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A crunchy case

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The Swiss Federal Administrative Court (BVGer) had to decide the likelihood of confusion between CRUNCH, a trademark of the Société des produits Nestlé SA and TIFFANY CRUNCH N CREAM, a trademark of the International Foodstuffs Co. LLC (B-6222/2019).

Nestlé had failed to cancel the opposed trademark before the Institute for Intellectual Property (IPI) and appealed the case to the BVGer. Although the opposing trademark CRUNCH is integrated in its entirety in the opposed trademark, the Court confirmed with its decision dated 17 June 2020 the ruling of the IPI and held that there is no likelihood of confusion between the two trademarks.

The Court found that, according to the established case law, the integration of the entire opposing trademark in the opposed trademark, usually leads to a likelihood of confusion. However, this does not apply in cases where the incorporated word element has merged with a new trademark, insofar, as it has lost its individuality and only appears as a subordinate element in the new sign.

The opposing mark CRUNCH and the incorporation of the term CRUNCH in the opposed mark TIFFANY CRUNCH N CREAM evokes an allusion in the minds of the target public as to the characteristics of the product, namely that the chocolate is creamy and crunchy. Therefore, the Court held that the opposing trademark only has a reduced distinctive character, regardless of the claimed increased awareness of the opposing trademark.

The Court finally reached the conclusion, that when assessing an overall impression, any differences between the two trademarks are sufficient, in order to reject a likelihood of confusion. Despite the trademark CRUNCH being fully integrated in the opposing trademark, both trademarks correspond only with regard to the element of reduced distinctive character. Furthermore, the attention of the target public focuses on the overall impression of the opposed trademark, on the word “TIFFANY” at the beginning of the sign.

Further, the reduced distinctive character of the trademark CRUNCH cannot be outweighed by the argument of increased awareness, nor the longstanding use and reputation of the sign.

This crunchy case shows that also in Switzerland, the principles of the meantime “stone-age” Life / Thomson Life Judgment are not unconditionally applicable. If a younger trademark fully takes over an older trademark consisting of a descriptive or a weakly distinctive word, you cannot keep for granted that the Court assumes a likelihood of confusion.

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