

World Trademark Review Daily

General Court rewards opponent with weak mark
European Union - MAQS Law Firm

Examination/opposition
International procedures

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In *Three-N-Products Private Ltd v Office for Harmonisation in the Internal Market* (OHIM) (Case T-313/10, November 10 2011), the General Court has annulled a decision of the Fourth Board of Appeal of OHIM in which the latter had found that there was no likelihood of confusion between the marks AYUURI NATURAL and AYUR.

In 2007 Sheilesh and Akhil Shah filed an application for the registration of the word mark AYUURI NATURAL as a Community trademark (CTM) for goods in Classes 3 ("soaps; perfumery, essential oils, cosmetics, hair care products; dentrifices; beauty products") and 5 ("Ayurvedic preparations, homeopathic preparations; herbal health preparations; health food supplements; healthcare products") of the [Nice Classification](#).

Three-N-Products Private Ltd lodged an opposition based on its earlier word mark AYUR and the earlier figurative mark reproduced below, which were both registered for identical or highly similar goods.



Throughout the proceedings, it was common ground that the goods covered by the marks were identical or highly similar.

The Opposition Division of OHIM upheld the opposition, finding that there was a likelihood of confusion between the marks. The Shahs appealed, and the Fourth Board of Appeal of OHIM reversed, finding that, while the goods in question were identical or similar, there was no likelihood of confusion between the marks. It reasoned that the earlier word mark AYUR had a weak distinctive character and that there was a low degree of similarity between the marks.

In concluding that the earlier word mark AYUR had a weak distinctive character, the board considered that a large part of the relevant public would understand the term as being derived from 'Ayurveda', a "recognised name for a form of alternative medicine originating in India". The similarity between the marks was based on their connection to the component 'Ayur', which is "descriptive for the goods in question".

With regard to the similarity between the marks, the board reasoned that:

- the visual similarity between the figurative mark and the word marks was average;
- there was a low degree of phonetic similarity between the marks; and
- while, for the part of the public who perceived the earlier marks as a reference to the notion 'Ayurveda', there could be a conceptual similarity, there would be no conceptual similarity for the part of the public perceiving the earlier mark as an invented term devoid of meaning.

Given these observations, the low degree of similarity meant that there was no likelihood of confusion within the meaning of Article 8(1)(b) of the [Community Trademark Regulation](#) (207/2009).

The General Court reversed again. First, the court held that the board should not have concluded that the relevant public was familiar with Indian culture or alternative medicine: the average consumer of the goods at issue would not necessarily be familiar with Indian culture or alternative medicine, and would not necessarily appreciate the meaning of 'Ayur'. Accordingly, the board had erred in finding that there was only a low degree of overall similarity between the marks.

The court acknowledged that a part of the relevant public would readily associate the terms 'Ayurveda' and 'Ayur' with the relevant products and, therefore, the earlier marks had only a weak distinctive character for that part of the relevant public. However, the weak distinctive character of the earlier marks did not prevent a finding that there was a likelihood of confusion, as the distinctive character of the earlier marks was only one factor among others in the assessment of the likelihood of confusion.

The General Court even went as far as to state (at Paragraph 65 of the decision) that:

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“even if the distinctive character of the earlier marks were considered weak for all of the relevant public, the similarities between the goods and signs... would justify the conclusion that there exists a likelihood of confusion.”

This case reinforces the idea that the CTM registration system is quite 'opponent friendly', even where the opponent's mark has a low distinctive character. The fact that the first three instances reached opposite conclusions indicates that the law in this area needs clarification. It will be interesting to see whether this decision is appealed to the Court of Justice of the European Union, not least because the word mark on which the opposition is based has been partially cancelled. However, the opponent appealed this cancellation decision on November 7 2011, and the case is now before the Fourth Board of Appeal (the same as in the present case).

Peter Gustav Olson, MAQS Law Firm, Copenhagen

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