



“Yes” to a single letter trademark. “No” to a monopoly on the alphabet.

In a recent dispute, the company L’Oréal obtained a favourable decision before the General Court of the European Union, which, on November 9, 2022, issued a decision in case T-610/21 holding that the two marks involved in the proceedings and consisting (mainly) of the letter “K” letter could not be considered as confusingly similar.

More specifically, the two signs (both used in reference to hair products) were: on one side, the figurative trademark filed by the famous cosmetic company consisting of a slightly stylized letter “K” depicted in a large bold font and positioned in the centre of a black square background, with the smaller-sized word elements written in upper-case letters “K WATER” overlying the stylized “K”; and, on the other side, the opponent’s earlier sign consisting of a stylized white letter “K” positioned on a black rectangular background.

Before the EUIPO, both the Opposition Division and the Board of Appeal decisions reveal some difficulty in providing objective criteria for establishing the “degree” of stylistic differentiation necessary to avoid confusion between marks chosen by two undertakings that feature the same letter, in particular where products are similar or identical.

In the first instance, the Opposition Division held that the two signs with the letter “K” were not confusingly similar due to their low degree of visual similarity. In this respect, the Opposition Division pointed out that, when there is phonetic and conceptual identity, the visual differences between the compared marks must be so strong as to eclipse the common verbal element. By applying this principle, the Opposition Division held that the stylistic elements of the earlier mark were not similar enough to establish a likelihood of confusion between the two signs, also due to the presence of the verbal expression “K WATER” in the opposed mark, as well as the fact that a consumer of hair products generally purchases these types of items in supermarkets on a self-service basis and is guided by the visual appearance of the product. Taking into account all of these aspects, the office concluded that the visual differences between the two signs with the letter “K” were significant and, as a consequence, rejected the opposition.

However, the EUIPO Board of Appeal disagreed, adopting different approach. The Board of Appeal observed that the starting point for comparing the trademarks should be to ascertain whether at least a significant part of the relevant public could recognize the letter of the alphabet in the signs at issue, regardless of how they may be stylized. Bearing in mind that the average consumer only rarely has the chance to make a direct comparison between the marks, and that the stylistic differences between the signs are not automatically sufficient to avoid their visual similarity, the Board of Appeal held that the visual similarity between the two “K” signs was average, and not low as established in the first instance. The Board also added that taking into account the identity between the products, the two signs would have to have strong differences in order to avoid a risk of confusion.

The overall impression from reading the decisions of the first and second instance of the EUIPO is that, even when trying to anchor the reasoning in general legal principles, the final decision will depend on the judge’s own analytic examination of the signs, which seems however to contradict the principle that the assessment has to be made bearing in mind the perception of the average consumer. This is likely one of the reasons why

the General Court decided to go in a different direction and ground its decision on a policy issue, to avoid encouraging anti-competitive practices that may strengthen the monopoly on a sign that the ownership of a trademark - by its nature – already confers.

In fact, the General Court observed that: (1) even where the products are similar or identical, the principle of interdependence should not be applied mechanically, and that (2) when comparing signs consisting of the same letter (regardless of stylization) one must avoid a final decision that allows an unjustified monopoly over a single capital letter of the alphabet for a specific range of goods.

In reading the decision, one recalls the decision of the EU Court of Justice in case C-84/16, which was commented some time ago in the IP Kat blog <https://ipkitten.blogspot.com/2017/08/are-you-xking-kidding-me-making-sense.html> and concerned a dispute between an earlier mark “X”, which was owned by Michelin, the famous producer of tyres, and the trademark “XKING”, which was also filed for tyres by its competitor Continental. Differently from the case at issue, in case C-84/16 the Court of Justice pointed out that there is no rule establishing that a single letter of the alphabet is a weak distinctive sign, and decided in favour of Michelin. However, in the above-cited blog post, the author critically observed that the decision risked enabling the owner of trademark consisting of a single letter – even if stylised - to prevent third parties from filing or using trademarks made up of the same letter, despite that they may be stylized differently or presented in combination with another word having a laudatory effect.

More specifically, according to the author of that post, the reasoning of the Court was erroneous (also) because the global assessment of the comparison of the marks had not been guided by the question of “how large should be the monopoly granted through the ownership of a trademark?”. In this respect, in the case T-610/21 at issue, the General Court, by finding that there was no confusion between the marks “K”/”K WATER”, appears to instead be guided precisely by this question:

“Furthermore, a finding that amounts to recognising a likelihood of confusion between two signs, one consisting primarily of a highly stylised, single capital letter and the other consisting of the same capital letter but written in a very different stylisation and combined with other word elements, would de facto amount to granting a monopoly over one capital letter of the alphabet for a specific range of goods. The Court has already had occasion to assess that risk, pointing out that the purpose of the opposition brought on the basis of a sign consisting of a single letter is to prevent the registration of a trade mark which is likely to give rise to a likelihood of confusion with an earlier mark, ‘in particular on account of its stylistic similarity’. In contrast, according to the Court, the purpose of the opposition is not to prevent the registration of a trade mark because it represents the same capital letter; nor is it to prevent the registration of all other trademarks consisting of such a letter (...)”. (Case T-610/21, para. 68)

Should the decision be appealed before the European Court of Justice, it will indeed be interesting to see what happens.