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Press and Information

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Judgments of the Court of First Instance in Cases T-396/02 and T-402/02

August Storck KG v Office for Harmonisation in the Internal Market (OHIM)

THE COURT OF FIRST INSTANCE HAS DISMISSED STORCK'S ACTIONS AGAINST OHIM'S DECISIONS NOT TO REGISTER TWO MARKS CONCERNING THE "WERTHER'S ORIGINAL" SWEET AS COMMUNITY TRADE MARKS

The shapes claimed are not sufficiently distinct from other shapes commonly used for sweets and therefore do not enable consumers to distinguish them from sweets of a different commercial origin

In 1998 August Storck applied to the Office for Harmonisation in the Internal Market (OHIM) for registration of two Community trade marks relating to the "Werther's Original" sweet. The first concerned a three-dimensional shape representing a light brown coloured sweet. The second concerned the representation in perspective of a twisted wrapper shape (shape of a sweet wrapper).

The OHIM examiner rejected those applications on the ground that the marks applied for were devoid of distinctive character and had not acquired such character through use. The Board of Appeal of OHIM dismissed Storck's appeals for the same reasons. In May 2003, Storck brought two actions before the Court of First Instance of the European Communities seeking annulment of those decisions.

The Court points out that a Community trade mark may consist of the shape of goods or of their packaging provided that it is capable of distinguishing the goods of one undertaking from those of other undertakings. Trade marks which are devoid of any distinctive character cannot therefore be registered.

The **three-dimensional mark** claimed in the present case is characterised by a combination of features which come naturally to the consumer's mind and which are typical of the goods in question. The shape of the sweet in question **is not significantly different from certain basic shapes for that type of product**, which are commonly used in trade, but is a variation of those shapes. It does not therefore enable the consumer to distinguish immediately and with

certainly the applicant's sweets from those of a different commercial origin.

As for **the mark consisting of the shape of a twisted wrapper**, the characteristics of its combination of shape and colour **are not sufficiently removed from those of the basic shapes commonly used in sweet or caramel wrappers** and consequently they are not likely to be remembered by consumers as indicators of commercial origin.

Furthermore, the advertising expenses incurred in promoting the "Werther's" caramel sweet do not provide any evidence of use of the trade marks as applied for. The same is true of the sales figures on which Storck relies which prove that the "Werther's Original" caramel sweet was sold by the applicant on the relevant market but do not in themselves demonstrate that the shape of the product or its wrapper were used as trade marks in respect of the product in question. Moreover, the sales figures provide no indication of the market share held by the applicant on the basis of the trade marks applied for. The surveys submitted for consideration by OHIM demonstrate that awareness of the caramel sweet in question was established not on the basis of its shape or of the shape of its wrapper, but on the basis of its name "Werther's", "Werther's Original" or "W.O." The survey concerning the market awareness of the "Werther's Echte" sweet shape was disregarded, irrespective of its evidential value, on the ground that it was adduced for the first time before the Court.

Consequently, the marks applied for were rightly refused registration.

REMINDER: An appeal, limited to points of law only, may be brought before the Court of Justice of the European Communities against a decision of the Court of First Instance, within two months of its notification.

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Languages available: DE, EN, FR, IT

The full text of the judgment may be found on the Court's internet site

<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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