

World Trademark Review Daily

**Board of Appeal's decision annulled due to "inadequate" assessment
European Union - Klos Morel Vos & Schaap**

**Examination/opposition
International procedures**

July 24 2013

In *Aventis Pharmaceuticals v Office for Harmonisation in the Internal Market* (OHIM) (Case T-142/12, July 11 2013), the General Court has annulled a decision of the Board of Appeal of OHIM in which the latter had found that, even though the goods and services at issue were identical or similar, there was no likelihood of confusion between the marks CULTRA and SCULPTRA.

Fasel Srl applied for registration as a Community trademark of the sign depicted below, covering goods in Class 10 of the [Nice Classification](#):



Aventis Pharmaceutical Inc opposed the application on the basis of Czech, German, Finnish, UK and Hungarian trademark registrations for the word mark SCULPTRA, covering goods and services in Classes 5, 10 and 44, under Article 8(1)(b) of the [Community Trademark Regulation](#) (207/2009) (likelihood of confusion).

Both the Opposition Division and the Board of Appeal of OHIM rejected the opposition. They based their decisions on the premise that there was only a low degree of similarity between the signs at issue. Together with the relatively high level of attention of the public when buying health-related goods and services, this was sufficient to exclude a likelihood of confusion, despite the identity or similarity of the goods and services.

On appeal, the General Court confirmed the Board of Appeal's finding that there was only a very low degree of visual similarity in the present case. However, with regard to aural similarity, the General Court found that the Board of Appeal had omitted to compare the signs from the perspective of that part of the relevant public which would pronounce the figurative element of the sign applied for as the letter 'C'; an element which brings the mark applied for closer to the earlier marks. In addition, even if the Board of Appeal had implicitly taken this into account, the General Court observed that the pronunciation of the beginning of the words 'cultra' and 'sculptra' by the relevant Hungarian and Czech public was liable to give rise to similar sounds. Consequently, contrary to the finding of the Board of Appeal, the General Court concluded that the marks were phonetically similar for at least that part of the public.

In addition, the court disagreed with the Board of Appeal's conclusion that the signs were conceptually different - because the board did no more than find that the words 'cultra' and 'sculptra' were conceptually different, without providing any explanation in support of this statement, even though it conceded that these words could refer to the concepts of 'culture' and 'sculpture', which may be linked to each other.

Consequently, the General Court ruled that, since the goods and services covered by the trademarks at issue were identical or similar, the Board of Appeal's finding that there was no likelihood of confusion necessarily flowed from the inadequate assessment of the phonetic and conceptual similarity of those marks. The court thus annulled the board's decision.

This decision demonstrates that, in view of the rule that likelihood of confusion in only one part of the Community is sufficient to reject an application for the whole Community under Article 8(1)(b) (see, eg, *Muelhens GmbH & Co KG v OHIM* (Case T-355/02, Paragraph 36) and *Osotspa Co Ltd v OHIM* (Case T-33/03, Paragraph 39)), the 'weakest link' in the Community is the deciding factor: account must be taken of those people who may perceive the signs as being similar (visually, aurally or conceptually), even though another part of the public may not perceive the signs as such.

Marloes Meddens-Bakker, Klos Morel Vos & Schaap, Amsterdam

World Trademark Review *Daily*

World Trademark Review (www.worldtrademarkreview.com) is a subscription-based, practitioner-led, bi-monthly publication and daily email service which focuses on the issues that matter to trademark professionals the world over. Each issue of the magazine provides in-depth coverage of emerging national and regional trends, analysis of important markets and interviews with high-profile trademark personalities, as well as columns on trademark management, online issues and counterfeiting.