

The General Court was called to decide on a trade mark conflict in relation to a polar bear with the name Knut who rose to stardom in Berlin Zoo where the bear was kept in captivity from 2006 until his untimely death in 2011. Rejected by his mother at birth, Knut was raised by zoo keepers. After a German tabloid newspaper covered the cub's story in December 2006, Knut became the centre of a mass media phenomenon that broke all records in Germany and around the globe. Knut's birth was largely responsible for a significant increase in revenue for Berlin Zoo in 2007. Attendance figures alone rose by an estimated 30%. It is, therefore, not surprising that Berlin Zoo sought to capitalise on the success story of raising a polar bear cub in captivity and soon protected the bear's name as a trade mark in Germany. It is equally unsurprising that third parties attempted to ride on the coattail of that success.

It is against this background that Knut IP Management applied to register the word mark KNUT – DER EISBÄR as a Community trade mark in April 2007. The application included goods and services in classes 9, 16, 25, 28 and 41 (the application for class 9 was later withdrawn). On publication, Zoologischer Garten Berlin AG ("Berlin Zoo") filed an opposition based on the German trade mark registration for the word mark KNUD as well as three other German trade mark registrations which however claimed a later priority date than Knut IP Management's application. The word mark KNUD was registered for goods in classes 9, 16 and 28. The grounds for the opposition were those laid down in Article 8(1)(b) of the Community trade mark regulation (40/94), now the Community trade mark regulation (207/2009). In April 2009, the Opposition Division of OHIM partially upheld the opposition on the grounds that there was a likelihood of confusion in respect of certain goods and services in classes 16, 28 and 41. It rejected the opposition in as far as Knut IP Management sought registration for goods in class 25. Berlin Zoo appealed.

The First Board of Appeal of OHIM upheld the appeal and allowed Berlin Zoo's opposition in its entirety. As a result, Knut IP Management's Community trade mark was rejected for all goods and services in dispute in classes 16, 25, 28 and 41. Knut IP Management appealed to the General Court.

Before the Court, Knut IP Management raised only one plea alleging infringement of Article 8(1)(b). It argued that the opposition should fail because there was no likelihood of confusion between the conflicting marks. In Knut IP Management's view, the Board of Appeal had incorrectly assessed the similarities between the signs as well as the similarity between the conflicting goods and services. With regards the average distinctiveness of Berlin Zoo's earlier mark, the low similarities between the signs and the dissimilarities between the goods and services, Knut IP Management alleged that consumers in Germany were unlikely to confuse the conflicting marks.

The General Court set out to assess the question of a likelihood of confusion by applying the standard criteria in accordance with respective case law. The Court reviewed at some length the Board of Appeal's assessment of the similarity of the conflicting goods and services. Perhaps unsurprisingly, the Court found that the respective goods in classes 16 and 28 (both classes were included in the conflicting trade marks) were similar. Moreover, the Court also confirmed the Board's decision that the goods "clothing, footwear, headgear" for which registration was sought by Knut IP Management in class 25 were similar to "dollies; games; toys; plush toys" in class 28. The Court had no difficulties in agreeing with the Board's conclusion that certain overlaps between the clothing and toys industries existed and that, as a consequence, consumers could reasonably expect a commercial link between manufacturers and distributors of the goods in question. Equally, the Court agreed with the Board's assessment that "sporting activities" for which registration was sought in class 41 were at least remotely similar to the "toys and games" in class 28.

With respect to the similarity of the conflicting signs KNUD and KNUT DER EISBÄR the General Court upheld the Board of Appeal's assessment that the disputed signs, considered as a whole, had major similarities. In accordance with its case law, the Court found that the fact that the relevant public would remember, in particular, the identity at the beginning of the trade marks in this case, the elements KNUD and KNUT, OHIM could validly conclude that there did not exist, on the part of the relevant public, a sufficient difference between those signs. As a result, the Court agreed with the Board's finding that there was a likelihood of confusion between Berlin Zoo's earlier German trade mark and Knut IP Management's Community trade mark application.

The decision which was published in French and German only is worth reading because of the exemplary assessment of the similarity of goods and services in classes 16, 25, 28 and 41. The case is also a good example to highlight the importance for zoos or similar institutions to protect their intellectual property deriving from animals - be it a 'German' polar bear or 'Scottish' pandas. As such, the trade mark issues evolving around Knut are, sadly for the polar bear's fans, promised to have a longer life than the polar bear itself.

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Contact

Florian Traub

National Partner

T +44 20 7655 1091

E florian.traub@squiresanders.com