for the purpose of indicating a characteristic of his own product (particularly its smell) in such a way that:

(a) it does not cause any likelihood of confusion of any sort; and

(b) it does not affect the sale of the products under the well-known registered mark; and

(c) it does not jeopardize the essential function of the registered trade mark as a guarantee of origin and does not harm the reputation of that mark, whether by tarnishment of its image or dilution or in any other way; and

(d) it plays a significant role in the promotion of the trader's product, does that use fall within Article 5(1)(a) of Directive 89/104?

(3) In the context of Article 3a(g) of Directive [84/450], what is the meaning of "take unfair advantage of" and in particular, where a trader in a comparison list compares his product with a product under a well-known trade mark, does he thereby

take unfair advantage of the reputation of the well-known mark?

(4) In the context of Article 3a(h) of the said directive, what is the meaning of "presenting goods or services as imitations or replicas" and in particular does this expression cover the case where, without in any way causing confusion or deception, a party merely truthfully says that his product has a major characteristic (smell) like that of a well-known product which is protected by a trade mark?

(5) Where a trader uses a sign which is similar to a registered trade mark which has a reputation, and that sign is not confusingly similar to the trade mark, in such a way that:

(a) the essential function of the registered trade mark of providing a guarantee of origin is not impaired or put at risk;

(b) there is no tarnishing or blurring of the registered trade mark or its reputation or any risk of either of these;

(c) the trade mark owner's sales are not impaired; and

(d) the trade mark owner is not deprived of any of the reward for promotion, maintenance or enhancement of his trade mark;

(e) but the trader gets a commercial advantage from the use of his sign by reason of its similarity to the registered mark,

does that use amount to the taking of "an unfair advantage" of the reputation of the registered mark within the meaning of Article 5(2) of Directive [89/104]?

Advocate General Mengozzi proposed the following answer:

"(1) Article 5(1)(a) of Directive 89/104/EEC must be interpreted as meaning that the proprietor of a trade mark is not entitled to prohibit use by a third party in comparative advertising of a sign that is identical with that mark for goods or services which are identical with those for which the mark is registered where such use does not affect or is not liable to affect the mark's essential function of providing a guarantee of origin or any of the mark's other functions and that is the case even if such use plays a significant role in the promotion of the advertiser's goods and, in particular, permits that advertiser to take unfair advantage of the mark's reputation.

(2) Article 3a(1)(g) of Directive 84/450/EEC, as amended, must be interpreted as meaning that it is not possible to conclude on the simple basis of the fact that a trader, in a comparison list, compares his product with a product identified by a well known mark that the advertiser takes unfair advantage of that mark's reputation and that if, where such an advantage exists, it can be presumed that the public at whom the advertising is directed is caused to associate the proprietor of the well-known mark with the advertiser in such a way that the public might associate by way of extension the reputation of the former's products with those of the latter, it is for the national court to determine whether that advantage is unfair in the light of all the relevant individual circumstances of the case.



(3) Article 3a(1)(h) of Directive 84/450, as amended, must be interpreted as meaning that:

– it prohibits an advertisement which alludes, explicitly or by implication, bearing in mind its economic context, to the fact that the advertiser's product has been manufactured in such a way as to imitate or reproduce a product protected by another person's mark, even where only one or more of the essential characteristics of that product is alluded to; and,

– consequently, it does not prohibit an advertisement solely on the ground that it states that the advertiser's product has an essential characteristic that is identical with that of a product bearing a protected trade mark, including well-known marks.

(4) Article 5(2) of Directive 89/104 must be interpreted as meaning that:

– where a trader uses a sign that is similar to another person's mark and derives an advantage from this originating in that similarity and in the consequential association of that sign with the positive qualities of that mark, such use may be prohibited if it is without due cause, which cannot be the advantage itself, or, where due cause is shown, if it is apparent, taking such due cause and all the relevant circumstances of the case into account, that that advantage is unfair;

– that prohibition cannot be precluded on account of the fact that there is no effect (or likelihood of any effect) on the mark's essential function of providing a guarantee of origin, no effect (or likelihood of any effect) on the mark's distinctive character or reputation and such use has no impact on the sales of the products identified by the mark or on the return on the investments made in connection with that mark."

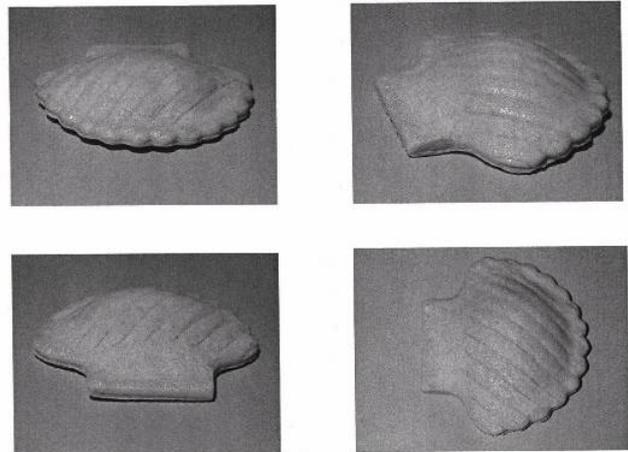
C:CFI Court of First Instance (CFI): Judgments and Orders on appeals against decisions of OHIM, Article 63 CTMR

C-1: CFI Judgments and Orders

Conchiglia 3D or Shape of a shell 3D or Jakobsmuschel 3D: T-8/08 – Judgment of 10 March 2009 (only in IT, FR; action dismissed, Office practice confirmed).

Keywords: Types of signs: three-dimensional signs. 3D signs: distinctiveness. Distinctiveness: acquired on the market.

The case had been brought against a decision of the 1st Board of 29.9.2007 in Case R 0530/2007-1 relating to an application for a 3D sign consisting of the shape of a shell which had been applied for for a range of goods in class 30.



It had been partially rejected on the ground of lack of distinctive character. The applicant's material filed under Article 7(3) CTMR in order to show acquired distinctiveness on the market had been rejected as insufficient since it related only to Italy. The 1st Chamber of the CFI (Jaeger; Tiili, rapporteur; Dehousse) agreed, relying on standard case-law.

Toro/Red Bull: T-165/07 – Case closed; Order of 6 March 2009 (Board decision stands).

Keywords: Opposition: likelihood of confusion: LOC. LOC: comparison of marks. Comparison of marks: conceptual comparison. Conceptual comparison of marks: principle of protection of the general or abstract concept of the earlier mark (?).

The action had been initiated against a decision of the 4th Board of 20.2.2007 in Case R 0147/2005-4 relating to a conflict between Osborne's CTM application TORO (figurative mark) and Red Bull brands.

<p>CTM application</p> 	<p>TORO ROSSO / TORO ROJO</p>   <p>RED BULL / ENERGY BULL / BAD BULL VODKA BULL / FUNKY BULL / BULL / BULLIT GOLDEN BULL / BULL RUSH / BULLERO BULLIONAIRE / BULLSHIT / FLYING BULL / LORD BULL / POWER BULL / BLACK BULL</p>
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The CTM application had been applied for for a range of goods and services in classes 32, 33 and 42. It had been opposed by Red Bull GmbH on the basis of a vast range of marks, registered in class 32. For some of them, reputation had been claimed. Whereas the opposition division had partially allowed the opposition, the Board had rejected it. Upon a declaration that the opponent and plaintiff in the



action wished to discontinue proceedings, the case was closed.

Slim Line: T-36/08 – Case closed; Order of 4 March 2009 (DE).

Keywords: Absolute grounds for refusal: distinctiveness.

The action had been initiated against a decision of the 2 nd Board of 22.11.2007 in Case R 1532/2007-2 relating to CTM application 5.907.266, SLIM LINE, word, which had been applied for for a range of goods in class 9, namely for equipment and instruments for guiding, switching, transformation, accumulation, regulation or control of light signals, in the form of optical fiber and data cables for communication purposes, optical fiber cables, data cables, network components, including optical cabinets, man holes and joint closures, and other passive equipment for fiber optic communication networks and other data networks, telecommunication cables, connector systems in as well as splice cabinets and patching panel solutions for fiber, telecommunication and data.

It had been rejected on the ground of descriptiveness (slim line conveying no more than an indication of a slim design of the respective products). Upon withdrawal of the action, the case has been closed.

VV: T-229/07 – Case closed; Order of 13 February 2009 (ES).

Keywords: Opposition: likelihood of confusion (LOC).

The action had been initiated against a decision of the 1 st Board of 7.11.2006 in Case R 1363/2005-1 relating to CTM application 2.669.513, a “V” (figurative mark), which had been applied, *inter alia*, for a range of goods in class 9.



It had been partially opposed on the basis of an earlier right in a “V” (figurative mark), registered in class 9. The opposition had been allowed. Upon withdrawal of the opposition, at pending proceedings, by the defendant in the action, the case was closed.

PTR Professional Tennis Registry: T-168/07 – Judgment of 4 March 2009 (action allowed; law of the case).

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

The action had been brought against a decision of the 1 st Board of 28.2.2007, as rectified, in Case R 1050/2005-1, concerning opposition proceedings between Registro Profesional de Tenis, SL and Professional Tennis Registry, Inc. The latter had filed a CTM application for its PTR brand (as shown below) which had been opposed on the basis of earlier rights in RPT (figurative mark).



The goods and services have not been in issue. Whereas the opposition division had rejected the opposition on the ground that the marks were dissimilar, the Board had allowed it on the ground that, overall, the marks are similar enough to constitute LOC. The 8 th Chamber of the CFI (Martins Ribeiro; Wahl, rapporteur; Dittrich) revoked the decision, giving different weight to the figurative element in the CTM application as compared to the word part in the earlier marks.

Ondacell : T-126/08 – Order of 10 February 2009 (only in DE; *a limine* rejected as manifestly unfounded; Office practice confirmed).

Keywords: Opposition formalities, Article 43(3) CTMR: payment of the fee. Payment: current account of a representative.

The case had been initiated against a decision of the 4 th Board of 22.1.2008 in Case R 1384/2007-4 relating to opposition proceedings brought against CTM application 4.755.971, Ondacell. In its brief, the representative of the opponent had indicated that the statutory fee should be deducted from its current account with the OHIM which, however, did not show the necessary balance. For this reason, the financial department requested the representative credit its account within one month. With the current account not showing the necessary balance upon expiry of the deadline, the notice of opposition had been considered not to have been filed. Upon appeal, the plaintiff argued that the mere existence of a current account would suffice to comply with the fee payment requirement; any difficulties as regards the available amount of money would just trigger an additional administrative fee. The 6 th Chamber of the CFI (Meij; Vadapalas, rapporteur; Truchot) rejected that argumentation *a limine*.



Piazza del Sole: T-265/06 – Judgment of 12 February 2009 (only in FR; action dismissed, Office practice confirmed).

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

The action had been brought against a decision of the 2nd Board of 5.7.2006 in Case R 0235/2005-2 relating to CTM application Piazza del Sole (figurative mark) which had been applied for a range of goods and services in classes 16, 21, 25, 29, 30 35, 36 and 42.



The goods and services are not of interest in this case. The CTM application had been opposed on the basis of several earlier rights in Piazza and Piazza d'Oro (word marks). The opposition had been rejected on the ground that the marks are dissimilar enough to exclude LOC. Given that the opponent could not show enhanced recognition on the market in respect of the common word part Piazza, the words "del Sole" in the CTM application suffice to distinguish the two marks. The 7th Chamber of the CFI agreed (Forwood; Sváby, rapporteur; Moavero Milanesi).

LifeScience: T-413/07 – Judgment of 11 February 2009 (action dismissed; Office practice confirmed).

Keywords: Opposition: likelihood of confusion (LOC). LOC: comparison of goods and services. Comparison of G&S: similarity of goods as compared to services.

The case had been initiated against a decision of the 1st Board of 2.8.2007 in Case R 1545/2006-1 relating to CTM application LifeScience (figurative mark) which had been opposed on the basis of an earlier right in Life Sciences Partners (figurative mark).

The goods and services for which registration had been sought are in classes 16, 35, 36, 41 and 42, namely in class 16: paper, cardboard and goods made from these materials; printing materials; writing stationery; typewriters and office requisites (except furniture); teaching materials (except apparatus); plastic materials for packaging; in class 35: providing advertising services; management of business affairs; provision of business administration services; office work; all the aforesaid services, in particular in the field of technology transfer and innovation consultancy; organisation of trade fairs and exhibitions for commercial or advertising purposes; market research, analysis of market trends and market analysis in the field of national and international technologies; in class 36: insurance affairs; financial affairs, in particular in the field of risk capital procurement and financial support for technology transfer and consultancy on the associated financial support programmes; monetary

transactions; real estate development services; in class 41: education; providing of training; organisation of trade fairs and exhibitions for entertainment, cultural or sporting purposes, and in class 42 for: engineering services; computer programming, other than for air conditioning and environmental technology; providing of expert opinion; research and consultancy (technical and legal) into industrial property matters; management and exploitation of copyright; exploitation of industrial property rights.

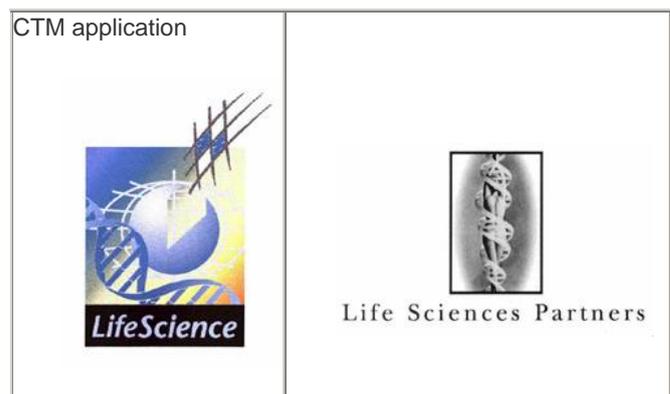
The earlier trade mark covers the following services in class 35: advertising and sales promotion; business management; business administration; office functions; business management and organisation consultancy; business economics consultancy; drafting statistics; marketing manipulation, marketing research and marketing analysis; opinion polling; composing and operating databases, and in class 36: insurances; financial affairs; monetary affairs; real estate affairs and acting as an intermediary for real estate sales; capital and other investments; consulting and acting as an intermediary in the field of granting of credits.

The opposition had been directed at all the goods and services covered by the mark applied for (*attention: in no.7 of the judgment it should read that the opposition had been based on all the services covered by the earlier registration*). By its decision, the opposition division had upheld the opposition in part. In essence, it had found that the services in classes 35 and 36 were identical and that the signs were sufficiently similar to give rise to LOC. The opposition had been dismissed as to the remainder on the ground that the services covered by the earlier trade mark were different from the goods and services in classes 16, 41 and 42 covered by the CTM application. The subsequent appeal brought by the CTM applicant had been dismissed. The 4th Chamber of the CFI (Czúcz; Labucka, rapporteur; O'Higgins) confirmed the challenged findings, relying on standard criteria.

C-2: CFI Judgments and Orders: Developments in pending cases

Insulate for Life: T-157/08 – Office response filed.

Keywords: Absolute grounds for refusal: assessment (impact of prior decisions of the OHIM; of national registrations). Absolute grounds for refusal: descriptiveness.





The case has been brought against a decision of the 2nd Board of 21.2.2008 in Case R 0054/2008-2 relating to CTM application 5.932.827, word sign INSULATE FOR LIFE. The goods and services in respect of which registration had been sought are in classes 6, 17, 19 and 37, namely: common metals and their alloys; metal building materials; transportable buildings of metal; materials of metal for railway tracks; non-electric cables and wires of common metal; ironmongery, small items of metal hardware; pipes and tubes of metal; safes; goods of common metal not included in other classes; ores; rubber, gutta-percha, gum, asbestos, mica and goods made from these materials and not included in other classes; plastics in extruded form for use in manufacture; packing, stopping and insulating materials; flexible pipes, not of metal; building materials (non-metallic); non-metallic rigid pipes for building; asphalt, pitch and bitumen; non-metallic transportable buildings; monuments, not of metal, and in class 37 construction; maintenance and repair; installation services.

The applicant had argued that the Office itself had accepted various trade marks containing the expression '... FOR LIFE', and that the sign in issue had achieved registration both in Finland and the United Kingdom. The application was rejected on the grounds of descriptiveness.

Noli-II: T-364/08 – Office response filed.

Keywords: Opposition: likelihood of confusion (LOC). LOC: comparison of goods.

The action has been initiated against a decision of the 2nd Board of 16.6.2008 in Case R 159 1 /2007-2, relating to CTM application 4.60 1 .017 "nollie" (figurative mark). Same situation as below, only the sign applied for differs slightly.

Noli-I: T-363/08 – Office response filed.

Keywords: Opposition: likelihood of confusion (LOC). LOC: comparison of goods.

The action has been initiated against a decision of the 2nd Board of 16.6.2008 in Case R 1590/2007-2, relating to CTM application 4.602.017 "nollie" (figurative mark).



The application had been filed in respect of goods in classes 3, 9, 11, 14, 18, 20, 25 and 26, namely: perfumes, colognes, scented body sprays; sunglasses; electric light bulbs; jewellery, namely bracelets, rings, necklaces, watches, belly chains, chokers, earrings; coin purses, leather purses, tote bags, umbrellas, handbags, purses, backpacks, messenger

bags, wallets; pillows; men, women and children's apparel, namely, hats caps, visors, gloves, mittens, wristbands, belts, socks, stockings, pantyhose, leggings, shoes, scarves, mufflers, pyjamas, robes; underpants, skirts, swimming trunks, tunics, tank tops, cotton woven shirts, knit shirts, polo shirts, t-shirts, sweatshirts, crew neck sweaters, v-neck sweaters, turtleneck sweaters, cardigans, shorts, shawls, jackets, outer jackets, flannel jackets, wool jackets, polyester woven shirts, rayon woven shirts, wool woven shirts, sneakers, boots, sandals, slippers, shirts, blouses, knit tops, dresses, jeans, pants, slacks, trousers, sweat pants, denim shorts, denim jackets, and finally in class 26 for belt buckles, barrettes, hair pins, hair clips and hair scrunches.

It had been partially opposed (except for class 11 goods) on the basis of several earlier rights in NOLI, word, registered in classes 3, 18, 24 and 25. Whereas the opposition division had allowed the opposition in full, the Board had restricted its scope, holding that the goods in classes 9 and 14, as well as the 'barrettes, hair pins, hair clips, hair scrunches' in class 26 of the CTM application were dissimilar to those covered by the earlier marks.

First-On-Skin/First: T-273/08 – Office response filed (DE).

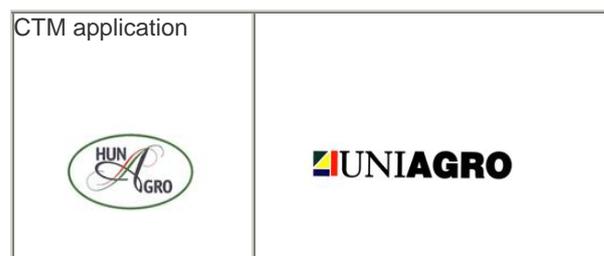
Keywords: Opposition: likelihood of confusion (LOC). LOC: comparison of marks.

The case has been brought against a decision of the 4th Board of 15.5.2008 in Case R 0281/2007-4 relating to CTM application 4.019.981, First-On-Skin, word, which had been applied for for a range of goods in class 25. It had been opposed on the basis of an earlier right in FIRST, word, registered in class 25. Whereas the opposition division had rejected the opposition, the Board had allowed it. It had reasoned that for clothing the part "on skin" would be descriptive, and that the word "first" would not be completely laudatory.

Hunagro: T-423/08 – Office response filed.

Keywords: Opposition: likelihood of confusion (LOC). LOC: comparison of goods.

The case has been initiated against a decision of the 2nd Board of 22.7.2008 in Case R 0071/2008-2 relating to opposition proceedings directed against CTM application 4.508.917, Hunagro (figurative mark).



The goods at issue here are in class 29, namely meat, fish, poultry and games; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs; milk and milk products; edible oils and fats. It had been opposed on the basis of Uniagro (fig.), registered for fruit and



garden herbs in class 31. The opposition division and the Board partially allowed the opposition, namely in respect of preserved, dried and cooked fruits and vegetables; jellies, jams, compotes in class 29.

Golden Elephant: T-303/08 – Office response filed.

Keywords: OHIM proceedings: right to be heard, Article 73 CTMR. Proceedings on relative grounds: scope of Article 74(1) CTMR. Cancellation proceedings: Article 51 CTMR and Article 5 CTMR after amendment. Opposition/invalidation: other earlier rights, Article 8(4) CTMR. Article 8(4) CTMR: right based on passing off (UK).

The case has been brought against a decision of the 1st Board of 7.5.2008 in Case R 0889/2007-1, relating to cancellation proceedings 1.304 C filed against CTM 241.810, registered on 4 February 1999 (with a filing date of 29 April 1996), for rice in class 30.



It had been challenged in the year 2005 based on the following grounds: Under Article 51(1)(a) CTMR that the registration of the contested mark did not meet the requirements of Article 5 CTMR in force prior to the amendment of the CTMR in 2004, as the CTM proprietor was a company with a registered office in the British Virgin Islands. Under Article 51(1)(b) CTMR that the CTM proprietor acted in bad faith when the application for the CTM was filed while knowing that, as a company registered in the British Virgin Islands, it could not file a CTM. Under Article 52(1)(c) CTMR, the requestor claimed to be entitled to obtain the rejection of the challenged CTM pursuant to the law of passing off on the basis of the unregistered figurative trade mark, used in the course of trade in the United Kingdom :

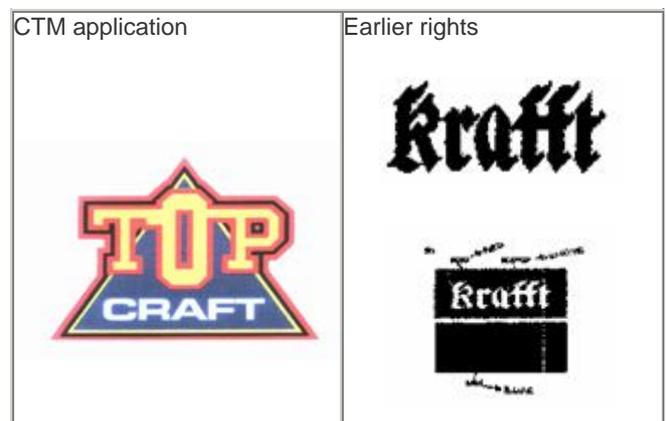
The cancellation division had rejected the request on the following grounds: Given that the application for cancellation was filed after the amendment of Article 51(1)(a) CTMR, only the grounds expressly stated in Articles 51 and 52 CTMR, as amended, could be invoked. As a consequence, the application for invalidity was inadmissible insofar as based on the alleged breach of Article 5 CTMR. Next, the requestor failed to provide evidence showing dishonest intention on the part of the CTM proprietor at the time of the filing of the application for the challenged CTM. Finally, that the requestor did not establish that goodwill had been attached to the products in association with the GOLDEN ELEPHANT by the relevant public.

Upon appeal, the Board declared the challenged CTM invalid. It considered first that the request for invalidity based on the earlier version of Article 5 CTMR was inadmissible, but finally decided in favour of the requestor on the grounds of Article 52(1)(c) CTMR. The Board did not carry out an examination of the appeal insofar as the remaining grounds were concerned, namely those of Article 51(1)(b) CTMR.

Top Craft: T-374/08 – Office response filed (DE).

Keywords: Opposition: likelihood of confusion (LOC). LOC: comparison of goods. Comparison of goods: goods in the same Nice class.

The case has been initiated against a decision of the 2nd Board of 25.6.2008 in Case R 0952/2007-2 relating to CTM application 3.444.767, Top Craft (figurative mark). It had been applied for a range of chemical products in classes 1 and 3.



It had been opposed on the basis of several earlier rights in KRAFFT (figurative and stylised) which are registered in classes 1 and 3. Notwithstanding that the goods concerned are in the same classes, the opposition had only been allowed in respect of a small range of goods in the CTM application. The Board took into account that part of the goods concerned were raw materials and others were finished products.

Hidalgo/Hidalgo : T-365/08 – Office response filed (ES).

Keywords: OHIM proceedings: material filed belatedly, Article 74(2) CTMR. Opposition: earlier right. Earlier right: impact of co-existence of an identical/similar right of the CTM applicant on the relevant market. Opposition: likelihood of confusion (LOC).

The action is directed against a decision of the 4th Board of 11.6.2008 in Case R 1329/2007-4 relating to Emilio Hidalgo's CTM application 4.032.108, HIDALGO, word, which had been applied for alcoholic beverages in class 33. It had been opposed by Hidalgo-La Gitana S. A. on the basis of Spanish registration HIDALGO, word, registered for wines in general and in particular for Jerez and Manzanilla. The opposition had been allowed by the opposition division. On appeal, the CTM applicant had stated that it enjoyed better rights in Spain in a mark HIDALGO, and that there were proceedings pending in Spain. The Board did not take into account that new argument.



Vogue Portugal-II: T-382/08 – Office response filed.

Keywords: OHIM proceedings: material filed belatedly, Article 74(2) CTMR. Opposition: earlier right. Earlier right: impact of co-existence of an identical/similar right of the CTM applicant on the relevant market. Opposition: proof of use (POU).

The case is “the second round” in a conflict between CTM application 183.756 VOGUE, word, which had been applied for clothing in class 25, and earlier rights in the mark VOGUE Portugal and the business name VOGUE SAPATARIA, for clothing. The CTM applicant challenges a decision of the 2nd Board of 30.6.2008 in Case R 0328/2003-2. The CTM application had been filed on 1.4.1996. After it had been opposed on 10.12.1999, the CTM applicant, on 27.11.2000, requested POU of the earlier registration on which the opposition had been based. In its communication of 16.1.2001, the opposition division invited the opponent to submit proof of use of its earlier trade mark and set a time limit of two months which expired on 16.3.2001.

On 14.3.2001, the opponent referred to the evidence it had already submitted in its brief dated 10.12.1999. By its decision of 31.1.2003, the opposition division considered that the evidence of use was sufficient and upheld the opposition. In its appeal, the CTM applicant claimed that it was the holder of IR No 158005 for the word mark VOGUE in class 25, which has effect in Portugal and which predates the earlier mark. In its decision of 27.9.2004, the Board dismissed the appeal. It found that the new facts and arguments relied on by the CTM applicant for the first time before the Board were inadmissible. It also confirmed the finding that genuine use of the earlier mark had been substantiated and that there is LOC in Portugal in respect of clothing articles. On subsequent appeal, by its judgment of 4.10.2007 in Case T-481/04, the CFI annulled the decision of the Board on account of the violation of Article 74(2) CTMR.

Quote: “(Instead of) exercising the discretion which it thus has, the Board wrongly considered itself to be lacking any discretion, in the present case, as to whether to take account or not of the facts and evidence at issue [that is, the facts and evidence regarding the alleged co-existence of the conflicting marks]” (see points 20-21 of the judgment).

The case had been remitted back to the 2nd Board which, in its decision at issue here, dismissed the CTM applicant's appeal. In the light of the guidance set by the Court of Justice in its Judgment of 13 March 2007 in Case C-29/05P, OHIM / Kaul GmbH, (ARCOL / CAPOL), ECR I-2213, the Board considered that the circumstances of the case did not justify taking into account the new fact and supporting evidence submitted by the CTM applicant. Firstly, the Board held that the applicant had been given ample time to rely on these facts and arguments before the opposition division. Secondly, the belatedly filed facts and arguments were *prima facie* irrelevant to the outcome of the dispute: in the absence of proof of use of the CTM applicant's international registration 158.005, the actual coexistence of the trade marks in Portugal was unsubstantiated.

Notfall Bonbons: T-372/08 – Office response filed (DE).

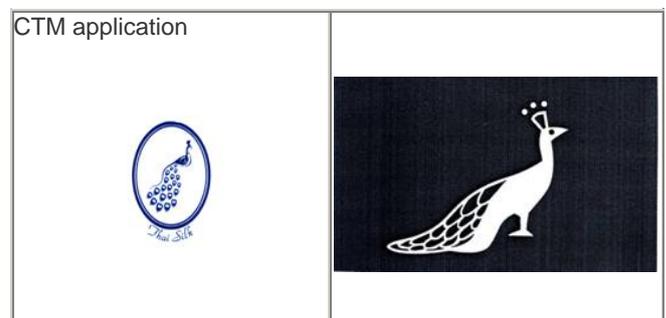
Keywords: Absolute grounds for refusal: distinctiveness.

The case has been initiated against a decision of the 1 st Board of 10.7.2008 in Case R 0909/2007-1 relating to CTM 3.563.251 and cancellation proceedings C1.651. The challenged CTM “Notfall Bonbons” is registered in classes 5 and 29; “Notfall” means emergency (case), and a Bonbon is a kind of sweet. The CTM had been challenged on the ground of descriptiveness but the cancellation request had been rejected. On appeal, the Board had revoked the cancellation division's decision and had held according to the request. “Notfall Bonbons” would directly relate to “Notfall Tropfen” (emergency drops), a well-known term in the sector of alternative medicine, namely in Dr. Bach's so called Blütentherapie (Dr. Bach's Notfall-Tropfen).

Thai Silk or Peacock: T-361/08 – Office response submitted (DE).

Keywords: Formalities: transfer of earlier right after Board decision. Opposition: likelihood of confusion (LOC). LOC: comparison of marks. Comparison of marks: protection of the abstract concept of a sign (“Motivschutz”).

The action is directed against a decision of the 4 th Board of 10.6.2008 in Case R 1677/2007-4 relating to CTM application 4.099.297, Thai Silk (fig; containing a peacock). It had been filed by “The Office of the Permanent Secretary/The Prime Minister's Office”, Bangkok, for silk in class 24 and for clothing made of silk in class 25.



It had been opposed on the basis of an earlier German trade mark representing a peacock, registered for a range of goods and services in classes 18, 25 and 35. The opposition had been rejected on the basis of dissimilarity of the marks in question; the Board had rejected taking into account the abstract concept as such (“peacock”). After the Board decision but prior to the court action, the earlier right had been transferred. The new owner seeks recognition as a party alongside the initial holder.



NEW DECISIONS FROM THE BOARDS OF APPEAL

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

I - Procedural issues

Opposition proceedings – Belated evidence – Competence of the Boards – Discretionary power

Decision of the First Board of 23 March 2009 in Case R 0392/2008-1 – (German)



R 0392/2008-1 EUROCOOL / (Eurocool Logistics) – (de)

The Board considers that the Opposition Division does have broad discretionary powers when taking late submissions into account in accordance with Article 74(2) CTMR. However, this discretion must be exercised according to appropriate criteria and justified. The question of whether the exercise of discretion is based on appropriate criteria can be examined by the Boards. In this case, the only argument that the OD gave for refusing the late submissions was that the opponent had had 29 months in which to submit the document due to the numerous extensions. Other criteria were mentioned, but not subsequently examined by the OD. The Board considers that the Opposition Division did not exercise its discretion in accordance with the right criteria. In the Board's view, the extension of the 'cooling-off period' and the mutually requested suspension of the proceedings are measures which are granted under procedural law to give the parties the opportunity to come to an amicable agreement. It can not be to the detriment of either party that these deadlines were extended. Furthermore, the contested decision did not address the arguments put forward by the opponent. The Board annulled the decision. Since the question of the exercise of discretion was discussed at length between the parties and overall the proceedings have already gone on for a long time, the Board found appropriate to take a decision straight away on the significance of the late evidence for extension. The Board found many arguments to support the taking into account of the extension document, such as the fact that proceedings were still at an early stage eight days after the period for substantiation had expired after the proceedings had been suspended for years; the evidence is decisive for the substantiation of the opposition and therefore for the outcome of the proceedings. In relation to the assessment of the likelihood of confusion between the mark applied for and the earlier mark and rights (Articles 8(1)(b) and (4) CTMR), the Board decided to remit the case to the Opposition Division with a view to giving the applicant the opportunity to respond to the opponent's statement of grounds of opposition

II – Ex-parte – Article 7(1)(b) CTMR

Examination proceedings – Distinctiveness – Three-dimensional trade mark

Decisions of the First Board of 19 March 2009 in Cases R 0840/2006-1 and R 0849/2006-1 (German)



R0840/2006-1  (Schokoladenhase - 3D mark) &



R0849/2006-1  (Schokoladenhase – 3D mark) – (de).

The Board decided that the Easter bunnies applied for are not distinctive for chocolate and chocolate goods.

III – Inter-partes – Articles 8(1)(b)

Opposition proceedings – Relative grounds - Common element - Descriptive element - Identity of the goods and services - Joined appeal - Likelihood of confusion - Similarity of signs

Decision of the Second Board of 7 April 2009 in Joined Cases R 1818/2007-2, R 0008/2008-2, R 0314/2008-2, and R 1930/2007-2 (English)

R 1818/2007-2, R 0008/2008-2, R 0314/2008-2, and R 1930/2007-2 OPTIROLL et al / OPTICOLOURS et al. (en). The goods at issue are identical; all the opponent's CTMs cover 'goods made from paper' which includes the contested goods 'toilet tissue, paper towels, paper toilet seat covers, handkerchiefs of paper; paper napkins'. In English-speaking member states the common element 'OPTI' would be unequivocally understood, in relation to the goods, as a shortened form for 'optimum' or 'optimal' and the second elements of the contested marks ('ROLL', 'TOWEL', 'NAP', 'TISSUE'), would be perceived as purely descriptive in relation to paper goods. Even assuming that the common element 'OPTI' would be perceived as a laudatory or commonplace element endowed with little distinctive character, the additional elements purely descriptive of paper goods in the minds of the average English-speaking consumer, are even weaker than the common element. Therefore, they cannot serve to effectively distinguish as to the origin of the goods at issue. Even if the English-speaking public might not directly confuse the marks, nevertheless, there remains the likelihood that due to the common element 'OPTI', in the initial position, they could perceive the contested marks 'OPTIROLL', 'OPTITOWEL', 'OPTINAP' and 'OPTITISSUE' as having a common commercial origin with that of the earlier CTMs 'OPTILABEL', 'OPTIFILM', 'OPTIPHOTO', 'OPTIPICTURE', 'OPTIPROFILE', 'OPTITEXT', 'OPTISIGN', 'OPTICOLOURS', or could wrongly assume some sort of economic relationship between their owners. This is all the more so, since the goods at issue are identical, which counterbalances, in the present case, the lesser degree of similarity between the marks. A likelihood of confusion is even more probable among consumers who would not accord any meaning to the term 'OPTI', and will perceive it as a fanciful and inherently distinctive term. The rejection of the CTM applications is confirmed and the appeals are dismissed.



IV – Inter-partes – Articles 43(2) and (3)

**Opposition proceedings – Proof of use - Evidence of use
– Translation – Invoice - Press articles - Promotional
material - Use not as registered**

Decision of the Second Board of 24 March 2009 in Case R 1297/2008-2 (English)

R1297/2008-2 BIT / BIT, S.A. et al. – (en) - The opposition was rejected because of the lack of translations of the evidence of use. The Board considers that, taking into account the explanations given in English in the observations accompanying the evidence, and the fact that the dates, amounts, figures, names and representations of images in the newspapers are self-explanatory and therefore do not require a translation, the evidence submitted, as a whole, demonstrates the place (public and outward use in Spain), time (at various dates over the five year reference period), extent (sufficiently high quantities and concerning the services registered) and nature of use (use on advertising of the opposing trade marks). The evidence taken together builds up a coherent picture of use of the mark 'BIT' for the services for which it was registered for during the five years preceding the publication of the CTM application. In the present case, use of the earlier trade mark constitutes use which differs from the form in which it was registered only in negligible elements. The appeal must be upheld and the contested decision annulled insofar as it dismissed the opposition because of the lack of translations of the evidence of genuine use. The evidence has also been found to be sufficient in content to prove that the earlier marks had been genuinely used for the respective services.