

Kluwer Trademark Blog

L'Oréal is triumphant in the battle of the 'K' trade marks

Julius Stobbs, Sarah Fellows (Stobbs IP) · Wednesday, January 25th, 2023

The General Court of the European Union (“GCEU”), annulling the Board of Appeal (“BOA”) decision, found that L’Oreal’s **K K WATER** mark is *not* confusingly similar to Heinze’s earlier **K** mark.

It was not disputed that the hair treatment goods covered by L’Oreal’s **K K WATER** mark in Class 3 (a sub-brand of its leading house brand, KERASTASE), are identical to the ‘*shampoos*’ and ‘*lotions for cosmetic purposes*’ in the same class covered by the earlier mark.

Comparison of the marks

Where the GCEU diverged from the BOA was its assessment of the similarity of the two marks. The CGEU emphasized that the assessment of the similarity between two marks means more than taking just one component of a composite trademark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks in question *as a whole*. This does not mean that the overall impression conveyed to the relevant public by a composite trademark may not, in certain circumstances, be *dominated* by one or more of its components. It is only if all the other components of the mark are *negligible* that the similarity can be assessed *solely* based on the dominant element.

So, here, the additional element “K WATER” written under the dominant “K” in L’Oreal’s mark could not be ignored, since although the additional element was secondary, it was not negligible (due to its size, font and positioning).

Further, the BOA erred in finding “K WATER” to be weakly distinctive because in their assessment of “K” being a repetition and “WATER” being a main ingredient of the goods, they failed to consider its distinctiveness in combination.

Even in comparing the dominant element of the marks, the BOA failed to identify or assess the difference in the stylization of each “K”. Heinze’s letter “K” is highly stylised, in calligraphic writing, importing dynamism, whereas L’Oreal’s letter “K” is depicted in a straight-lined, angular, bold font and pink-grey colour. These differences are particularly relevant since the shorter a sign, the more easily the public can perceive all its elements. So, in short words, small differences may frequently lead to a different overall impression.

Likelihood of Confusion

A global assessment of the likelihood of confusion implies some interdependence between the factors considered and, in particular, between the similarity of the trademarks and that of the goods or services covered. Accordingly, a low degree of similarity between those goods or services may be offset by a high degree of similarity between the marks, and vice versa. But this cannot be applied mechanically as the assessment of the likelihood of confusion must be a global one.

A likelihood of confusion can be safely excluded when two conflicting signs, albeit containing or consisting of the same single letter or a combination of letters not recognisable as a word, are stylised in a sufficiently different way or contain a sufficiently different figurative element so that their different overall graphical representation eclipses the common verbal element.

Cancellation No C 50 816 (Invalidity), L'Oréal v Arne-Patrik Heinze – 1 December 2022

Consistent with the GCEU's ruling, for the same reasons, the Cancellation Division rejected L'Oréal's application for a declaration of invalidity against Heinze's K mark. It was based on various earlier registrations:

Although the marks resemble Heinze's "K", they are distinguishable in stylisation and by the visible presence of the additional word elements.

Inherent and acquired distinctiveness of single letter marks

Heinze's earlier K mark is inherently distinctive to an average degree, as it conveys no clear concept for the goods in question. But how much of that distinctiveness is attributable to its stylisation? Could the letter K have been registered as a word mark? Or would acquired distinctiveness be required to meet that threshold? As this would have potentially changed the outcome in this case, since the scope of protection is narrowed through its stylisation.

Another angle?

Is it just us or does anyone else think that Heinze's "K" bears a striking resemblance to the K in Kiehl's famous cosmetic brand? Which, as good fortune would have it, is a brand that is also owned by L'Oréal...

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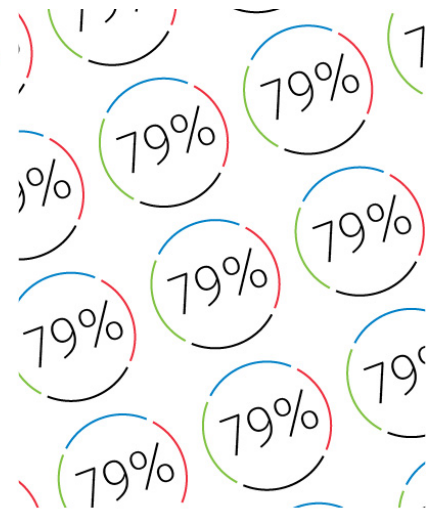
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