

**European Union** - Dr. Helen Papaconstantinou, John Filias and Associates

In *Laboratoire Garnier et Cie v Office for Harmonisation in the Internal Market* (OHIM) (Case T-559/10), the General Court has held that the use of common graphical methods was not sufficient to divert the attention of the relevant public from the descriptive message conveyed by the descriptive words contained in the figurative mark NATURAL BEAUTY.

In April 2009 French company Laboratoire Garnier et Cie filed a Community trademark application for the following figurative mark for “cosmetics, body and beauty care products” in Class 3 of the Nice Classification:



In March 2010 the application was rejected on the grounds that it was descriptive and lacked distinctive character. The OHIM examiner held that:

- the mark, which consisted of two English words, informed immediately the English-speaking consumer that the goods at issue were cosmetics that have a positive effect, namely the capacity to preserve one’s natural beauty; and
- in light of the descriptive character of the mark and the fact that the stylisation was minimal, the mark was incapable of indicating the commercial origin of the goods.

Garnier appealed the decision in May 2010. The First Board of Appeal of OHIM dismissed the appeal on the following grounds:

- The expression 'natural beauty' provided obvious and direct information on the quality of the goods, since it could be understood as describing the fact that the goods help consumers to preserve their natural beauty;
- The minimal stylisation of the mark could not alter the fact that it was descriptive;
- Because the mark conveyed an obvious message and its stylisation was minimal, it would not be perceived by consumers as a distinctive mark for the goods in question; and

- The oral non-distinctiveness of the mark was even more obvious and striking than its visual non-distinctiveness.

Garnier appealed to the General Court, alleging that the mark was not descriptive because it did not consist exclusively of descriptive indications and included a degree of stylisation.

The General Court agreed with the findings of the Board of Appeal that the assessment of the descriptive character should be carried out by reference to the average consumer of mass-consumption goods and that the mark consisted of the English words 'natural' and 'beauty'. Therefore, the relevant public consisted of English-speaking consumers.

The General Court also confirmed that, taking into account the goods covered by the application, the relevant public would consider the expression 'natural beauty' as a meaningful expression describing the fact that the products at issue help consumers to preserve their natural beauty, thus providing obvious and direct information on the quality of the goods. The court stressed that Garnier had not questioned the above findings.

Garnier alleged that the Board of Appeal had erred in finding that the figurative element of the mark was negligible; Garnier argued that the stylisation of the mark distinguished it from common graphical features and, therefore, the mark did not consist exclusively of descriptive indications. However, the General Court agreed with the Board of Appeal that the stylisation of the mark was limited to the addition of common graphical features: the board had found that the use of an ordinary typeface, as well as the fact that the two words were written one over the other and that the letter 'B' of the word 'beauty' was slightly bigger than the other letters, were not capable of diverting the consumer's attention from the clear message conveyed by the descriptive words.

More specifically, the General Court concluded that these graphical elements were limited to the presentation of the two word elements and resulted from the use of common graphical methods. According to the court, the typeface used was banal and the presentation of the two words one over the other could not be considered as unusual. Moreover, the fact that the letter 'B' was larger than the

other letters in the word 'beauty', as well as the position of the word 'natural', which was intended to integrate that word into the element 'beauty', were considered to be barely perceptible.

Consequently, the General Court concluded that the above elements were not capable of creating the impression of a logo and could not confer distinctive character on the mark applied for, since they were unable to divert the attention of the public from the descriptive message resulting from the expression 'natural beauty'. The action was thus dismissed.

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