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Cocktail lovers – watch out! Are alcoholic drinks similar to non-alcoholic ones (and if only for trademark purposes)?

Alena Fischerova (Bomhard IP) · Tuesday, October 6th, 2020

As readers may recall, the General Court rendered a judgment around two years ago in the Asolo v Red Bull case (known under FLÜGEL – T-150/17 of 4 October 2018) ruling on similarity, or rather dissimilarity, between alcoholic and non-alcoholic beverages. While the FLÜGEL case concerned specifically energy drinks vs. alcoholic drinks, the General Court made a reference to previous decisions in which it had held that "*the average [German] consumer is used to and aware of the distinction between alcoholic and non-alcoholic drinks*" (LINDENHOF, T?296/02, para. 54 and MEZZOPANE, T?175/06, para. 80) and concluded that the same applied to energy drinks and alcoholic drinks. As a result, they were held dissimilar.

At the time, the by far prevailing opinion was that alcoholic and non-alcoholic beverages were similar for the purposes of assessing likelihood of confusion. This opinion was also supported by prior GC case-law (see, for example, T?421/10 of 5 October 2011, Rosalia de Castro; T-278/10 of 21 September 2012, WESTERN GOLD; or T?557/14 of 1 March 2016, SPEZOOMIX) – less isolated cases than the contrary opinion (such as LINDENHOF or MEZZOPANE cited above, but also MONTEBELLO RHUM AGRICOLE, where rum and wine, both pertaining to class 33, had been held "*manifestly different*" (T?430/07 of 29 April 2009, para. 37)). The reasoning behind the similarity between alcoholic and non-alcoholic beverages was not that consumers could not tell them apart – they can, indeed, just like they can distinguish belts and pants, and yet the two are similar in law. These admittedly different types of beverages are marketed and consumed together, and not rarely are pre-mixed drinks traded under the same brand as the alcoholic or non-alcoholic beverage on its own. The FLÜGEL judgment therefore came as a surprise. Even more surprisingly, almost immediately after that judgment, the EUIPO adapted its Guidelines to this new judgment, categorically declaring alcoholic and non-alcoholic beverages to be dissimilar. And to top this off, in January 2019, the Grand Board rendered its decision in the Iceberg case (R 1720/2017-G of 21 January 2019), holding that vodka was dissimilar to mineral water and aerated water, non-alcoholic beverages, fruit beverages and fruit juices. While the Iceberg case concerned specifically vodka, it was remitted to the Grand Board because the Boards of Appeal had issued diverging decisions not only concerning the goods at stake but also class 32 and 33 goods in general. Sure enough, the Office Guidelines soon cited also this Grand Board's decision in support of the newly declared dissimilarity between non-alcoholic beverages and alcoholic beverages in general.

One would have thought that this shut the door to any opposition or invalidity action based on likelihood of confusion where the rights in conflict covered non-alcoholic beverages, on the one side, and alcoholic beverages, on the other side, and that only reputation could help to preserve

exclusivity. [On the side – the FLÜGEL case has meanwhile been resolved in favour of Red Bull, who could show the reputation of its (German version of) GIVES YOU WINGS slogan, on which the later FLÜGEL ("wings") mark traded.]

However, the world is full of surprises, and so are the EUIPO Boards of Appeal. Two years have passed since the judgment in the FLÜGEL case and this author thought it was time to see how the EUIPO case law had developed.

The research revealed eight relevant decisions rendered by the Boards of Appeal since the Iceberg case. In **six** of these (75%!), the Boards of Appeal concluded a **low degree of similarity** between non-alcoholic beverages and alcoholic beverages. Interestingly, in one of those cases, the Board of Appeal went even further and found a low degree of similarity between waters and alcoholic beverages (R2524/2018-4 of 20 January 2020). This case is now pending before the General Court (T-195/20) and the author is curious to see which stance the General Court will take this time and whether the pendulum might swing back again to impact on the EUIPO practice.

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