

these goods would come from the same undertaking or from economically linked undertakings. There could consequently be no risk of a likelihood of confusion under Article 9(2) EUTMR.

In relation to the claim of encroachment of SOFIERO's reputation, the court concluded that the SOFIERO trade marks are well-known in relation to beers. The main factor in the court's assessment was the very large sales volumes proven in Sweden. The court thereafter continued by assessing the possibility of a link to be created between the marks by the consumers. The relevant consumers for this assessment are those consumers who will come into contact with the defendant's mark as only these consumers could have the possibility to make a link between the defendant's mark and the claimant's mark. The court assessed the relevant criteria established by the Court of Justice of the European Union (CJEU). It reiterated that the goods had been found to be dissimilar and that the earlier mark's reputation is strongly connected to beers. The court further considered that there is a low probability that a consumer who encountered Sofiero Kafferosteri's trade mark on a package of coffee would think of the SOFIERO trade mark and beers. The court therefore concluded that Kopparbergs had not successfully shown that a link between the signs is established, or that there is a substantial risk that this will be established, in the mind of relevant consumers. As such, no infringement in the SOFIERO trade marks could be established. The court therefore did not even proceed in assessing the question of unfair advantage or detriment to repute or distinctiveness.

### Practical significance

This case is a good example of how the establishment of the Patent and Market Court in 2016 has moved Sweden closer to EU practice when assessing likelihood of confusion. The structure and reasoning of the judgment is very similar to what could be expected from a decision from the Boards of Appeal of the EUIPO. The conclusion that coffee beans and ground coffee are dissimilar from beverages is further in line with EUIPO's practice as shown on the EUIPO's public online tool. This is encouraging for practitioners as it shows that EUIPO's online tool can have relevance also outside the administrative world. In relation to assessment of a possible link, the court emphasized that the claimant had not successfully proven the existence of such link. This makes one wonder if the outcome could have been different as a result of a more thorough argumentation by the claimant.

**David Leffler**

Synch Advokat AB

Email: david.leffler@synchlaw.se

doi:10.1093/jiplp/jpx206

## ■ Short marks composed of four letters with different last two consonants held to be confusingly similar

*The Ritz Hotel Limited & The Ritz-Carlton Hotel Company, LLC v Sami Yorulmaz*, 27.09.2016, 2016-M-7845 (finalized early 2017). Re-Examination and Evaluation Board of the Turkish Patent and Trade Mark Office

**In this landmark decision, the Re-Examination and Evaluation Board ('Board') of the Turkish Patent and Trade Mark Office ('Office') concluded that, in some cases, one of the elements creating the mark can have a greater effect on average consumers. Thus these elements should be evaluated by themselves rather than as part of the trade mark as a whole. The Board rejected the contested RIDS mark for being confusingly similar to the opponents' well-known RITZ and RITZ-CARLTON marks.**

### Legal context and facts

On 28 December 2015 the applicant (Sami Yorulmaz) filed an application for a RIDS mark, seeking registration for services in class 43. Following the publication of the application on the Official Trade Mark Bulletin of 12 January 2016, the opponents (world-famous hotel management companies, namely The Ritz Hotel Limited & The Ritz-Carlton Hotel Company, L.L.C.), having registrations for RITZ and RITZ-CARLTON marks in many countries around the world, including Turkey – *especially for the services in class 43 among others* -, filed a joint opposition to this application on 12 April 2016 on the grounds of:

- likelihood of confusion between the contested RIDS mark and the opponents' RITZ and RITZ-CARLTON marks as per Article 8/1(b) of the Decree Law no. 556 on the Protection of Trademarks, and
- well-known status of RITZ and RITZ-CARLTON marks as per Article 8/4 of the Decree Law no. 556 on the Protection of Trademarks.

The Trade Marks Department Directorate ('TDD') of the Office, however, rejected this joint opposition on 20 April 2016, finding lack of any similarity that would lead to confusion between the marks. Following this rejection, the opponents filed a joint appeal before the Board of the Office on 14 June 2016 with the request for the re-examination of their joint opposition.

### Analysis

After examining the appeal on 27 September 2016, the Board reversed the decision of the TDD, confirmed the opponents' claims with respect to the likelihood of confusion between RITZ and RIDS marks and decided for the rejection of the RIDS application in its entirety.

In its reasoned decision, the Board justified its conclusion for likelihood of confusion with the following reasoning:

- The average consumer does not usually have the chance to make a direct comparison between the marks but instead they only take the incomplete images of the marks remaining on their minds. Therefore, in some cases, the comparison cannot be made only in terms of the overall impression of the marks because one of the elements creating the mark can have a greater effect on average consumers. In this respect, the distinctiveness and reputation of the marks do affect the likelihood of confusion as well.
- Both the contested RIDS and the main element of the opponents' marks RITZ has four letters and the order of R and I letters is the same in these marks. Besides, the marks ending with D-S and T-Z letters also have a very similar pronunciation.
- In addition to the above, considering the distinctiveness and the well-known status of RITZ and RITZ-CARLTON marks, there is likelihood of confusion between the contested RIDS mark and the opponents' RITZ and RITZ-CARLTON marks.

The applicant was entitled to file a cancellation action against this decision before Ankara Civil IP Courts within two months as of the notification of the decision. However, since the applicant did not file a cancellation action against this decision in due time, the Board's decision became final in the early 2017.

### Practical significance

Over the past few years, the Office has tended to adopt a strict approach regarding short marks and reject the oppositions/appeals on the grounds that the use of one or two different letters removes the likelihood of confusion between the trade marks as they will not be perceived as similar in terms of their overall impression.

This recent landmark decision, on the other hand, illustrates how the Office's evaluations have improved within the past couple of years with regard to the assessment of the likelihood of confusion between short marks having no figurative elements.

Indeed, the Office renounced its strict approach with this decision and accepted that there is likelihood of confusion between these trade marks, even though RITZ-CARLTON is a two-word mark, due to the fact that RITZ has a significant impact on consumers in their perception of the RITZ-CARLTON; furthermore, although the last two letters of RITZ and RIDS marks are visually different, they have a similar pronunciation.

Besides, with this decision the Office also decided that the distinctiveness and well-known status of RITZ and RITZ-CARLTON marks increases the chance of finding a likelihood of confusion between them and marks bearing a similarity to RITZ.

Overall, this decision sets a current precedent for opposition cases where the contested mark is a short mark giving a similar aural impression with the main element of the ground marks although its last letters are visually different from the ground trademarks and emphasizes that the distinctiveness and well-known status of ground marks should be taken into consideration while evaluating the similarity and likelihood of confusion.

**Mutlu Yıldırım Köse and Begüm Soydan**

Gün + Partners

Emails: mutlu.kose@gun.av.tr and

begum.soydan@gun.av.tr

doi:10.1093/jiplp/jpx205

Advance Access Publication 27 November 2017

## Copyright

### ■ Spiegel Online: Do copyright exceptions and fundamental rights make easy bedfellows?

*Spiegel Online*, C-516/17 (in progress)

In *Spiegel Online*—a reference made in the context of proceedings between German politician Volker Beck and news publisher Spiegel Online GmbH—the German Federal Supreme Court (BGH) has referred a number of questions to the Court of Justice of the European Union (CJEU). These relate to the exceptions laid down in Article 5 of Directive 2001/29 (InfoSoc Directive) and their relationship with the Charter of Fundamental Rights of the EU (Charter).

### Legal context

Articles 2 and 3 of InfoSoc Directive respectively harmonize the authors' exclusive rights of reproduction and communication to the public. Article 5 lists 21 exceptions to these rights, describing in an exhaustive manner (Recital 32) the uses of copyright-protected works that may be lawfully carried out without the rightholder's authorization. All exceptions but one (temporary copies) are optional for Member States to implement into their own legal systems.

Two of these exceptions are specifically relevant in *Spiegel Online*: the one for uses of works in connection with the reporting of current events (Article 5(3)(c), second hypothesis) and the one exempting quotations of works that have already been lawfully made available to the public (Article 5(3)(d)).

In interpreting InfoSoc exceptions, the CJEU has often tried to strike a fair balance between the fundamental right to property, which covers intellectual property (IP) pursuant to Article 17(2) of the Charter, and the fundamental rights of users, namely their freedom of expression and