



OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET
(TRADE MARKS AND DESIGNS)

The Boards of Appeal

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DECISION
of the Fourth Board of Appeal
of 21 January 2010

In Case R 385/2008-4

Stefan Fellenberg
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Germany

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Applicants and Appellants

represented by Patentanwältin Gabriele Mohsler, Am Nordpark 56, D-50733 Cologne,
Germany

APPEAL relating to Community trade mark application No 6 025 159

THE FOURTH BOARD OF APPEAL

composed of D. Schennen (Chairperson and Rapporteur), E. Fink (Member) and
F. López de Rego (Member)

Registrar: J. Pinkowski

gives the following

Decision

Summary of the facts and arguments of the parties

- 1 On 13 June 2007, the appellants sought to register the figurative mark



as a Community trade mark for the following goods:

Class 25 – Clothing, footwear, headgear.

Class 32 – Beers and aerated waters and other non-alcoholic drinks.

Class 33 – Alcoholic beverages (except beers).

- 2 The examiner objected to the registrability of the sign under Article 7(1)(f) and (2) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ L 78, 24.3.2009, p. 1, codified version of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark ('CTMR') because of its meaning in English. The appellants opposed the objection.
- 3 By decision of 20 December 2007 the examiner refused the application pursuant to Article 7(1)(f) and (2) CTMR. The word elements of the sign applied for consisted of the term 'Fucking', which derived from the English verb 'to fuck', and was a coarse and indecent expression, and the word 'Hell'. The sign as a whole was 'Fucking Hell' in English [approximately 'verdammte Scheiße' in German]. The expression used sexuality in order to express contempt and violent anger. The village Fucking in Austria, to which the appellants had referred, had only 93 inhabitants, and no-one knew of it. The right of freedom of expression had to have limits in the case of upsetting, accusatory or derogatory signs.
- 4 On 16 February 2008 the appellants filed a notice of appeal against the contested decision, and submitted a written statement of grounds on 23 April 2008. They pointed out, inter alia, that there was a village called Fucking in Upper Austria, approximately 30 km north of Salzburg, which had been mentioned in a document for the first time as early as 1070. Its name originated from the Count Focko, and the word 'Hell' stood for a 'ein helles Bier' [a pale beer].

Reasons

- 5 There can be no objection to the idea of giving a beer speciality the name of a village plus the generic indication 'Hell' [pale] (officially known as an abbreviation for 'ein helles Bier' [a pale beer]). The examiner had not even attempted to support his objection by referring to the existence of a geographically descriptive indication.
- 6 Under Article 7(2) CTMR, it would be sufficient for an application to be refused if a trade mark had been submitted which was contrary to public policy or to accepted principles of morality, in terms of the United Kingdom and Ireland as parts of the Community.
- 7 As to the question of whether advertising measures can be forbidden as unfair, the fundamental right to freedom of expression must be taken into account (Köhler/Bornkamm, UWG [Gesetz gegen den unlauteren Wettbewerb – German Unfair Competition Act], 26th edition, 2008, § 5, paragraph 1.65). Nothing else can apply under Article 7(1)(f) CTMR since the affirmation of this rule assumes that the use of the designation as such can be prohibited. This means that the appellants cannot be prevented from expressing their own opinion, but are not allowed to infringe the fundamental rights of others, and in individual cases careful consideration may be required. The point of departure of the contested decision that the appellants could not invoke fundamental rights in order to express contempt and violent anger, if the state were to forbid them to do so, was legally incorrect.
- 8 The Board does not consider it constructive to continue the discussion between the examiner and the appellants on the nuances of meaning of the word combination claimed and its elements or to proceed on the linguistic level envisaged by the examiner through extensive quotations from dictionaries. Suffice it simply to say that, in Christian terms, 'Hell' is the place of highest torment. It is a place of damnation. In common parlance 'Hell' is a synonym for something negative and causing torment. If the first word element stands for 'verdammte ...' in German, then the sign designates only that which according to popular belief happens in hell.
- 9 Under Article 7(1)(f) CTMR signs may not be registered if they are disparaging, discriminatory, blasphemous or derogatory, incite criminal offences or insurrection.
- 10 However, the word combination claimed contains no semantic indication that could refer to a certain person or group of persons. Nor does it incite a particular act. It cannot even be understood as an instruction that the reader should go to hell. The meaning assumed by the examiner is, overall, an interjection used to express a deprecation, but it does not indicate against whom the deprecation is directed. Nor can it be considered as reprehensible to use existing place names in a targeted manner (as a reference to the place), merely because this may have an ambiguous meaning in other languages.

Order

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision.**
- 2. Allows the Community trade mark to proceed to publication.**

D. Schennen

E. Fink

F. López de Rego

Registrar:

J. Pinkowski