

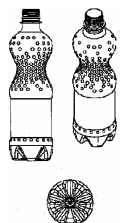


**DECISION
of 26/06/2006
RULING ON OPPOSITION No B 822 918**

Opponent: **The Coca-Cola Company**
One Coca-Cola Plaza
Atlanta, Georgia 30313
United States of America

Representative: **Elzaburu**
Miguel Angel, 21
28010 Madrid
Spain

Trade Mark:



against

Applicant/holder: **REWE-Zentral AG**
Domstr. 20
50668 Köln
Germany

Contested trade mark:



I. FACTS AND PROCEDURE

On 22/09/2003 the applicant filed application No. 3 367 224 to register the three

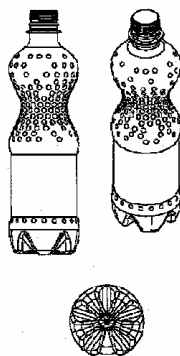


dimensional mark

The opposition is directed against all of the goods and services covered by the application, namely the goods in classes 21, 32 and 33.

The opposition is based on:

- Earlier Community trade mark registration No. 2 541 795 for the three



dimensional mark registered for goods in class 32. The opponent bases its opposition on all of these goods.

The ground of the opposition is the one laid down in Article 8(1)(b) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark ("CTMR") (OJ OHIM 1/95, p. 53).

Both parties filed observations and evidence within the time limits set by the Office.

The opponent argues that the slight differences between the two conflicting bottles do not suffice to preclude a likelihood of association, since they are so minor and inconsequential that they would only be noticed by consumers who pay particular attention, and it is well known that consumer's attention levels tend not to be very high when purchasing everyday consumption goods. Additionally, consumers often do not have the opportunity to compare two marks directly side by side.

In reply, the applicant contests the likelihood of confusion by stating that the form of the bottle itself has no influence on the likelihood of confusion so that the small details such as the bubbles in the bottle of the earlier mark and the six lines around the bottle in the CTM exclude a likelihood of confusion.

A. LIKELIHOOD OF CONFUSION

According to Article 8(1)(b) CTMR, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered:

“If because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trade mark.”

The risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion (see Judgment of the Court of Justice, Case C-39/97, *Canon Kabushiki Kaisha v Metro-Goldwyn Mayer Inc* [1998], OJ OHIM No. 12/98, page 1407 *et seq.*, paragraph 29.)

i) Comparison of the goods and services

When making an assessment of similarity of the goods and services concerned, all relevant factors relating to these goods and services should be taken into account. These factors include, *inter alia*, their nature, their purpose and method of use and whether they are in competition with each other or are complementary (see Judgment of the Court of Justice, Case C-39/97 *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*. [1998] OJ OHIM 12/98, p. 1419, paragraph 23). Further factors include the pertinent distribution channels (in particular the sales outlets), the relevant public, and the usual origin of the goods.

The goods to be compared are the following:

<p><i>Beers; mineral and aerated waters and</i></p>	<p><i>Household or kitchen utensils and containers (not of precious metal nor coated therewith); combs and sponges, articles for cleaning purposes, rubber gloves, cloths for cleaning of textile and non-textile materials, scouring and cleaning pads, extractor hoods; household kitchen utensils, namely pans, pots strainers, soufflé dishes, baking tins; articles made of glass, porcelain, ceramics, earthenware or plastic for household and kitchen purposes, in particular glasses, cups, pots, mugs, plates, dishes, vases, bowls; hand brushes, dustpans, brooms, brushes of all types (included in class 21); scrubbing brushes, sponges, cleaning and household cloths, skins of chamois, feather-dusters, mops, carpet sweepers, steel wool, buckets, gloves for household purposes, scouring pads; hair, nail and tooth brushes in Class 21</i></p> <p><i>Beers; mineral and aerated water and</i></p>
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<i>other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages in Class 32</i>	<i>other non-alcoholic drinks; fruit drinks and fruit juices, vegetable juices; syrups and other preparations for making drinks; whey beverages; instant powdered drinks in Class 32</i> <i>Alcoholic beverages (except beers), in particular wine, sparkling wine, spirits, liqueurs in Class 33.</i>
EARLIER CTM	CTM APPLICATION

Class 21 of the contested application

The applicant's "household or kitchen utensils and containers (not of precious metal nor coated therewith); combs and sponges, articles for cleaning purposes, rubber gloves, cloths for cleaning of textile and non-textile materials, scouring and cleaning pads, extractor hoods; household kitchen utensils, namely pans, pots strainers, soufflé dishes, baking tins; articles made of glass, porcelain, ceramics, earthenware or plastic for household and kitchen purposes, in particular glasses, cups, pots, mugs, plates, dishes, vases, bowls; hand brushes, dustpans, brooms, brushes of all types (included in class 21); scrubbing brushes, sponges, cleaning and household cloths, skins of chamois, feather-dusters, mops, carpet sweepers, steel wool, buckets, gloves for household purposes, scouring pads; hair, nail and tooth brushes" present no point of contact with the "beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages" of the opponent as regard nature and purpose. Besides, they are not in competition with each other and are provided by different undertakings. Although there is a complementarity between the opponent's beverages and some of the applicant's goods, such as cups and glasses, this cannot make them similar, for the relevant public would not assume that these cups and glasses come from the same undertaking as the beverages. In fact, the public knows that these products come from different specialised enterprises. Thus the Office considers them dissimilar.

Class 32 of the contested application

As the specification of the earlier mark consists in the class heading of class 32 the general rule is that it covers all goods included in this class. Therefore, the goods of class 32 covered by the CTM application are identical to the goods of this earlier mark.

Class 33 of the contested application

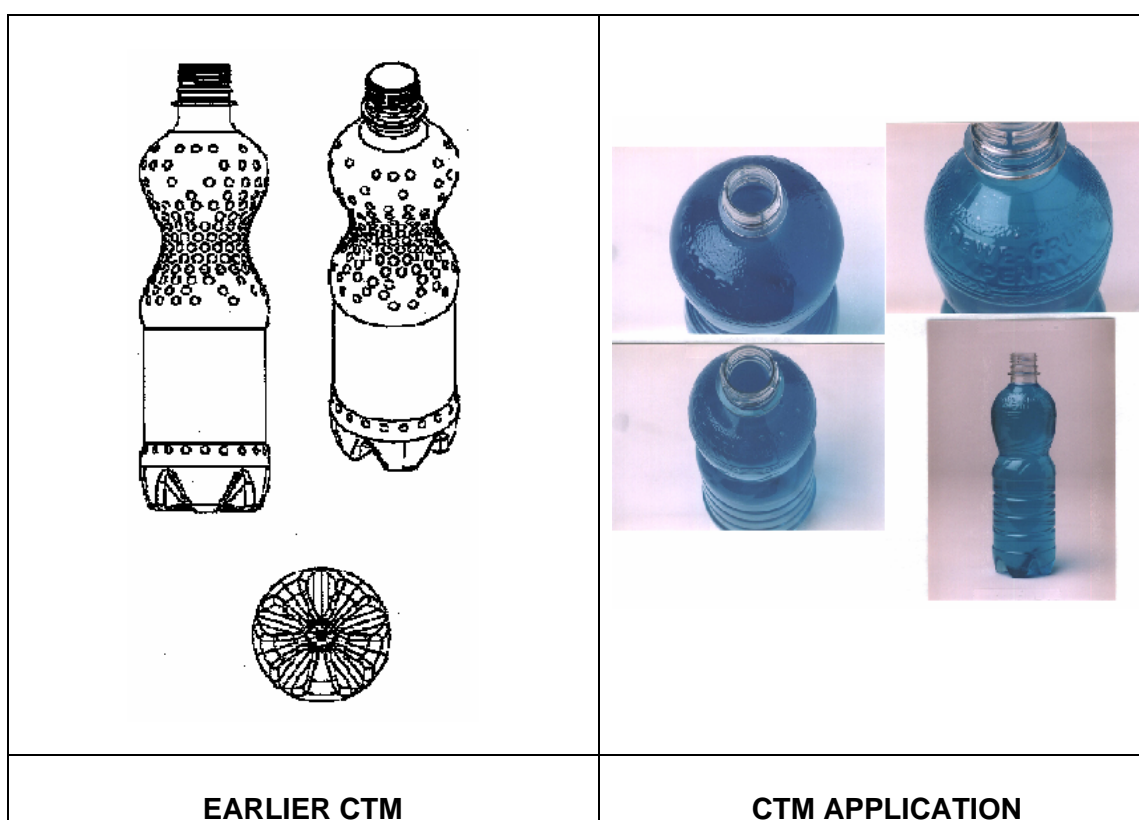
Both the "alcoholic beverages (except beers), in particular wine, sparkling wine, spirits, liqueurs" for which the applicant seeks protection and the "beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages" covered by the earlier mark belong to the wider category of 'beverages'. Such goods, be these alcoholic (wines, spirits, liqueurs, beers) or non-alcoholic (fruit drinks, fruit syrups and preparations for making beverages) beverages, are all served in restaurants and bars, on sale on supermarket or grocery shelves and are aimed at a wide public. Furthermore, alcoholic and non-alcoholic beverages may be mixed and consumed together, for example in the form of a cocktail, and are thus to a degree complementary. Therefore, having found that alcoholic and

non-alcoholic beverages share the same end purpose and the same distribution network, are aimed at the same public and are to a degree complementary, there exists a degree of similarity between these goods (see to this effect also Decision of the Fourth Board of Appeal of 8 July 2004 In Case R 0083/2003-4).

ii) Comparison of the signs

In determining the existence of likelihood of confusion, trade marks have to be compared by making an overall assessment of the visual, phonetic and conceptual similarities between the marks. The comparison must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components (see Judgment of the Court of Justice, Case C-251/95 *Sabèl BV v Puma AG, Rudolf Dassler Sport* [1997] OJ OHIM 1/98, p.91, paragraph 22 et seq.).

The marks to be compared are the following:



The earlier trade mark is protected in the European Union. Therefore, it is the impression that the signs make on the public in the European Union and their meaning and pronunciation in the languages of the European Union which are relevant for their comparison.

When making a visual comparison of the signs it must be noted that the fact that both trade marks represent a bottle does not make them visually similar. It is the specific manner in which the bottles are shaped that may serve in trade to distinguish the goods of one undertaking from those of other undertakings. Consequently, it has to be considered whether the original characteristics that make the earlier mark stand out as a trade mark are confusingly repeated in the contested application. Taking into account that the bottle's division in an upper spherical upper part and a cylindrical lower part is quite common, its distinctiveness must be looked for in the specific way these parts are represented. This means that in the present case the consumers being familiar with

bottles consisting of an upper spherical and lower cylindrical shape, will only recognise the bottle of the earlier mark as coming from a certain undertaking by the particular form and design of its waist line, consisting of a specific shape reminiscent of a woman's waist in combination with a specific bubbled surface relief. These particularities are not to be found in the contested application, which further differs from the earlier mark by the horizontal lines present on the lower part of the bottle and the inscribed words on the upper part of bottle. Therefore, taking into account the aforementioned differences and the narrow scope of protection of the earlier mark, it is considered that overall the trade marks are visually dissimilar.

Phonetically, the marks have nothing in common either, since the competing signs are not likely to be pronounced in any way by members of the public.

Both the CTM application and the earlier trade mark are conceptually similar to the extent that they both depict a bottle. However, this aspect will have very little influence on the overall conceptual perception of the marks in question, because the representation of a bottle for goods in classes 32, 33 and 21 will not be perceived as an indicator of origin but rather as reference to the container of the goods in question (classes 32 and 33) or some of the goods themselves (class 21) .

Taking all the above into account, it is concluded that the trade marks are not similar.

iii) Conclusion

The necessary global assessment of the likelihood of confusion implies some interdependence between the relevant factors, and in particular a similarity between the trade marks and between the goods or services. Accordingly, a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa (see *Canon*, paragraph 28; *Lloyd*, paragraph 19).

Furthermore, the more distinctive the earlier mark the greater will be the likelihood of confusion. It follows therefore that a mark with a less distinctive character, such as one which includes elements descriptive of the goods or services for which it has been registered or one which is not characterized by unusual or original features, enjoys a lesser degree of protection than a mark which is highly distinctive either *per se* or because of the recognition it possesses on the market (see, to that effect, *Lloyd*, paragraphs 20, 21; *Sabel*, paragraph 24, and *Canon*, paragraphs 18, 19).

In the instant case, the opponent has not submitted any evidence showing that the earlier marks enjoy any reputation in the relevant territory. Consequently, it cannot be assumed that the distinctiveness of the earlier marks has been in any way enhanced by long and intensive use.

As regards the inherent distinctiveness of the marks, the distinctive capacity of the signs in conflict is not based on the representation of a bottle, but on the specific manner in which the bottle is represented. As mentioned above, the representation of a bottle for goods in classes 32, 33 and 21 is very weak and may only then function as a trade mark if it contains features which enable the consumer to distinguish the goods of one undertaking from those of other undertakings.

Consequently, the average consumer will tend to notice any further indication which may enable him to associate a specific bottle with a specific undertaking. Hence, the overall impression given by the two signs depends more on the specific stylisation and contour of the bottles, this being their dominant and distinctive component, and less on the association that the public might make between the bottles as such.

As in the present case it was established that the distinctive individual features of the earlier mark are not reproduced in the application, the public will remain at all times aware of the differences between the marks and is likely neither to directly confuse the two by mistaking the one for the other, nor to further associate them in a way that could suggest common origin. This finding is not affected by the established identity of the goods; all the more so since it should be remembered that it is precisely for such goods that a bottle is not distinctive and hence the identity of the goods is not relevant in this case.

Thus, the overall visual and stylistic differences between the signs in this case are such as to outweigh any similarities due to the fact that they both represent a bottle, and are sufficient to prevent any risk of confusion whatsoever on the part of the public confusion in the relevant territory namely the European Union.

Since there is no likelihood of confusion, the opposition must be rejected.

B COSTS

According to Article 81(1) CTMR, the losing party in opposition proceedings must bear the fees incurred by the other party, as well as all costs.

According to Rule 94(1) IR, the apportionment of costs must be dealt with in the decision on the opposition.

Since the opponent is the losing party in the opposition proceedings, it must bear all costs incurred by the other party in the course of these proceedings.

**THE OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET
(TRADE MARKS AND DESIGNS)
DECIDES TO:**

1. Reject opposition number B 822 918 in its entirety.
2. Order the opponent to bear the costs.

FIX THE COSTS AS FOLLOWS:

The amount of the costs to be paid by the opponent to the applicant pursuant to Article 81(6) CTMR in conjunction with Rule 94(3) IR shall be:

Costs of representation	EUR 300
Total amount	<u>EUR 300</u>

the Opposition Division

Dimitris
BOTIS

Adriana
VAN ROODEN

María Belén
IBARRA De DIEGO

Notice on the availability of an appeal:

Under Article 58 CTMR any party adversely affected by this decision has a right to appeal against this decision. Under Article 59 CTMR notice of appeal must be filed in writing at the Office within two months from the date of notification of this decision and within four months from the same date a written statement of the grounds of appeal must be filed. The notice of appeal will be deemed to be filed only when the appeal fee of 800 euro has been paid.

Notice on the review of the fixation of costs:

The amount determined in the fixation of the costs may only be reviewed by a decision of the Opposition Division on request. Under Rule 94(4) IR such a request must be filed within one month from the date of notification of this fixation of costs and shall be deemed to be filed only when the review fee of 100 euro (Article 2 point 30 of the Fees Regulation) has been paid.