

Large similarity applied in class 5 while upholding CICATRAL and CITRACAL as similar.

On July 6, 2000, Bayer Healthcase LLC, filed the word Community trademark for CITRACAL in respect of “*dietary supplements, including dietary supplements inclusive of calcium salt*” in class 5. Uriach-Aquilea OTC SL lodged an opposition based on its Spanish trademark for CICATRAL covering “*pharmaceutical products and specialties of all types*” in class 5. The applicant requested evidence that, during the period of five years preceding the publication date of the contested trademark, the earlier mark had been genuinely used in Spain.

On January 30, 2007, the OHIM upheld the opposition. Use of the earlier mark was regarded as evidenced in respect of “*healing pomades (cicatrisant)*”. These products were found similar with the “*dietary supplements*” and the signs were regarded as similar. On May 5, 2008, the Board of Appeal confirmed the goods and signs similarity. The CFI confirmed the Board’s view.

For the Court, said goods are supplied without prescription, have the same nature, function and intended purpose (treating human health problems). They are aimed at the same ultimate consumers, produced by the same manufacturers, sold in pharmacies (same distribution channels) and are complementary in some cancer therapies. Their administration mode (applied to wounds and sores in one case / ingested as supplements to daily nutrition in the other case) and therapeutic indications were insufficient to prevent said similarity.

Until now, the OHIM rather ruled similarity of dietetic substances with pharmaceutical products if specified in a broad or large way such as on April 17, 2009 (Opposition Division, trademarks ISOPRO and ISOPROTIL, covering “*dietetic substances, adapted for pharmaceutical use, food supplements containing soy isoflavonoids*” and “*pharmaceutical preparations and medicaments for humans and animals*”) or on May 22, 2009 (Opposition Division, trademarks NULCEX and NUFLEX covering “*pharmaceutical products*” and “*nutritional supplements*”). The above decision goes one step beyond.

While comparing the signs, the Court considered that the marks matched in the syllables “CI” and “AL”. The inverted syllables in the middle were not enough to disturb the overall similarity. The applicant argued that in the relevant territory (Spain) CICATRAC alluded to “*scar*” (“*cicatriz*” in Spanish) and CITRACAL to “*citric*” (“*citric*” in Spanish) and “*calcium*” (“*calico*” in Spanish). For the Court, these allusions did not evoke on the part of the public an image strong enough to offset the visual and phonetic similarities between the signs because the wordings “CICA” and “CITRA” had not more concrete meaning than the endings “TRAL” and “CAL”. The decision concluded that the marks would unlikely be broken

down by the public into separated word elements having concrete meaning or resembling words known to it which would form a coherent whole giving meaning to each or one of the signs in concerns.

In our opinion, the inverted letters in the middle of the marks how created quite striking differences in terms of sound. The allusions raised by the marks have also been minored. On June 17, 2009, the CFI pointed out that “PHARMA” could be understood directly by the public as a reference or an abbreviation of the English word “pharmaceutical” as it is included in several English words even if it does not exist as such. The same reasoning could have been applied to the prefixes “CICA(T)” and “CITRA(C)” to rule the matter differently than above.

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