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INSIGHTS OF THE EUROPEAN COMMUNITIES TRADE MARK ASSOCIATION

INTERVIEW WITH
ANETTE RASMUSSEN

THE DIGITAL SERVICES
ACT- A CURRENT VIEW
WITH AN EYE TO THE
FUTURE
NICOLE VAN ROON



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Enjoy !

Red Bull-Trade Marks Well-known also for ‘Events’

BACKGROUND

Red Bull has been the world's largest producer of energy drinks for decades. It is established case law in many jurisdictions that Red Bull's trade marks, especially the signs shown here below (hereinafter: ‘Red Bull signs’), have a reputation for energy drinks.

Red Bull

e.g. [EUTM 017363094](#)



e.g. [EUTM 017363037](#)



e.g. [EUTM 01056431](#)



e.g. [EUTM 01564301](#)

BULL

e.g. [IR 0867085](#) designating the EU

Bullsone, based in South Korea, has been selling car care products in South Korea since at least 2001 and has a market share of over 90 percent there. On 5 May 2011, Bullsone changed its branding appearance from the signs used until then namely,



to the signs



and

Bullsone

(hereinafter: ‘Bullsone signs’).

Red Bull and Bullsone have litigated regarding the signs in many jurisdictions for years. As Bullsone started to offer its products in Austria, Red Bull filed an action with the Commercial Court in Vienna, Austria, on 19 December 2017, requesting an EU-wide injunction.

AUSTRIAN PROCEEDINGS FOR EU-WIDE INJUNCTION

Red Bull requested, *inter alia*, injunctive relief based on the outstanding reputation of the Red Bull signs, arguing that these were well-known not only for energy

8. ECTA Case Law Reports

drinks but also for entertainment services in connection with cultural and sporting activities ('events'). Furthermore, Red Bull requested the authorisation for the publication of the decision in one of the largest newspapers in Austria.

Bullsone's defence was based on absence of a risk of confusion. Moreover, it considered that the Bullsone signs and the Red Bull signs would not be associated, especially due to the entirely different kind of products: energy drinks on the one hand, car care products on the other. Furthermore, Bullsone argued that Red Bull had been aware of Bullsone's signs for more than twenty years, so the limitation in consequence of acquiescence applied. In any case, Red Bull's trade mark rights did not cover car care products and their reputation of energy drinks could not be transferred to those.

SCOPE OF PROTECTION FOR WELL-KNOWN TRADE MARKS

To be protected under Art. 9(2)(c) EUTMR, the trade mark must enjoy a reputation among (at least) a significant part of the relevant public for the goods or services in question (ECJ C-375/97, *General Motors*). However, it is not necessary that the trade mark is used or even reputed on the market where the infringing sign is used. The main requirement is that the junior sign is likely to be associated with the reputed mark, which requires, in any event, that the signs are similar (ECJ C-408/01, *Adidas*; C-487/07, *L'Oréal*). While the goods and services need not be similar, the product fields in which the respective signs are reputed or used must not be so remote as to exclude any association in the minds of the relevant public. This is why Red Bull specifically referred to the reputation of its trade marks for entertainment services in connection with cultural and sporting activities ('events').

As regards the reputation of the Red Bull signs, the Austrian Court, based

on the undisputed submissions by Red Bull, found that the Red Bull signs 'undoubtedly fulfil(ed)' the requirements also for 'events'. Red Bull indeed develops, organises and hosts numerous sportive events in many countries of the world including in the EU. The relevant public for such events is aware that Red Bull does not appear at those events (exclusively) to promote their energy drink, but that Red Bull has created those sports or series of events as their organiser.

Furthermore, the Court ruled that the Bullsone signs are similar to the Red Bull signs in particular because of the same colouring (red colour) and figurative representation (charging bull in front of – a shield with – a sun). Also the word mark Bullsone was found similar to the Red Bull signs, because – in addition to the same red colouring – both contained the word 'Bull', which makes a strong reference to the protected trade mark (the bull) in terms of visual, phonetic and conceptual similarity. The fact that it was only a single word could not dispel that similarity, particularly since the word 'bull' is clearly distinctive in both signs.

The protection of a well-known trade mark requires further that the use of the junior sign is without due cause and takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark. The mere existence of an association is not sufficient, but if an identical or similar sign is used, it is reasonable to suspect unfair motives because of the obvious possibility of exploiting the reputation of the well-known trade mark. This is particularly the case where the third party attempts free-riding (C-487/07, *L'Oréal*, mn 49, 74). The Austrian court affirmed such free-riding in the present case: There was no explanation which honest motives would have led to

changing Bullsone's prior branding and adopting the new signs that were highly similar to Red Bull's well-known trade marks. While Bullsone had the Bullsone signs designed in 2011, this was shortly after Red Bull had entered the Korean market.

The Commercial Court of Vienna therefore ruled in favour of Red Bull, issuing an EU-wide injunction against use of the Bullsone signs for car care products. This was maintained by the Higher Court of Vienna by judgment of 28 July 2020 ('Oberlandesgericht Wien' – 1 R 140/19v). Notably, to the knowledge of the author, this is the first time that the reputation of Red Bull is confirmed to encompass also sporting and cultural events. This judgment further solidifies Red Bull's brand protection in the EU.«



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