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Ausonia (EVAX) loses another battle against 'eva intima' – Mélenchon and LFI condemned for infringement of a street artist's copyright



EVAX vs eva intima

Last 21 June, the General Court of the EU annulled two EUIPO decisions - one of them partially – that were favourable to the Spanish company Ausonia, which had filed an opposition against the registration of two trade marks on the grounds that they were similar to its EVAX trade mark. The two contested marks were held by a Greek company and were composed by the name element “eva intima”. The EUIPO had initially ruled in favour of Ausonia and refused registration of the trade marks in question for most of the designated goods. Now, the General Court has partially annulled these decisions.

Background to the dispute

On 23 September 2019, the Greek company Ioulia and Irene Tseti Pharmaceutical Laboratories, S.A. (the applicant/ the appellant) filed a first EU trade mark application with EUIPO for the figurative sign 'eva intima' ('the first mark applied for') - which you can view [here](#) - for goods in the following classes:

Class 3 ('toiletries; body cleaning preparations; cleaning preparations'),

Class 5 (hygienic preparations and articles; sanitary preparations for medical purposes; feminine hygiene products; absorbent articles for personal hygiene; medicated and sanitising soaps and detergents')

Class 10 ('medical and veterinary apparatus and instruments')

Class 35 ('advertising; marketing and promotional services').

On the same day, the applicant filed a second EU trade mark application with EUIPO for the figurative sign 'eva intima', accompanied by a graphic element regarded as a stylised female belly ('second mark applied for') - which can be viewed [here](#) - designating the same goods.

On 8 January 2020, the Spanish company Arbora & Ausonia, S.L. (the intervener) filed a notice of opposition to the registration of both trade marks applied for in respect of the goods and services in the abovementioned classes.

The opposition was based on the following two earlier trade mark rights:

- On the one hand, the EU word mark ['EVAX' No. 3780947](#), in respect of which genuine use had been demonstrated for the goods in Class 5 corresponding to the following description: 'sanitary towels; panty liners (sanitary); menstruation tampons'.
- Secondly, the Spanish word mark ['EVAX' No M2601121](#) [\[↗\]](#), in respect of which genuine use had been demonstrated for the goods in Class 5 corresponding to the following description: 'hygienic pads; feminine hygiene pads; pantliners (hygienic products); menstruation tampons'.

The ground relied on in support of the opposition was that set out in Article 8(1)(b) of the EUTMR: likelihood of confusion between the two marks applied for and the earlier marks owned by the intervener.

The Opposition Division partially upheld the opposition and rejected the application for registration of the marks applied for in classes 3 and 5.

The applicant appealed the decision before EUIPO, and the Board of Appeal partially upheld the appeal on the ground that there was no likelihood of confusion for the following goods in Class 3 designated by the marks applied for: 'beauty care preparations; fragrancings preparations; perfumery and fragrances; detergents; cloths impregnated with a detergent for cleaning'. By contrast, for the other goods covered by the marks at issue, the Board of Appeal held that there was a likelihood of confusion.

Therefore, [the Board of Appeal refused registration](#) of the marks applied for in respect of the following goods:

Class 3: 'Toiletries; body cleaning preparations; cleaning preparations'.

Class 5: 'Hygienic preparations and articles; sanitary preparations for medical purposes; feminine hygiene products; absorbent articles for personal hygiene; medicated and sanitising soaps and detergents'.

The applicant appealed to the General Court.

Judgment of the General Court

Firstly, the General Court noted that the likelihood of confusion must be assessed globally, according to the relevant public's perception of the signs and goods or services in question and taking into account all factors relevant to the circumstances of the case, in particular the interdependence of the similarity of the signs and that of the goods or services covered.

The comparison of the signs

As regards the first mark, the General Court upheld the Board of Appeal's finding concerning the identification of the dominant elements: the dominant elements of the first mark were the words 'eva' and 'intima'.

Regarding the second mark, the General Court considered the Board of Appeal's finding that the most distinctive elements of that mark were the word elements 'eva' and 'intima' to be incorrect. It considered that the figurative element was twice as large as the word element 'eva' and five times larger than the word element 'intima'.

The General Court argued that the Board of Appeal was incorrect to consider that the figurative element - understood as a stylised depiction of a female belly - was a descriptive element, and therefore could not be dominant. It pointed out that, although it is true that, according to the case-law, descriptive elements are not generally regarded by the public as dominant, the weak distinctive character of an element of a composite does not necessarily mean that it cannot constitute a dominant element since it may, on account of its position or size, be capable of imposing itself on the consumer's perception and remaining in the consumer's memory, as is the case here.

The visual comparison

As regards the first mark applied for, the General Court shares the Board of Appeal's view that there is an average degree of similarity between the mark at issue and the earlier mark. The contested mark 'contains few original elements which could constitute sufficient distinguishing features to preclude any similarity between them and the word elements of the earlier mark' - stated the General Court.

Regarding the second mark at issue, the word elements are visually similar ('Eva' and 'EVAX'), but the General Court noted that it is necessary to determine whether the additional graphic or figurative element specific to the mark applied for - the representation of the female belly - can constitute a sufficient element of differentiation to exclude any visual similarity between the conflicting signs. The General Court found that, although the figurative element was twice as large as the word element 'eva', it could not be concluded that the figurative element can constitute a sufficient element of differentiation to exclude any visual similarity between the word elements of the conflicting signs 'eva' and 'EVAX'.

The General Court affirmed that there was a low degree of visual similarity between the conflicting signs.

On a phonetic level, the General Court agreed with the Board of Appeal in finding that the two marks applied for by the appellant were similar to the sign 'EVAX' at least to an average degree. It argued that the word elements 'Eva' and 'EVAX' shared the first three letters, and that 'the final letter 'x', whether or not pronounced by the consumer, could not be regarded as a particularly striking consonant capable of substantially influencing the phonetic impression. The final 'x' is not sufficient to offset the identity of the common part of the elements 'eva' and 'EVAX'.

Conceptually, the General Court concluded that the word 'Eva' was understood by the public as a female name and therefore conveys semantic content. On the contrary, the name 'EVAX' was understood as a fantasy name and therefore has no semantic content.

The General Court recalled that, according to the case-law, where one of the conflicting marks has a conceptual meaning and the other has no meaning, the marks are conceptually dissimilar.

However, the General Court rejected the appellant's argument that the conceptual difference between the signs could neutralise the similarities of those signs in other respects. It argued that, although in this case, the marks applied for are conceptually different from the earlier signs, they do not have such a clear and specific meaning that they produce a different overall impression as to neutralise the visual and phonetic similarities with the earlier marks.

The likelihood of confusion

As regards the second mark applied for, the General Court stated that it was conceptually different from the earlier signs, to which it was visually similar only to a low degree and phonetically similar to an average degree. It recalled that there was nothing to prevent a finding that there was no likelihood of confusion even in the presence of identical goods. It therefore concluded that the second mark applied for was not similar to the earlier marks 'to such a degree as to give rise to confusion for the purposes of Article 8(1)(b) of the EUTMR', thus annulling the second contested decision in its entirety.

Regarding the first mark applied for, the General Court stated that it was conceptually different, but phonetically and visually similar to an average degree, so that the existence of a likelihood of confusion must be assessed in the light of the similarity of the goods in question.

- Some of the goods covered by the first mark were identical to the goods covered by the earlier marks. In this case, the identity of the goods in question offsets the conceptual differences, so that there is a likelihood of confusion.

The General Court upheld the first decision on this point, preventing registration of the mark applied for in respect of the following goods:

Class 5: 'feminine hygiene products; absorbent articles for personal hygiene; medicated and sanitising soaps and detergents'

- Another part of the goods was similar to a less than average degree. In this case, this below-average similarity cannot compensate for the conceptual difference between the signs, which is also not compensated by a high degree of visual and phonetic similarity. There is no likelihood of confusion.

The General Court annulled the first decision on this point, allowing registration of the mark applied for in respect of the following goods:

Class 3: 'toiletries; body cleaning; cleaning preparations'

Class 5: 'hygienic preparations; sanitary preparations for medical purposes'

To summarise, the General Court partially annulled the first decision, so that the first mark applied for by the appellant could be registered - contrary to the Board of Appeal's decision - but only for certain goods. And it annulled the second decision in its entirety, allowing registration of the second mark applied for in respect of all the goods covered by it.

Mélenchon and LFI condemned on appeal for copyright infringement

The French political party 'La France Insoumise' (LFI) and its leader Jean-Luc Mélenchon have been ordered on appeal to pay 40,000 euros for infringing the copyright of street artist Combo, their lawyer

announced. In particular, they must pay 15,000 for 'moral prejudice', 10,000 'in compensation for his financial prejudice' and 15,000 in legal costs.

The Paris Court of Appeal thus annuls the decision of the Paris Court of Justice, which in 2021 dismissed the street artist's claims.

At the centre of the dispute is 'La Marianne asiatique', a mural depicting Marianne, a French republican symbol, holding a tricolour flag with the slogan 'Liberté, Égalité, Humanité'. The mural was made by Combo in early 2017 on the Boulevard du Temple in Paris, and in 2020 it was used by the French political party LFI in its campaign clips without the artist's permission.

The street artist claimed more than 900,000 euros before the Paris Court of Appeal for 'counterfeiting, infringement of his copyrights and moral prejudice'. Combo complained mainly about the political exploitation of his work and damage to his reputation, according to his lawyer.

Combo's lawyer has commented on the recent decision, stating that 'Combo's victory is historic, as it is the first jurisprudence in France to protect a street art work under copyright law'.

Details

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