

Appeal brought on 11 June 2012 by You-Q BV against the judgment of the General Court (Eighth Chamber) delivered on 29 March 2012 in Case T-369/10: You-Q BV v Office for Harmonisation in the Internal Market (Trade Marks and Designs)

(Case C-294/12 P)

(2012/C 303/22)

Language of the case: English

Parties

Appellant: You-Q BV (represented by: G.S.C.M. van Roeyen, advocaat)

Other parties to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs), Apple Corps Limited

Form of order sought

The appellant claims that the Court should:

- set aside the judgment of the General Court of 29 March 2011 in Case T-369/10;
- uphold its application for annulment of the contested decision;
- alternatively, refer the case back to the General Court for reconsideration;
- order OHIM and Apple Corps Limited to pay the costs, including those incurred at first instance.

Pleas in law and main arguments

In its first plea in law the applicant submits that certain parts of the reproduction by the General Court of the background to the dispute, to be more specific certain parts of paragraphs 9, 12, 14, 17 and 53, are improperly established and contrary to the requirements of Article 8 (5) of Regulation No 207/2009 ⁽¹⁾. Firstly the General Court has incorrectly held that the earlier marks on which Apple Corps relies include an earlier well known mark, since the General Court did not establish that status and moreover did not reveal which earlier mark should be regarded as a well known mark. These findings of the General Court are wrong and violate the principle of clarity. Secondly, the General Court did not properly take into account the factor 'the nature of the goods or services for which the conflicting marks were registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public' to be applied according to the decision of the Court in Case C-252/07 Intel Corporation (2008) ECR I-8823.

In its second plea in law the applicant submits nine complaints against the contested judgment of the General Court, all based on infringement of Article 8(5) of Regulation No 207/2009. Firstly the applicant complains about incorrect findings by the General Court in paragraphs 24, 55, 56, 57 and 58 with regard to the dissimilarity of the goods and services and with regard to

the distinctiveness of the earlier marks. Secondly the applicant contests the finding in paragraph 26 of the contested judgment, in which the General Court — contrary to Article 8(5) of Regulation No 207/2009 — abstracted the protection provided for by said article from the goods or services for which the mark with a reputation is registered and from the other requirements for protection of said article (detriment to the distinctive character of the earlier mark, detriment to the repute of that mark and unfair advantage taken of the distinctive character of the repute of that mark). Thirdly, the applicant contests the finding in paragraphs 31 and 54 of the contested judgment, that the distinctive character and reputation of the earlier marks ought to have been examined in the light of the public perception of the mark applied for, since in paragraph 39 of the application of the General Court You-Q puts forward: 'It should be noted furthermore that the Board of Appeal wrongly did not — as it should have done — define the public whose perception should be taken into account to assess the distinctiveness and the reputation of the earlier mark. According to Intel this should be consumers of the goods and services for which the earlier mark is registered.' Fourthly, the applicant contests the finding of the General Court that the Board of Appeal has held that the relevant public in relation to whom the earlier marks have reputations consists of the public at large. Fifthly, the applicant contests the finding by the General Court that, according to You-Q, the existence of a reputation must be established by reference to the public concerned by the mark applied for, namely a specialist public and furthermore contests considerations by the General Court with regard to the relevant public, more particularly overlaps in the relevant public, which cannot be a factor for the assessment of reputation of an earlier trade mark. Sixthly, the applicant contests the findings of the General Court as to what is required to establish an enormous reputation and a very substantial reputation for the goods and services concerned. Seventhly, the applicant contests the findings of the General Court with regard to the similarity of the signs. Eighthly, the applicant contests the application by the General Court of the global assessment test, and the relevant factors included in that test, to establish the required link. Finally, the applicant contests the application and interpretation by the General Court of the requirement of Article 8(5) of Regulation No 207/2009 that unfair advantage must be taken of the distinctive character or the repute of the earlier marks.

⁽¹⁾ Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark
OJ L 78, p. 1

Reference for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 29 June 2012 — UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Munich (Germany), Wega Filmproduktionsgesellschaft mbH

(Case C-314/12)

(2012/C 303/23)

Language of the case: German

Referring court

Oberster Gerichtshof

Parties to the main proceedings

Appellant in the appeal proceedings and defendant: UPC Telekabel Wien GmbH, Vienna

Respondents in the appeal proceedings and plaintiffs: Constantin Film Verleih GmbH, Munich, Wega Filmproduktionsgesellschaft mbH

Questions referred

1. Is Article 8(3) of Directive 2001/29/EC ⁽¹⁾ (the Information Directive) to be interpreted as meaning that a person who makes protected subject-matter available on the internet without the rightholder's consent (Article 3(2) of the Information Directive) is using the services of the access providers of persons seeking access to that protected subject-matter?
2. If the answer to the first question is in the negative: Are reproduction for private use (Article 5(2)(b) of the Information Directive) and transient and incidental reproduction (Article 5(1) of the Information Directive) permissible only if the original of the reproduction was lawfully reproduced, distributed or made available to the public?
3. If the answer to the first question or the second question is in the affirmative and an injunction is therefore to be issued against the user's access provider in accordance with Article 8(3) of the Information Directive: Is it compatible with Union law, in particular with the necessary balance between the parties' fundamental rights, to quite simply prohibit an access provider from allowing its customers access to a certain website (without ordering specific measures) as long as the material available on that website is provided exclusively or predominantly without the rightholder's consent, if the access provider can avoid incurring preventive penalties for breach of the prohibition by showing that it had nevertheless taken all reasonable measures?
4. If the answer to the third question is in the negative: Is it compatible with Union law, in particular with the necessary balance between the parties' fundamental rights, to require an access provider to take specific measures to make it more difficult for its customers to access a website containing material that is made available unlawfully if those measures require not inconsiderable costs and can easily be circumvented without any special technical knowledge?

⁽¹⁾ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

Reference for a preliminary ruling from the Handelsgericht Wien (Austria) lodged on 9 July 2012 — Novontech-Zala Kft v LOGICDATA Electronic & Software Entwicklungs GmbH

(Case C-324/12)

(2012/C 303/24)

Language of the case: German

Referring court

Handelsgericht Wien

Parties to the main proceedings

Appellant and defendant: Novontech-Zala Kft

Respondent and applicant: LOGICDATA Electronic & Software Entwicklungs GmbH

Questions referred

1. Does the failure on the part of a party's lawyer to comply with the time limit for opposing a European order for payment constitute fault on the part of the defendant for the purposes of Article 20(1)(b) of Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure? ⁽¹⁾
2. If fault on the part of the lawyer representing the defendant is not to be regarded as fault on the part of the defendant itself, is the failure of the former to take note of the correct date of expiry of the time limit for opposing a European order for payment to be regarded as an extraordinary circumstance within the meaning of Article 20(2) of Regulation 1896/2006?

⁽¹⁾ OJ 2006 L 399, p. 1.

Reference for a preliminary ruling from the Finanzgericht Düsseldorf (Germany) lodged on 10 July 2012 — Rita van Caster, Patrick van Caster v Finanzamt Essen-Süd

(Case C-326/12)

(2012/C 303/25)

Language of the case: German

Referring court

Finanzgericht Düsseldorf

Parties to the main proceedings

Applicant: Rita van Caster, Patrick van Caster

Defendant: Finanzamt Essen-Süd