

# World Trademark Review Daily

**OHIM decision upheld despite error as to similarity of goods  
European Union - MAQS Law Firm**

**Examination/opposition  
International procedures**

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In *Häfele GmbH & Co KG v Office for Harmonisation in the Internal Market (OHIM)* (Case T-336/09, January 18 2011), the General Court has held that the Second Board of Appeal of OHIM had interpreted the phrase "in particular" too narrowly. Nevertheless, it agreed with the board that there was a likelihood of confusion between two TOPCOM marks for kitchen machines and utensils.

*Häfele GmbH & Co. KG* filed an application for the registration of the word mark TOPCOM as a Community trademark (CTM) for goods in Classes 7, 9 and 11 of the [Nice Classification](#). The goods in Class 9 were "Electric [kitchen machines and utensils], in particular scales".

*Topcom Europe NV* lodged an opposition based on the earlier word mark TOPCOM, registered for various goods in Class 9, including "thermometers".

It was not disputed that the marks were identical. However, the Opposition Division of OHIM rejected the opposition, finding no similarity between "scales" and "thermometers". On appeal, the Second Board of Appeal of OHIM reversed, finding that, although "scales" and "thermometers" are not in competition or interchangeable, they have the same intended purpose and are complementary. Therefore, there was a low degree of similarity between them. The board went on to observe that:

- the category of "electric kitchen machines and utensils" covered by the application was sufficiently wide to include "thermometers" used for measuring the temperature of an oven, meat, cakes or other dishes; and
- the phrase "in particular, scales" indicated that scales are an example of "electric kitchen machines and utensils".

It thus considered that its comments made in the comparison between "scales" and "thermometers" applied *mutatis mutandis* to the general category of "electric kitchen machines and utensils". In those circumstances, the board found that, notwithstanding the low degree of similarity between the goods, the identical nature of the marks at issue meant that there was a likelihood of confusion within the meaning of Article 8(1)(b) of the [Community Trademark Regulation \(207/2009\)](#).

On appeal to the General Court, Häfele submitted that there was no likelihood of confusion, either from the perspective of a skilled cook or from that of the average consumer, as there was no similarity between "scales" and "thermometers".

The court noted that the goods to be compared were not just "scales" and "thermometers". Rather, they were "electric kitchen machines and utensils, in particular scales" on the one hand, and "thermometers" on the other. According to case law, the phrase "in particular", used in a description of goods, is merely indicative of an example. The phrase "in particular" serves to distinguish goods that are of particular interest to the holder of a mark, without excluding any other goods from the list.

Regarding the comparison of the goods in question, the court first considered that "electric kitchen machines and utensils, in particular scales" did not exclude "electric thermometers designed for kitchen use". Cooks regularly use thermometers in the preparation of foods. Thus, the goods "c[ould] be regarded as identical", and did not merely have a low degree of similarity, as found by the Second Board of Appeal.

However, the court agreed with the board that, in essence, the category of "electric kitchen machines and utensils, in particular scales" was wide enough to include "thermometers". The court held that, given the identical nature of the goods and the marks at issue, the Board of Appeal, notwithstanding its error regarding the degree of similarity of the goods, was correct in finding that there was a likelihood of confusion between the marks.

This case demonstrates that the General Court is willing to find that a particular type of good covered by an earlier mark is identical to a wider category of goods in a CTM application.

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