

## **Athens Administrative Court of Appeal**

**Decision No. 2209/2009** (formally served on January 18<sup>th</sup>, 2010)

1. Reversal/Recourse
2. National Procedures

*Likelihood of confusion between different classes of products aimed at children*

The Athens Administrative Court of Appeal issued a ruling confirming that trademarks covering different classes of products may pose a risk of consumer confusion, particularly where the overall effect of the contested trademark is similar to a prior existing trademark.

This case concerned the opposition raised by Ferrero SpA, who were holders of more than 17 pre-existing composite (figurative and word) trademarks that included the word 'KINDER' and covered, among others, various products in class 30. The opposition was lodged against an application filed by the company Soldan Holding Bonbonspezialitäten GmbH for the registration of the composite trademark "KINDER EUCAL" for class 5 and class 30 products. The contested trademark consisted of a drawing of a young, smiling boy with striped clothing, holding a banner in his hands bearing the words KINDER and EUCAL. Ferrero's claim was based on Art.3a of Law No. 1998/1939, as replaced by Art.1 of Law No. 3205/1955, providing that a trademark cannot be acceptable for registration if, *inter alia*, it constitutes a misrepresentation or imitation of a trademark that has already been lawfully registered and has not been removed thence. Accordingly, Ferrero sought the annulment of the Trademark Committee's decision to accept the registration of the "KINDER EUCAL" trademark, arguing that it constituted an imitation of its own, earlier composite trademarks, including - *inter alia* - "KINDER", "KINDER SURPRISE", "KINDER CIRCUS", "KINDER SOFTY" and "KINDER BUENO", some of which also included a similar depicting of a young, smiling boy. The Committee partially accepted the opposition filed, but only insofar as the registration in relation to class 30 products (confectionery, dietary confectionery products, etc) was concerned, and not in relation to class 5 products (pharmaceutical preparations, including dietary confectionery products such as diet candies, diet chocolates, throat lozenges and syrups, etc). Ferrero filed a recourse against this decision before the Athens Administrative Court of First Instance, claiming that registration of the said trademark should also be rejected for class 5 products, as they, too – just like Ferrero's well-known products – were aimed towards children and, as such, risk of consumer confusion as to the origin of the products was present. The Court rejected this claim, stating that the said class 5 products were entirely different than those covered by Ferrero's registered trademarks, thus posing no such risk.

Upon appeal filed by Ferrero, the Athens Court of Appeal ruled that this reasoning was flawed. The Court was not convinced by Ferrero's claim that the KINDER series of earlier trademarks was famous or generally well-known amongst Greek consumers at the relevant time. Contrary to the ruling of the First Instance Court, however, it found that there was a likelihood of confusion as to the origin of the products and a risk of associating them with the producing company of the well-established KINDER products. Therefore, given that:

- the dominating feature of all trademarks in question was the word KINDER

- all products covered were geared at child consumers, even though they were categorized within different classes
- there was considerable phonetic and visual similarity, the word ‘EUCAL’ and the device of the contested mark resembling a child’s sketch not being sufficient to differentiate the marks from each other

the Athens Administrative Court of Appeal upheld Ferrero’s contentions and quashed the decision regarding the acceptability of registration of the “KINDER EUCAL” trademark in regard to class 5 products.

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