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31 Jul 2019

General Court conrms lik elihood of confusion between H'UGO'S and HUGO'S BURGER BAR

European Union - Dr Helen G Papaconstantinou and Partners Law Firm

- **Owner of word mark H'UGO'S in Classes 29, 30 and 43 opposed registration of gur ative mark HUGO'S BURGER BAR in Classes 29 and 30**
- **EUIPO found that there was likelihood of confusion on relevant public's part**
- **General Court agreed, nding, among other things, that 'Hugo 's' constituted dominant and distinctive element of opposed mark**

In opposition proceedings involving Maltese company Hugo's Hotel Ltd (the applicant), the European Union Intellectual Property Office (EUIPO) and German company H'ugo's GmbH (Case T-397/18, 9 July 2019), the First Chamber of the General Court has refused the registration of the figurative sign HUGO'S BURGER BAR.

Background

In September 2015 Hugo's Hotel Ltd filed an application with the EUIPO for an EU figurative mark covering goods in Classes 29 and 30:

In March 2016 an opposition was filed by an individual, Ugo Crocamo, predecessor in title of H'ugo's GmbH, on the basis of the earlier EU word mark H'UGO'S, covering, among others, goods and services in Classes 29, 30, and 43. The opposition was upheld by the Opposition Division, which found that there was a likelihood of confusion between the two marks on the part of the English-speaking public.

The applicant filed a notice of appeal before the EUIPO in 2017. The Fourth Board of Appeal of the EUIPO concluded that there was a likelihood of confusion on the part of the relevant public in view of:

- the identity of the goods covered by the marks in Class 29 and the similarity of the goods in Class 30;
- the average visual similarity and high phonetic similarity of the marks; and
- the normal distinctiveness of the earlier mark and the average level of attention of consumers.

The applicant brought the case before the General Court, alleging that the Board of Appeal had erred in its findings concerning the level of attention of the public, the comparison of the goods, the analysis of the signs and their visual and phonetic comparison, as well as in its assessment of the likelihood of confusion.

Decision

Upon considering the relevant public and its level of attention, the General Court refused the applicant's argument that, in the food and catering sectors, consumers display a higher level of attention when choosing between brands. The court stated that the relevant consumer was the average consumer, and that the level of attention of the relevant public was also average.

Turning to the comparison of goods, the General Court held that the term 'meat' is broad enough to designate not only raw meat, but also processed meat such as hamburgers. It therefore concluded that the "meat burgers", "meat products in the form of burgers" and "hotdog sausages" (among others) covered by the opposed trademark were identical to the broad category of 'meat' covered by the earlier mark. Similarly, the court concluded that the "vegetable burgers", "soy burger patties", "fruit and vegetable salads" (among others) covered by the earlier mark were identical to the "preserved, frozen, dried and cooked fruits and vegetables" covered by the earlier mark. Interestingly, the court found that burgers and sausages contained in bread rolls were similar to 'bread', due to the fact that the category 'bread' covered by the earlier mark includes bread rolls, which are indispensable for the production of burgers. As they were complementary, those goods had to be regarded as similar.

With regard to the visual similarity of the marks, the General Court agreed with the Board of Appeal's finding that the word 'Hugo's' constituted the dominant and distinctive element of the opposed trademark, due to its central position in the sign, the size of its script and the banal character of the figurative elements, which were considered to have no particular meaning or feature. On the other hand, the court held that the apostrophe between the 'H' and 'U' in the earlier mark was a negligible element, so that, contrary to the applicant's allegation, there was an average degree of visual similarity between the marks. Moreover, according to the court, the fact that the word 'Hugo's' is a first name which does not correspond to any concept gives it distinctive character.

The court also underlined that, according to settled case law, when it comes to composite marks the average consumer tends to refer to them by name rather than by describing their figurative element. The General Court then stressed that the phonetic similarity between the marks was even more evident, taking into account that, in accordance with settled case law, when signs that include word elements are compared phonetically, only those elements should be taken into consideration, putting aside any figurative elements. Consequently, when comparing the earlier sign H'UGO'S with the word element 'Hugo's burger bar', the court concluded that there was a high degree of phonetic similarity, as the Board of Appeals had found.

Turning to the global assessment of the likelihood of confusion, the General Court dismissed the applicant's argument that, in the food and catering sectors, the visual similarity is more important than the phonetic similarity. The court agreed with the Board of Appeal that the average degree of visual similarity between the marks, combined with the other findings of the case, was sufficient to cause a likelihood of confusion.

The court also upheld the Board of Appeal's finding that the average distinctive character of the earlier mark did not mean that a likelihood of confusion did not exist. The court also opined that the applicant had not demonstrated its assertion that, in the food and catering sectors, it was not common to create sub-brands by combining a main brand and other sub-brands, thus making it unlikely that the combination of 'Hugo's' with other elements would create a link between those two signs. Finally, in response to the applicant's argument that the owner of the earlier mark should not be able to prevent anyone with the same first name from using that name, the General Court replied that, if a trademark is registered, it is protected by virtue of **Regulation 2017/1001** (and, in particular, Article 8(1)(b) thereof), irrespective of whether one of its components is a first name.

In the light of all the above, the General Court dismissed the action and upheld the decision of the Board of Appeal.

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TAGS

Portfolio Management, **Enforcement and Litigation**, **Food and Beverage**, **European Union**, **Europe**