



OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET
(TRADE MARKS AND DESIGNS)

Cancellation Division

**DECISION
of the Cancellation Division
of 07/07/2009**

IN THE PROCEEDINGS FOR A DECLARATION OF INVALIDITY

OHIM reference number: 2890 C

Community trade mark: 2 997 856
EVIOL

Language of the proceedings: English

APPLICANT

Merck KGaA
Frankfurter Straße 250
64293 Darmstadt
Germany

REPRESENTATIVE

**Merck KGaA Trademark Dept.
Christine Graser**
Frankfurter Straße 250
64293 Darmstadt
Germany

against

**COMMUNITY TRADE MARK
PROPRIETOR**

**Gkap Anonymi Etaireia Viomichania
Farmakon diakritikos titlos G.A.P. S. A. i
GKAP A.E.**
Agisilaou 46
Agios Dimitrios (Brachami) Attikis
Greece

REPRESENTATIVE

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THE CANCELLATION DIVISION

composed of: Alexandra Apostolakis, Ruxandra Manea and Stephan Hanne has taken the following decision on 07/07/2009:

1. **The registration of Community trademark No 2 997 856 “EVIOL” is declared invalid in respect of all the goods for which invalidity is requested, namely for *vitamin preparations* in class 5.**
2. **The Community trademark No 2 997 856 remains registered for all uncontested goods.**
3. **The CTM proprietor bears the costs incurred by the applicant for cancellation.**

The costs are fixed as follows:

The amount of the costs to be paid by the CTM proprietor to the applicant pursuant to Article 85(6) Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community Trade Mark (“CTMR”) in conjunction with Rule 94(3) Implementing Regulation (EC) No 2868/95 of 13 December 1995 (“CTMIR”) shall be: 700 Euro (invalidity fee).

FACTS AND ARGUMENTS

(1) The Community trade mark No 2 997 856 “EVIOL” (word mark) was filed on 31/12/2002 and registered on 10/01/2008 for goods in classes 3 and 5.

(2) On 15/05/2008, Merck KGaA (“the applicant”) filed a request for a declaration of invalidity against the CTM on the basis of relative grounds, namely that the trade mark is confusingly similar to earlier rights of the applicant (Article 53(1)(a) CTMR in conjunction with Article 8(1)(b) CTMR).

(3) The following earlier rights have been invoked amongst others:

- Finnish Registration No 241 397 “EVION” (word mark), applied for on 14/10/1998, registered on 29/02/2008 and renewed until 28/02/2018 for goods in class 5. The application is based on all of the goods, namely *pharmaceutical, chemical preparations for medical and sanitary purposes, pharmaceutical substances and preparations, plasters, surgical dressings, disinfectants;*

- German Registration No 492 774 “EVION” (word mark), applied for on 31/07/1936, registered on 15/04/1937 and valid until 31/07/2016 for goods in class 5. The application is based on all of the goods, namely *pharmaceuticals, chemical products for medical purposes and hygiene, pharmaceutical drug substances and preparations, plasters, dressing materials, pesticides and herbicides, disinfectants*;
- Benelux Registration No 200 766 “EVION” (word mark), applied for on 14/10/1998 and registered on 12/07/2007 for goods in class 5;
- French Registration No 07/ 3 510 035 “EVION” (word mark), applied for and registered on 14/10/1998 for goods in class 5;
- German Registration No 307 36 696 “EVION” (word mark), applied for on 14/10/1998 and registered on 06/02/2008 for goods in class 5;

(4) The applicant has shown evidence of its entitlement with regard to the earlier registrations.

(5) The applicant files its request for a declaration of invalidity in respect of only part of the goods covered by the Community trade mark, namely:

Class 5: *Vitamin preparations.*

(6) On 22/05/2008 Gkap Anonymi Etaireia Viomichania Farmakon diakritikos titlos G.A.P. S. A. i GKAP A.E. (“the CTM proprietor”) was notified of the request. The CTM proprietor did not file any observations within the time limit set by the Office.

(7) In support of its request, the applicant alleges similarity of the marks on a visual and aural level. Moreover, the goods at issue are also found to be similar. A likelihood of confusion thus exists between the contested mark and the earlier rights.

(8) On 05/03/2009, the parties were informed that a decision would be taken.

GROUNDINGS FOR THE DECISION

On the admissibility

(9) The request complies with the formalities prescribed in the CTMR and CTMIR and is, therefore, admissible.

On the substance

(10) For the sake of economy of the proceedings the Office will base its decision on the earlier Finnish trademark registration No 241 397 and the

German trade mark registration No 492 774 because the duration of protection of these earlier rights has clearly not lapsed yet.

(11) The request is well founded. In the light of the evidence before it, the Office considers that CTM No 2 997 856 has been registered in breach of Article 8(1)(b) CTMR. Article 53(1)(a) CTMR is therefore applicable.

(12) Pursuant to Article 53(1)(a) CTMR a Community trade mark shall, on request to the Office, be declared invalid where there is an earlier trade mark as referred to in Article 8(2) CTMR and the conditions set out in Article 8(1) or (5) CTMR are fulfilled.

(13) Pursuant to Article 8(1) CTMR, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered:

(b) if because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trade mark.

On the likelihood of confusion

(14) The risk that the public might believe that the goods in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion (see Judgment of the Court of Justice of 29 September 1998 in case C-39/97, Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc., paragraph 29, published in OJ OHIM No 12/98, page 1407).

Comparison of the goods

(15) In assessing the similarity of the goods concerned, all the relevant factors relating to these goods must be taken into account. These factors include, *inter alia*, their nature, their purpose and their method of use, and whether they are in competition with each other or are complementary (see *Canon*, paragraph 23). Further factors include their origin and the pertinent distribution channels and sales outlets.

(16) The conflicting trade marks are registered for the following goods:

Finnish registration No 241 397:	<i>Vitamin preparations</i> in class 5
<i>Pharmaceutical, chemical preparations for medical and sanitary purposes, pharmaceutical substances and</i>	

<pre>preparations, plasters, surgical dressings, disinfectants in class 5; German registration No 492 774: Pharmaceuticals, chemical products for medical purposes and hygiene, pharmaceutical drug substances and preparations, plasters, dressing materials, pesticides and herbicides, disinfectants in class 5</pre>	
Earlier Rights	Disputed CTM

(17) The Office finds at least a high degree of similarity between *vitamin preparations* of the contested mark and the goods of the earlier rights, in particular *chemical preparations/products for medical purposes and pharmaceutical preparations*. The goods to be compared are distributed through the same sales channels and outlets, namely pharmacies or health food shops, are of the same nature, namely being preparations, available in the form of pills, capsules, powder or in liquid form and serve in general the same purpose. Both, *vitamin preparations* as well as *chemical preparations for medical purposes and pharmaceuticals* are ingested in order to improve one's health or to prevent or alleviate illnesses. Consequently, the goods at issue also target the same consumer or end user.

(18) The goods under comparison are therefore found to be highly similar.

Comparison of the signs

(19) According to the case law of the Court of Justice, "in determining the existence of likelihood of confusion, trade marks have to be compared by making an overall assessment of the visual, phonetic and conceptual similarities between the marks. The comparison must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components" (see Judgment of the Court of Justice of 11 November 1997 in case C-251/95, Sabel v. Puma, paragraph 23, published in OJ OHIM No 1/1998, page 91).

(20) The signs to be compared are:

EVION	EVIOL
Earlier Rights	Disputed CTM

(21) The earlier rights enjoy trade mark protection in Finland and Germany. Therefore it is the impression that the signs make on the Finnish and German public and their meaning and pronunciation in these languages which is relevant for their comparison.

(22) The earlier rights consist of the term "EVION" whereas the disputed CTM consists of the term "EVIOL".

(23) Visually, the signs thus coincide in their first four letters, namely "EVIO" and differ only in their very last and fifth letter, namely "N" in comparison to "L". They are of identical length. Considering the above, the signs to be compared are highly similar on a visual level.

(24) Phonetically, both signs consist of three syllables, namely /E/VI/ON/ as opposed to /E/VI/OL/. The first and second syllables are identical, as is the rhythm and intonation of the terms as such, based on the identical sequence of vowels: E-I-O. In both terms the accent lies either on the very beginning "E" or on the vowel "O". The only phonetic difference is to be found at the very end of the words, namely ending on "-ON" as compared to "-OL". However, the ending is not accentuated so that the difference created by this divergence is of minor impact on the overall high phonetic similarity.

(25) As to the conceptual comparison, neither of the terms has a meaning in Finnish or German. Therefore, the conceptual comparison has no influence on the comparison of the signs.

(26) Against the background of the aforesaid, the Office finds that the signs to be compared are visually and phonetically highly similar.

Conclusion

(27) Likelihood of confusion must be assessed globally, taking into account all the circumstances of the case. Likelihood of confusion implies some interdependence between the relevant factors, and in particular a similarity between the trade marks and between the goods or services. Accordingly, a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa. Furthermore, the more distinctive the earlier mark, the greater the risk of confusion. Marks with a highly distinctive character, either *per se* or because of the reputation they possess on the market, enjoy broader protection than marks with a less distinctive character (see *Canon*, paragraph 17 et seq.).

(28) For the purposes of that global appreciation, the average consumer of the category of products concerned is deemed to be reasonably well-informed and reasonably observant and circumspect. However, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind. It should also be borne in mind that the average consumer's level of attention is likely to vary

according to the category of goods or services in question (see Judgment of the Court of Justice of 22 June 1999, case C-342/97, *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel BV*, paragraph 26, published in OJ OHIM No 12/1999, page 1585).

(29) The goods in question target the public at large. It is thus the average degree of attentiveness of the average consumer which has to be taken into account.

(30) Moreover, in general the Office has the duty to assess the degree of distinctiveness of the earlier right given that the distinctiveness of the earlier trade mark must be taken into account in the assessment of likelihood of confusion. Indeed, the more distinctive the earlier mark, the greater will be the likelihood of confusion (see *Sabèl*, paragraph 24), and therefore marks with a highly distinctive character, either per se or because of the recognition they possess on the market, enjoy broader protection than marks with a less distinctive character (see *Canon*, paragraph 18).

(31) At issue, the applicant has neither claimed nor proven an enhanced degree of distinctiveness of the earlier rights through use. It is therefore the inherent distinctiveness of the signs, which applies and which is of an average degree.

(32) The goods have been found to be highly similar. The signs have been found to be highly similar visually and phonetically based on their identical beginnings.

(33) Against the aforesaid, the Office thus comes to the conclusion that a likelihood of confusion exists for the relevant public.

(34) Consequently, the request for invalidity as based on Articles 53(1)(a) and 8(1)(b) CTMR and with respect to Finnish registration No 241 397 and German registration No 492 774 as earlier rights is successful. The disputed CTM No 2 997 856 is invalid for the contested goods.

COSTS

(35) Pursuant to Article 85(1) CTMR and Rule 94 CTMIR, the party losing the cancellation proceedings shall bear the fees and costs of the other party. Thus, the applicant, as the party losing the cancellation proceedings shall bear the fees and costs of the CTM proprietor.



THE CANCELLATION DIVISION

Alexandra Apostolakis

Ruxandra Manea

Stephan Hanne

Notice on the availability of an appeal:

Under Article 59 of the Community Trade Mark Regulation any party adversely affected by this decision has a right to appeal against this decision. Under Article 60 of the Regulation notice of appeal must be filed in writing at the Office within two months from the date of notification of this decision and within four months from the same date a written statement of the grounds of appeal must be filed. The notice of appeal will be deemed to be filed only when the appeal fee of 800 Euro has been paid.

Notice on the review of the fixation of costs:

The amount determined in the fixation of the costs may only be reviewed by a decision of the Cancellation Division on request. Under Rule 94 (4) CTMIR such a request must be filed within one month from the date of notification of this fixation of costs and shall be deemed to be filed only when the review fee of 100 Euro (Article 2 point 30 of the Fees Regulation) has been paid.