



General Court refuses to revoke 3D baby bottle shape mark due to non-use

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- The EUIPO revoked a 3D mark consisting of the shape of a baby's bottle for goods in Class 30 on the ground of non-use
- The General Court held that the Board of Appeal had erred in attributing a weak distinctive character to the mark
- The board had erred in finding that the mark had merged with additional figurative and word elements to form another sign in the eyes of the relevant consumer

In [The Bazooka Companies Inc v European Union Intellectual Property Office](#) (EUIPO) (Case T-273/21, 26 October 2022), the General Court has annulled the decision of the Second Board of Appeal of the EUIPO of 10 March 2021, which declared the revocation of an EU trademark (EUTM) for goods in Class 30.

Background

The Topps Company ('the trademark owner') registered a 3D EUTM for goods in Class 30, covering "confectionery, sugar confectionery, candy, sweets and sherbet" pursuant to an application submitted on 25 November 1999 for the following three-dimensional (3D) sign:



In 2018 Trebor Robert Bilkiewicz filed an application for revocation of this registration. The ground relied in support of the application was that the contested mark had not been put to genuine use during a continuous period of five years in the European Union (Article 58(1)(a) of [Regulation 2017/1001](#)). The trademark owner submitted evidence to establish genuine use

of the mark, including the following products:



The Cancellation Division of the EUIPO revoked the registration on the ground that the evidence provided did not support use of the mark as registered.

The trademark owner appealed, but the Second Board of Appeal of the EUIPO found that the contested mark was weak on the ground that it consisted of a commonly shaped baby's bottle. Further, the board found that the mark had merged with the additional figurative and word elements to form, in the eyes of the relevant consumer, another sign, different from the registered mark. It concluded that, although several marks could be used genuinely on one product at the same time, the proprietor of the mark for which use had to be demonstrated had to show that that mark was still perceived as an independent mark. Accordingly, the board confirmed the revocation and dismissed the appeal.

The trademark owner appealed further to the General Court, and fared better there.

Decision

The General Court held that the board had erred in attributing a weak distinctive character to the contested mark. In its assessment, the board did not take into account the type of goods in respect of which the mark was registered; the relevant public's perception is not necessarily the same in the case of a 3D mark consisting of the shape of the product itself. The court noted that confectionery, sugar confectionery, candy and sherbet are entirely unrelated to goods used for feeding milk to babies. Accordingly, the court concluded that the mark had an average distinctive character.

With regard to the 3D shape of the contested registration, the court held that there was little variation between that form and the form in which the contested mark was used, since both have the shape of a baby's bottle, with a teat, a serrated surface and a lid. The court noted that it is practically impossible that the relevant public would perceive the differences relied on by the EUIPO. Therefore, despite the transparent nature of the lid, the baby's bottle shape of which the contested mark as used consisted would be perceived by the relevant public as identical to the form protected by the contested mark as registered.

Finally, the court held that the Board of Appeal had erred in finding that the contested mark had merged with the additional figurative and word elements to form, in the eyes of the relevant consumer, another sign, while the form of which that mark consisted continued to be perceived by the relevant public as indicative of the commercial origin of the goods at issue.

The court emphasised that the Board of Appeal had correctly found that the proprietor of the contested mark had to show that that mark was still perceived as an independent mark and that combining it with another mark did not alter its distinctive character. It noted that the trademark owner had submitted, in the course of the proceedings before the EUIPO, various items such as articles and screenshots of websites offering for sale the goods covered by the contested mark where they were described on various occasions as candy or lollipops in the shape of a baby's bottle.

The decision of the Board of Appeal was thus annulled.

Comment

This decision is a boon to owners of 3D marks because, firstly, it focuses on the strength of the shape itself, holding that a baby bottle is distinctive in relation to candy. Secondly, it concedes that 3D marks may bear additional words or logos in practice, but those do not necessarily diminish the trademark function of the shape itself when the shape is distinctive in relation to the goods.

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