

Current Intelligence

Trade Marks

■ Likelihood of confusion in composite trade marks: a tale of alcoholic deer

Mast Jägermeister Ag v Budapesti Likoripari Kft Buliv and Zwack Unicum Rt, Italian Supreme Court of Cassation, Judgment no 1249, 18 January 2013

The assessment of a composite trade mark's likelihood of confusion must be carried out with reference to the distinctiveness of each and every core element of the sign, and not on the basis of a mere synthetic analysis.

Legal context

According to Articles 12 and 13 of the Italian Industrial Property Code (Legislative Decree No 30 of 10 February 2005), for a mark to be legally protected, it is necessary that it be characterized, among other things, by novelty and distinctiveness. The mark must be such that the consumer can identify the product among others of the same kind present on the market, and that the owner of the later mark does not elicit an unfair advantage from the reputation and distinctiveness of the earlier mark. On a theoretical ground, the assessment of similarity between two composite marks can be conducted either on the basis of the overall impression conveyed by the marks (so-called *Prägetheorie*) or with reference to specific elements. In practice, this choice is likely to produce very different results.

Facts

The judgment arises out of an appeal filed before the Italian Supreme Court of Cassation by Mast Jägermeister AG (Jägermeister) following the dismissal of its previous action against Budapesti Likoripari KFT (Likoripari) and Zwack Unicum RT (Zwack), the latter on the quality of the trade mark's grantee.

Jägermeister sued Likoripari, claiming to be the owner of a composite trade mark portraying a deer's head and asserting that the defendants had registered an international trade mark with similarities to Jägermeister's. Jägermeister also challenged the validity of the later mark's registration on the ground of unfair competition.

The defendants stressed the differences between the two trade marks (colours, figurative elements, wording) and the generally common use of pictures of deer on alcoholic beverages.

The action was dismissed both at first instance and on appeal, on the ground that the depiction of a deer's head

was not sufficient to characterize a trade mark because it constituted only one of many elements that form a brand.

In addition, the courts held that the mark lacked the innovativeness and originality required for being granted legal protection.

Jägermeister challenged the appellate decision before the Supreme Court of Cassation, which ruled on the authentic interpretation of the principle set forth by law and remitted the case to a different section of the Court of Appeal for a new decision.

Analysis

In its judgment, the Court of Cassation recognized that the lower courts had correctly qualified the earlier trade mark as 'strong', given the fact that the figurative element (a deer's head with a crucifix between the antlers) was entirely unrelated to the product (a high alcohol content beverage). The Supreme Court then reversed the two earlier decisions because the lower courts had neglected to apply the principle set by its own jurisprudence according to which, in evaluating composite trade marks, the assessment of the likelihood of confusion is to be carried out with regard to the distinctiveness of each and every graphic, phonetic and/or visual element as individually considered, and not on the basis of a global analysis.

This last doctrine, reaffirmed by the Court of Justice of the European Union (see Case T-586/10 *Aktieselskabet af 21. november 2001 v OHIM and Parfums Givenchy*, 8 December 2011 and Case C-498/07 P *Aceites del Sur-Coosur v Koipe and OHIM* [2009] ECR I-07371), posits that similarity is to be assessed on the basis of the overall impression conveyed by the marks. It follows that, whenever a common element characterizes a composite mark to the extent that another element is subsidiary to the overall impression, similarity will be found to exist. This is because, on average, the public perceives a mark as a whole and does not focus on its details.

Notwithstanding the fact that the overall impression may be dominated by a single element, it is also possible that a sign has a distinctive role for the earlier mark, without necessarily being the dominant element. In this case, consumers may be led to believe that the two products in which the marks are incorporated refer to the same company, or to two companies with links between them. In this case, the likelihood of confusion must be held to be established.

By contrast, the Italian court drew a distinction between marks whose distinctive character is the result of an overall combination of the elements they incorporate and marks possessing more than one distinctive core. In the latter

case, the trade mark is intended to protect both the combination and the individual elements.

Judges have argued that the mark in question, formed by two distinctive core elements autonomously equipped with distinctive attributes (the deer's head and the denomination), in the case of eventual similarity, should have been evaluated with reference to each of the elements. In particular, the court recognized the existence of the likelihood of confusion between the figurative element and the denomination, denying that (as previously stated by the Court of Appeal) a different denomination in the defendant's mark could have been considered the 'decisive and predominant' element which would prevent consumers from being confused.

Instead, the Court of Cassation argued that no form of hierarchy exists among elements, such as figurative elements which possess a distinctive character that is potentially superior to denominative ones. In this case, whenever the source of one of the elements is likely to be misattributed, the likelihood of confusion extends to the entire sign.

Some brief considerations of a more practical nature follow.

Practical significance

In economic parlance, trade mark protection is tailored by the consumer search cost rationale in order to divert competitors from free-riding on their rivals' investments. There can be, however, notable details that could engender an imperfect recollection on the buyer's side, especially when the visual element is logically disconnected from the marketed good. It is certainly the case for an animal coupled with a drink.

The defendants' trade mark portrayed the head of a deer with a three-lettered goblet between its antlers and had a

denominative element. Jägermeister's also contained a deer, but with a crucifix between the antlers, so the denominative elements were different. Both marks, therefore, were characterized by religious iconography with evident reference to an episode narrated in the hagiography of Saint Hubert, the patron saint of hunters. Also, the identity of the goods (alcoholic beverages) contributed to neutralizing the visual differences. For the record, in Italy, another alcoholic drink, Amaro Montania, is also currently being marketed with a mark picturing a deer.

This judgment highlights a discrepancy between the interpretation of national and European law with regard to the assessment of likelihood of confusion in composite trade marks.

Even if this discrepancy were to be mitigated in accordance with the distinction drawn by the court with regard to marks that have a single distinctive core and marks possessing more than one distinctive core, this approach is likely to result in different outcomes when the same circumstance is brought before courts belonging to different jurisdictions. By doing so, it puts a brake on the steady process of harmonization of national laws across Europe. It would therefore be opportune for the authentic interpretation of national courts to be better aligned with European case law and for legal reserves for composite trade marks not to be established beyond the boundaries of legal predictability.

Valerio Cosimo Romano

Ph.D. student at LUISS Guido Carli;

Visiting Researcher at Harvard Law School

Email: valeromano86@yahoo.it

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