

Not even an energy drink could fuel up certain trademarks – the recent invalidity of the Red Bull two-colour logo

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On 29 July 2019, Red Bull GmbH saw its appeal against the decision of the General Court of the European Union dismissed by the European Court of Justice (“ECJ”) in case C-124/18 P. Thus, confirming the invalidity of two Red Bull proprietary trademarks, respectively filed on 2002 and 2010 and both consisting of the following blue and silver colour combination:

Both trademarks carried a 50%-50% ratio of the colours at issue, however, in the first one those were described as “[...] blue (RAL 5002) and silver (RAL 9006)” and, in the second one “[...] blue (Pantone 2747C), silver (Pantone 877C)”.

The company Optimum Mark filed with the EUIPO a declaration of invalidity of both the trademarks above. Such a pleading was granted by the Cancellation Division on the grounds that the signs were not described precisely enough as the “[...] allowed numerous different combinations which would not permit the consumer to perceive and recall a particular combination, thereby enabling him to make further purchases with certainty”. Such a decision was then retained both by the First Board of Appeal of EUIPO and then by the General Court.

The dismissal of the Red Bull claim did not cause the ECJ to find any creative grounds. We highlight some of the cornerstones of the colours trademark developed by the EU case-law on the point (i.e. cases C-578/17, C-104/01, C-49/02):

- The graphic representation of a trademark provided for its registration shall effectively and precisely determine the subject matter and the scope of the sought protection;
- The examination of a trademark application consisting of a combination of colours shall not unduly restrict the availability of colours among those operators selling products of the same type of those pertaining to the application at issue;
- The mere juxtaposition of colours in a trademark application does not effectively allow the competent authorities, the relevant public and the other business operators to know the scope of the protection afforded to the proprietor of the trade mark.

In the end the ECJ determined that the description of the Red Bull trademarks is not sufficiently precise and that the use of the term “juxtaposition” thereof entails that the association of the colours at issue “[...] can take different forms, giving rise to different images or layouts, while still being in equal proportion”.

From this decision we have learnt that the application of a trademark consisting of a combination of colours, regardless of the reputation acquired through its prior use, requires extreme precision, clearness, intelligibility and self-contained details for its validity.

So, is it over for the famous-but-not-protectable Red Bull blue and grey combination? Perhaps.

We can ponder whether this ECJ ruling would have been the same if the contested marks had been applied after 1 October 2017 and thus subject to art. 4 of EU Regulation 2017/1001, which does no longer require the “graphical representation” of the application.

Based on the assumption above, the ECJ ruling is based on an objection by the EUIPO based on the grounds of the graphic representation of the signs, it is arguable that the same case could have a different outcome if decided under the application of EU Regulation 2017/1001.

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