



## BUNNY TALES OR A QUESTION OF BAD FAITH

CASE C-529/07 OF 11 JUNE 2009  
CHOCOLADEFABRIKEN LINDT  
& SPRÜNGLI AG/FRANZ  
HAUSWIRTH GmbH

This case concerned the validity of a chocolate bunny registered as a 3D trade mark by Chocoladefabriken Lindt & Sprüngli AG in 2001.

The distinctive gold foil-wrapped 3D bunny with a bell attached to a red ribbon around its neck has become familiar to many chocolate lovers, and usually heralds the approach of Easter.

Lindt (a Swiss company) began marketing 3D gold-wrapped chocolate bunnies in the 1950s, and began selling the bunny as we know it today in 1994.

Concurrently, an Austrian company, Frans Hauswirth began marketing 3D gold foil-wrapped chocolate bunnies in 1962, and the separate bunnies now at issue bear a marked resemblance to each other.

Lindt registered a 3D mark representing a gold-coloured 3D bunny (as shown on page 2) as a CTM in 2000.

Following registration of this mark they initiated a fairly aggressive programme of legal action against manufacturers of other similar 3D chocolate bunnies, despite the fact that there were a considerable number

of other manufacturers selling goods of this type in Europe.

Lindt began infringement proceedings in Austria against Hauswirth relying on their CTM and alleging that confusion would arise between the two bunnies if they were both sold in Austria. Hauswirth counterclaimed by filing an application to invalidate Lindt's 3D Community mark on the grounds that Lindt were acting in bad faith when they filed the application.

In their defence to the invalidity claim, Lindt argued that even before they had filed for the 3D Community mark they enjoyed both reputation and distinctiveness in the market and legal protection in various EU Member States under Unfair Competition Law or Trade Mark Law since they had invested a considerable amount of money in advertising and promoting their goods. They also argued that the object of registering the 3D bunny shape as a trade mark was to protect its commercial value against products which imitated it.

Clearly on the facts there were arguments in favour of both sides.

Before assessing whether or not Lindt were acting in bad faith, the Austrian



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Court decided to refer three legal questions to the ECJ for a preliminary ruling. The questions were:

- Is it considered to be bad faith if an applicant for a Community trade mark is aware, at the time of his application, that a competitor in at least one Member State is using the same or a similar sign and he applies for the trade mark in order to prevent that competitor from continuing to use the sign?

Alternatively:

- Is the applicant to be regarded as acting in bad faith if he applies for the trade mark in order to prevent a competitor from continuing to use the sign which he knows to be identical or similar but in which the competitor has already acquired rights, for example, by way of common law or passing off?

If either of the preceding two questions were answered in the affirmative, the Austrian court then queried:

- Would it still be bad faith if the applicant's sign had already obtained a reputation with the public and was therefore, itself, already protected under common law.

In answering these questions, the ECJ acknowledged that bad faith was one of the grounds on which an invalidation application may be based and may also be used as a ground of attack in defending an infringement action.

The relevant time for establishing bad faith is the date on which the application was filed. When Lindt applied for registration of their trade mark in 2000, there were several similar gold bunnies on the market which Lindt must have been aware of.



Even so, the European Court decided this was not in itself sufficient to conclude that bad faith had existed because it was necessary to consider the applicant's intention. If the intention had been to prevent others from marketing a similar 3D bunny but the registrant had no intention of using the mark himself, then it would be bad faith because the mark would not, then, fulfil its essential function of distinguishing one entity's goods from those of another.

Equally, it may be considered to be bad faith if it was the applicant's intention to prevent a third party's longstanding use of a similar or identical mark when they had already acquired some rights in the trade mark, side by side with those of the registered trade mark owner.

The ECJ was also of the opinion that when considering bad faith, one should take into account how many other similar shapes are available for adoption by the different parties. In this case, it seems that packaging technology limits the number of shapes of 3D bunnies that can be produced moulded in gold foil.

Moreover, they stated that the reputation enjoyed by the applicant in the mark on the date on which the application is filed should be taken into account as the extent of that reputation may justify the applicant's interest in ensuring a wider legal protection for his mark.

As usual, the ECJ has not provided a final judgment in this case, nor should they do so. Their role is merely to answer questions of law raised by

the National Court and then to allow the National Court to interpret their answers and to apply them to the facts of the case in question. In the present case, the ECJ has simply set down that the National Court must consider all relevant factors specific to the case at the time the application was filed, but in particular:

- The fact that the applicant must have known a third party was using a similar mark in at least one Member State which was capable of causing confusion,
- Whether the applicant's intention was to prevent third parties from continuing to use their established mark, and
- The degree of legal protection enjoyed by the third party's sign.

It is arguable that this judgment can only really apply to the particular 3D shape marks in issue and that we shall have to wait for some other occasion for the ECJ to opine more widely on what constitutes bad faith. However, the judgment does provide an indication of the key aspects to be taken into account, particularly the fact that all circumstances of the case must be reviewed and that the critical date for assessing bad faith is the date on which the application was filed.

It is, however, clear from this Decision that an Applicant who files for a mark with no intent to use it himself, but simply with the aim of blocking a legitimate competitor from adopting the same trade mark, will have made a "bad faith" filing. Whether this ruling applies where the other side has not themselves used their trade mark is still debatable.

Equally we are still a long way from the position taken in the US PTO, where bad faith will be found if the Applicant applies to register a mark with no actual intent to use it (even if they are not planning to block a third party).



# PROOF OF USE: THE MEANING OF “SO REQUESTS” IN OHIM PROCEEDINGS

## A CAUTIONARY TALE

Article 56(2) of Regulation 40/94 (now Article 57(2) of Regulation 207/2009) states that “if the proprietor of the Community trade mark *so requests* [emphasis added], the proprietor of an earlier Community trade mark.... shall furnish proof that....the earlier Community trade mark has been put to genuine use....”. However, in a recent invalidity case before the Court of First Instance, an issue arose with regard to what is meant by the term “so requests”.

Cuadrado SA had applied to invalidate Harwin International LLC’s Community trade mark registration for PICKWICK COLOUR GROUP (& Device) on the basis of its prior registered trade marks for PICK OUIIC covering identical goods. At the time of filing the Application for Invalidity, Cuadrado included evidence showing use of its earlier registrations. In filing its observations in reply to the invalidity action, the defendant, Harwin, stated that the evidence included in the Application was insufficient to demonstrate that Cuadrado’s registrations had been put to genuine use.

In response, Cuadrado filed additional evidence showing use of its marks. However the question of whether this was “genuine use” was not considered by OHIM’s Cancellation Division, who nevertheless granted the Application for Invalidity. Harwin appealed on the basis that the Cancellation Division had not considered whether Cuadrado had made “genuine use”

of its marks. The Board of Appeal dismissed the appeal holding that Harwin had not made an express request for Cuadrado to prove use of its trade marks during the invalidity proceedings and that such a request could not be made for the first time at the appeal stage. Harwin appealed further to the Court of First Instance (“ECFI”).

In finding in favour of Harwin, the ECFI held that proof of use of earlier marks relied on in the proceedings, if they are more than five years old, must be provided if the registered proprietor “so requests”. In the present case, Cuadrado had, of its own volition, submitted evidence in support of its Application for Invalidity concerning use of the trade marks it was relying on. Harwin had stated that this evidence was insufficient to prove genuine use, and in response, Cuadrado had submitted further additional evidence.

The ECFI held therefore that Harwin had indeed made a request for proof of use in due time before the Cancellation Division and that the request could be inferred from Harwin’s statement in its observations that the evidence provided by Cuadrado was insufficient to show genuine use. The Court held that the request was clearly understood in this manner by Cuadrado as it subsequently filed additional materials to address this issue and that there had been a clear exchange of arguments on this point between the parties. The

Court found that by holding that the question of genuine use of Cuadrado’s marks did not have to be examined by the Cancellation Division, the Board of Appeal had infringed Article 56(2) and the decision of the Board of Appeal was therefore annulled in its entirety.

### CASE COMMENT

The wording of Article 56(2), with regard to the method for requesting proof of use, is fairly vague and the easiest way for a Registered Proprietor (or Applicant) to ensure that proof of use is adduced is to make an express request to OHIM in due time.

However, this decision allows for implied requests and both Applicants for Invalidity (or Opponents) and the relevant division of OHIM will need to be prepared to address the issue of proof of use, even if a reference to the evidence being “insufficient” is made by the Registered Proprietor (or Applicant) without them expressly requesting proof of use.

[Case T-450/07 dated 12 June 2009]





## ECFI TELLS LAST MINUTE TOUR TO PACK THEIR BAGS

### “LAST MINUTE” CHALLENGE SUCCEEDS IN ECFI

In a case involving two “last minute” travel agencies, the ECFI has overturned a Decision of OHIM’s Board of Appeal and reinstated the initial findings of OHIM’s Cancellation Division concerning an invalidity challenge against the stylised mark LAST MINUTE TOUR (see below).



The successful party in this cancellation action was Last Minute Network Limited (“LMN”), owners of the well known trade mark LASTMINUTE.COM. Despite the fame which this mark now enjoys, the proprietor’s attempt to register LASTMINUTE.COM in 2000 (admittedly only two years after LastMinute.com started trading) had resulted in a rejection by OHIM on distinctiveness grounds.

The defendant, Last Minute Tour SPA had subsequently filed to register LAST MINUTE TOUR in

a stylised version (see above) as a Community trade mark and the mark was accepted as distinctive overall. Following its publication, LMN filed a Notice of Opposition but failed to substantiate the Grounds of Opposition, with the consequence that LAST MINUTE TOUR in the stylised version proceeded to registration.

Shortly thereafter, LMN filed an invalidity action against the mark, based on a claim to earlier common law rights in LASTMINUTE.COM pursuant to Article 8(4) of Regulation no. 40/94 concerning the Community trade mark.

This time, LMN were careful to file evidence of their reputation in LASTMINUTE.COM from which the OHIM Cancellation Division concluded that LMN had acquired (among the relevant public in the United Kingdom) considerable goodwill associated with its sign.

Since the contested “travel agency” and “hotel reservations” services in classes 39 and 42 were identical, and “LAST MINUTE” was found to be the common dominant element in both marks, the Cancellation Division concluded that there was a likelihood of confusion and

that as a result LMN was likely to suffer commercial damage if the registration was maintained.

Accordingly they cancelled the defendant’s CTM registration for LAST MINUTE TOUR in respect of all services in class 39 and 42; however the registration had also covered class 16 goods and their conclusion on this point was that LMN had not substantiated their claim to earlier rights by filing evidence of previous use of the sign LASTMINUTE.COM in relation to those goods. The registered coverage was thus maintained in class 16.

Both parties to the cancellation action appealed these findings to OHIM’s Board of Appeal.

The Board of Appeal reversed the Cancellation Division’s decision to annul the CTM registration for LAST MINUTE TOUR in classes 39 and 42 and also dismissed LMN’s appeal, upholding the Cancellation Division’s refusal to grant a declaration of invalidity in respect of the class 16 coverage.

The Board of Appeal relied heavily on a finding that the expression “LAST MINUTE” was descriptive and devoid of distinctive character for

the goods and services concerned. They concluded that the UK public, whom they defined as being average consumers (deemed to be reasonably well informed and observant/circumspect) would not immediately think, when faced with the expression “LAST MINUTE”, that the contested services were offered by the proprietor of the trade mark LASTMINUTE.COM.

On this basis, and taking account of the fact that the registered mark in issue had an added graphic symbol as well as containing the different word “TOUR” the Board of Appeal concluded that the marks were visually distinguishable, as well as phonetically different.

They also relied on the fact that the LASTMINUTE.COM mark contained a reference to the electronic address “.com” which enabled a conceptual difference to be established between the two marks.

Essentially they concluded that the reputation claimed by LMN was for the composite “LASTMINUTE.COM” and not enough to monopolise the generic term “LAST MINUTE”.

Thus they inferred that there was no likelihood of confusion, even with respect to identical services.

The decision by OHIM’s Board of Appeal was then further appealed by LMN to the European Court of First Instance.

They found that OHIM’s Board of Appeal had applied the wrong legal test when considering whether Article 8(4) of Regulation No. 40/94 was applicable to the case.

In particular, by holding that the question of confusion or misrepresentation needed to be assessed from the perspective of the average consumer, the Board of Appeal had wrongly interpreted the findings in UK case law on “passing off” which had consistently held that the relevant public were the customers of the proprietor of the

non registered National mark, not the average consumer at large.

The ECFI also found that it was possible for claimants in an action for “passing off” to establish that even descriptive elements in their trade marks have acquired an independent reputation and secondary meaning through usage and that the Board of Appeal appeared to have wrongly construed the Appellant’s evidence on the point by finding that LMN did not have a reputation in the words “LAST MINUTE” as a stand alone.

Moreover when assessing whether a misrepresentation was likely to occur by the use of the sign LAST MINUTE TOUR the Board of Appeal had failed to take account of all relevant factors and simply focused on a comparative examination of the two marks; in particular they had ignored the finding that there was a reputation attaching to the mark LASTMINUTE.COM when making such a comparison.

The CFI accordingly annulled the Board of Appeal’s Decision and remitted the case to OHIM for re-examination of the claim that LAST MINUTE TOUR was invalid, requiring them to take account of all the

elements of an action for “passing off” including, as appropriate, the requirement relating to the damage arising from the possibly misleading nature, in the mind of LMN’s customers, of an offer of the goods and services concerned under the sign LAST MINUTE TOUR. The relevant date for this consideration was that on which the application for the contested Community Trade Mark was filed.

The outcome of this case is encouraging for owners of unregistered marks which enjoy a reputation through use, although it highlights the potential inconsistency between OHIM’s Examination practice on distinctiveness and the extent of the rights which they will recognise as a basis for legal challenge to third party registered marks.

Unsurprisingly, it appears that LMN have now refiled for lastminute.com as a Community mark for travel agency services in class 39.



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## [CASE C-542/07 DATED 11 JUNE 2009]

The ECJ has upheld an Appeal originating at OHIM on the relevant date for assessing registrability of the trade mark PURE DIGITAL.

The Appeal centred around OHIM's decision to refuse to take into account evidence of use occurring after the application date to show that the trade mark had acquired distinctiveness through use.

OHIM's Examiner had refused registration of the trade mark PURE DIGITAL in Classes 9 and 38 on the grounds that the trade mark was descriptive and devoid of any distinctive character. Further, the Examiner refused to take into consideration evidence of acquired distinctiveness through use which related to the period after the application had been filed. The Applicant (Imagination Technologies) appealed this refusal, but the rejection was upheld by OHIM's Board of Appeal.

Notwithstanding the apparent hopelessness of their case, the Applicant appealed further to the European Court of First Instance, alleging that the Board of Appeal had incorrectly analysed the distinctive character of the mark and that they had failed to take account of the possibility of requesting a disclaimer on the separate words "PURE" and "DIGITAL". The CFI refused to entertain these arguments but reviewed the third Ground of Appeal namely that evidence of use relating to a date after the application had been filed should be considered.

The CFI noted that this argument was

contradicted by previous case law on the point and also that it would make the current application system unworkable since this could allow applicants to string out the application procedure while they were building up more evidence of acquired distinctiveness and permit them to "leapfrog" conflicting applications with a later filing date.

The Applicant also argued that OHIM's refusal to accept their evidence did not accord with the treatment of registered marks under Article 51(2) of Regulation no. 40/94. In that case, where a registered mark is attacked on the grounds of lack of distinctive character, the proprietor is entitled to rely on evidence of use and secondary meaning built up post registration. The CFI rejected this argument also, stating that the provisions of Article 51(2) were designed to satisfy the legitimate expectations of a trade mark owner who had registered his mark and possibly invested in it after securing registration.

Despite this somewhat trenchant rejection of their position, the applicant for PURE DIGITAL appealed the case further to the European Court of Justice, alleging that as a matter of law the correct interpretation of Article 7(3) CTMR should be that distinctive character may be acquired during the registration procedure up until the date when a decision on distinctiveness is taken.

The ECJ again reiterated that a correct reading of the wording of this Article

made it clear that post filing use should not be considered when assessing the distinctive character of a mark; it upheld the ECFI's reasoning and rejected the further argument by the Appellant that Article 9(3) of Regulation no. 40/94 supported its view that evidence of post filing use could be taken into account. The ECJ pointed out that this provision only related to the compensation which may be imposed on third parties in respect of matters arising after the date of publication of a CTM proprietor's registration thereof.

Further, the ECJ commented that the "intention of the Community Legislator was to grant protection as a CTM only to those marks whose distinctive character had been acquired through use prior to the date of the application for registration."

Accordingly they dismissed the Appeal and ordered Imagination Technologies to pay the costs of the case to OHIM (who had, perhaps unsurprisingly, requested an award of costs).

We agree with this decision. If evidence of acquired distinctiveness through use could be filed at any stage during the application procedure, this could result in considerable uncertainty and jeopardise the integrity of the system. As the ECJ pointed out, if it were to allow the appeal, it would also affect conduct of opposition and invalidation actions where third parties rely on pending applications.



# NEW UK CUSTOMS PROCEDURES ANNOUNCED

## INCREASED BURDEN ON IP RIGHTS OWNERS

Many of our readers will be familiar with the established procedures followed by the UK Customs Authorities (HMRC) when Customs Offices come across suspected counterfeit goods. Such goods would be detained by HMRC and the rights owner would be given the opportunity to submit a statement confirming whether or not the goods are counterfeit. If confirmed as counterfeit by the rights owner, HMRC would then formally seize and destroy the goods on the basis of the statement unless the importer appealed against the seizure.

Under their new procedures, which came into effect on 3 July 2009, HMRC will still detain suspected counterfeit goods, but will only seize and destroy them if the rights owner begins court proceedings against the importer within a specified time limit and the court orders the goods to be seized. This change in practice is bad news for rights owners who are likely to need to devote more time and resources to litigation in the war against counterfeit goods in future.

The change results from a case brought before the Belfast Magistrates Court (Revenue and Customs Commissioners v Penbrook Enterprises Limited [2008]) where the court held that HMRC's existing practice did not comply with the relevant European Regulation. The Regulation requires that suspected counterfeit goods be seized by HMRC only if the rights owner obtains a

successful judgment against the importer and the relevant Customs Office is directed by the court to seize the infringing goods. HMRC is obliged to comply with the Regulation and has, therefore, amended its procedures.

In future, when HMRC comes across suspected counterfeit goods it will contact the rights owner and detain the goods for 10 working days (as was the case under the old practice). But, if the goods are to be detained beyond this period, the rights owner must either begin court proceedings to ascertain whether its rights have been infringed, or apply for an extension of a further 10 working days, or reach an agreement with the importer under which the goods are abandoned. Failing this, the detained goods will be released to the importer. HMRC will only formally seize the goods if the court directs it to do so following a judgment in favour of the rights owner.

These changes bring the procedures for goods suspected of infringing registered trade marks and copyrights into line with those relating to goods suspected of infringing patents or design rights. The burden of proof has been firmly shifted onto the rights owner, who is now obliged to take

court action if he wishes to have the goods destroyed in cases where the importer is not willing to abandon them.

Another setback for rights owners is that, under the new rules, rights owners are responsible for the cost of destroying seized goods. Under the old practice, HMRC was responsible for the destruction of counterfeit goods and the cost of doing this was not always passed onto the rights owner, who often enjoyed the benefit of a free destruction service from HMRC.

The new procedure is likely to lead to additional work and expense for any rights owners who are keen to continue fighting the war against counterfeit goods. Rights owners must, however, be willing and ready to take immediate court action once the notification from HMRC has been received. This is likely to lead to a greater administrative burden on the rights owner. It is hoped, however, that the increased likelihood of immediate court action will act as a greater deterrent to importers of counterfeit goods.

In favour of the importers, however, is the additional cost to the rights owner of the new procedures, in particular the cost of taking court action. Rights owners will have to think carefully about the resources they allocate to such court actions. Knowing that these are relatively expensive, particularly for rights owners who regularly encounter suspected counterfeit goods, the importers may continue to chance their arm.





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## OUT AND ABOUT

### THE BRAND PROTECTION SHOW

16-17 SEPTEMBER 2009

Mark Snowball will be attending The Brand Protection Show at Olympia, London.

### ITMA AUTUMN CONFERENCE

24-25 SEPTEMBER 2009

Gillian Deas will be chairing the ITMA Autumn Conference in Lisbon, Portugal.

### SOLENT INNOVATION & GROWTH SEMINAR

24 SEPTEMBER 2009

Jeremy Pennant and Helen Cawley will be presenting at Solent Innovation & Growth's 'How to Build and Protect a Brand' seminar in Fareham, Hampshire.

### PTMG AUTUMN CONFERENCE

30 SEPTEMBER - 3 OCTOBER 2009

Gillian Deas will be attending the Pharmaceutical Trade Marks Group Autumn Conference in Lisbon, Portugal.

### COLLABORATE2INNOVATE

6 OCTOBER 2009

Members of the D Young & Co Trade Marks and Patents Groups will be attending South East Business Innovation & Growth's Collaborate2Innovate event in Southampton.

### INTA LEADERSHIP MEETING

11-14 NOVEMBER 2009

Jeremy Pennant will be attending the INTA Leadership Meeting in Miami Beach, Florida, USA.

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