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ПРАВНА РЕГУЛАТИВА УСЛУГА У НАЦИОНАЛНИМ ЗАКОНОДАВСТВИМА И ПРАВУ ЕВРОПСКЕ УНИЈЕ

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Драган Вујисић



Крагујевац
2023.

ПРАВНИ ФАКУЛТЕТ УНИВЕРЗИТЕТА У КРАГУЈЕВЦУ
Институт за правне и друштвене науке

**ПРАВНА РЕГУЛАТИВА УСЛУГА
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Уредник
ДРАГАН ВУЈИСИЋ

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THE DANGER OF MISCONCEPTION IN THE LATEST PRACTICE OF THE EUROPEAN COURT OF JUSTICE

Summary

The notion of similarity of trademarks and products has as much to do with the likelihood of confusion as a specific requirement for protection. In order to determine the danger of misconception, numerous circumstances should be taken into account, especially the known trademark on the market, the degree of similarity between the trademark and the sign, as well as between the products and services with which they are marked, and the relationship established between the new signs and the trademark.

The authors analyze the decision of the European Court of Justice in case C-766/18, through Article 10 of the preamble of Directive 89/104 and Article 66 of Directive 207/2009 and through the prism of legal theoretical concepts they give their opinions and recommendation.

Key words: *distinctive character, the similarity of signs and products, likelihood of confusion.*

1. Introduction

The large number of goods and services on the market manifested the need for mutual differentiation, how and in what way it would be possible for consumers, that is, users of services to recognize where the products and services come from and on what basis to decide on their purchase or use of services. Consequently, enabling consumers to identify the product regardless of whether it is the goods or services of a particular trader is the main function of a trademark to distinguish it from other identical or similar products of competitors.

The act of trademark protection refers to precisely defined products or services for which the trademark is registered, whereby a specific form of connection is established between the mark and the marked products or services. This means a sign cannot be protected with a trademark that represents a certain artistic or graphic

solution if it does not simultaneously serve to mark certain products or services in circulation. The specialty of a trademark is an inseparable connection between two phenomena: a sign and a product. In fact, that relationship between the specific sign and the specific product is designated in the theory as the principle of specialty. Hence, the application of this principle can result in numerous consequences, the most important of which is certainly the weakening of the distinctive power of the sign of the protected trademark. This change occurs when dissimilar products are marked with the same or similar sign and at the same time refers to a violation of the trademark right both in terms of damage and in terms of using its distinctive power.

The general impression of the marks, which is determined on the basis of the distinctive and dominant elements of the marks, is relevant for determining similarity. The likelihood of confusion is assumed in the case of using an identical sign for identical goods or services. One of the important factors for determining the danger of substitution is the distinctive power of the mark.

Distinctive power is the ability of a certain mark to individualize specific products or services. In this context, marks can be more or less suitable to identify the products marked with them as products originating from a certain company, as well as to distinguish them from the products of other companies. Namely, the likelihood of confusion is all the greater, if the distinctive power of the mark is greater, which means that trademarks that have a greater distinctive power enjoy wider protection than trademarks with a lower distinctive power.

Protection against the risk of substitution is related, namely, to the function of the trademark to identify products according to their origin and according to their individuality.

Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered of its identity with, or similarity to, the earlier trademark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trademark. The likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 207/2009, must be understood as being the risk that the public might believe that the goods or services covered by the earlier trademark and those covered by the trade mark applied for all originate from members of the association which is the proprietor of the earlier trade mark or, where appropriate, from undertakings economically linked to those members or to that association.

Although, as a result, in the event of opposition by the proprietor of a collective mark, the essential function of that type of mark, as set out in Article 66(1) of Regulation No 207/2009, must be taken into account in order to understand what is meant by likelihood of confusion, within the meaning of Article 8(1)(b) of that regulation, the fact remains that the case-law establishing the criteria with regard to which the existence of such a likelihood must be assessed in practice is

applicable to cases concerning an earlier collective mark. None of the characteristics of EU collective marks justifies derogation, in the event of opposition based on such a mark, from the assessment criteria of the likelihood of confusion which emerge from that case-law.

2. Collective trademark

A collective trademark¹ belongs to a larger number of persons. In other words, although, as a rule, a trademark is a trademark of a natural or legal person, there is still a possibility of common interest for several entities to register a sign for trademark protection and thereby acquire the right to a sign as a collective subjective right, i.e. to ride as subjects of a collective trademark.

Hence, the legal basis for this is Article 7 bis of the Paris Convention (hereinafter PC), which the collective trademark right provides as one of the minimum rights. When it comes to the content of the powers of the collective trademark, the fact that it is a collective subjective right that determines the structure of its content should also be taken into account.²

The essence is reflected in the fact that the content of the collective trademark is identical to the content of the individual trademark, that is, the subjects are authorized to use the sign to mark goods or services in circulation and at the same time prohibit their use by third parties.³ The collective trademark only operationalizes the common interests of several persons in the trade, through the use of the same trademark. This means that the subjects of the collective trademark have the right to use, that is, they can use the sign for which they have acquired the right only in accordance with a general act or agreement on that brand. Namely, the exercise of the user right must not be contrary to the general act or agreement for a collective trademark.

Otherwise, it may be a basis for the termination of the validity of the trademark. Hence, the very fact that the collective trademark cannot be disposed of either on the basis of an assignment agreement or on the basis of a license agreement speaks of the fact that it is a subjective right with narrower content in relation to individual trademarks. This means that the subjects themselves are mutually limited in terms of the exercise of the right, that is, the right of one of them

¹ A special type of brand, it can also be called a collective brand, collective trademark, marquee collective, collective sign, etc.: Polenak-Aqimovska, M., Dabović-Anastasovska, J., Buchkovski, V., Pepeljugoski, V., Varga, Lj, *Industrial property right (practicum)*, Skopje, 2005, pp. 314-315.

² The very definition of the trademark clearly indicates the meaning of the content of the rights. Hence, in view of the content of the trademark as a subjective right from the intellectual property, the most important issue is the content of the rights in relation to the subjects of the trademark.

³ Sutova, M, *Legal protection of well-known trademarks in comparative law*, Skopje, 2016, p. 74.

is the same as the right of the other. That is why the legal system is being built, and its rules are being formulated, all with the aim of providing an applicable regulation with the help of which the protection of the interests of the participants in the trade will be respected. Hence, we believe that the legislator gives a clear picture regarding the issue of how far the rights of the holders of the collective mark extend, or rather what those rights refer to. Consequently, the holder of the right to the collective mark enjoys all rights except the right of disposal.

3. Distinctive power of trademark

Distinctive power is the ability of a certain trademark to individualize specific products or services.⁴ In this context, marks can be more or less suitable to identify the products marked with them as coming from a certain company, as well as to distinguish them from the products of other companies. It is a dynamic category that must be seen in the temporal and spatial context of the specific market.

One of the important factors for determining the danger of substitution is the distinctive power of the mark. Namely, the danger of substitution is all the greater, if the distinctive power of the mark is greater, which means that trademarks that have a greater distinctive power enjoy wider protection than trademarks with a lower distinctive power. Marks protected by a trademark are divided into: weak, average, well-known and famous based on their distinctive power.⁵

Well-known trademarks possess distinct distinctive power, which can be acquired not only on the basis of registration, but also on the basis of use.⁶ Against the generally accepted approach that the extent of trademark protection is greater, if its distinctive power is greater, the argument is made that in traffic, it is precisely a characteristic and well-known mark that is more difficult to replace with a similar mark, than a mark that is almost unknown. For this reason, some authors believe that the danger of substitution is not a suitable criterion for determining the scope of protection of a well-known and famous trademark and that these trademarks should be protected based on the general clause of the law on the suppression of unfair competition. In addition, they consider that the scope of protection does not depend on the danger of substitution in the sense that it is understood in traffic.⁷ These arguments are not accepted in most of the theory, nor in judicial practice. Protection against the risk of substitution is related, namely, to the function of the trademark to identify products according to their origin and according to their individuality. Only in circumstances where the mark is suitable for identifying the product, the use of a similar mark can cause a threat of substitution in terms of origin, which proves

⁴ Feser, K. H., *Markenrecht*, Auflage 3, München, 2001, pp. 207 - 209.

⁵ Feser, K. H., cited commentary, p. 388, 390, 742; Vlašković, B., he mentioned work, p. 83.

⁶ Marković, S., Popović, D., *Intellectual Property Law*, Belgrade, 2013, p. 169.

⁷ Baumbach, A., Hafermehl, W., *Warenzeichengesetz*, 12. Auflage, München, 1985, p. 867.

precisely the fact that the threat of substitution depends on the distinctive power of the marks.⁸

In the consumer's memory, on the basis of mutual agreement, marks with a higher degree of distinctive power are retained longer. There are certainly cases where the mark is so distinctive and well-known that it cannot be confused with another.⁹

3.1 Similarity of trademark and neutralization of similarities

The similarity of the mark is determined by the meaning aspect, as well as the visual and auditory aspect.¹⁰ For establishing similarities, the general impression mark is the authority, which is established on the basis of distinctive and dominant element marks. In this sense, in the "Gold Hase II" ruling, the Federal Supreme Court of Germany pointed out: "When assessing the similarities of a mark on the basis of orders, general impressions, only those similarities in the marks, which are referred to as origin, are decided."¹¹

The significance, which for the general impression belongs to a certain component part of the mark, depends on its relation to other parts of the mark. In addition, to determine the general impression of a mark, the decisive circumstance is how it affects the average consumer. Since the basic rule is that the average consumer perceives the mark as a whole and does not pay attention to its details,¹² the marks must always be compared with each other as a whole, which does not exclude the possibility of a certain part or parts being decisive for the formation of a general impression. This part or parts of the mark is called the dominant mark. This term refers to those features, which are suitable by themselves, regardless of other parts of the mark, to create an image of it, which remains in the memory of

⁸ Feser, K. H., cited commentary, p. 211.

⁹ Baumbach, A., Hafermehl, W., cited commentary, p. 868.

¹⁰ Baumbach, A., Hafermehl, W., cited commentary, p. 324 - 423. In domestic literature see more about it: Marić, V., *Similarity of Trademarks*, Belgrade, 2009.

¹¹ Judgment of the Federal Supreme Court of Germany, I ZR 57/08 Goldhase II, dated 7/15/2010, item 24, *Gewerblicher Rechtsschutz und Urheberrecht* 1/2011, p. 148. See: Vlašković, K., *Development of legal protection of well-known trademarks in German law and the law of the European Union*, Kragujevac, 2016, Institute of Comparative Law, Belgrade, p. 24.

¹² Vlašković, K., *Protection of well-known trademarks according to directive number 89/104/EEC*, *Annals of Law, Faculty in Belgrade*, no. 1/2013, p. 270.

the average consumer.¹³ Only in such a case, the similarity can be based solely on the dominant part of the particular mark.¹⁴

4. The relationship between the likelihood of misconception and bringing into thought connection in the practice of the European Court of Justice

Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi, found in Nicosia (Cyprus), has protected the mark HALLOUMI as a collective trademark of the European Union for cheese. An EU collective trade mark is a specific type of EU trade mark capable of distinguishing the goods or services of the members of the trade mark association from those of other participants.

On July 9, 2014, M.J. Dairies EOOD applied to the EUIPO to register the figurative trademark. The Foundation for the Protection of Traditional Cheese in Cyprus, as the holder of the trademark right, filed an opposition against the application for EU trademark registration of the figurative sign containing the word element "BBQLOUMI", for which M. J. Dairies EOOD, the Bulgarian company, filed application for registration of, inter alia, cheese, meat extracts, cheese flavored foodstuffs and catering services:



The holder of the collective trademark, in the objection, relies in particular on the likelihood of confusion within the meaning of Article 8, paragraph 1, point (b) of the Trademark Directive 207/2009.¹⁵

¹³ Hacker, F., *Methodenlehre und Gewerblicher Rechtsschutz - dargestellt am Beispiel der markenrechtlichen Verwechslungsgefahr*, Gewerblicher Rechtsschutz und Urheberrecht, no. 7/2004, p. 549, Vlašković, K., *Development of legal ...*, p. 20.

¹⁴ However, an individual part of a particular mark does not always have to be dominant in determining the overall impression. In the new conception, it is enough that the part retains its independent marking role. In that case, the condition is that the conflicting marks are similar, even to the smallest extent. Then we are talking about the danger of substitution in a broader sense. For more information on the issue of the independently marking role of a part of the mark, see: Vlašković, B., the above article, p. 655-664.

The European Union Intellectual Property Office (EUIPO) and the General Court rejected the objection and appeal on the grounds that the mark HALLOUMI has a low degree of distinctiveness. These decisions are essentially based on the view that the trademark HALLOUMI corresponds to the mark of a well-known Cypriot cheese and therefore has only a weak distinctive character.¹⁶

The General Court had held that, despite the fact that the goods covered by the marks at issue are in part identical and in part similar to some degree, there cannot be any likelihood of confusion on the part of the relevant public since the existence of a visual, phonetic and conceptual similarity is not, in the case of an earlier descriptive mark with low distinctive character, sufficient to give rise to a presumption of a likelihood of confusion.¹⁷

By the first two grounds of appeal, the Foundation challenges, first and foremost, paragraph 41 of the judgment under appeal and also paragraph 71, but in fact it requests that the Trade Mark Regulation, particularly the rules on likelihood of confusion, be applied to collective marks differently than to individual marks. The Foundation's submissions contain three stages of reasoning. First, the Foundation claims that the General Court requires it to show that its registered collective mark has distinctive character. Second, it maintains that a registered collective mark must necessarily be acknowledged as having increased distinctive character, even if it is descriptive. Third, it asserts that in any event the distinctive character of geographical collective marks under Article 66 (2) of the Trade Mark Regulation, that is, of collective marks with signs or indications which may serve, in trade, to designate the geographical origin of the goods or services, cannot be assessed by reference to general criteria.¹⁸

The Foundation's arguments relate to the likelihood of confusion that it claims exists between its own mark and the mark at issue. Article 8 (1)(b) of the Trade Mark Regulation — which is, in the absence of any provision to the contrary in Articles 67 to 74 of that regulation, applicable to EU collective marks pursuant to Article 66 (3) — provides that, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered if, because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks, there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected.¹⁹ A lesser degree of similarity between these

¹⁵ See: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=224114&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2090677>

¹⁶ Case C-766/18.

¹⁷ *Ibid*

¹⁸ <https://curia.europa.eu/juris/document/document.jsf?text=&docid=219261&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2172327>

¹⁹ For the purposes of applying Article 8(1)(b) of the Trademark Regulation 207/2009, for the likelihood of confusion also presupposes that the trademark for which registration is sought and

goods or services may be offset by a greater degree of similarity between the marks, and vice versa. The interdependence of these factors is expressly mentioned in the eighth recital of trademark regulation, which states that it is indispensable to give an interpretation of the concept of similarity in relation to the likelihood of confusion, the appreciation of which depends, in particular, on the recognition of the trade mark on the market and the degree of similarity between the mark and the sign and between the goods or services identified.

Under Article 66 (1) of the Trade Mark Regulation, on the other hand, a collective mark is intended to distinguish the goods or services of the members of the association which is the proprietor of the mark from those of other undertakings.²⁰ The essential function of such a collective mark is thus to guarantee the collective commercial origin of goods and services.

The Foundation objects in particular to paragraph 41 of the judgment under appeal, which states that it is for the holder of a collective mark to show what level of distinctive character it has, since he intends to rely on it in support of opposition proceedings. To some extent, the Foundation evidently understands the General Court thinks it should to the very existence of the distinctive character of a registered collective mark must be proven.

The finding made by the General Court does in fact appear questionable in so far as neither the decision in *Tulliallan Burlington v EUIPO*, (21) which is directly invoked by the General Court, nor the judgment in *Anheuser-Busch v Budějovický Budvar*, (22) which is referred to indirectly, contains a statement regarding the burden of proof for the distinctive character of a registered collective mark. On the other hand, Article 76 of the Trade Mark Regulation, which is also cited by the General Court, is relevant in so far as, under the second sentence of paragraph 1, in proceedings relating to relative grounds for refusal of registration the Office is restricted to the facts, evidence and arguments provided by the parties and the relief sought. However, like in the two decisions (here we mean the decision of the Appeals Board and the General Court), that provision does not require specific proof of the distinctive character of registered collective marks. It is indisputable that registered trademarks should have a distinctive character, but the court cannot require specific proof of this. In the specific case, the Municipal Court did not dispute the existence of the distinctive character of the trademark, on the contrary, it recognized that the registered collective trademark HALLOUMI has a distinctive power, although it emphasizes that it is minimal. However, it states that the collective trademark has a weak distinctive character on the one hand, and on the other hand suggests that the degree of

the earlier trademark are identical or similar and that the goods or services covered by the application for registration are identical or similar to those for which the previous trademark was registered, and those conditions are cumulative.

²⁰ Article 66 (1), Regulation (EC) No 207/2009.

distinctiveness is minimal and takes a negative decision on the grounds that there is no danger of likelihood of confusion.

Because under Article 66(1) of the Trade Mark Regulation a collective mark is intended to guarantee collective commercial origin, in accordance with Article 4, which is applicable to collective marks by virtue of Article 66(3), only signs that are capable of distinguishing the commercial origin of the goods or services which they designate may constitute EU trade marks. The registration of a collective mark, just like the registration of other marks, therefore presupposes its distinctive character. Rather, just like all other marks, collective marks can have varying degrees of distinctive character. As EUIPO clearly demonstrates with the aid of examples, the degree of distinctive character depends, first, on the sign chosen and, second, on the acquisition of additional distinctive character through use of the sign. The distinctive character of collective marks must therefore be assessed in principle by reference to general rules.

European Court of Justice, did the right thing when he determined that such a premise is incorrect since the fact that the distinctiveness of an earlier mark is weak does not preclude the existence of a likelihood of confusion. Accordingly, it set aside that judgment and referred the case back to the General Court for it to examine whether there is a likelihood of confusion for consumers as regards the origin of the goods covered by the sign 'BBQLOUMI.

The European Court of Justice considers that when it comes to the risk of likelihood of confusion, Article 10 of the preamble of Directive 89/104 must be applied, according to which the elements for determining the risk of confusion likelihood are considered: the distinctiveness of the trademark, the similarity of the marks at issue, and the similarity of the products.²¹

When considering cases concerning opposition proceedings based on earlier individual marks, the Court acted correctly when he noted that the likelihood of confusion must be understood as the risk that the public might believe that the goods or services covered by the earlier mark and those covered by the mark applied for come from the same undertaking or, as the case may be, from economically linked undertakings. The likelihood of confusion must be assessed globally, taking into account all factors relevant to the circumstances of the case. As regards the visual, phonetic or conceptual similarity of the marks at issue, that assessment must be based on the overall impression that they convey to the relevant public. It can also be noted that the degree of distinctiveness of the earlier mark, which determines the extent of the protection conferred by it, is one of the relevant factors in the case in point. Where the distinctiveness of the earlier mark is significant, such a circumstance is likely to increase the likelihood of confusion.

The General Court, considering that the mark HALLOUMI has a weak distinctive character, recognized "a certain degree of distinctive character" of that mark. From the judgment of the European Court of Justice, it is evident that when

²¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31989L0104>

making the decision, the court, in addition to other circumstances, also appreciated this circumstance, which is the basis for the existence of a likelihood of confusion.

Protection of the trademark on the basis Article 10 of the preamble of Directive 89/104, also applies to instances of similarity and trademarks and similarities of products and services. Therefore, it is necessary to interpret the concept of similarity in relation to the danger of misconception (substitution), which is a specific requirement for protection.

5. Conclusion

In the paper, the authors analyze the European Court of Justice Case C-766/18. After appealing the decision of the Basic Court, by the holder of the collective trademark right Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi, the European Court of Justice returned the case for decision-making again.

The primary court made a decision in which it stated that there is no danger of misconception and stated that a weak distinctive character is not sufficient to establish the existence of a likelihood of misconception.

The European Court of Justice did not take into account this reasoning, considering it incomplete. The European Court of Justice considers that when it comes to the risk of confusion, Article 10 of the preamble of Directive 89/104 must be applied, in which the elements for determining the risk of confusion are: distinctiveness, similarity of trademarks, and similarity of products.

In the specific case (C766/18), it is evident that the first-instance court did not take into account all these elements, but only concluded that the trademark has a weak distinctive character without giving an explanation for the same.

For that reason, the European Court of Justice made a decision to annul the judgment of the Court of First Instance and to return the case for re-decision with instructions to take into account all elements (distinctive character, similarities of trademarks and similarities of products) and to determine their influence in the specific case, to determine whether there is a risk of confusion. It can be noted from the judgment that the General Court does not deny the existence of the distinctive character, which is one of the elements for realizing legal protection.

Hence, we think that the European Court of Justice acted correctly when it determined that such a premise (the weak distinctive character is not a basis for the likelihood of confusion) is incorrect because the fact that the distinctiveness of the earlier mark is weak does not exclude the existence of a likelihood of confusion. It also directed that it be examined whether there is a likelihood of confusion among consumers as to the origin of the goods covered by the mark "BBQLOUMI".

Like all types of trademarks, collective marks can also have a different degree of distinctive character (distinctiveness depends on the type of trademark, the degree of frequency, etc.).

As EUIPO makes clear with the help of examples, the degree of a distinctive character depends, first, on the sign chosen and, second, on the acquisition of additional distinctive character through the use of the sign. Hence, the special character of collective marks must be evaluated according to the general rules.

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ОПАСНОСТ ЗАБУНЕ У НАЈНОВИЈОЈ ПРАКСИ ЕВРОПСКОГ СУДА ПРАВДЕ

Резиме

Неопходно је да се појам сличности тумачи у вези са опасношћу замене, која је специфичан услов за заштиту. За утврђивање опасности замене морају се узети у обзир бројне околности, посебно познатост жига на тржишту, степен сличности између жига и ознаке, као и између производа или услуга који су њима обележени и мисаона веза која се успоставља између млађе ознаке и жига.

Аутори анализирају одлуку Европског суда правде у предмету C-766/18, кроз члан 10. преамбуле Директиве 89/104 и члан 66. Директиве 207/2009 и кроз призму правно-теоријских концепата дају своја мишљења и препоруке.

Кључне речи: *дистинктивни карактер, сличности ознаке и производа, опасност забуне.*

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