SQUIRE SANDERS

RELEVANT PUBLIC WILL NOT UNDERSTAND TECHNICAL ART TERM

In *Hartmann-Lamboy v Office for Harmonisation in the Internal Market* (OHIM) (Case T-305/10, February 7 2012), the General Court has rejected an appeal relating to an opposition to a Community trademark (CTM) application for DYNIQUE on the basis of an earlier CTM registration for DIPTYQUE.

In June 2007 Marlies Hartmann-Lamboy filed a CTM application for the word mark DYNIQUE for cosmetic products in Class 3, training services in Class 41, and healthcare and beauty services in Class 44 of the Nice Classification. In November 2007 Diptyque SAS, a manufacturer of high-end candles, perfumes and related products, opposed the application on the basis of a CTM registration for DIPTYQUE covering goods and services in Classes 3, 4 and 35.

In August 2009 the Opposition Division of OHIM upheld the opposition on the basis of a likelihood of confusion between the marks and, in October 2009, Hartmann-Lamboy appealed against the decision.

In May 2010 the First Board of Appeal partially overturned the opposition decision (only in relation to the similarity between some of the respective services in Classes 35 and 41) and otherwise upheld the opposition decision. Hartmann-Lamboy appealed further to the General Court.

In its preliminary observations, the court observed that:

- the board's finding that the goods and services in Classes 3 and 44 were identical or similar had not been disputed by Hartmann-Lamboy or OHIM;
- Hartmann-Lamboy had not contested the finding that the relevant public was composed of average consumers and professionals throughout the European Union; and
- the sole basis of the appeal in this regard was that the consumer of the goods and services in Classes 3 and 44 would have a particularly high level of attention.

The court then stated that:

- the goods in question were often sold at low prices and in drugstores and supermarkets; and
- the correct consideration was the goods and services covered by the application, rather than the marketing strategy of the applicant.

Turning to the usual considerations of visual, phonetic and conceptual similarity, the court held that the fact that both marks shared the first letter 'D' and suffix 'QUE', and had six letters in common, meant that the differences arising from the letters which the marks did not share - 'P', 'T' and 'N' - were insufficient to affect their visual similarity. It further held that, phonetically, the marks were even more similar, due to the letters 'I' and 'Y', and the syllables 'DI/DY' and 'IQUE' having the same pronunciation.

Conceptually, the court referred to the meaning of the word 'dyptique' (ie, a work of art having two parts); however, without evidence that consumers would grasp that meaning when purchasing the goods in question, any conceptual differences were insufficient to overcome the visual and phonetic similarities. The court thus found that, on a global appreciation, there was a likelihood of confusion between the marks. It rejected the appeal and awarded costs against Hartmann-Lamboy.

As an interesting piece of background, Hartmann-Lamboy appears to operate a hotel in Germany under the name HOTEL DEYNIQUE and to offer cosmetics and cosmetic treatments under the DEYNIQUE mark.

One wonders whether Dyptique would also object to this mark.

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