

General Court confirms low level of attention of consumers when purchasing food products

In August *Storck KG v Office for Harmonisation in the Internal Market (OHIM)* (Case T-462/09, January 12 2012), the General Court has rejected an appeal against the refusal of August Storck KG's application for the word mark RAGOLIZIA.

Storck filed its application in July 2006 for confectionery products in Class 30 of the Nice Classification. In March 2007 Radiotelevisione Italia SpA (RAI) opposed the application on the basis of an earlier Community trademark registration for FAVOLIZIA, which also covered goods in Class 30. The Opposition Division of OHIM upheld the opposition on the basis of a likelihood of confusion.

In December 2008 Storck appealed against the decision and, in September 2009, the Fourth Board of Appeal of OHIM rejected the appeal, finding that:

- the respective goods were identical; and
- the marks had an average degree of visual similarity and some phonetic differences, but those were insufficient to eliminate similarity.

Storck appealed further to the General Court.

Storck alleged that the marks were visually different and had a low degree of phonetic similarity, because the respective first and third letters were different. It added that, because these letters were at the beginning of the marks, the public would remember them more, and that the first two syllables of the marks, 'rago' and 'favo', would create a dominant impression on the relevant public.

However, the court held that the differences were not sufficient to reduce the visual and phonetic similarity between the marks, because they were of identical length, had four or five syllables (depending on the language in which they were pronounced) and were visually similar, sharing seven out of nine letters which had the same position and were in the same order.

With regard to the likelihood of confusion, the court reiterated the doctrines of global appreciation and imperfect recollection, adding that the level of attention of the average consumer varies depending on the goods or services in question. In this regard, Storck had argued that, at the point of purchase of the goods, the relevant public would have an increased attention level which would preclude it from being confused between the marks.

Unsurprisingly, the court held that, because the goods were everyday consumer goods of relatively low value, the attention of the public could not be higher than it would be in relation to other such goods.

Storck had also suggested that:

- the FAVOLIZIA mark had a low degree of distinctive character because a large number of marks covering the relevant Class 30 goods had the prefix 'favo' or the suffix 'lizia' or 'izia', but the mark RAGOLIZIA had a high degree of distinctiveness by virtue of the first two syllables; and
- because FAVOLIZIA could allude to 'favour' or 'favourite', the mark had a low level of distinctiveness in comparison with Storck's invented mark.

The court held that, if the distinctive character of the earlier mark had to be considered in order to appreciate the likelihood of confusion, it was only one element in the appreciation. Therefore, even if an earlier mark had a low degree of distinctive character, there may still exist a likelihood of confusion, particularly by virtue of the similarity between the marks and the similarity of the goods. It thus rejected the appeal and awarded costs against Storck.

This case confirms that the court will be reluctant to find that consumers will have anything but a low level of attention when buying everyday consumer products, such as foodstuffs. It also confirms that, where marks share the majority of letters, phonetic and visual similarity - and, therefore, a likelihood of confusion - are almost inevitable.

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