

Alicante News

Up to date information on IP and EUIPO-related matters

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Decision of ECJ Case C 371/18, Sky and Others

The EUIPO has welcomed the decision of the Court of Justice of 29 January 2020, in Case C 371/18, Sky and Others, in the context of a request for a preliminary ruling.

The EUIPO considers that the Court of Justice provided important guidance on the **requirement for clarity and precision** of the specification of goods and services, on the one hand, and the concept of **bad faith**, on the other.

The main issues arising from the questions referred to the CJEU are the following :

1. Whether a trade mark can be declared invalid, wholly or in part, on the grounds that the specification of goods and services lacks clarity and precision;
2. If the answer to the first question is yes, whether terms such as “computer software” are considered to lack clarity and precision;
3. Whether a trade mark can be declared invalid on grounds of bad faith if the applicant does not have any intention to use the mark in relation to the specified goods and services;
4. If the answer to the third question is yes, whether it is possible to conclude that the trade mark was only partly filed in bad faith as regards the goods for which there was no intention to use the mark.

In its response to the first question, the Court confirmed that **a European Union trade mark or a national trade mark cannot be declared wholly or partially invalid on the ground that the terms used to designate the goods and services in respect of which that trade mark was registered lack clarity and precision**. In this regard the Court found that both First Directive 89/104 and Regulation No 40/94 provide an exhaustive list of the absolute grounds for invalidity among which there is no such ground as lack of clarity and precision of the specification of the goods and services. Furthermore, the lack of clarity and precision of the terms used to designate goods and services does not fall within the scope of one of the absolute grounds set in Article 7 of the Regulation or Article 3 of the Directive and in particular it cannot be considered contrary to public policy.

As the first question was answered in the negative, the Court did not need to propose an answer to the second question.

To answer the third question, **the Court confirmed that the application for a trade mark without any intention to use it in relation to the goods and services applied for could constitute bad faith if a number of conditions are fulfilled**. In this regard the Court remarked that the trade mark applicant is not required to indicate or even to know precisely, on the date of filing of his mark, the use he will make of it, and that bad faith, therefore, cannot be presumed on the basis of the mere finding that, at the time of filing the application, the applicant had no economic activity corresponding

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to the goods and services referred to in that application. However, the registration of a trade mark by an applicant without any intention to use it in relation to the goods and services covered by that registration may constitute bad faith, where it is apparent from relevant and consistent indicia that the proprietor of a trade mark has filed it not with the aim of engaging fairly in competition but with the intention of undermining the interests of third parties, or with the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark, in particular the essential function of indicating origin.

As regards the fourth question **the Court held that when the absence of the intention to use a trade mark in accordance with its essential function concerns only certain goods or services covered by the registration, the invalidity of that trade mark covers those goods or services only.**

The EUIPO considers that these clarifications contribute to ensuring legal certainty.

The answer to the first question reassures EUTM owners that they will not face invalidity actions for registrations which include broad terms solely on the basis of the fact that those broad terms may lack clarity and precision. This confirms the current practice of the Office, which do not include the lack of clarity and precision of the specification among

the absolute grounds for invalidity (see Guidelines, Part D, Cancellation, point 3, [Absolute Grounds for Invalidity](#)).

Moreover, as the Court did not question the clarity and precision of the term “computer software”, it also does not call into question EUIPO and Member States’ practice on terms lacking clarity and precision, reflected in the [Common Communication on the Common Practice on the General Indications of the Nice Class Headings](#).

Finally, the Office considers that the Court has clarified the circumstances in which the ground of bad faith can be invoked against registrations for goods and services which the applicant has not any intention to use, according to Article 59(1)(b) EUTMR. See Guidelines, Part D, Cancellation, point 3.3.2.1, [Factors likely to indicate the existence of bad faith](#), indent 3 (c).

In this regard the EUIPO would like to invite applicants to carefully consider their business needs before applying for overly long lists of goods and services. In particular, applicants are advised against including in the application goods and services solely with the intention of extending the scope of their exclusive right or for purposes other than those falling within the functions of a trade mark. Applicants who fail to abide by this principle may face invalidity actions on the ground of bad faith and suffer the total or partial invalidation of their registration, as well as bear the costs of the proceedings.

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European Cooperation: new online services in Lithuania

The State Patent Bureau of the Republic of Lithuania (SPB), with the support of the EUIPO's European Cooperation Projects (ECP1), has improved the service provided to their users through the launch of an additional set of modern online services for trade mark and design applications.

The new platform includes 13 new online services for trade marks (Generic and Details changes among others) and designs (Details changes for Owner, Representative and Correspondent) that will **help modernise IP related operations in Lithuania**. The new digital services platform became available on 10 February 2020.

The release comes as a result of the work carried out by the EUIPO and its partners under the [European Cooperation Projects](#). The launch at SPB is another successful implementation of front office tools (ECP1) developed and offered by the EUIPO to the national and regional intellectual property offices of the EU.

These projects support the intellectual property offices in developing more efficient, reliable and user-friendly tools and services for trade marks and designs within the European Union Intellectual Property Network (EUIPN).

New Zealand joins TMview

On 17 February 2020, The [Intellectual Property Office of New Zealand \(IPONZ\)](#) made its trade mark data available in the TMview search tool.

With the integration of IPONZ, TMview now contains data from 73 participating offices.

With the addition of more than 685,000 trade marks from IPONZ, TMview provides information and access to more than 57 million trade marks.

You can find out more at www.euipn.org and www.tmview.org

New e-filing for designs in Denmark

The Danish Patent and Trademark Office (DKPTO) has implemented a new design e-filing system, which went live on 17 February 2020.

Developed in cooperation with the EUIPO under ECP1 (European Cooperation Project), the new system is configured to process both standard and multiple design applications.

The system includes tooltips with further information and the automatic numbering of designs and views, integration with DesignClass and coloured, validated Locarno classes and subclasses, and the

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automatic calculation of fees as users navigate their way through the e-filing process.

The new system also allows users to file validated applications in a digital format, and contains a simplified and updated architecture and technology stack, to simplify the IT administrative process.

With this application, the DKPTO continues to support the implementation of future IP law by leveraging a modern, digital services platform.

The EUIPO and its stakeholders are working together on five major ECPs, whose main aim is to benefit users across the EU by providing modern, state-of-the-art tools and services for EU IP offices.

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EUIPO Guidelines in electronic format: tips and tricks

To coincide with the latest edition of the EUIPO Guidelines for Examination of EUTMs and RCDs, which entered into force on 1 February 2020, an [updated tutorial](#) has been made available to users.

The tutorial now contains tips and tricks on how to navigate and search in the complete PDF file, as well as how to save smaller PDFs (pages 14-17).

The tutorial will be updated regularly as additional information or new functionalities become available.

Although the PDFs previously offered (down to Chapter level) are not currently available online, the following PDF options are available:

- a complete 'clean' PDF (without track changes) of the entire Trade Mark and Design Guidelines via the PDF icon;
- a PDF of the page you are viewing can be generated, either with or without track changes, via the 'Print' icon;
- the ability to save smaller 'clean' PDFs based on the complete PDF available via the PDF icon.

Users should note that the PDFs previously offered (down to Chapter level) will be available again in the coming months. For technical reasons however, they will be generated from HTML in the future, rather than Word.

Service Charter: 2019 Annual Figures Results Available

The EUIPO Service Charter defines what users of our services can expect from us. It sets measurable standards in three areas: timeliness, accessibility and quality of decisions.

For the last quarter of 2019, all reported indicators except for one stayed within excellence and compliance levels.

The entire list of quality decisions indicators is aligned with the Office's commitment levels. The Office works to provide a continuously improving and evolving service, tightly aligned with users' needs and expectations.

In relation to timeliness, the average time needed for EUTM Publication improved more than 40% since the beginning of the year in both products, fast track and regular track. The average registration time for RCDs was 1 working day for fast track and less than 10 working days for regular track. Additionally, the Office has been implementing a set of measures to improve the timeliness related to inter partes decisions. The results are being materialised through the Cancellation decision indicator, which improved its timeliness up to 30%.

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The accessibility indicators remained at excellence levels. Accessibility indicators include the time it takes the Office to answer a telephone call, an email, deal with a user complaint as well as the availability of our website.

[See the Service Charter](#)

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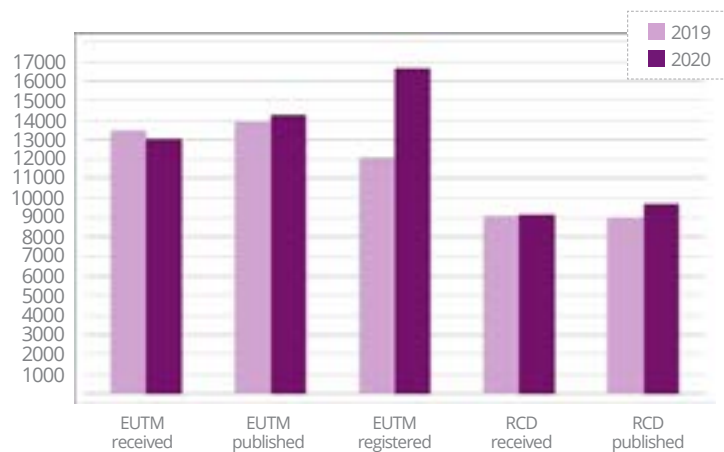


Statistical Highlights



| Monthly statistical highlights January* | 2019 | 2020 |
|---|--------|--------|
| European Union Trade Mark applications received | 13 466 | 13 044 |
| European Union Trade Mark applications published | 13 878 | 14 242 |
| European Union Trade Marks registered (certificates issued) | 12 103 | 16 660 |
| Registered Community Designs received | 9 072 | 9 139 |
| Registered Community Designs published | 8 992 | 9 681 |

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



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Luxembourg trade mark and design news

A: Court of Justice: Orders, Judgments and Preliminary Rulings

16/01/2020, C 118/18 P REV II, bittorrent, EU:C:2020:11

RESULT: Action dismissed

KEYWORDS: Admissibility

FACTS:

The applicant applied for a revision of the order of 28/06/2018, C 118/18 P, bittorrent, EU:C:2018:522, pursuant to Article 44 of the Statute of the CJEU (Statute).

By that order, the Court had dismissed the applicant's appeal against the judgment of the General Court of 12/12/2017, T 771/15, bittorrent, EU:T:2017:887, as being in part manifestly inadmissible and in part manifestly unfounded (Article 181 RPCJ).

The applicant based its application for revision on the Office's decision of 12 March 2019, which approved the conversion of the EU trade mark bittorrent into two national trade mark applications, German and Austrian respectively. The applicant for revision submitted that the Office's decision of 12 March 2019 constituted a fact that would be likely

to have a decisive influence on the order under appeal and that was unknown to the Court and to the party claiming the revision of that order, within the meaning of Article 159(1) RPCJ.

SUBSTANCE:

The revision of a decision may only be made upon the discovery of a fact that is of a decisive nature, and that, when the judgment was delivered, or the order served, was unknown to the Court and to the party claiming the revision (Article 44 of the Statute, Article 159(1) RPCJ) (§ 26).

Revision is not an appeal procedure, but an exceptional review procedure that allows the authority of res judicata attached to a final judgment, or to an order, to be called into question on the basis of the findings of fact relied upon by the Court. Revision presupposes the discovery of elements of a factual nature that existed before the judgment or the order and that were unknown at that time to the Court that delivered the judgment or the order, as well as to the party applying for revision, and that, had the Court been able to take them into consideration, could have led it to a different determination of the proceedings (§ 28).

In light of the exceptional nature of the revision procedure, the conditions governing the admissibility of an application for revision are to be interpreted strictly (§ 29).

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Article 159(1) RPCJ presupposes the discovery of a fact that, before the decision was given, was unknown to the Court. It follows that the fact, on the basis of which the request for revision is based, must precede the delivery of the decision of the Court which is the subject of the application for revision (§ 31).

The Office's decision of 12 March 2019 post-dates the delivery of the order under appeal (§ 32). Thus, the application for revision is dismissed as inadmissible (§ 35).

B: General Court: Orders and Judgments on appeals against decisions of the EUIPO

[16/01/2020, T 128/19, Sativa \(fig.\) / K KATIVA \(fig.\) et al, EU:T:2020:3](#)

RESULT: Action dismissed

KEYWORDS: Admissibility

FACTS:

The proprietor designated the European Union in respect of the international registration (IR) of the figurative sign 'Sativa' for goods in inter alia Class 3. The IR was notified to the Office on 13 August 2015. An opposition was filed pursuant to Article 41 CTMR based on six earlier EU trade marks. The Opposition Division upheld the opposition.

By decision of 16 November 2018, the Board of Appeal (BoA) dismissed the appeal filed by the original proprietor.

On 11 December 2018, the International Bureau of the World Intellectual Property Organisation (WIPO) received a request for the recording of a change in ownership of the international registration, which the original proprietor had assigned on 3 December 2018 to Hemp Foods Australia Pty ('the first request for the recording of a change in ownership'). On 11 January 2019, WIPO requested that the first request for the recording of a change in ownership be regularised within a period of 3 months. According to Hemp Foods Australia Pty, the first request for the recording of a change in ownership was deemed to have been abandoned on 11 April 2019 on the ground that certain irregularities that had been found to exist had not been remedied within the time limit set.

On 31 May 2019, WIPO received a new request for the recording of a change in ownership of the international registration ('the second request for the recording of a change in ownership'). On 21 June 2019, the change in ownership of the international registration was recorded in the international register.

On 22 February 2019 Hemp Foods Australia Pty filed an action before the General Court (GC). The GC dismissed the action as inadmissible.

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SUBSTANCE:

INADMISSIBILITY OF THE ACTION

The admissibility of an action must be judged by reference to the situation prevailing when the application was filed (§ 20).

Under Article 72(4) EUTMR, action against a BoA decision is open to any party to proceedings before the BoA adversely affected by its decision (§ 21).

Furthermore, it is clear from a combined reading of Article 20 EUTMR, in particular Article 20(11) EUTMR, on the one hand, and Article 199 EUTMR on the other, that it is only after the recording of a change in ownership of an international registration in the international register that the new proprietor may invoke the rights arising from that registration (§ 22).

In addition, Articles 174 to 176 RPGC state that, where an intellectual property right affected by the proceedings before the GC has been transferred, the new proprietor of that right, as the successor to the party before the BoA, may be authorised by order to replace the transferor in the proceedings before the GC, where the former proprietor of the right has no objection and the GC, having heard the other parties to the action, considers it appropriate (10/09/2015, T 517/14, *be.bag / BE et al.*, EU:T:2015:720, § 16) (§ 23).

Moreover, where the change in ownership of an international registration designating the European

Union takes place after the BoA has adopted a decision, but before an action has been brought before the GC, the new proprietor may bring an action before the GC without having to submit an application for replacement and should be accepted as a party to the proceedings once it has proven ownership of the registration invoked before the Office (28/06/2005, T 301/03, *Canal Jean*, EU:T:2005:254, § 19, and 21/04/2010, T 361/08, *Thai silk*, EU:T:2010:152, § 31) (§ 24).

In the present case, when, on 22 February 2019, the applicant brought the present action, the change in ownership of the international registration had not been recorded in the international register. It follows that, at the time when it brought the present action, the applicant had not become a party to proceedings before the Office for the purposes of Article 72(4) EUTMR as interpreted by the case-law (§ 25).

Consequently, it was for the original proprietor to bring the present action and to have itself replaced, in accordance with the formal requirements laid down by Articles 174 to 176 RPGC, by *Hemp Foods Australia Pty* once the change in ownership of the international registration had been recorded in the international register (§ 26).

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29/01/2020, T 239/19, ENCANTO (fig.) / BELCANTO, EU:T:2020:12

RESULT: Action dismissed

KEYWORDS: Likelihood of confusion

FACTS:

The applicant sought to register the figurative mark ENCANTO for goods in Class 33. An opposition based on the earlier German word mark BELCANTO, registered for Alcoholic beverages (except beers) in Class 33, was filed pursuant to Article 8(1)(b) EUTMR.

The Opposition Division upheld the opposition.

The applicant filed an appeal which the Board of Appeal (BoA) dismissed finding that there was a likelihood of confusion (LOC) between the marks.

The applicant filed an action before the General Court (GC), relying on a single plea in law: infringement of Article 8(1)(b) EUTMR. The GC dismissed the action.

SUBSTANCE:

INFRINGEMENT OF ARTICLE 8(1)(b) EUTMR. The relevant public is the general public in Germany with an average level of attention (not disputed) (§ 21). The goods are identical (not disputed) (§ 23).



EUTM application



Earlier trade mark

BELCANTO

The signs have at least a low degree of visual similarity (§ 28-32). They are phonetically similar (§ 33-37) and their conceptual comparison is neutral since the relevant public perceives the term 'belcanto' (the earlier mark) as a fanciful term, and the term 'encanto', which forms part of the mark applied for, is meaningless (§ 38-45).

Overall, there is a LOC in the mind of the relevant public with an average level of attention, since the goods are identical, and the conceptual comparison does not counteract the visual and phonetical similarities (§ 50-51).

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29/01/2020, T 697/18, ALTISPORT / ALDI, EU:T:2020:14

RESULT: Action partially upheld (BoA decision partially annulled)

KEYWORDS: Dissimilarity of the goods and services, Lack of reasoning, Priority

FACTS:

The EUTM applicant sought to register the international figurative mark designating the EU for goods and services in Classes 25, 28, 35, and 40.

An opposition, based on the earlier international word mark ALDI in Classes 35 and 41, and the earlier word EUTM ALDI in Classes 3, 9, 16, 24, and 25, was filed pursuant to Article 8(1)(b) EUTMR. The Opposition Division partially upheld the opposition. It found that only certain goods in Class 28 could be registered.

The opponent filed an appeal. The Board of Appeal (BoA) partially upheld the appeal. It found that the contested mark could not be registered only for the goods in Class 28 board games and playing cards, since they were similar to the opponent's goods and there was a likelihood of confusion.

The opponent filed an action before the General Court (GC), relying on a single plea in law: infringement of Article 8(1)(b) EUTMR. The GC

partially upheld the action and partially annulled the BoA decision.

International registration for the EU

ALTISPORT

SUBSTANCE:

(i) INFRINGEMENT OF ARTICLE 8(1)(b) EUTMR

Comparison of the contested goods in Class 28 and the opponent's services in Class 35

The right of priority has effect only when it is necessary to determine the priority of the conflicting signs and is, therefore, without effect on the date of registration of a trade mark if this is not the same as its priority date (§ 36).

For the application of the requirements resulting from the judgment of 07/07/2005, C 418/02, Praktiker, EU:C:2005:425, the relevant date is the date of registration of the EU trade mark concerned, namely the date of its final registration, which must be after the delivery of that judgment (§ 38).

The requirements resulting from the judgment in the Praktiker case are intended to apply to international registrations designating the EU

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for which registration was granted after that judgment was delivered, even if the filing date of the application is earlier than that judgment, and even if the protection conferred by the registration is retroactive to the date of the application (§ 44).

Since the requirements resulting from the judgment in the Praktiker case were applicable to the earlier international mark and the applicant failed to specify the goods or types of goods concerned by the retail activity covered by that earlier international mark, the BoA's finding that it was not possible to establish a similarity or complementarity between the opponent's services in Class 35 and the contested goods in Class 28 is correct (§ 47).

Comparison of the contested goods in Class 28 and the opponent's goods

The BoA's finding about the dissimilarity of ball for games, playing ball and throwing ball in Class 28, covered by the contested sign, and the opponent's goods in Class 25 is confirmed (§ 61, 109). Even though an exact delimitation between gymnastic and sports articles and games and toys is difficult in certain cases (§ 50-51), and there is a tendency for game and toy manufacturers to also manufacture sports clothing (§ 51), the goods have a different nature, purpose, origin, manufacturers and sale outlets, and they are in competition (§ 54-60).

The BoA's finding about the dissimilarity of accessories for water games, swimming aids, and inflatable pool toys in Class 28, covered by the contested sign, and the opponent's goods in Class 25, is confirmed (§ 74, 109). The goods have a different nature and purpose, and they are not similar nor complementary despite the fact that they are sold near each other in the same specialised stores and addressed to the public at large (§ 69-73).

The BoA's finding about the dissimilarity of swimming pool in Class 28, covered by the contested sign, and the opponent's goods in Class 24, is confirmed (§ 82, 109). The opponent's argument about the similarity of swimming pool and tarpaulins included in Class 24 is ineffective because tarpaulins belong to Class 22, and not to Class 24 (§ 75-81).

The BoA's finding about the dissimilarity of gaming tables for playing games in Class 28 covered by the contested sign and the opponent's goods playing cards in Class 16 is confirmed (§ 103-104, 109). The fact that gaming tables can be used for playing cards is not enough to consider the goods as complementary (§ 102).

(ii) INFRINGEMENT OF ARTICLE^o94(1) EUTMR

The BoA failed to take into account the opponent's arguments about the similarity of the contested goods toys in Class 28 and the opponent's goods playing cards in Class 16 and limited itself to comparing the contested toys with the opponent's goods in Class 25 (§ 89-90). Therefore, it infringed its obligation to state reasons (§ 96).

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29/01/2020, T 42/19, CROSS, EU:T:2020:15

RESULT: Action dismissed

KEYWORDS: Descriptive, Lack of reasoning, Non-distinctive, Principle of legality

FACTS:

The applicant sought to register the word mark CROSS for goods and services in Classes 12, 28, 35 and 37. The examiner refused the application in respect of some goods and services in these Classes pursuant to Article 7(1)(b), Article 7(1)(c) and Article 7(2) EUTMR, as the mark was descriptive and devoid of distinctive character.

The applicant filed an appeal and requested a restriction of the list of goods and services.

The Board of Appeal (BoA) allowed the restriction of the list of goods and services. The appeal was partially dismissed for goods and services in Classes 12, 35 and 37.

The applicant filed an action before the General Court (GC), relying on three pleas in law: (i) infringement of Article 7(1)(c) EUTMR and Article 94(1) EUTMR, (ii) infringement of Article 7(1)(b) EUTMR and (iii) infringement of Article 94(1) EUTMR. The GC dismissed the action.

SUBSTANCE:

(i) INFRINGEMENT OF ARTICLE 7(1)(c) EUTMR. The relevant public consists of the English-speaking general public and specialist public. The degree of attention is high for goods in Class 12, 35 and 37 (not disputed) (§ 23).

The sign is composed of one verbal element 'cross' and its meaning refers to 'cross vehicles' which are used for driving off-road or on a difficult road with obstacles (§ 24, 38).

The BoA correctly pointed out that, in addition to other meanings, the word 'cross' is the abbreviation of the term 'cross-country'. By referring to 'cross-country' in its decision, the BoA has not disregarded the principle according to which only the verbal element which is the subject of the application is relevant (§ 27).

RELEVANT GOODS IN CLASS 12. The Office can assess the registration of a trade mark providing only general reasoning, such as where all the goods or services of a category or a group are interlinked in a sufficiently direct and specific way that they form a sufficiently homogeneous category (§ 32).

All the goods concerned in Class 12 have the common characteristic of being vehicles suitable for driving off-road or on difficult roads. Therefore, it is justified that they are assessed together (§ 45-48).

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(ii) INFRINGEMENT OF ARTICLE 7(1)(b) EUTMR. It has not been claimed nor demonstrated that the sign became distinctive as a consequence of its use. Therefore, the trade mark applied for is descriptive and devoid of distinctive character (§ 59).

Moreover, the word 'cross' used alone does not have the originality or resonance that would require at least some interpretation or set off a cognitive process (§ 62).

Therefore, the trade mark applied for is devoid of distinctive character (§ 63).

(iii) INFRINGEMENT OF ARTICLE 94(1) EUTMR. The BoA did not infringe the obligation under Article 94(1) EUTMR to state reasons and explained in detail the reasons that led to consider the infringement of Article 7(1) EUTMR (§ 75).

The BoA is not bound by the first instance decisions. The legality of the BoA's decisions must be assessed solely on the basis of the EUTM Regulation as interpreted by the EU courts (§ 68-75, 76).

30/01/2020, T 598/18, BROWNIE / BROWNIE, Brownie, EU:T:2020:22

RESULT: Action dismissed

KEYWORDS: Evidence of use, Extent of use, Nature of use, Use not as registered

FACTS:

The applicant sought to register the word mark BROWNIE as an EUTM for goods and services in Classes 18, 25 and 35.

An opposition, based on the series of earlier United Kingdom word marks BROWNIES, BROWNIE, Brownies and Brownie, registered for goods and services in Classes 6, 18, 25, 26 and 41, was filed pursuant to Article 8(1)(a) and (b) CTMR and Article 8(5) CTMR. The Opposition Division (OD) partially upheld the opposition considering that the opponent had submitted sufficient proof of genuine use for the goods and services.

The applicant filed an appeal. The Board of Appeal (BoA) dismissed the appeal.

The applicant filed an action with the General Court (GC), relying on a single plea in law: infringement of Article 8(1) CTMR, although the GC considered that the applicant had raised a single plea in law alleging, in essence, infringement of Article 42(2) and (3) CTMR. The GC dismissed the action.

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SUBSTANCE:

The figurative elements in the earlier mark are limited to the presentation of the word 'brownies' in a yellow stylised font, the dot on the letter 'i' in the form of a flower and, sometimes, an uneven border (§ 66). The word 'brownies' remains the distinctive element in the sign thus stylised and, consequently, its use in that form is to be considered use of the earlier mark (§ 68).

The fact that a figurative mark, while having a certain distinctive character, may also be used to decorate the product bearing it, does not affect its ability to fulfil the essential function of a mark. That is especially true in the clothing sector, where it is not unusual for products to bear a stylised form of a mark (§ 69).

The applicant claims that an invoice addressed to a member association of the opponent cannot be considered to be outward public use (§ 78). The recipient of the invoice is an independent charity with its own statutes and board of trustees (§ 79). The fact that two legally independent charities collaborate in a network does not mean that they are the same entity (§ 80).

The products bearing the earlier mark are intended primarily for a specific niche audience, namely some 200 000 girls aged 7 to 10, who are members of Girlguiding UK. Therefore, the turnover must be regarded as relatively high for the sector concerned and the BoA had rightly found that the earlier mark had been genuinely used (§ 90).

30/01/2020, T 559/19, Device of a white deciduous tree (fig.) / Device of a fir tree silhouette on a base (fig.), EU:T:2020:19

RESULT: Action dismissed

KEYWORDS: Conceptual dissimilarity, Dissimilarity of signs, Visual dissimilarity

FACTS:

The applicant sought to register the figurative sign for goods in Classes 3 and 5. An opposition based on the earlier EU figurative mark, as well as an international registration designating the European Union for air-fresheners and air freshening preparations in Class 5 and the international registration designating the European Union for cosmetics, disinfectants in Class 3 and for products for improving the air, disinfectants in Class 5, was filed pursuant to Article 8(1)(b) EUTMR.

The Opposition Division rejected the opposition.

The Board of Appeal (BoA) dismissed the appeal, finding that there was no likelihood of confusion (LOC) since the figurative elements of the signs were associated with completely different types of tree and they presented no visual, phonetic or conceptual similarities. It further found that, since the signs were different, the conditions for upholding the opposition on the basis of Article 8(5) EUTMR had not been satisfied.

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The opponent filed an action before the General Court (GC), claiming an infringement of Article 8(1)(b) EUTMR and Article 8(5) EUTMR. The GC dismissed the action.



SUBSTANCE:

(i) INFRINGEMENT OF ARTICLE 8(1)(b) EUTMR. The relevant public consists of the average consumer in the territory of the European Union (not disputed) (§ 19).

Even if the consumer does not memorise the details of the signs, the mere fact that both signs represent trees is not sufficient to find that they are visually similar due to the differences between them, relating — with regard to the mark applied for — to the broad lines depicting a tree with many deciduous leaves and broad roots in a blue circle and — with regard to the earlier mark — to the representation of the silhouette of a black fir tree on a rectangular base and, in respect of the international registration, accompanied by the word element ‘arbre magique’ (§ 30). There is no visual similarity between the signs (§ 31).

A phonetic comparison of the signs is irrelevant in the examination of the similarity of a purely figurative mark with another mark (§ 32-36).

Conceptually, the signs do not refer to the same concept. The signs are made up of figurative elements – and also of a word element, in the case of the international registration – that convey clear differences that the relevant public will easily perceive in their semantic content (§ 37-38). The mere fact that there is a generic word ‘tree’, which serves to describe the semantic content of the signs,

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Earlier trade mark



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is not such as to establish conceptual similarity. The conflicting marks evoke the concept of 'tree' only in an indirect manner. Thus, the signs will not be perceived as representing an unidentifiable tree but rather as evoking: (i) the silhouette of a fir tree, or an 'arbre magique', in the case of the international registration, and (ii) a deciduous tree, or the symbol of 'the tree of life' (§ 39). Consequently, the signs are not similar (§ 40). There is no LOC (§ 45).

(ii) INFRINGEMENT OF ARTICLE 8(5) EUTMR. As there is no similarity between the signs, Article 8(5) EUTMR does not apply to the case (§ 52).

06/02/2020, T 135/19, LaTV3D / TV3, EU:T:2020:36

RESULT: Action partially upheld (BoA decision partially annulled)

KEYWORDS: Dissimilarity of the goods and services, Likelihood of confusion, Similarity of the signs

FACTS:

The EUTM applicant sought to register the word mark LaTV3D for services in Classes 38 and 41.

An opposition, based on the earlier Spanish word mark TV3 covering, inter alia, services in Classes 38 and 41, was filed pursuant to Article 8(1)(b) EUTMR. The Opposition Division (OD) rejected the opposition.

The opponent filed an appeal. The BoA dismissed

the appeal: the level of attention of the relevant Spanish public (general public and professional public) varied from average to high; the contested translation and interpretation services in Class 41 were dissimilar from the opponent's services in Class 41; there was no likelihood of confusion (LOC) due to the low degree of similarity of the signs and the inherently low distinctiveness of the earlier mark.

The opponent filed an action before the General Court (GC), relying on a single plea in law: infringement of Article 8(1)(b) EUTMR. The GC partially upheld the action and partially annulled the BoA decision.

SUBSTANCE:

INFRINGEMENT OF ARTICLE 8(1)(b) EUTMR. When the BoA confirms some aspects of the OD's decision, and given the functional continuity between the OD and the BoA, that decision, together with the statement of reasons pertaining to those aspects, forms part of the context in which the BoA decision was adopted, a context which is known to the parties and enables the Court to fully review whether the BoA's assessment was well founded (§ 19).

Comparison of the services

The BoA's finding about the difference between the contested translation and interpretation services in Class 41 and the opponent's services in Class

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41 is confirmed (§ 26). Since the ways in which the services are provided may vary over time and according to the wishes of the proprietors of the marks, they cannot be taken into account to analyse the existence of a LOC (§ 24).

Comparison of the signs

The degree of visual and phonetic similarity of the signs is average, and not low as the BoA found (§ 49, 55). The contested sign fully contains the earlier mark (§ 40) and its different elements are not capable of significantly reducing the visual and phonetic similarity of the signs (§ 41, 46, 49).

The degree of conceptual similarity of the signs is average, and not low as the BoA found (§ 53). The signs have the common elements 'tv' and '3' in the same order, and the relevant public may attribute the same conceptual meaning to the same combination of elements (§ 51 53).

Overall assessment of LOC

The BoA was right in finding no LOC between the contested translation and interpretation services in Class 41 and the opponent's services in Class 41 as these services are dissimilar (§ 58).

The BoA was wrong to find no LOC with the other services in Classes 38 and 41 (§ 70 71): the signs are visually, phonetically and conceptually similar

to an average degree (§ 67); the other services, with the exception of the contested education services and the opponent's on-line electronic publications of books and newspapers services, are identical (§ 68); the level of attention of the relevant public is average (§ 69).

05/02/2020, T 573/18, FORM EINES SCHNÜRSENKELS (3D), EU: T:2020:32

RESULT: Action dismissed

KEYWORDS: Distinctive element, Three dimensional mark

FACTS:

The applicant sought to register three-dimensional signs as an EUTM for goods and services in Class 26, namely shoe laces, shoe ornaments made of plastic, laces for footwear, accessories for apparel, sewing articles and decorative textile articles, shoe eyelets, shoe buckles, shoe hooks, shoe fasteners.

The Office refused the application pursuant to Article 7(1)(b) EUTMR, as it was devoid of distinctive character.

The applicant filed an appeal. The Board of Appeal (BoA) partially upheld the appeal and annulled the first instance decision regarding shoe eyelets and shoe hooks. It dismissed the appeal for the rest of

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the goods and services in Class 26. The mark was considered devoid of distinctive character pursuant to Article 7(1)(b) EUTMR.

The applicant filed an action before the General Court (GC), relying on one single plea in law: infringement of Article 7(1)(b) EUTMR. The GC dismissed the action.

EUTM application



SUBSTANCE:

INFRINGEMENT OF ARTICLE 7(1)(b) EUTMR. The relevant public consists of the general public and specialists in the European Union with an average level of attention (§ 32, 35).

The mark applied for is a three-dimensional mark in the shape of a link or shoe strap, represented in four illustrations from different angles. At one end of the strap is an eyelet into which the button at the other end can be inserted to fasten the strap. The strap is



shown both open and closed. The type of material from which the strap is made cannot be inferred from the illustration in the application (§ 41). The various elements constituting the requested shape, namely the oval convex shape of the strap in the closed position and in the upward-facing position, and the eyelet and button at its ends, do not constitute distinctive characteristics of the shape, but are perceived as purely decorative or functional elements (§ 80).

The function of a shoelace is to bring both sides of the upper of a shoe closer together and to keep them attached. However, the tying of such a lace is not one of its essential characteristics. Therefore, the mark consists of the shape of the product it represents, namely a shoelace or a substitute for a shoelace (§ 45, 47).

Moreover, even if a product whose shape corresponds to a mark were found to be novel, this alone would not make the mark distinctive. The decisive criterion is the ability of that shape to fulfil the function of indicating commercial origin (§ 62, 64).

In addition, while it is possible to take account of the fact that the design of a product has won awards, these awards cannot constitute a factor that, in itself, would lead to the conclusion that the mark has distinctive character (§ 67).

Consequently, the mark is devoid of distinctive character as it is not capable of fulfilling the essential function of indicating commercial origin (§ 81).

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22/01/2020, R 1458/2019-5, Bavaria Weed

EUTM application



Figurative mark, Contrary to public policy or accepted principles of morality, Article 7(1)(f) EUTMR, Decision confirmed, Application rejected.

The term 'weed' means, inter alia, 'Marihuana' and would be associated as such by English-speaking consumers within the EU. Even though the services in Classes 35, 39, 42 and 44 indicated legal use, because the consumption of such a substance was illegal in some Member States, the application had to be refused on the basis of Article 7(1)(f) EUTMR.

The Board confirms that the sign contains an element that is contrary to accepted principles of morality since the English-speaking relevant public, within the EU, will understand the meaning of the term 'weed'. The targeted public is not limited to specialised doctors and pharmacist but also includes average consumers such as patients, who



should be taken into account for the examination under Article 7(1)(f) EUTMR. Moreover, the Board endorses the examiner's opinion that the sign as a whole supports drug use, which even if it is for medical reasons, it is still illegal in some Member States and it should be examined as such.

29/01/2020, R 912/2019-1, Polish Agro

EUTM application



Figurative Mark, Non-Distinctive, Article 7(1)(b) EUTMR, Decision Confirmed, Application rejected

The relevant public would understand the sign as a reference to 'Polish Agriculture' since the term 'agro' was widely used for agriculture, while the term 'Polish' would indicate the respective country. As such, the sign would not indicate the commercial origin of the goods and services and had to be rejected pursuant to Article 7(1)(b) EUTMR.

The Board confirms that the sign is devoid of distinctive character. The goods and services applied for in Classes 1, 5, 31, 35, 39 and 44 relate mainly to agricultural products and respective services, which are addressed to agricultural professionals such

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as gardeners and farmers. The sign is composed of an expression which is widely used in English. Therefore, the assessment of the mark should be made from the point of view of English-speaking consumers. The term 'Agro' would be associated with agriculture while the word 'Polish' is used as an adjective, thus indicating a link to Polish agriculture. As a result, the sign would inform the relevant public of the nature of the goods and services and their geographical origin instead of distinguishing them from other goods and services relating to Polish agriculture. The Board also points out that the figurative elements of the sign would not provide distinctiveness when assessing the sign as a whole.

05/02/2020, R 810/2019-1, \$ Cash App

EUTM application



Figurative mark, Non-distinctive, Article 7(1)(b) EUTMR, Decision Confirmed, IR designating EU rejected

The figurative mark '\$ Cash App' in Class 36 had to be rejected pursuant to Article 7(1)(b), combined with Article 7(1)(c), EUTMR on the premise that the mark was descriptive and would be perceived by



English-speaking consumers as an indication of the quality and intended purpose of the services.

The Board endorses the examiner's opinion that the relevant public would perceive the sign as information that the services applied for are 'electronic transfer of financial instruments for others perfectly feasible through an immediate payment on a mobile device'. Such a sign lacks distinctive character. The mark consists of four elements (a square with rounded corners, the colour green, the '\$' sign and the expression 'Cash App'), each of which lacks distinctiveness. The relevant consumer will perceive it as an indication that the service is about an application that transfers money instead of indicating the commercial origin of the service at issue. Specifically, the Board notes that the '\$' symbol along with the text 'Cash App' clearly indicates the purpose of the service, i.e. the transfer of money electronically through a downloadable app, instead of indicating business origin. The fact that these consumers are, in view of the nature of the service, highly observant, only makes this information more obvious.

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29/01/2020, R 1073/2019-2, *Vinya carles / Carlos I et al.*

Contested sign

CARLOS I.

Earlier trade mark

VINYA CARLES

Word Mark, Conceptual Dissimilarity, Likelihood of Confusion, IR designating EU, Article 8(1)(b) EUTMR, Decision Confirmed, Opposition Rejected

The opposition based on Article 8(1)(b) EUTMR was rejected in its entirety, namely for goods in Class 33, specifically wines, thus allowing the international registration designating the European Union to proceed. While wines were identically contained in both lists of goods, there was no conceptual similarity between the two signs.

The Board confirms the contested decision. The comparison between the two marks and the overall impression given by them, is considered from the perception of the Spanish public. In light of the latter, the Spanish consumer would understand

'Vinya' as vineyard even though it is written in Catalan, while the term 'Carles' is the Catalan equivalent of the male first name 'CARLOS. As far as the earlier mark is concerned, the numeral 'I' following the name Carlos would be associated by Spanish consumers with the historical figure of a King of Spain, i.e. 'Carlos the First'. Even though there are common visual elements between the two marks, there are also significant differences. Conceptually the signs indicate completely different things. On the one hand, 'VINYA CARLES' points to the vineyard belonging to, or associated with, a person named 'CARLES', while the earlier mark refers to a Spanish king. Overall, despite the identity between the goods there is no risk of confusion from the perspective of the Spanish public. The clear conceptual dissimilarity between the two signs also affects the visual and phonetic perception thereof and thereby neutralises the elements that the two signs have in common. Furthermore, the Board notes that the result would have been the same in relation to other earlier rights i.e. 'CARLOS II' and 'CARLOS III' since they follow the same structure as the earlier mark analysed.

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20/01/2020, R 19/2018-3, Tents

Prior design 001892142-0001



Contested design 002073155-0001



Individual character, Article 6(1) CDR, Decision Confirmed, RCD invalidated

The Board confirms that the differences between the conflicting designs will be perceived as minor variations of one and the same design. The prior design destroys the individual character of the contested RCD.

According to Article 6(1)(b) CDR a registered Community design is to be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before the date of filing the application for

registration or, if a priority is claimed, the date of priority. In the present case, the publication of RCD No 1 892 142-0001 in the Official Bulletin on 17 August 2011 constitutes an event of disclosure within the meaning of Article 7(1) CDR. With regard to sun sail pavilions, the designer's freedom is not limited. The informed user of sun sail pavilions is neither the manufacturer nor a seller of such pavilions, but the person who uses them. Without being a designer or a technical expert, the informed user knows the various designs for sun sail pavilions as a result of the product range available on the market, possesses a certain degree of knowledge with regard to the features which they normally include, and, as a result of his or her interest, shows a relatively high degree of attention when using them. The individual character of a design results from a different overall impression from the viewpoint of the informed user with reference to the prior design taking into account the differences which are sufficiently pronounced to produce a different overall impression and discarding the differences which do not affect the overall impression. The informed user is aware that a great variety of designs for such pavilions exist, in terms of the shape and colour of the awning, the construction to support the awning and the way the awning is fixed to that construction. He or she will therefore notice that the conflicting designs not only coincide in the shape of the awning but also in the construction of the supporting frame made from four vertical bars of different heights and four horizontal bars.

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Both designs produce the impression of a single sail supported by a frame that only differs in minor details: the contrast between the colour of the awning and the colour of the poles, which is more pronounced in the contested RCD (white awning/black poles) than in the prior design (awning and poles of more or less the same colour), the way in which the awning is fixed to that frame, namely by means of black spheres and loops in the contested RCD that leave a small gap between awning and the frame as opposed to the tightly fixed awning in the prior design, and the black hemispheres on top of the poles of the contested RCD. However, while the informed user will not overlook these differences, these will be perceived as a minor variation of one and the same design and cannot suffice to produce a different overall impression.

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