



**DECISION
of the First Board of Appeal
of 27 May 2010**

In Case R 1153/2009-1

Rössle & Wanner GmbH

Ulrichstr. 102

D-72116 Mössingen

Germany

Opponent / Appellant

represented by OSTERTAG & PARTNER, Epplestr. 14, D-70597, Stuttgart,
Germany

v

INVISTA TECHNOLOGIES S.à.r.l.

Pestalozzistr. 2

CH-9000 St. Gallen

Switzerland

Applicant / Respondent

represented by BARKHOFF REIMANN VOSSIUS, Grosjeanstr. 2, D-81925,
München, Germany

APPEAL relating to Opposition Proceedings No B 1 085 721 (Community trade mark
application No 4 460 473)

THE FIRST BOARD OF APPEAL

composed of Th. Margellos (Chairperson), C. Rusconi (Rapporteur) and
Ph. von Kapff (Member)

Registrar: J. Pinkowski

gives the following

Decision

Summary of the facts

- 1 By an application filed on 27 May 2005, INVISTA TECHNOLOGIES S.à.r.l. ('the applicant') sought to register the figurative



for, as far as relevant in these proceedings, the following goods:

Class 20 – Furniture, cushions, pillows, mattresses, mattress pads; mirrors, photo frames, picture frames, baskets, hampers, jewellery boxes, furniture coverings, deckchairs and folding chairs, door stops, soft furnishings, trays; goods of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone shell, amber, mother of pearl, meerschaum and substitutes for all these materials, or of plastic.

- 2 The application was published in the Community Trade Marks Bulletin No 036/2006 of 4 September 2006.
- 3 On 4 December 2006 Rossie & Wanner GmbH (hereinafter, 'the opponent') filed a notice of opposition on grounds of likelihood of confusion (Article 8(1)(b) CTMR) with the following earlier marks:
 - a) Word mark **LEGRA**, registered in Germany in 1997 under No 39713100 for 'electric drives for use with lath grids, mattress cores made of rubber or plastic materials, slatted frames, bedsteds, bedroom furniture, supporting structures for slatted frames, mattresses' in Classes 7, 17 and 20;
 - b) Figurative mark RO WA LEGRA, as reproduced hereunder



registered in Germany in 1997 under No. 39713101 and extended, under the Madrid Agreement, to Austria, Benelux and France, for the same goods.

- 4 On 13 September 2007 the applicant asked that the opponent be invited to prove use (Article 43(3) CTMR) between 2001 and 2006. On 18 February 2008 the

opponent submitted the following:

- invoices for printing the opponent’s advertisements (enclosed as ANNEX1);
- invoices issued for printing the opponents brochures (ANNEX2);
- invoices for producing the opponent’s brochures (ANNEX3);
- invoices for producing the opponent’s brochures (ANNEX4);
- invoices for printing the opponent’s brochures (ANNEX5);
- invoices for producing an illustration for the opponent (ANNEX6);
- invoices for producing the opponent’s leaflets (ANNEX7);
- invoices for producing the opponent’s promotional messages (ANNEX8);
- invoices for producing the opponent’s advertisements (ANNEX9);
- invoices for producing graphic designs for the opponent (ANNEX10);
- invoices for producing advertisements for the opponent (ANNEX11);
- a schedule showing money invested in advertising the LEGRA mark (ANNEX12);
- an advertisement for a ‘Bettsystem Legra’ (ANNEX13);
- an advertisement for the ‘LEGRA-schlafsystem’ (ANNEX14);
- a picture of a bed without any mark (ANNEX15);
- another picture of a bed without any mark (ANNEX16);
- an advertisements featuring a mattress and the words ‘Bettsystem LEGRA’ (ANNEX17);
- an advertisement for LEGRA mattresses (ANNEX18);
- a statement about the LEGRA bed issued by Oko-Test (ANNEX19);
- another statement about the bed by the same testing firm (ANNEX20);
- pictures of mattresses and slatted grids showing how the LEGRA mark is used on the products (ANNEX21);
- pictures of showrooms displaying the Bettsystem LEGRA’ (ANNEX22);
- a CD, whose contents cannot be read (ANNEX23);
- a copy of the opponent’s brochure LEGRA, displaying mattresses and grids associated with the LEGRA mark (ANNEX24);

- screenshots from the opponent’s website (ANNEX25);
 - comments and translations of preceding documents (ANNEX 26);
 - an affidavit signed by Hermann Glaser, managing director of the opponent (ANNEX27); the affidavit is accompanied by sales figures, advertising figures.
- 5 The applicant responded that the evidence was unsatisfactory, giving many reasons.
- 6 On 30 July 2009 the Opposition Division rendered its decision. The opposition was rejected on the ground that the evidence of use was insufficient for the following reasons:
- Annexes 10, 13, 15 and 23 are dated outside the relevant period (September 2001 to September 2006);
 - Annexes 17, 18, 22, 24 and 25 are not dated;
 - The figures in Annex 12 and 27 only consist of general items without taking into account the relevant goods in question;
 - The affidavit was ‘prepared’ by one of the employees of the opponent, therefore its evidentiary value is very low, due to the opponent’s own interest; moreover the sales figures are not subsequently documented by additional evidence;
 - Extracts of newspapers, brochures and tests, due to their ‘limited meaning’, cannot prove genuine use;
 - Invoices about advertising literature (Annexes 1 to 11) can generally give a ‘certain impression’ about the use of a trade mark; nevertheless, they are not a relevant documentation to inform about the extent of the use of the marks; other documents such as invoices, advertising figures, sales figures or the ‘volume of the use’ have not been filed; therefore the extent of use is not ‘comprehensible’; furthermore, the opponent ‘failed to demonstrate the prices’ of the products;
 - For the above reasons, the opponent’s material ‘is not suitable to prove a valid use’.
- 7 On 30 September 2009 the opponent filed an appeal. The grounds were received on 30 November 2009. The opponent asks that the decision be annulled and the case sent back to Opposition Division for ruling on likelihood of confusion. In the opponent’s opinion, the evidence of use has been incorrectly assessed for a number of reasons:
- The opponent’s declaration was incorrectly dismissed on the ground that the declarant cannot be trusted: the contrary is true, since the declarant is the person best informed on the facts;

- It is not clear why a declaration listing turnover figures, which is itself evidence, must be proved with ‘additional’ evidence, i.e. invoices; requiring declarations on turnover to be accompanied by bundles of invoices is irrational and absurdly burdensome: even invoices can be easily fabricated;
 - There is no explanation why extracts from newspapers and brochures have a ‘limited meaning’;
 - Annexes 1 to 11 show that a big number of brochures were printed and this suggests the intensity of promotional activities;
 - The sentence ‘Other documents such as invoices, sales and advertisement figures should have been submitted’ is manifestly wrong, since these have been submitted;
 - Individual proofs must not be considered *per se*, but in relation to the others, otherwise the overall picture is lost;
 - New evidence is attached: OPPO 28 and 29 are screenshots from the opponent’s website showing that LEGRA mattresses and slatted grids were on sale in 2002, 2003, 2004 and 2005; OPPO 30 to 32 are new brochures showing LEGRA products; these brochures are dated 2002 and 2005; OPPO 44 is a new affidavit signed by Manfred Greiner, managing director of the opponent, giving sales of mattresses and mattress supports from 2002 to 2007.
- 8 The applicant responded on 23 February 2010. It argues, firstly, that the evidence submitted is insufficient to prove use of the earlier marks: the affidavit is not supported by ‘bills’ or other independent verification; the documents filed only refer to advertisement efforts, not sales of products; the evidence submitted at the appeal stage should be refused because it is belated and submitted in the wrong language (German). Secondly, the applicant argues that there is no likelihood of confusion.

Reasons

- 9 The appeal complies with Articles 58, 59 and 60 CTMR and Rule 48 of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing the CTMR (‘CTMIR’) (OJ EC 1995 No L 303, p. 1; OJ OHIM 2-3/95, p. 258) as amended. It is, therefore, admissible.
- 10 The appeal is also well founded. The use of the earlier mark LEGRA has been proved for the purpose of Article 43 CTMR in relation to the goods for which the earlier word mark is registered in Germany. The contested decision must be annulled for this reason and the file shall be remitted to the Opposition Division for a ruling on the likelihood of confusion.
- 11 Annex 21 shows (i) how the mark is physically affixed on the products and (ii) what the products are for which the mark is used. The mark is affixed by means

of a label pasted on a side of the products. The mark is sometimes displayed together with the sign ROWA, which is another of the opponent's marks. It is a widespread practice to brand a product with more than one trade mark. The Board is satisfied that LEGRA is used as a trade mark.

- 12 The products for which LEGRA is used, according to Annex 21 are mattresses and slatted frames for mattresses.
- 13 The nature of use and the goods for which the mark is used have, thus, been proved (Rule 22 CTMIR).
- 14 Annex 27 is an affidavit. The document was rejected by the Opposition Division on the grounds that it was 'prepared' by an employer (sic) of the opponent. The Board observes that the affidavit was not merely 'prepared', but signed. It is the signature, rather than the 'preparation', that gives a document all its value: it is the person who signs a document who takes responsibility for the contents thereof.
- 15 The affidavit, dated 20 February 2008, was signed by Hermann Glaser, who states having been the managing director and partner of Rossle & Warner GmbH (the opponent) since 1983. The statement was drawn up and, above all, signed 'knowing the penal consequences of a wilfully wrong statutory declaration' and therefore complies with the formal requirement set out in Article 78(1)(f) CTMR.
- 16 Mr Glaser must be deemed well informed on the facts that he is making declaration about. He is not a simple employee of the firm, but the person most closely involved in the day-to-day management. He has been in this position for a quarter of a century. Anything this person states about the company carries weight. The Opposition Division's position that the weight to be given to Mr Glaser's declarations is 'very low' is, in this context, surprising. The justification given for the low value of the document is even more surprising: Mr Glaser has an 'interest' in the proceedings. It is the contrary that should be surprising, since any party in proceedings has (even must have) an interest. Mr Glaser's interest in winning the opposition is obvious and legitimate but the Opposition Division is not within its rights to automatically infer from that interest that Mr Glaser is prepared to make false statements.
- 17 Doubts concerning the trustworthiness of the declaration may always exist but must be based on objective elements, such as the existence of contradictions in the declaration or of manifestly implausible statements or suspiciously vague or reticent wording. As the General Court stated in its judgement of 7 June 2005 in Case T-303/03 *Lidl Stiftung & Co. KG v OHIM* ('Salvita') [2005] ECR II-1917, at paragraph 42, 'in order to assess the strength of a document as evidence, one should first of all look at the plausibility of the information it contains. To this effect, one should in particular consider who issued the document, in which circumstances it was produced, to whom it is intended and if, on the basis of its contents, it appears reasonable and reliable'.
- 18 The Opposition Division refused even to consider the merits of the document. Had the Opposition Division read it, it would have realised that nobody else – let alone somebody external to the firm – would have been able to make the kind of

statements it contains. The declaration is full of commercial information that third parties would have trouble in compiling.

- 19 The information in the declaration appears reasonable and plausible. Mr Glaser explains that the mark was first used in 1997 in Germany and has been continually used since. He states that the goods are mattresses and frames. He explains why the LEGRA mark is sometimes used in combination with ROWA. He explains that the mark is not advertised as a consumer product to the public because the beds are upmarket and are the subject of selective distribution. He comments in detail on the rest of the evidence that has been submitted. He gives statistics as regards the turnover for selling LEGRA goods and advertising them, during the relevant period, year by year.
- 20 The Board could not find anything in the declaration that might generate doubts about its trustworthiness. The applicant merely objected that the declaration was not supported by 'bills' (invoices), a view also expressed by the Opposition Division. Article 78 CTMR considers declarations as evidence on the same footing as 'documents and items of evidence'. The Board does not share the Opposition Division's position that declarations which contain sales figures should be proved with invoices because the declaration, provided it complies with the formal and substantial requirements listed above, is already proof. In addition, as the opponent suggests, since it would be easy to produce fake invoices (or falsify genuine ones), the submission of invoices would not increase substantially the reliability of the declaration.
- 21 Sales of LEGRA products average 2.8 million euros annually over the relevant five-year period. The opponent has demonstrated that the products are of high quality and expensive. They are not mass products. High quality mattresses sell for many hundreds of euros; frames are also costly. These are circumstances that must be considered when assessing if use is genuine or not. In the Board's opinion, the sales do prove a genuine, if perhaps not massive, use of the LEGRA brand on the German market of mattresses and bed frames.
- 22 Without it being necessary to examine the evidence filed at the appeal stage, the Board concludes that the evidence submitted at the opposition stage duly proves that the LEGRA word mark (subject matter of German registration No 39713100) has been used for all the goods mentioned in the registration.
- 23 The merits of the opposition should be examined on that basis.

Costs

- 24 Since the Board does not decide on the merits of the opposition, no adjudication of costs will be made for equity reasons (Article 85(2) CTMR). Each party will bear its own costs and fees.

Order

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision;**
- 2. Remits the file to Opposition Division for a ruling on the merits;**
- 3. Orders that each party bear its own costs and fees.**

Th. Margellos

C. Rusconi

Ph. von Kapff

Registrar:

J. Pinkowski