

OPPOSITION No B 3 181 648

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a g a i n s t

Spendrups Bryggeriaktiebolag, Sankt Eriksgatan 121, 113 43 Stockholm, Sweden (applicant), represented by **Awa Sweden AB**, Matrosgatan 1, 211, 18 Malmö, Sweden (professional representative).


On 20/08/2024, the Opposition Division takes the following

DECISION:

1. Opposition No B 3 181 648 is upheld for all the contested goods.
2. European Union trade mark application No 18 760 871 is rejected in its entirety.
3. The applicant bears the costs, fixed at EUR 620.


REASONS

On 26/10/2022, the opponent filed an opposition against all the goods of European Union trade mark application No 18 760 871 'TURN TABLE' (word mark). The opposition is based on, inter alia, international trade mark registration designating the European Union

No 1 601 105  (figurative mark). The opponent invoked Article 8(1)(b) EUTMR.

LIKELIHOOD OF CONFUSION — ARTICLE 8(1)(b) EUTMR

Pursuant to Article 8(1)(b) EUTMR, a likelihood of confusion exists if there is a risk that the public might believe that the goods or services in question, under the assumption that they bear the marks in question, come from the same undertaking or, as the case may be, from economically linked undertakings. Whether a likelihood of confusion exists depends on the appreciation in a global assessment of several factors, which are interdependent. These factors include the similarity of the signs, the similarity of the goods and services, the distinctiveness of the earlier mark, the distinctive and dominant elements of the conflicting signs, and the relevant public.

The opposition is based on more than one earlier trade mark. The Opposition Division finds it appropriate to first examine the opposition in relation to the opponent's international trade mark registration designating the European Union No 1 601 105 .

a) The goods, relevant public and degree of attention

The goods on which the opposition is based are the following:

Class 33: *Alcoholic beverages (except beer); wine; white wine; red wine; cviček (special wine from the Slovenian region Lower Carniola); rosé wines; sparkling wines; flavoured alcoholic beverages based on sparkling wine; predicate wines; archive wines; barrique wines; sweet wines; dessert wines; fruit wines; grape wines; grape wine; strawberry wine; cooking wine; beverages containing wine (spritzers); wine coolers (drinks); low alcoholic drinks; distilled beverages, spirits (beverages); alcoholic beverages containing fruit; brandy; aperitifs; cocktails; digesters; bitters; liqueurs; gin; rum; hydromel (mead); vodka; whisky; pre-mixed alcoholic beverages, other than beer-based; alcoholic extracts; fruit extracts, alcoholic; distilled aperitifs.*

The contested goods are the following:

Class 32: *Beer; non-alcoholic wine.*

Class 33: *Alcoholic beverages, except beers; alcoholic preparations for making beverages.*

As a preliminary remark, it is to be noted that according to Article 33(7) EUTMR, goods or services are not regarded as being similar to or dissimilar from each other on the ground that they appear in the same or different classes under the Nice Classification.

The relevant factors relating to the comparison of the goods or services include, inter alia, the nature and purpose of the goods or services, the distribution channels, the sales outlets, the producers, the method of use and whether they are in competition or complementary.

Contested goods in Class 32

The contested *beer* is similar to the opponent's *alcoholic beverages (except beer)*. As the last is a broad category which includes various kinds of alcoholic beverages in view of their ingredients, methods of manufacturing, alcohol content, occasions in which they are consumed. Among others, such category encompasses alcoholic beverages, such as 'cider' which are characterized by a low-alcohol content just like beers. Alcoholic drinks, such as 'cider', on the one hand, and beers, on the other, are intended to quench thirst and consumed on the same occasions and in the same places. Moreover, they are offered in the same commercial establishments, placed in the same sections (15/11/2006, T-366/05, Budweiser, EU:T:2006:347, § 45; 05/10/2011, T-421/10, Rosalia de Castro, EU:T:2011:565, § 31). There is an average degree of similarity between these goods (07/12/2018, T-378/17, CERVISIA (fig.) / CERVISIA AMBAR, EU:T:2018:888, § 20). They have the same purpose and distribution channels. They are addressed to the same consumers and, furthermore, are in competition.

The contested *non-alcoholic wine* and the opponent's *wine* are similar. There is a growing trend in the drinks market sector for winemaking companies to also produce and offer non-alcoholic wine as an alternative to alcoholic wine. Non-alcoholic wine often goes through the same fermentation and ageing process as alcoholic wine, only to have the alcohol removed at the last stages, (either through distillation or filtration). Non-alcoholic wine is intended to be consumed in the same circumstances as alcoholic wine by consumers who cannot, or choose not to, consume alcohol. Since consumers will perceive them as alternative products, they must also be considered to be in competition. It is not uncommon for non-alcoholic wine to be

sold in wine shops or specialised wine sections in supermarkets. They coincide in producers, distribution channels and consumers.

Contested goods in Class 33

The contested *alcoholic beverages, except beers* are identically contained in both lists of goods with slightly difference in their wording.

The contested *alcoholic preparations for making beverages* overlap with the opponent's *alcoholic extracts*. Therefore, they are identical.

In the present case, the goods found to be identical or similar target the public at large, whose degree of attention is average. It is settled case-law that: firstly, the goods at issue are for everyday consumption and are normally widely distributed – ranging from the alcoholic drinks section of supermarkets, department stores and other retail outlets, to restaurants and cafes; secondly, the consumer of alcohol is a member of the general public, who will demonstrate an average level of attention when purchasing such goods (19/01/2017, T 701/15, LUBELSKA (fig.) / Lubeca, EU:T:2017:16, § 22).

b) The signs

	<p>TURN TABLE</p>
<p>Earlier trade mark</p>	<p>Contested sign</p>

The relevant territory is European Union

The global appreciation of the visual, aural or conceptual similarity of the marks in question must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23).

The unitary character of the European Union trade mark means that an earlier European Union trade mark can be relied on in opposition proceedings against any application for registration of a European Union trade mark that would adversely affect the protection of the first mark, even if only in relation to the perception of consumers in part of the European Union (18/09/2008, C-514/06 P, ARMAFOAM / NOMAFOAM, EU:C:2008:511, § 57). This applies by analogy to international registrations designating the European Union. Therefore, a likelihood of confusion for only part of the relevant public of the European Union is sufficient to reject the contested application.

The common element 'Turn' is not meaningful in certain territories, for example in those countries where English is not understood. Consequently, the Opposition Division finds it appropriate to focus the comparison of the signs on the Slovenian and Spanish-speaking part of the public, for whom this word is meaningless and, therefore, is distinctive.

The element 'Table' will be understood by the relevant public, as the noun forms part of the basic vocabulary of English (the foreign language whose education and use are most widely

used in the EU countries) and are generally known. This fact, moreover, is not a point of contention being, therefore, it has a normal degree of distinctiveness.

The applicant argues that the contested sign will be perceived as one word 'turntable'. However, on the one hand, these verbal elements visually appear separated by a space and, on the other hand, the relevant public under analysis will not perceive the word 'Turn' as having a meaning and will recognize the word 'table' as an English term used to describe a piece of furniture with a flat top and one or more legs.

The word 'Turn' is the dominant element in the earlier mark by virtue of its size, as it is the most eye-catching. Its figurative element placed in the central part of the letter 'U' of 'Turn' is considered a banal common shape. Furthermore, when signs consist of both verbal and figurative components, in principle, the verbal component of the sign usually has a stronger impact on the consumer than the figurative component. This is because the public does not tend to analyse signs and will more easily refer to the signs in question by their verbal element than by describing their figurative elements (14/07/2005, T-312/03, SELENIUM-ACE / SELENIUM SPEZIAL A-C-E (fig.), EU:T:2005:289, § 37).

The typography of the earlier trade mark is rather basic and will not detract consumers from the recognition of the verbal element 'Turn'. Therefore, it is considered decorative and non-distinctive.

Visually and **aurally**, the signs coincide in 'Turn', the sole verbal element in which consists of the earlier mark and is incorporated in its entirety at the beginning of the contested sign. However, they differ in the word 'Table' of the contested sign which has no counterpart in the earlier mark. Visually, they also differ in the graphical representation and the figurative element of the earlier mark, of lesser impact on consumers than the coinciding verbal element 'Turn', for the reasons explained above. It is recalled that consumers generally tend to focus on the beginning of a sign when they encounter a trade mark. This is because the public reads from left to right, which makes the part placed at the left of the sign (the initial part) the one that first catches the attention of the reader, in the present case 'Turn'.

Therefore, visually and aurally the signs are similar to, at least, an average degree.

Conceptually, although the public in the relevant territory will perceive the meaning of 'table' in the contested sign as explained above, the earlier mark has no meaning in that territory. Since one of the signs will not be associated with any meaning, the signs are conceptually not similar.

As the signs have been found similar in at least one aspect of the comparison, the examination of likelihood of confusion will proceed.

c) Distinctiveness of the earlier mark

The distinctiveness of the earlier mark is one of the factors to be taken into account in the global assessment of likelihood of confusion.

The opponent did not explicitly claim that its mark is particularly distinctive by virtue of intensive use or reputation.

Consequently, the assessment of the distinctiveness of the earlier mark will rest on its distinctiveness per se. In the present case, the earlier trade mark has no meaning for any of the goods in question from the perspective of the public in the relevant territory. Therefore, the distinctiveness of the earlier mark must be seen as normal.

d) Global assessment, other arguments and conclusion

Evaluating likelihood of confusion implies some interdependence between the relevant factors and, in particular, a similarity between the signs and between the goods or services. Therefore, a lesser degree of similarity between goods and services may be offset by a greater degree of similarity between the marks and vice versa (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 17).

The goods are partly identical and partly similar, and they target the public at large whose degree of attention is considered to be average. The distinctiveness of the earlier mark is normal.

The signs are visually and aurally similar at least to an average degree.

As explained above, the earlier mark is entirely reproduced as an independent and distinctive element at the beginning of the contested sign. According to the case-law, when the sole component of the earlier mark is included in its entirety within the contested sign, the signs at issue are partly identical in such a manner as to create a certain impression of visual similarity in the mind of the relevant public (20/06/2018, T-657/17, HPC POLO / POLO et al., EU:T:2018:358, § 30; 10/09/2008, T-325/06, Capió, EU:T:2008:338, § 92; 23/04/2015, T-282/13, IGLOTEX / IGLO, EU:T:2015:226, § 65). In this regard, even if the contested sign contains an additional element, the fact remains that the earlier mark is not only entirely reproduced but also, taking an initial position in the contested sign.

The impact of this coinciding term is not counteracted by the additional term in the contested sign, also because they are placed in a less prominent position within the sign to which consumers pay less attention, although its additional concept.

Likelihood of confusion covers situations where the consumer directly confuses the trade marks themselves, or where the consumer makes a connection between the conflicting signs and assumes that the goods/services covered are from the same or economically linked undertakings. Indeed, it is highly conceivable that the relevant consumer will perceive the contested sign as a sub-brand, a variation of the earlier mark, configured in a different way according to the type of goods that it designates (23/10/2002, T-104/01, Miss Fifties (fig.) / Fifties, EU:T:2002:262, § 49), due to the coincidence in 'Turn'.

Considering all the above, as differences in the signs are less obvious than the coincidences, a likelihood of confusion still exists, as the coinciding element plays an independent distinctive role in both signs. Therefore, there is a likelihood of confusion on the part of the Slovenian and Spanish-speaking part of the public. As stated above in section c) of this decision, a likelihood of confusion for only part of the relevant public of the European Union is sufficient to reject the contested application.

Therefore, the opposition is well founded on the basis of the opponent's international trade mark registration designating the European Union No 1 601 105. It follows that the contested sign must be rejected for all the contested goods.

As the said earlier right leads to the success of the opposition and to the rejection of the contested sign for all the goods against which the opposition was directed, there is no need to examine the other earlier right invoked by the opponent (16/09/2004, T-342/02, Moser Grupo Media, S.L., EU:T:2004:268).

COSTS

According to Article 109(1) EUTMR, the losing party in opposition proceedings must bear the fees and costs incurred by the other party.

Since the applicant is the losing party, it must bear the opposition fee as well as the costs incurred by the opponent in the course of these proceedings.

According to Article 109(1) and (7) EUTMR and Article 18(1)(c)(i) EUTMR, the costs to be paid to the opponent are the opposition fee and the costs of representation, which are to be fixed on the basis of the maximum rate set therein.

**The Opposition Division**

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According to Article 67 EUTMR, any party adversely affected by this decision has a right to appeal against this decision. According to Article 68 EUTMR, notice of appeal must be filed in writing at the Office within two months of the date of notification of this decision. It must be filed in the language of the proceedings in which the decision subject to appeal was taken. Furthermore, a written statement of the grounds for appeal must be filed within four months of the same date. The notice of appeal will be deemed to have been filed only when the appeal fee of EUR 720 has been paid.