General Court: no likelihood of confusion between abstract ‘fantasy figures’

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- **The EUIPO dismissed Zitro’s opposition to the registration of a figurative mark in Classes 9, 38 and 41 based on an earlier figurative mark for identical or similar goods/services**
- **The court confirmed that the signs represented two fantasy figures stylised in a different way**
- **The mere fact that there is a generic phrase (‘fantasy figure’) which serves to describe the semantic content of the signs was not such as to establish conceptual similarity**

In ***Zitro International Sàrl v European Union Intellectual Property Office*** (EUIPO) (Case T-491/22, 19 April 2023), the Sixth Chamber of the General Court has dismissed the action filed by Zitro International Sàrl seeking annulment of the decision of the Fourth Board of Appeal of the EUIPO of 30 May 2022 (Case R 2005/2021-4).

Background

In April 2018 Czech company e-gaming sro applied for the registration of the EU figurative trademark reproduced below, to cover goods and services in Classes 9, 38 and 41:

In August 2018 Zitro’s predecessor in law opposed the registration for all goods and services applied for, on the basis of the following earlier EU figurative marks:

- No 9 614 868 covering goods and services in Classes 9, 28 and 35:

- No 13 358 775 covering goods and services in Classes 9 and 28:

- No 17 931 235 covering goods and services in Classes 9, 28 and 41:

- No 14 591 424 covering goods and services in Classes 9, 28 and 41:

- No 6 276 448 covering goods and services in Classes 9, 28 and 41:

- No 12 395 431 covering goods and services in Classes 9, 28 and 41:

The ground relied on in support of the opposition was that set out in Article 8(1)(b) of **Regulation 2017/1001**. The opposition was rejected in its entirety by the Opposition Division. Zitro appealed.

The Board of Appeal of the EUIPO dismissed the appeal, comparing the opposed mark with the earlier mark No 9 614 868; it found that they were visually, phonetically and conceptually dissimilar, thus not creating a likelihood of confusion. Additionally, the Board of Appeal stated that the other earlier trademarks contained elements that further differentiated them from the opposed mark.

Decision

Zitro turned to the General Court by way of an appeal, requesting that the court should annul "the decisions of EUIPO" and order the EUIPO and "whoever opposes" this appeal to pay the costs. The court held that Zitro's request must be interpreted as meaning that annulment of the decision of the Board of Appeal was sought, as only such decisions may be contested before the General Court.

With regard to the alleged infringement of Article 8(1)(b) of the regulation, the General Court assessed the visual, phonetic and conceptual similarities between the mark applied for and the earlier trademark No 9 614 868, with particular emphasis on their distinctive and dominant elements.

Comparing the signs from a visual point of view, the court held that they did share certain features and were represented in the same colours (white, grey and black). However, it found that such features were represented differently in the two signs. The court therefore concluded that the overall impression conveyed by the two signs was so different that the relevant public would not establish a link between them, as they were two different fantasy figures stylised in a different way.

Replying to Zitro's allegation that the Board of Appeal had not taken into account certain arguments which had been directed against the decision of the Opposition Division, the court stressed that the Board of Appeal cannot be required to provide an exhaustive account that follows all the lines of reasoning of the parties; its reasoning may be implicit, on condition that it enables the parties to know the reasons of its decision and provides the competent court with sufficient material to exercise its power of review.

Turning to the phonetic comparison of the signs, the court confirmed established case law whereby, when it comes to purely figurative marks, the phonetic comparison is relevant only when the semantic content of such marks can be immediately associated with a specific, concrete word. In the case at hand, though, the court found that no specific word could be attributed exactly to the signs at issue, which consisted of abstract fantasy figures. The two signs contained only the letters 'b' and 's', which would be pronounced differently by the part of the relevant public that would pronounce them. The court thus upheld the findings of the Board of Appeal in this respect.

Concerning the conceptual comparison of the signs, the court confirmed in essence the findings of the Board of Appeal. It stated that the signs did not convey any particular meaning, given that they represented different abstract fantasy figures. The fact that the Board of Appeal used the generic phrase 'fantasy figure', which served to describe the semantic content of the signs, was not such as to establish a conceptual similarity.

The General Court further agreed with the Board of Appeal that the rest of the earlier marks comprised elements that further differentiated them from the opposed mark, and did not proceed to make a detailed assessment. It therefore confirmed the decision of the Board of Appeal in its entirety, concluding that there was no likelihood of confusion on the part of the relevant public.

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