

'Hyal' marks: General Court criticises EUIPO's "contradictory" reasoning

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- **The EUIPO found that there was no likelihood of confusion between HYALOSTEL ONE and the earlier marks HYALONE and HYALISTIL**
- **The opponent argued that the Board of Appeal had relied on a contradictory assessment as to the understanding and perception of 'hyal' by the relevant public**
- **The court agreed that the board had defined the distinctive character of that term in a contradictory manner**

In [*Fidia farmaceutici SpA v European Union Intellectual Property Office*](#) (EUIPO) (Case T-194/21, 21 December 2021), the General Court has annulled a decision of the Fifth Board of Appeal of the EUIPO in which the latter had affirmed that HYALOSTEL ONE was not confusingly similar to, among other marks, HYALONE and HYALISTIL.

Background

Stelis Biopharma Ltd filed an application to register the figurative mark HYALOSTEL ONE as an EU trademark (EUTM) for goods in Class 5. Fidia farmaceutici SpA lodged an opposition based on 16 earlier marks, including HYALONE (and device), the word mark HYALISTIL and the word mark HYALO.

Throughout this dispute it was common ground that the goods are identical or highly similar.

The Opposition Division of the EUIPO found no likelihood of confusion.

Fidia appealed, and the Fifth Board of Appeal of the EUIPO upheld the decision of the Opposition Division, holding firstly that there was no likelihood of confusion between HYALOSTEL ONE and the earlier marks HYALONE and HYALISTIL. The board held that the relevant public included both:

- average consumers, who have a higher-than-average level of attention because pharmaceutical goods affect their health; and
- professionals in the medical and pharmaceutical fields, who have a high level of attention.

Although the relevant territory was the European Union, the analysis focused on the Italian-speaking part of the relevant public. For this part of the public, the word element 'hyal' in the earlier mark did not evoke the concept of hyaluronic acid, according to the Fifth Board of Appeal. However, for the Italian-speaking professionals in the medical and pharmaceutical fields, 'hyal' could evoke hyaluronic acid.

As regards the global assessment of the likelihood of confusion, the board found no likelihood of confusion based on, among other things, the conceptual neutrality for the general public and the low degree of conceptual similarity for the professional public. Besides these factors, the board found an average degree of similarity of the marks and a normal distinctive character of the marks at issue. Particularly due to the higher-than-average level of attention, a likelihood of confusion could be excluded for the target public even if the goods were identical or complementary.

Appeal to the General Court

Fidia appealed further to the General Court, arguing, among other things, that the Board of Appeal's finding that there was no likelihood of confusion relied on a contradictory assessment as to the understanding and perception of the word element 'hyal' by the relevant public. Specifically, Fidria argued that:

- on the one hand, the board had excluded the existence of a likelihood of confusion, taking into account the high level of attention of the relevant public, finding that the term 'hyal' in the earlier mark could allude to hyaluronic acid for the Italian-speaking part of that public and therefore have a weak distinctive character; and
- on the other hand, the board had held earlier in its decision that part of the public would not perceive 'hyal' as evoking the concept of hyaluronic acid and that the inherent distinctiveness of that term was normal.

General Court decision

The General Court agreed that the board's reasoning in relation to the existence of a likelihood of confusion was based on contradictory considerations, and ruled in favour of Fidria.

The court pointed out that the board went to great lengths to show that, for the Italian-speaking part of the relevant public, the term 'hyal' would not evoke any meaning; rather, it would perceive that term as a word of foreign origin given that the letters 'h' and 'y' are used only exceptionally in Italian. It is also well settled that it is not necessary to find that a likelihood of confusion exists for the whole of the relevant public, as long as a risk exists for a non-negligible part of the relevant public. Here, however, the board never quantified that part.

Comment

This case is interesting in that it shows that the role of the General Court in EUTM appeals is to ensure that the Board of Appeal's reasoning is logical and not contradictory.

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