

**Levi Strauss successful on appeal in '501' case  
European Union - Squire Patton Boggs**

**Examination/opposition  
International procedures**

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In *Levi Strauss & Co v Office for Harmonisation in the Internal Market* (OHIM) (Case T-604/13), the General Court has overturned a decision of the Second Board of Appeal of OHIM, finding that the Community trademark (CTM) application for the word mark 101 was visually and phonetically similar to *Levi Strauss & Co's* earlier CTM 501. The Board of Appeal will now have to examine whether such similarity creates a likelihood of confusion under Article 8(1)(b) of the *Community Trademark Regulation* (207/2009) and, if so, whether the CTM application takes unfair advantage of, or is detrimental to, the repute of Levi's mark under Article 8(5).

On October 14 2011 L&O Hunting Group GmbH applied for the word mark 101. The mark was filed in, among others, Class 25 of the *Nice Classification* for "clothing, footwear and headgear". Levi opposed this mark based on its earlier CTM 501 for identical goods in Class 25, citing Articles 8(1)(b) and 8(5). Both the examiner and the Second Board of Appeal of OHIM rejected Levi's opposition, finding that the conflicting signs were sufficiently dissimilar.

In its appeal before the General Court, Levi repeated its two pleas in law alleging infringement of Articles 8(1)(b) and 8(5). In its first plea, Levi accused the Board of Appeal of having overestimated the difference between the marks created by the fact that they begin with different numbers, while at the same time underestimating the similarity created by the fact that the remaining two digits were identical and located at the end of each numerical sequence. The difference in a single digit could not *per se* be sufficient to eliminate the overall visual and phonetic similarity of the signs.

Levi further argued that the Board of Appeal should not have relied on the general rule that differences between short signs are more likely to create a different overall impression; rather, it should have made an overall assessment, taking into account the reputation of the earlier mark. In addition, Levi argued that the Board of Appeal had failed to recognise that the principle according to which the emphasis is on the beginning of a mark does not necessarily justify a finding of dissimilarity in an overall assessment of the marks.

Levi's second plea followed from its first, contending that the Board of Appeal had erroneously decided the threshold matter of similarity, and thus had not analysed the likelihood of confusion in the mind of the consumer or the claim of infringement under Article 8(5).

In its legal assessment, the General Court stressed the general legal principle, as held in *GIORGIO BEVERLY HILLS* (Case T-162/01, Paragraph 33), that the average consumer generally perceives a mark as a whole and does not proceed to analyse its various details. Thus, the General Court was receptive to Levi's arguments regarding the importance of an overall assessment.

With regard to the visual similarity, the General Court reasoned that a difference between two marks that is based on a variance in only one of their three components, without additional, special circumstances, cannot result in a different overall impression of the compared signs. Even though the consumer normally attaches more importance to the first part of a mark, a difference in the first digit of the compared signs cannot be regarded as a special circumstance in itself, without further analysing the differing digit. With regard to the Board of Appeal's finding that a difference existed by virtue of the symmetrical structure of the mark 101 compared to the asymmetrical structure of the mark 501, the General Court determined that this reasoning did not sufficiently support the conclusion that such a difference created a dissimilar overall impression. Therefore, the General Court held that the Board of Appeal had erred in holding the marks to be visually dissimilar.

With regard to the phonetic similarity, Levi argued, among other things, that the common parts in both marks are longer compared to their dissimilar first digit, thus making the marks sound more similar than not. From a French perspective, the mark applied for is even fully integrated in the earlier mark when written or spoken ('*cent un*' (101) and '*cinq cent un*' (501)). As a consequence, there was no denying that the similarity in sound at the end of the conflicting signs could easily be perceived by the relevant public. Taking Levi's assertions into account, the General Court held that the Board of Appeal had failed to establish that the conflicting signs created overall disparate impressions and, thus, had erred in its decision of the phonetic dissimilarity.

Regarding the conceptual similarity between the marks at issue, the General Court agreed with the Board of Appeal that the similarities in the marks were not sufficient in themselves to establish a conceptual

similarity because the numbers, in this instance, conveyed no meaning. The General Court further reasoned that, even if it were to assume that numbers could convey a meaning, the differing digits at the beginning of the signs conveyed different meanings, namely the respective amounts to which they refer. Thus, the Board of Appeal had been correct to conclude that these signs were, overall, conceptually dissimilar.

The General Court concluded that, due to the degree of visual and phonetic similarity between the marks, the Board of Appeal had erred in its assessment on this point. As a consequence of its error on this threshold issue, the Board of Appeal had failed to assess the overall likelihood of confusion between the conflicting marks and, potentially, whether the CTM application took unfair advantage of, or was detrimental to, the repute of Levi's mark. On those grounds, the contested decision was annulled, and the case returned to OHIM for further examination.

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