

O-465-12

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 2582086

BY

RICHARD EDRICH

TO REGISTER THE TRADE MARK:

NUTRIGRO

IN CLASS 1

AND

THE OPPOSITION THERETO

UNDER NO 102415

BY

SPECIALITY FERTILIZER PRODUCTS, LLC

1) On 23 May 2011 Mr Richard Edrich filed an application for the registration of the trade mark NUTRIGRO (the trade mark). The application for registration was published on 17 June 2011 with the specification:

manure.

The above goods are in class 1 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

2) Specialty Fertilizer Products, LLC (Speciality) filed a notice of opposition to the registration of the application. It relies upon section 5(2)(b) of the Trade Marks Act 1994 (the Act), which states:

“(2) A trade mark shall not be registered if because -

.....

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

The opposition is based upon Community trade mark registration no 5716923 of the trade mark NUTRISPHERE-N. The application for registration was filed on 26 February 2007, with an international priority date of 31 January 2007 from the United States of America, and the registration procedure was completed on 12 February 2008. It is registered for:

chemical additives for fertilizers.

The above goods are in class 1 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

3) Speciality claims that the respective trade marks are similar as the first five letters of each are identical. It claims that GRO alludes to an effect/benefit of the goods. “As such the first five letters of the mark are most important in determining distinctive character.” (It is not clear to which trade mark Speciality is referring.) Speciality claims that the respective goods are similar or identical. Consequently, there is a likelihood of confusion.

4) Mr Edrich filed a counterstatement. He claims that there is no likelihood of the average consumer confusing the respective trade marks.

5) Both parties filed evidence. Speciality filed two sets of written submissions.

6) A hearing was held on 16 November 2012. Mr Edrich was represented by Mr Kevin Brewer of National Business Register LLP. Speciality was represented by Ms Kara Bearfield of Forresters.

Evidence

7) Kara Lynn Bearfield filed evidence for Speciality. Ms Bearfield is a trade mark attorney with Forresters. She exhibits screen shots from nutrisphere-n.com and a transcript of the video clip that appears upon the website. It is not clear when the screen shots were made. The website is clearly a United States website. The screen shots relate to a product sold under the NUTRISPHERE-N trade mark. NUTRISPHERE-N “manages nitrogen fertilizer – protecting it at the molecular level”. In the transcript the product is referred to by a farmer as NUTRISPHERE. Also exhibited is a screen shot, with no discernible date, from carrs-fertiliser.co.uk. The NUTRISPHERE-N product is described as a nitrogen fertiliser additive.

8) Mitchell Willmott, a trade mark attorney with National Business Register LLP, filed evidence for Mr Edrich. Parts of the witness statement are submissions. Material relating to the prefix nutri, downloaded from various websites on 10 January 2012, is exhibited:

- From abbreviations.yourdictionary.com. Nutri is defined as being short for nutrition.
- From medical-dictionary.thefreedictionary.com. Nutri is defined as a prefix meaning nourishment; nutrceptor, nutrient and nutritorium are given as examples of its use.
- Pages 8 – 25, 30, 32, 34 - 52 are pages from various websites showing use of Nutri in relation to products for human health, human food or personal care products.
- A page, without identification of jurisdiction, relating to a product called Nutri-FX. The product is described as a nutrient and is used to improve plant growth.
- Pages from an Australian website relating to software which is used by a company called Nutri-Tech Solutions, which makes fertilisers and supplements for livestock.
- A page from quizlet.com with results for “[f]lashcard sets with a „nutri’ term meaning „nourishing””.
- From chacha.com. A page that states that the Latin root of nutri means nourish.
- From wordmeaning.org. Nutri is described as meaning food, nurture, foster or keep.
- From zooplus.co.uk. Pages relating to Nylabone Nutri Dent teeth cleaning dog treats.
- From gardenhealth.com, a website for the United Kingdom and the Republic of Ireland. A page for Nutri all purpose plant food.

- From ellisonpoultry.com. Pages relating to Nutri-Peck Block, a product for poultry.
- From chickencoopsdirect.com, a United Kingdom website. Pages relating to Poultry Nutri Drops, a poultry supplement.
- Pages from carrs-fertiliser.co.uk. Pages relating to Nutri-Choice PK, a fertiliser.
- Pages from techneatengineering.co.uk and plantswap.co.uk. Pages relating to Nutri-Start Lq, a liquid fertiliser applicator.
- Page from nutri-bio.co.uk. A page relating to nutri-bio, a product to optimise the effects of fertiliser on crops.

The examples of use in trade show nutri being used as part of trade marks or trade names.

Likelihood of confusion – section 5(2)(b) of the Act

Average consumer, nature of purchasing decision and standard for likelihood of confusion

9) The average consumer “is deemed to be reasonably well informed and reasonably circumspect and observant”ⁱ. The respective goods could be used by farmers, nurserymen or home gardeners. The purchasing decisions of the first two categories are likely to be more careful and educated than the last category; lessening the effect of imperfect recollection. The consideration of likelihood of confusion must take into account all types of average consumers and so consideration must be given for the home gardener as consumer. The home gardener is likely to want to make sure what he or she is purchasing will have a positive effect, and not a deleterious effect, upon the plants in relation to which he or she intends to use the product. Consequently, the product is likely, by the home gardener, to be brought with a reasonable degree of care; so the effects of imperfect recollection will be limited in relation to this category of customer. For the home gardener the products are likely to be bought from shelving in retail establishments and so visual similarity will be of greater importance than aural similarityⁱⁱ. For the commercial consumer, the respective goods may be purchased by telephone or at a counter at an agricultural goods supplier as well as from shelving, by catalogue or over the Internet. Consequently, aural similarity may be as of much importance as visual similarity.

Comparison of goods

10) In “construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of tradeⁱⁱⁱ”. Words should be given their natural meaning within the context in which they are used, they cannot be given an unnaturally narrow meaning^{iv}. Consideration should be given as to how the average consumer would view the goods^v. The class of the goods in which they are placed may be relevant in

determining the nature of the goods^{vi}. In assessing the similarity of goods it is necessary to take into account, inter alia, their nature, their intended purpose, their method of use and whether they are in competition with each other or are complementary^{vii}. In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281, Jacob J also gave guidance as to how similarity should be assessed^{viii}.

11) Speciality has claimed that the respective goods are identical. In doing so it has treated the specification of its registration as being for fertiliser. It is not. The specification is for *chemical additives for fertilizers* ie chemicals that are added to fertilisers. (As well as being the clear meaning of the term, the evidence of Speciality shows that these are the goods in relation to which it uses the trade mark.) The respective goods are not identical.

12) Both sets of goods will be used on plants in order to improve their fertility. Consequently, they have the same purpose. The users will be those growing plants; they may be farmers, nurserymen, home gardeners or the like. The end users are the same. The respective goods will be available through the providers of agricultural products and garden shops; so they could have the same channels of trade. Manure is a product made from animal dung or plant material and is used in large quantities in relation to the area upon which it is used. A chemical additive is not used in large quantities and is not made from the same materials; the respective goods do not have the same nature.

13) In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T- 325/06 the General Court (GC) explained when goods are complementary:

“82 It is true that goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking (see, to that effect, Case T-169/03 *Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI)* [2005] ECR II-685, paragraph 60, upheld on appeal in Case C-214/05 *P Rossi v OHIM* [2006] ECR I-7057; Case T-364/05 *Saint-Gobain Pam v OHIM – Propamsa (PAM PLUVIAL)* [2007] ECR II-757, paragraph 94; and Case T-443/05 *El Corte Inglés v OHIM – Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)* [2007] ECR I-0000, paragraph 48).”

14) The goods of the earlier registration require fertilisers to use them and manure is a fertiliser; the goods of the earlier registration could be used to improve the effectiveness of manure. Manure does not require the goods of the earlier registration; consequently, there is potential dependency one way only. Taking into account the nature of the respective goods, the average consumer may think that the responsibility for those goods lies with the same undertaking. The respective goods are complementary.

15) The respective goods are not fungible; they are not in competition.

16) Overall there is a good deal of similarity between the respective goods.

Comparison of trade marks

17) The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details^{ix}. The visual, aural and conceptual similarities of the marks must, therefore, be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components^x. Consequently, there cannot be an artificial dissection of the trade marks, although it is necessary to take into account any distinctive and dominant components. The average consumer rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he/she has kept in his/her mind and he/she is deemed to be reasonably well informed and reasonably circumspect and observant^{xi}. The assessment of the similarity of the trade marks must be made by reference to the perception of the relevant public^{xii}.

18) The trade marks to be compared are NUTRISPHERE-N and NUTRIGRO. Speciality has criticised the evidence of Mr Edrich in relation to the meaning and use of the prefix nutri. In the two trade marks nutri is followed by a word or the obvious phonetic equivalent of a word. Nutri is a prefix that appears in words such as nutrition and nutrient. The goods of the respective trade marks provide nutrients for plants or improve the effect of nutrients for plants. In *Paul Hartmann AG v Harmonisierungsamt für den Binnenmarkt (Marken, Muster und Modelle)* (HABM) Rechtssache T-415/11, the GC, in relation to a different set of goods, held that nutri would be seen as meaning nutrition^{xiii}.

Outwith the evidence of Mr Edrich, nutri would be seen as indicating nutrition or nutrient and so descriptive of the products of both parties which supply nutrition or nutrients or assist in the absorption of nutrition or nutrients. As shown in the evidence of Mr Edrich, nutri is used in a number of areas and it clearly refers to nutrition in them. Even if the average consumer was not used to seeing nutri in relation to the respective goods; his or her knowledge from other areas would mean that the meaning would be readily understood. The average consumer will see nutri as being a prefix meaning nutrition or nutrient for the respective goods.

19) Speciality has submitted that it is established case law that the first portion of a trade mark is typically regarded as “lending the most distinctive character”. This is not established case law. The case law states that the consumer normally attaches more importance to the first part of words; this is not the same as the first part having the most distinctive character. The case law also states that this is not always the case^{xiv}; it is dependent upon the nature of the trade mark. Ms Bearfield referred to a decision of the Fourth Board of Appeal in R 414/2011-4 *Novartis AG v Tenimenti Angelini SPA*; that case turned upon its own facts and is not pertinent to the issues under consideration in this case.

20) Speciality has argued that in use the N element of its trade mark may not be referred to; in relation to this it adduced the transcript from the website. The comparison is of trade marks in their entireties, the N element cannot be excluded from this comparison. The N element of Speciality's trade mark, taking into account the nature of the goods, will be seen as the chemical symbol for nitrogen; an essential element for plant growth. It is highly descriptive. The sphere element of Speciality's trade mark neither directly relates nor clearly alludes to the goods of the registration. The most distinctive and the most dominant element of Speciality's trade mark is sphere.

21) The gro element of Mr Edrich's trade mark is allusive to the purpose of the goods, to help plants grow. Being allusive, rather than directly descriptive, means that gro is slightly more distinctive and dominant than nutri. However, this is marginal and the distinctiveness very much lies with the trade mark as a whole.

22) There is a degree of visual and phonetic similarity, owing to the presence of nutri in both trade marks. The nutri element is directly descriptive and the weakest elements of the respective trade marks. Taking into account the nature of the prefix, there is a limited degree of visual and phonetic similarity in the trade marks in their entireties.

23) Speciality describes the respective trade marks as "fictitious" and so conceptual comparison is not relevant. Both trade marks consist of the prefix NUTRI and a readily recognisable component. Sphere, gro and N, in the context of the goods, all have clear and different meanings. So parts of the trade marks are conceptually identical and parts of them conceptually dissimilar; the conceptually identical parts are directly descriptive of the goods. However, NUTRISPHERE and NUTRIGRO as wholes have no clear meaning. Overall, the presence of the alien words sphere and gro, taking into account the descriptiveness of nutri, will give a limited degree of conceptual dissimilarity.

24) Overall, taking into account the distinctive and dominant components, the respective trade marks have a limited degree of similarity.

Conclusion

25) In considering whether there is a likelihood of confusion various factors have to be taken into account. There is the interdependency principle – a lesser degree of similarity between trade marks may be offset by a greater degree of similarity between goods, and vice versa^{xv}. In this case the respective goods enjoy a good deal of similarity. The sequitur of this degree of similarity is not that the trade marks have to be very different to avoid a finding of likelihood of confusion^{xvi}.

26) Owing to the common prefix and lack of any similarity of the other elements, the position in relation to aural and visual similarity are the same.

27) It is necessary to consider the distinctive character of the earlier trade mark; the more distinctive the earlier trade mark the greater the likelihood of confusion^{xvii}. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public^{xviii}. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the mark to identify the goods for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods from those of other undertakings^{xix}. As a whole NUTRISPHERE-N only has clear meaning in relation to the N element. NUTRISPHERE, as a whole, has no clear meaning. As a whole, the trade mark of Speciality enjoys a reasonable degree of inherent distinctiveness. (Speciality has referred to the fact that its product is sold in the United Kingdom and that this has an effect upon the likelihood of confusion. There has been no claim that the trade mark has acquired increased distinctiveness through use and no evidence to support such a supposition. It is not, therefore, understood what the relevance of the sale of the product in the United Kingdom is. (There is also no evidence that the product was for sale in the United Kingdom at the material date, 23 May 2011.)

28) In its written submissions Speciality submits that “[t]he applicant submits they are the proprietors of the distinctive mark NUTRISPHERE-N, used in connection with “manure” and “chemical fertilisers””. It is assumed that Speciality meant the opponent. If Speciality is referring to the goods for which its trade mark is registered, this submission is incorrect. It is registered for neither manure nor chemical fertilisers. As noted in relation to the comparison of goods, it is registered for *chemical additives for fertilizers*.

29) Mr Edrich submits that Speciality cannot claim a monopoly in the prefix nutri for the goods under consideration. The issue of likelihood of confusion must be made on the basis of the global appreciation; whether or not Speciality is claiming a de facto monopoly in the prefix nutri is not pertinent to this consideration.

30) The common element of the trade marks is the descriptive prefix nutri. In *Bundesverband der Deutschen Volksbanken und Raiffeisenbanken eV (BVR) g Harmonisierungsamt für den Binnenmarkt (Marken, Muster und Modelle) (HABM) Rechtssache T-197/10* the GC considered the issue of similarity and likelihood of confusion where trade marks coincide in relation to descriptive or non-distinctive elements^{xx}. The prefix nutri is not an element by which the average consumer will identify the goods of Speciality. The other elements of the respective trade marks are completely alien.

31) Taking into account the nature of the common prefix, the nature of the purchasing decision and the differences between the trade marks, there is not a likelihood of either direct or indirect confusion. The ground of opposition under section 5(2)(b) of the Act is dismissed.

Costs

32) Mr Edrich having been successful is entitled to a contribution towards his costs. Costs are awarded upon the following basis:

Preparing a statement and considering the other side's statement:	£200
Preparing evidence and considering the evidence of Speciality:	£500
Preparation for and attendance at the hearing:	£300

Total:	£1,000
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Specialty Fertilizer Products, LLC is to pay Mr Richard Edrich the sum of £1,000. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 23rd day of November 2012

**David Landau
For the Registrar
the Comptroller-General**

ⁱ *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* Case C-342/97.

ⁱⁱ In *New Look Ltd v Office for the Harmonization in the Internal Market (Trade Marks and Designs)* Joined Cases T-117/03 to T-119/03 and T-171/03 the GC stated:

"49 However, it should be noted that in the global assessment of the likelihood of confusion, the visual, aural or conceptual aspects of the opposing signs do not always have the same weight. It is appropriate to examine the objective conditions under which the marks may be present on the market (BUDMEN, paragraph 57). The extent of the similarity or difference between the signs may depend, in particular, on the inherent qualities of the signs or the conditions under which the goods or services covered by the opposing signs are marketed. If the goods covered by the mark in question are usually sold in self-service stores where consumer choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand

the product covered is primarily sold orally, greater weight will usually be attributed to any aural similarity between the signs.”

ⁱⁱⁱ *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281.

^{iv} *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267.

^v *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2003] RPC 32 dealt with a non-use issue but are still pertinent to the consideration of the meaning and effect of specifications:

“In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use. The court, when deciding whether there is confusion under section 10(2), adopts the attitude of the average reasonably informed consumer of the products. If the test of infringement is to be applied by the court having adopted the attitude of such a person, then I believe it appropriate that the court should do the same when deciding what is the fair way to describe the use that a proprietor has made of his mark. Thus, the court should inform itself of the nature of trade and then decide how the notional consumer would describe such use”

^{vi} *Altecnic Ltd's Trade Mark Application* [2002] RPC 34.

^{vii} *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* Case C-39/97.

^{viii} He considered that the following should be taken into account when assessing the similarity of goods and/or services:

“(a) The respective uses of the respective goods or services;
(b) The respective users of the respective goods or services;
(c) The physical nature of the goods or acts of service;
(d) The respective trade channels through which the goods or services reach the market;
(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.”

^{ix} *Sabel BV v Puma AG* Case C-251/95.

^x *Sabel BV v Puma AG* Case C-251/95.

^{xi} *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* Case C-342/97.

^{xii} *Succession Picasso v OHIM - DaimlerChrysler (PICARO)* Case T-185/02.

^{xiii} “27 Zunächst ist festzustellen, dass der Begriff „skin“ das englische Wort für Haut ist und der Begriff „nutri“ als Hinweis auf die Ernährung verstanden werden muss, da die maßgeblichen Verkehrskreise den Begriff als eine Abkürzung des Wortes nutrition (Ernährung) und anderer Worte mit ähnlicher Bedeutung, die vom lateinischen Verb „nutrire“ abgeleitet sind, ansehen. Sodann ist festzustellen, dass zwischen der sprachlichen Neuschöpfung „Nutriskin“ und der bloßen Summe ihrer beschreibenden Bestandteile „nutri“ und „skin“ kein merklicher Unterschied besteht. Daraus folgt, dass der Bestandteil „Nutriskin“ von den maßgeblichen englischsprachigen

Verkehrskreisen als „Hauternährung“ verstanden wird und somit Hauternährungsprodukte bezeichnet. Dem Vorbringen der Klägerin, der Bestandteil „Nutriskin“ bedeute „Ernährungshaut“ und sei daher beschreibend für Haut enthaltende Waren, die nicht von der Anmeldung erfasst seien, ist nicht zu folgen. Der Sinngehalt des angemeldeten Zeichens ist nämlich im Hinblick auf die betroffenen Waren zu prüfen; im vorliegenden Fall sind dies Haar- und Hautpflegeprodukte. Somit ist der Sinngehalt zu untersuchen, den der Begriff „Nutriskin“ für die maßgeblichen Verkehrskreise im Zusammenhang mit den in Rede stehenden Waren haben könnte. Hierzu ist festzustellen, dass der genannte Begriff von den maßgeblichen Verkehrskreisen nicht als Bezeichnung für Haut enthaltende Waren verstanden werden kann. Vielmehr wird dieser Begriff in Bezug auf die angemeldeten Waren von den maßgeblichen Verkehrskreisen als Beschreibung einer Eigenschaft von Haar- und Hautpflegeprodukten verstanden, nämlich ihrer hauternährenden Funktion. Diese beschreibende Bedeutung des Bestandteils „Nutriskin“ wird außerdem durch die zwei ebenfalls beschreibenden Bestandteile verstärkt, die das Zeichen ergänzen, nämlich „Protection“ und „Complex“.

28 Aus den vorstehenden Ausführungen geht hervor, dass die Beschwerdekammer zu Recht entschieden hat, dass der Begriff „Nutriskin“ für die von der Anmeldung erfassten Waren beschreibend ist, da er für die maßgeblichen Verkehrskreise eine Verweisung auf die hauternärende Funktion der genannten Waren darstellt.“

^{xiv} See *Spa Monopole, compagnie fermière de Spa SA/NV v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-438/07 the GC stated:

“23 Admittedly, the consumer normally attaches more importance to the first part of words (Joined Cases T-183/02 and T-184/02 *El Corte Inglés v OHIM – González Cabello and Iberia Líneas Aéreas de España (MUNDICOR)* [2004] ECR II-965, paragraph 81). However, that argument cannot hold in all cases (see judgment of 16 May 2007 in Case T-158/05 *Trek Bicycle v OHIM – Audi (ALL TREK)*, not published in the ECR, paragraph 70 and the case-law cited) and does not, in any event, cast doubt on the principle that the assessment of the similarity of marks must take account of the overall impression created by them.

^{xv} *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* Case C-39/97.

^{xvi} See *Meda Pharma GmbH & Co KG c Office de l’harmonisation dans le marché intérieur (marques, dessins et modèles) (OHMI)* Dans les affaires jointes T-492/09 et T-147/10:

« 50 La requérante soutient que, en cas d’identité de produits, il est nécessaire, pour exclure tout risque de confusion, que les signes présentent une plus grande différence que dans une situation où l’écart entre les produits est important. Or, dans les circonstances de l’espèce où l’identité des produits n’est pas contestée, la chambre de recours aurait dû conclure au risque de confusion, à l’instar de ce qui a été considéré dans la décision R 734/2008-1 de la première chambre de recours de l’OHMI, du 14 septembre 2009 (Alleris et Allernil). Selon la requérante, plusieurs décisions de l’OHMI démontrent que les décisions attaquées s’écartent de la pratique décisionnelle de l’OHMI, ce qui viole les principes d’égalité et de non-discrimination.

51 Il ressort de la jurisprudence que l’OHMI est tenu d’exercer ses compétences en conformité avec les principes généraux du droit de l’Union. Si, eu égard aux principes d’égalité de traitement et de bonne administration, l’OHMI doit prendre en considération les décisions déjà prises sur des demandes similaires et s’interroger avec une attention particulière sur le point de savoir s’il y a lieu ou non de décider dans le même sens, l’application de ces principes doit toutefois être conciliée avec le respect du principe de légalité. Au demeurant, pour des raisons de sécurité juridique et, précisément, de bonne administration, l’examen de toute demande d’enregistrement doit être strict et complet

afin d'éviter que des marques ne soient enregistrées de manière indue. C'est ainsi qu'un tel examen doit avoir lieu dans chaque cas concret. En effet, l'enregistrement d'un signe en tant que marque dépend de critères spécifiques, applicables dans le cadre des circonstances factuelles du cas d'espèce, destinés à vérifier si le signe en cause ne relève pas d'un motif de refus [voir, en ce sens, arrêt de la Cour du 10 mars 2011, Agencja Wydawnicza Technopol/OHMI, C-51/10 P, non encore publié au Recueil, points 73 à 77, et la jurisprudence citée, et arrêt du Tribunal du 22 novembre 2011, LG Electronics/OHMI (DIRECT DRIVE), T-561/10, non publié au Recueil, point 31).

52 Or il apparaît que, dans la présente affaire, la chambre de recours a correctement pris en compte les circonstances de l'espèce. À cet égard, elle a, à juste titre, constaté l'identité des produits concernés en l'espèce, elle a aussi retenu une similitude très faible des signes en cause sur les plans phonétique et visuel et une impossibilité de comparaison de ces mêmes signes sur le plan conceptuel, comme il ressort des points 40, 41 et 46 ci-dessus. Dès lors, comme le soutient à juste titre l'OHMI, l'identité entre les produits désignés est compensée par un très faible degré de similitude entre les signes en cause et la chambre de recours a pu conclure à bon droit à l'absence de tout risque de confusion, d'autant que le degré d'attention du public est accru et qu'il n'est pas démontré que la marque antérieure présente un caractère distinctif élevé. »

^{xvii} *Sabel BV v Puma AG Case C-251/95.*

^{xviii} *Rewe Zentral AG v OHIM (LITE) Case T-79/00.*

^{xix} *Windsurfing Chiemsee v Huber and Attenberger Joined Cases C-108/97 and C-109/97.*

^{xx} "48 Diese Rügen des Klägers können jedoch das Ergebnis der Beschwerdekammer nicht in Frage stellen, wonach zwar zwischen den einander gegenüberstehenden Zeichen eine „gewisse Ähnlichkeit“ auf begrifflicher Ebene vorliege, diese jedoch schwach bleibe. Genauso wie sich nämlich die Begriffe „Austria“ und „Leasing“ oder die Abkürzung „Gesellschaft m.b.H.“ jeweils auf Österreich, Mietkaufverträge oder eine Gesellschaftsform beziehen, verweist der Begriff „Raiffeisen“ in allerdings weniger offenkundiger, jedoch ebenso bedeutsamer Weise, was die Prüfung auf begrifflicher Ebene angeht, auf eine Art genossenschaftlicher Organisation im Bankensektor, die durch die von Friedrich Wilhelm Raiffeisen im 19. Jahrhundert entwickelten Grundsätze geleitet wird. Zudem übernimmt die Beschwerdekammer zwar die Auffassung, dass das Wortelement „Raiffeisenbank“ der älteren Marke von den angesprochenen Verkehrskreisen als Hinweis auf den Namen „einer bekannten Gruppe regionaler Banken, die Raiffeisenbanken, verstanden“ werde, doch seien diese „Raiffeisenbanken“ dem Publikum nicht im Zusammenhang mit Österreich oder einer österreichischen Bankengruppe bekannt, die sich von den Ideen von Friedrich Wilhelm Raiffeisen leiten lasse. Bankengruppen nach dem von diesem erdachten Konzept gebe es in verschiedenen Ländern.

49 Der Begriff „Raiffeisen“ hat nämlich eine beschreibende Bedeutung, die auf eine Art genossenschaftlicher Organisation verweist und die für den Kläger in Deutschland ebenfalls Kennzeichnungskraft hat, denn die von dieser Organisation in diesem Land angebotenen Dienstleistungen werden durch eine Bildmarke gekennzeichnet, die diesen Begriff verwendet. Eine andere Bildmarke kann jedoch diesen Begriff ohne Weiteres enthalten, wenn dieser auf begrifflicher Ebene nur auf seine beschreibende Bedeutung oder zumindest auf einen Wirtschaftsteilnehmer, der mit dieser Art genossenschaftlicher Organisation in einem anderen Land als Deutschland tätig ist, hinweist.

... 61 Außerdem kann sich die Beurteilung der Verwechslungsgefahr entgegen dem Vorbringen des Klägers nicht mit der Feststellung begnügen, dass der Begriff „Raiffeisen“ möglicherweise als dominierender Bestandteil der älteren Marke betrachtet, oder, wie der Kläger ausführt, einem Bestandteil gleichgestellt werden kann, der eine selbständig kennzeichnende Stellung in der

angemeldeten Marke im Sinne des in Randnr. 56 des vorliegenden Urteils angeführten Urteils Medion hat. Aus dem Vorstehenden ergibt sich nämlich, dass die Beschwerdekammer davon ausgegangen ist, dass die anderen Elemente der älteren Marke und der angemeldeten Marke bei der Beurteilung der Verwechslungsgefahr eine Rolle spielten. Sie hat die einander gegenüberstehenden Bildmarken zu Recht insgesamt geprüft, ohne sie auf den einzigen Begriff zu reduzieren, der in jeder dieser Marken enthalten ist.

62 Überdies legt der Kläger, da es „Raiffeisen-Bankengruppen“ in verschiedenen Ländern, wie Österreich und Deutschland, gibt, nicht überzeugend dar, aus welchen Gründen die maßgeblichen Verkehrskreise, bei denen in Bezug auf die Finanzdienstleistungen ein höherer Grad an Aufmerksamkeit vorliegt (vgl. Randnr. 20 des vorliegenden Urteils), die in Deutschland niedergelassenen „Raiffeisenbanken“ gedanklich mit den in Österreich niedergelassenen „Raiffeisenbanken“ in Verbindung bringen könnten.

63 Im Ergebnis ist davon auszugehen, dass die Beschwerdekammer zu Recht aufgrund der Ausführungen in der angefochtenen Entscheidung zu dem Ergebnis gelangt ist, dass unter Berücksichtigung der maßgeblichen Verkehrskreise und trotz der Ähnlichkeit der beanspruchten Dienstleistungen die zwischen den Zeichen bestehenden Unterschiede in Anbetracht des Gesamteindrucks ausreichend sind, um jede Verwechslungsgefahr auszuschließen.”