

Court of Appeals: target consumers' level of attention rules out likelihood of confusion Examination/opposition
Registration
Turkey - Gün + Partners National procedures

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- Owner of A-101 marks opposed registration of A10.COM in Classes 9 and 41
- Office and IP Court found that there was a likelihood of confusion
- Court of Appeals reversed due to high level of attention of target consumers

In a recent decision, the Court of Appeals has ruled that the level of attention of the target consumers of a trademark plays a significant role in the assessment of the likelihood of confusion.

Background

On March 9 2012 Dutch company Spil Games applied to register the trademark A10.COM in Classes 9 and 41 before the Turkish Patent and Trademark Office, to use for its online gaming portal targeting teenage boys. The application covered goods such as computers, computer parts and computer games, and services such as providing online computer games. The Turkish owner of the A-101 trademarks, which designate a leading discount market in Turkey, opposed Spil Games' trademark application on the basis of its trademarks:



The opposition was successful.

Spil Games applied to the Court of Intellectual Property, seeking the cancellation of the administrative decisions of the Patent and Trademark Office, which had rejected its appeal and its trademark application. The main argument of Spil Games was that the parties operate different businesses and that the parties' trademarks target different groups of consumers. Therefore, there would be no confusion, as both trademarks are composed of generic letter and number elements.

The first instance court, after hearing the case, decided to refuse the action filed by Spil Games, holding that the application for A10.COM was confusingly similar to the A-101 trademarks and would thus create a likelihood of confusion. Therefore, the court concluded that the mark was not admissible for registration, in line with the opinion submitted to the file by a panel consisting of three experts appointed by the court.

Spil Games brought the matter before the Court of Appeals, requesting the reversal of the first instance decision.

Court of Appeals' decision

The Court of Appeals accepted the appeal and reversed the first instance decision. Despite the contrary findings of the expert report and administrative decisions of the office, the Court of Appeals concluded that there was no likelihood of confusion between the trademarks, as the goods and services in Classes 9 and 41 target cautious and selective consumers.

The Court of Appeals acknowledged the similarity between the trademarks, but considered that the average consumers of the goods and services in Classes 9 and 41 - namely, the audience targeted by computer games - are cautious and careful. Therefore, the similarity of the trademarks would not lead to a likelihood of confusion.

Comment

The examination by the Court of Appeals is limited to whether the lower courts complied with the laws. For this reason, the Court of Appeals rarely overturns decisions of the first instance courts, unless such decisions are clearly erroneous. The decision of the Court of Appeals in this case is thus notable, primarily for this reason.

The Court of Appeals' approach to the average consumers of goods and services in Classes 9 and 41 is

also remarkable. The Court of Appeals has decided in many cases that the high level of attention of healthcare professionals would prevent a likelihood of confusion between trademarks for pharmaceuticals, even where the trademarks were highly similar. However, the consideration of the level of attention of other consumer groups represents a new approach, and this is one of the rare decisions in which the level of attention of consumers was given particular weight regarding the likelihood of confusion.

The Court of Appeals found that the consumers of the relevant goods and services - namely online casual game players - are cautious and careful and, therefore, would not confuse the mark A10.COM and the A-101 trademarks. This decision provides important guidance, since it shows that the similarity of the signs and/or the goods/services is not sufficient to create a likelihood of confusion, and that the perception of the relevant consumers is a determinant factor.

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