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THE RELEVANT PUBLIC IN THE COMMUNITY TRADE MARK SYSTEM – UNVEILING THE MYSTICAL ANIMAL

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1. Introduction

The most important goal of a trade mark is to create a connection between the trade mark owner and his potential customer. On the supply side of the market, trade marks are used by corporations to distinguish their products from those of rival companies. On the demand side, a trade mark helps consumers to make a choice between a whole range of similar goods. Trade marks consequently constitute an essential element in the success of free competition.

A mark however only exists through consumer perception and it is therefore crucial to know in what aspects of (European) trade mark law the relevant public plays a role and – more significantly – how to interpret this concept. In practice we see that the search for the average consumer receives only minor attention and involves nothing more than the reciting of a few of the mantras the European Court of Justice (ECJ) uses in its case-law. The need for more clarity about the relevant consumer is reflected in the fact that the Office for Harmonization in the Internal Market (OHIM) internally sometimes refers to this person as the 'mystical animal'.

The concept of the relevant public can be found in various places within European trade mark law: distinctiveness, acquired distinctiveness through use, likelihood of confusion and the degree to which a mark is well-known are probably the main instances. As the approach to the relevant public is identical in each of these instances this article will analyze the notion of the relevant consumer in depth without going into its various habitats.

2. The relevant public

Several questions surround the issue of the relevant public. Are all (possible) buyers of a product or service included in this public or does the general public form the relevant public for trade mark purposes? Is the product sector the yardstick? Does the perception of all members count or do we need to look at one representative member?

a. The basic rule

In its *Lloyd/Klijsen* judgment[1] the ECJ laid down a description of the relevant public to which it systematically returns in its later case-law.[2] According to the Court, one needs to start from the premise of an '*average consumer of the category of products concerned*' who '*is deemed to be reasonably well-informed and reasonably observant and circumspect*'.[3]

[1] ECJ 22 June 1999, Lloyd/Klijsen, ECR 1999, 3819.
[2] See for example: CFI 9 October 2002, Glaverbel/OHIM, ECR. 2002, 3887, para. 31.
[3] ECJ 22 June 1999, Lloyd/Klijsen, ECR 1999, 3819, para. 26.

This maxim has been refined in later judgments by the addition of the average consumer's '*presumed expectations*'.[4]

In my opinion, a two-tier test can be deduced from the Court's reasoning. The judge or trade mark officer first of all needs to define the relevant public of the goods or services in question. In a second phase he needs to zoom in on the average consumer within that group. The whole group is reduced to a single representative. This extensive simplification rules out the relevance of the diversity of the public. The relevant public can either be composed of a group of reasonably well-informed and reasonably observant consumers or of a more heterogeneous bunch of customers. This makes little difference because the European judiciary seems to look at a single person as a legal *pars pro toto*.[5]

When determining the relevant public in phase one of the test the judge or trade mark officer will have to take the nature of the goods or services into account. When dealing with goods aimed at professionals the relevant public will have a certain degree of knowledge and a higher level of attention. An example of such a product can be found in the *KWS* judgment of the Court of First Instance (CFI). In that case treatment installations for seeds, agricultural, horticultural and forestry products were held to justify the application of a special relevant public.[6] This part of the ruling was not challenged before the ECJ.[7]

For everyday goods the situation is different. The consumer's attention level is lower than when purchasing expensive products.[8] Examples of everyday products are washing powders and dish-washer tablets.[9] Market studies show that a consumer spends not more than one second choosing between these types of ordinary products.[10] In the words of Laddie J: '*A typical weekly family shop among the 25000 different items ranged in a typical supermarket takes 40 minutes. Consumers tend to scan the shelves and make rapid purchase decisions*'.[11]

b. <u>The composition of the relevant public</u>

There still does not seem to be an answer to the question whether the relevant public consists of those people who will (presumably) buy the product or whether the public can be extended to anyone who comes in contact with the trade mark.

Thierry Van Innis, the '*pope of trademark law in Belgium*' according to Chambers Europe, argued that the relevant public is wider than the (potential) customers of the goods and services. In his view, people who could come in contact with the trade mark sign should also be included.[12]

[4] ECJ 12 February 2004, Henkel, ECR. 2004, 1725; ECJ 12 February 2004, Postkantoor, ECR 2004, 1619; ECJ 6 May 2003, Libertel, ECR. 2003, 3793; ECJ 8 April 2003, joint cases Linde, Winward and Rado, ECR 2003, 3161 and ECJ 18 June 2002, Philips/Remington, ECR 2002, 5475.
[5] J.H. SPOOR, *Hooggeschat publiek – over de rol van het publiek in de intellectuele eigendom*, Amsterdam, Uitgeverij G.A. van Oorschoot, 2007, 16-17.
[6] CFI 9 October 2002, KWS/OHIM, ECR 2002, 3843, para. 31.
[7] ECJ 21 October 2004, KWS/OHIM, ECR 2004, 10107.
[8] L. BENTLY en B. SHERMAN, *Intellectual Property law*, New York, Oxford University Press, 2008, 819; R. INCARDONA en C. PONCIBO, *The average consumer, the unfair commercial practices directive and the cognitive revolution*, 26 (papers.ssrn.com).
[9] CFI 17 January 2006, Henkel, *Rec*. 2006, II, 6.
[10] P. MATHELY, *Le nouveau droit français des marques*, Vélizy Cedex, Ed. J.N.A., 1994, 302.
[11] Kimberly-Clark Ltd/Fort Sterling Ltd [1997] *FSR* 877, 884 (CA).
[12] T. VAN INNIS, *Les signes distinctifs*, Brussels, Larcier, 1997, 124.

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As support for this opinion, he referred to a judgment of the Court of Appeals of Brussels (Belgium) which he believed advanced this, as it stated that the public in the sense of '*the crowd, the people as a whole*' and not only '*the persons of the subgroup or sector of the economical trade concerned*'[13] should be the starting point.[14]

Van Innis' approach can be illustrated with the image of three concentric circles. The smallest contains the consumers and users while the second circle consists of the people for whom the goods or services are intended. In the biggest circle we find those persons who are likely to come in contact with the mark. Most of the time the relevant public will coincide with the general public. For only a few marks the relevant public will be narrower than the general public.

Van Innis substantiates his view by giving a few examples. Rolls Royce and Ferrari cars are out of reach for most people. This however does not mean that the ordinary mortal does not know of these cars (and their respective trade marks). Limiting the relevant public in those cases to people who can afford these expensive vehicles does not hold. The same goes for less famous marks. One does not need to be a smoker to be attracted by a cigarette brand or one does not need to read a certain magazine to know its title.[15]

In my opinion a restrictive interpretation instead of this extensive interpretation should be followed. The notion of the '*average consumer*' as stated in *Lloyd* seems to reject the extensive approach since 'consumer' linguistically means: '*an individual who purchases goods for personal use*'. In *Linde* the ECJ implicitly confirms the method of analysis suggested in this article by stating that '*a trade mark's distinctiveness must be assessed by reference to […] the perception of the relevant persons, namely the consumers of the goods or services'*.[16] Moreover, in *Postkantoor* it was held that the moment at which the consumer makes his choice between different products forms an element of the assessment of the distinctive character of a sign.[17] Van Innis' inclusion of the people at whom the product or service is aimed is understandable, but his idea to incorporate into the relevant public all who come in contact with the mark is a bridge too far.

The relevant public can only consist of actual and potential customers (potential meaning: those at whom the products are aimed or in other words, those for whom the goods are 'destined'). This view, which can be referred to as the 'destination' criterion is supported by the frequent use of the phrase '*target public*' in the case-law of both the ECJ and the CFI.[18]

This 'destination' criterion needs to be the yardstick for the definition of the relevant public. If the goods in question are everyday consumer products, the application of this criterion will lead to the conclusion that the relevant public coincides with the general public. Such goods (e.g. chocolate) are aimed at everyone. Every person is a possible consumer. Van Innis would reach the same conclusion but would base this on the reasoning that everyone can potentially come in contact with the mark. When the goods or services are aimed at a specialized sector the relevant public is a narrow public of experts.

For products not belonging to one of the abovementioned categories, the actual and potential consumers make up the relevant public. It is here that the 'destination' principle comes in

[13] Own translation.
[14] Brussels 23 March 1987, Adidas, *Ing.-Cons*. 1987, 342.
[15] T. VAN INNIS, *Les signes distinctifs*, Brussels, Larcier, 1997, 127.
[16] ECJ 8 April 2003, joint cases Linde, Winward and Rado, ECR 2003, 3161, para. 41.
[17] ECJ 12 February 2004, Postkantoor, ECR 2004, 1619.
[18] See for example CFI 17 October 2002, Windvd, *OJ* C 297 of 8 December 2007, 41, para. 22; ECJ 20 September 2001, Proctor & Gamble, ECR 2001, 6251, para. 39; CFI 22 June 2005, Metso, *Rec*. 2005, II, 2383, para. 24.

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conflict with the extensive view. The latter would in such cases extend the relevant public to cover all persons who come in contact with the mark.

In other words, under the Van Innis opinion, products and services that cannot be classified as targeted at a specialized public need to be looked at from the perspective of the general public whereas the 'destination' criterion requires a further distinction. This category of non-professional goods can be broken down in two groups. On the one hand the everyday goods for which the general public acts as relevant public and on the other hand the other (neither ordinary nor professional) goods which demand a relevant public composed of the (potential) buyers of the products.

In sum, the only variable in the two-step mechanism is the relevant public. The relevant public depends on the goods or services involved. Defining this public is the hardest part of the enquiry as the second phase consists only of focusing on the perception of the average consumer within that group. Above all, this assessment is inherently linked to the factual elements of the case and can best be described as an *ad-hoc* exercise.[19]

c. Further differentiations

The ECJ extends the basic principle of the '*average consumer*' through some additional specifications. One always needs to take into account the fact that the '*average consumer*' only very rarely has the opportunity to directly compare the different marks but that he has to rely on his imperfect recollection of them.[20] His memory is fallible.[21] The relevant person usually looks at the trade mark as a whole and does not pay any attention to the details it contains.[22]

It is interesting to note that the ECJ case-law does not keep a consistent line with regards to the relevant public. It for instance suggests that the requirement of distinctiveness is satisfied when a '*significant portion of the relevant class of people'* identifies the goods or services as originating from a particular undertaking based on the trade mark.[23] The same goes for the assessment of likelihood of confusion. The Court has refused to lay down thresholds in terms of percentages.[24] This stands in sharp contrast with the situation in the United States where a part of the judiciary finds likelihood of confusion when certain thresholds (which can be formulated in absolute figures or relative figures) have been reached.[25] A few courts have for example set the threshold at 15 percent.[26] Thus far there is no generally accepted test.

This reasoning conflicts with the rule of the '*average consumer*' which – in my view at least – only instructs the judge or trade mark officer to look at the perception of this representative member of the group and does not require an analysis of the perception of a certain number of people within that class.

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[19] J. PHILLIPS, *Trade Mark law: a practical anatomy*, New York, Oxford University Press, 2003, 320; T. CHOU, Proctor & Gamble v. OHIM: Is the Generic "Average Consumer" Too Generic for its Own Good?, *Loy. L.A. Int'l & Comp. L. Rev. 2006*, 630.

[20] ECJ 22 June 1999, Lloyd/Klijsen, ECR 1999, 3819, para. 26.

[21] .P. RAAS, *Het benelux merkenrecht en de eerste merkenrichtlijn: overstemming over verwarring*?, The Hague, Boom Juridische Uitgevers, 2000, 425.

[22] ECJ 22 June 1999, Lloyd/Klijsen, ECR 1999, 3819, para. 25; ECJ 11 November 1997, SABEL, ECR 1997, 6191, para. 23.

[23] ECJ 4 May 1999, Chiemsee, ECR 1999, 2779, para. 52; ECJ 18 June 2002, Philips/Remington, ECR 2002, 5475, para. 62.

[24] ECJ 22 June 1999, Lloyd/Klijsen, ECR 1999, 3819, para. 24.

[25] See for example: Mushroom Makers Inc./R.G. Barry Corp., 580 F.2d 44 (2nd Cir. 1978).

[26] James Burrough Ltd./Sign of Beefeater Inc., 540 F.2d 266 (7th Cir. 1976) and Exxon Corp./Texas Motor Exchange Inc., 628 F.2d 500 (5th Cir. 1980).

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d. The need for flexibility

The two-tier mechanism explained above needs to be applied with common sense. The animal owners and not the animals themselves are the relevant public for animal food.[27] The need for a clear understanding of the system elaborated on above can be found in a case before the High Court of Tokyo (Japan) where it was held that the relevant consumer for prescription medication is the doctor and not his or her patient because the latter cannot – or only to a very small extent – decide which drugs the doctor will prescribe.[28]

A similar problem was raised in Europe. The ECJ in *Björnekulla* ruled that the whole aim of the commercialisation process is the purchase of the product by the consumers or end users. They therefore form the relevant public for the goods in question. However, the court added, '*depending on the features of the product market concerned, the influence of intermediaries on decisions to purchase, and thus their perception of the trade mark, must also be taken into consideration*'.[29] In the context of prescription drugs this decision implies that the relevant public comprises both doctors and patients.[30] In Europe the patient's perception thus also seems to play a role because, although the doctor makes the final decision, there is a possibility that a patient will move heaven and earth to try and influence his physician's choice.[31] There is no doubt that the introduction of a supplementary reference person, namely the average 'intermediary', next to the average consumer does not make the application of the test any easier.[32]

Defining the relevant public can sometimes be extremely difficult. A case before the Landgericht of Munich proves this. The court had to decide on the relevant public for BETTY-dolls and it concluded that four-year-old girls constituted this public although it could be argued that such young children are not able to make their own purchases.[33] In the United States there is a trend to select children as relevant consumers for certain goods which are targeted at them based on the idea that they intervene in their parents' purchase decision.[34]

3. Conclusion

In this article I have explained and defended a particular view on the concept of the relevant public within EU trade mark law. The mechanism of the two-step test was elaborated on and emphasis was put on the important and tricky issue of defining this relevant public. I have fleshed out the idea of a 'destination' criterion as the central benchmark in the search for the relevant class of people.

[27] Lidl Stiftung & Co KG/Heinz Iberica SA, Case R 232/200-4 [2003] *ETMR* 312 (ORLANDO animal and human food).
[28] Tokyo High Court 30 March 1993, 1420 *Hanrei Jiho* 116.
[29] ECJ 29 April 2004, Björnekulla, ECR 2004, 5791, para. 24-25.
[30] CFI 17 November 2005, Biofarma, *Rec*. 2005, 4743.
[31] ECJ 26 April 2007, Trivastan/Travatan, ECR 2007, 3569.
[32] J.H. SPOOR, *o.c.*, 20.
[33] Landgericht München I, Ohio Art Company and Bandai GmbH Toys and Entertainment/CreCon Spiel U Hobbyartikel GmbH [2000] *EMTR* 756, 763.
[34] R.E. SCHECHTER and J.R. THOMAS, *Intellectual Property: The law of Copyrights, patents and trademarks*, St. Paul, Thomson West, 2003, 644.

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In this restrictive view only the perception of the average person within the group of actual and potential consumers should matter as they are the ones at whom the product or service is targeted. Whether this minimalistic interpretation is correct, let alone is approved in practice, will be left to the relevant public, of course only if defined according to the 'destination' criterion.

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