

BL O/712/22

TRADE MARKS ACT 1994

IN THE MATTER OF:

TRADE MARK APPLICATION No. 3643288

IN THE NAME OF PANAYIOTIS THEOKLITOU

DECISION

1. The Registrar of Trade Marks decided for the reasons given by Mr Oliver Rose’Meyer in his Decision issued on 22 December 2021 under reference BL O/934/21 that the designation **DRINK SOCIALLY RESPONSIBLY** lacked distinctiveness (and was accordingly caught by the exclusion from registration contained in s.3(1)(b) of the Trade Marks Act 1994) for goods in Classes 32 and 33 of the kind then listed in the relevant application for registration (Application No. 3643288 filed by Mr Panayiotis Theoklitou on 18 May 2021).
2. The Applicant contends on appeal before me under s.76 of the 1994 Act that the Hearing Officer’s Decision was wrong and should be set aside for not recognising and accepting that the mark applied for “**was an unexpected juxtaposition of two known phrases, namely: ‘DRINK RESPONSIBLY’, which may be perceived as an ordinary message not to overconsume the goods in a social context; and ‘DRINK SOCIALLY’, which may be perceived as an ordinary message to consume the goods in a social context**” such that, taken as a whole, it “**also has a meaning that alludes to the concept of ‘social responsibility’ and which thereby playfully transcends the ‘cautionary message’ meaning to spark a cognitive process that evokes consideration by the average consumer of social responsibility in relation to product attributes and business ethics.**”

3. The goods for which registration is now requested are: **“craft spirits; craft gin; craft vodka; craft rum; craft bourbon; craft whisky; craft whiskey; craft rye whiskey”** in Class 33. The word **“craft”** was added by amendment to the application for registration in Class 33 during the pendency of this Appeal in order to bring the specification of goods into closer alignment with the Applicant’s production methods and business ethics.
4. These were described by the Hearing Officer in para. [5] of his Decision: **“ ... the applicant’s business fully embraces the concept of ‘social responsibility’ and intends to be a leader in the drinks industry in this respect. Accordingly, the applicant has developed a proprietary distillation method for spirits that uses substantially less water and energy than traditional distilling methods. Local ingredients are used to to minimise food miles and harvested rainwater is used as a water source. No single use plastic packaging is used for any goods and all glass bottles are recycled and / or recyclable. Other packaging is made from sustainable sources and is fully compostable. A tree planting programme off-sets any carbon inputs. Overall, the intention is to work towards being a carbon negative business. ... it is for these reasons that the Applicant has selected its mark DRINK SOCIALLY RESPONSIBLY to convey to consumers its strong commitment to ‘social responsibility’ in a distinctive and memorable way.”**
5. In post-amendment submissions on behalf of the Applicant it was emphasised — and I accept — that these are factors the presence of which can affect the exercise of consumer choice in the selection and purchase of **“craft”** spirits. They are nonetheless factors the absence of which does not prevent spirits from being **“craft”** spirits properly so called.
6. In response to the suggested oddity of using two adverbs side-by-side (**‘SOCIALLY RESPONSIBLY’**) the Hearing Officer pointed out in paras [16] and [33] by reference to the Cambridge English Dictionary, the Collins English Dictionary and the Merriam-Webster Dictionary that an adverb is by its nature a word that may be used to give more information about or modify another adverb.

7. His assessment in para. [31] was: **“Having made a full semantic analysis of this sign, without pre-conception or pre-emption, and taking into account all known and relevant surrounding circumstances, I do not consider it to have any of the qualities that would enable this sign to be seen as a trade mark. The mark is not, in any way, imaginative, surprising or unexpected. Used on or in respect of beverages, it merely encourages the consumer to drink socially responsibly.”**
8. In para. [26] he observed: **“One must be aware that the test is one of immediacy or first impression”** citing for that proposition para. [20] of the Judgment of the General Court in Case T-130/01 Sykes Enterprises Inc v OHIM (REAL PEOPLE, REAL SOLUTIONS) EU:T:2002:301. However, the Judgment of the CJEU in Case C-398/08P Audi AG v OHIM (VORSPRUNG DURCH TECHNIK) EU:C:2010:29 indicates (in particular, at paras [48], [49] and [59]) that the need for a measure of interpretation on the part of the public does not negate the possibility of a finding of distinctiveness.
9. Consistently with the latter approach, the Judgment of the General Court in Case T-253/20 Oatly AB v EUIPO (IT’S LIKE MILK BUT MADE FOR HUMANS) EU:T:2021:21 recognises at para. [28] that **“a mark must be recognised as having a distinctive character if, apart from its promotional function, it may be perceived immediately by the relevant public as an indication of the commercial origin of the goods and services concerned”** and further recognises at para. [46] that a mark can be found to possess a distinctive character if it **“conveys a message which is capable of setting off a cognitive process in the minds of the relevant public making it easy to remember and which is consequently capable of distinguishing the applicant’s goods from goods which have another commercial origin.”**
10. It is clear from the Hearing Officer’s Decision as a whole that he would have maintained the objection to registration for lack of distinctiveness under s.3(1)(b) of the Act even if he had adopted the broader approach to assessment of distinctiveness envisaged by Audi and Oatly.

11. The argument before me proceeded with reference to the informative analysis contained in the EUIPO Boards of Appeal “Case-law Research Report — The distinctive character of slogans (October 2021). The Applicant invited me to consider the registrability of the designation **DRINK SOCIALLY RESPONSIBLY** from the perspective identified in paras [15] and [16] of the Report:

[15] The following **non-exhaustive factors** laid down in the case-law may serve to establish distinctiveness for a slogan: **(a)** it has a number of meanings; **(b)** it constitutes a play on words; **(c)** it introduces elements of conceptual intrigue or surprise, so that it may be perceived as imaginative, surprising or unexpected; **(d)** it has some particular originality or resonance, and / or triggers in the minds of the relevant public a cognitive process or requires an interpretative effort; **(e)** it has unusual syntactic structures and / or linguistic and stylistic devices such as alliterations, metaphors, rhymes.

[16] It is important to underline that none of the above factors apply in absolute terms independently from one another. For instance, the fact that a slogan has a number of meanings does not necessarily mean that it is distinctive. On the other hand, even if a slogan is not capable of setting off a cognitive process in the mind of the relevant consumer, it is not necessarily devoid of distinctive character.

12. The factors identified at **(a)** to **(e)** of para. [15] of the Report do not appear to me to be applicable to the designation in question in the present case. The words **DRINK SOCIALLY RESPONSIBLY** call on people in plain and straightforward terms to **DRINK** (verb, modified by) — **SOCIALLY** (adverb, further modified by) — **RESPONSIBLY** (adverb). This is the natural and inevitable effect of using that wording in connection with the supply of “**craft**” spirits even if and whether or not the production methods and business ethics of the supplier are specially dedicated to the promotion of socially responsible drinking. By reason of the generality of the message it conveys and the directness of the terms in which the message is conveyed, the designation **DRINK SOCIALLY RESPONSIBLY** lacks the capacity to individualise alcoholic beverages (including “**craft**” spirits) to a single economic undertaking. The wording is origin neutral for such goods, in essentially the same way as other such wording is origin neutral for similarly pertinent goods and services: **EAT SOCIALLY**

RESPONSIBLY; COOK SOCIALLY RESPONSIBLY; DRIVE SOCIALLY RESPONSIBLY; TRAVEL SOCIALLY RESPONSIBLY; SHOP SOCIALLY RESPONSIBLY; and so forth. These are easily recognisable and readily understood variations in plain English on the societally important theme of endeavouring to do things in a socially responsible way. I am satisfied that the Hearing Officer did not err in deciding that the application for registration should be refused under s.3(1)(b) of the Act.

13. The Appeal is dismissed for the reasons I have given above. In accordance with the usual practice in this Tribunal on appeals against the refusal of registration, it is dismissed with no order for costs.

Geoffrey Hobbs QC

23 August 2022

Dr Christopher Pike of Sterling IP Ltd appeared on behalf of the Applicant

Ms Bridget Rees (Examination Practice Manager, Trade Marks and Designs) appeared on behalf of the Registrar