World Trademark Review

6 Dec 2021

General Court: it is not necessary for a mark to be used in an extensive geographic area for its use to be deemed genuine

European Union - Hoogenraad & Haak, Advertising + IP Advocaten

- **Rivella International opposed the registration of RIVIVA in Class 32 based on its earlier mark RIVELLA in the same class**
- **The evidence submitted by Rivella did prove that its mark had been used for "lemonades and carbonated soft drinks" during the relevant period**
- **The fact that use had been proved only in connection with a small part of the territory of Germany and France did not preclude its use from being genuine**

In ***Jeronimo Martins Polska SA v European Union Intellectual Property Office*** (EUIPO) (Case T-551/20), the General Court has held that the Board of Appeal of the EUIPO was right in finding that there was a likelihood of confusion between the marks at issue. The General Court rejected Jeronimo Martins Polska SA's pleas with regard to the Board of Appeal's assessment of the proof of use provided by Rivella International AG and the comparison of the goods and signs at issue.

Background

Jeronimo Martins sought to register the word sign RIVIVA in Class 32 for:

> *Fruit juice; vegetable juices [beverages]; fruit-vegetable juice; fruit drinks; vegetable and fruit-and-vegetable beverages; mineral water [beverages]; spring water; carbonated and non-carbonated water; non-alcoholic beverages; syrups for beverages; preparations for making beverages.*

Rivella filed an opposition based on the earlier EU word mark RIVELLA in Class 32 for "mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages", claiming a likelihood of confusion.

The opposition was upheld in its entirety by the Opposition Division of the EUIPO, as Rivella had proved use of its earlier mark in connection with some of the goods covered by that mark, namely "carbonated soft drinks". Therefore, there was a likelihood of confusion with regard to all the goods covered by the mark applied for. The Board of Appeal upheld the Opposition Division's decision and dismissed the appeal.

This led to an appeal before the General Court filed by Jeronimo Martins, invoking two pleas in law. In the context of its first plea, Jeronimo Martins disputed, in essence, the Board of Appeal's finding that genuine use of the earlier mark has been proved in connection with the goods "lemonades and carbonated soft drinks".

By its second plea, Jeronimo Martins claimed that the Board of Appeal had erred in finding that there was a likelihood of confusion between the marks at issue.

General Court decision

The General Court dismissed the first plea. The Board of Appeal had correctly found that, taken together, the evidence submitted by Rivella did prove that the earlier mark had been used in connection with the goods "lemonades and carbonated soft drinks" during the relevant period. The fact that use of the earlier mark has been proved only in connection with a small part of the territory of Germany and France did not preclude the use from being genuine, particularly because that use has been proved not in a sporadic manner, but with regard to almost the whole of the relevant period and to sufficiently significant quantities.

The General Court also rejected the second plea and consequently dismissed the action in its entirety. The court found that the Board of Appeal had erred in the comparison of some of the goods (some compared goods were highly similar rather than identical and *vice versa*) and in finding that the marks at issue had a lower-than-average degree of visual and phonetic similarity, rather than at least an average degree of similarity. However, this did not change the conclusion that there was a likelihood of confusion between the marks at issue.

Comment

It remains to be seen whether this decision will also be contested before the Court of Justice of the European Union, although this would seem to be an uphill battle for Jeronimo Martins.

Mathijs Peijnenburg

Hoogenraad & Haak

Moïra Truijens

Hoogenraad & Haak

TAGS

Enforcement and Litigation, Portfolio Management, Food and Beverage, Europe, European Union