

The General Court has confirmed a decision of OHIM's fourth board of appeal (BoA), finding a likelihood of confusion between a CTM application for ROCA, covering cleaning products in class 3, in the name of Buzil-Werk Wager (BWW) and an earlier Spanish trade mark registration of ROCA and a CTM designation of an IR for ROCA, both covering goods in class 21, in the name of Roca Sanitoria SA (RS).

In particular, the General Court (GC) has confirmed that there was a likelihood of confusion between the marks on the basis that they were highly similar, and that the goods that they covered were similar. The GC has also confirmed the relevance of complementarity when assessing the similarity between goods. It found a likelihood of confusion between the marks, and the contested application was refused in its entirety.

OHIM's opposition division upheld the opposition insofar as the application covered *perfumed oils* and *deodorant sprays* in class 3, finding that there would be a likelihood of confusion with *perfume* and *cologne sprays* covered by RS's earlier CTM designation. RS appealed the decision to the BoA, which allowed the opposition against BWW's application in its entirety. The assessment was made on the basis that the similarity of the marks and the goods covered by the marks should be viewed from the perspective of the average consumer.

BWW appealed against the BoA's decision to the GC, on the grounds that it was contrary to Art 8(1)(b) CTMR 207/2009.

BWW alleged that the BoA's assessment of similarity was erroneous. This was on the grounds that the Opposition Division and the BoA had considered the opposition on the basis of different earlier rights, being RS' earlier CTM designation and Spanish registration respectively. However, the GC stated that even though the assessment of confusion had been made in respect of different earlier marks, the pertinent elements of both marks that had been considered when assessing a likelihood of confusion were the same. Therefore, this was not an issue.

The GC confirmed that the appeal only extended to the refusal of registration in respect of goods other than *perfumed oils* and *deodorant sprays*, as BWW had not contested the Opposition Division's initial refusal at the BoA, and the GC was limited to considering the extent of matters considered by the BoA.

BWW alleged that OHIM's assessment of the relevant public was erroneous. BWW argued that the assessment should be made from the perspective of a cleaning professional, who would have an elevated level of attention when purchasing such goods. However, the GC disagreed, finding that the cleaning products covered in class 3 were available to the average consumer, and were not limited to cleaning professionals. The average consumer would have a lower level of attention than a cleaning professional.

In terms of assessing similarity, BWW disputed that the products covered by its application in class 3 would not necessarily be used in conjunction with those covered by RS' marks in class 21, such as *brushes* and *sponges*. Additionally, BWW disputed that the products were sold from the same retail outlets, and argued that they differed in their nature and substance.

OHIM argued that the products in question had the identical function of cleaning, and were complementary, as the products in class 3 had to be used in conjunction with the *brushes* and *sponges* covered in class 21. This was reinforced by the fact that the products were distributed through the same channels of trade, and sold at the same points of sale.

BWW challenged the lack of evidence demonstrating that the cleaning products covered by its contested application were used in conjunction with *brushes* and *sponges*, and that they were sold at the same point of sale. The GC dismissed this argument, indicating that, following case law, appeal courts should apply the facts and evidence that are presented to them, but also make their decisions based on common knowledge. The GC deemed that it is usual to believe that groups of cleaning products and apparatus would be found at the same point of sale and that the average person would use these products in conjunction.

The GC dismissed BWW's appeal, finding a likelihood of confusion between the marks, and refusing BWW's application in its entirety.

This case confirms the relevance of the different factors affecting the similarity between goods and services, especially the complementary nature of products. It equally confirms that the assessment of likelihood of confusion should usually be made from the perspective of the average consumer, unless the goods or services in question are only available to, or used by, a specialist consumer or end-user.

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