O-385-09

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 2491270
BY
NOVARTIS AG
TO REGISTER THE TRADE MARK

OXYDUREL

IN CLASS 05

AND

THE OPPOSITION THERETO
UNDER NO 98209
BY
MUNDIPHARMA AG

Trade Marks Act 1994

In the matter of application 2491270
by Novartis AG
to register the trade mark:

OXYDUREL

in class 5
and the opposition thereto
under no 98209
by Mundipharma AG

1. On 27 June 2008, Novartis AG (which I will refer to as Novartis) applied to register the above trade mark. Following examination, the application proceeded to publication in the *Trade Marks Journal* on 8 August 2008. An amendment to the specification was subsequently made by Novartis and was published in the *Journal* on 12 December 2008. The specification was amended to:

Pharmaceutical preparations, namely analgesic/anti-inflammatory drugs.

The above goods are in class 5 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

2. Mundipharma AG (which I will refer to as Mundipharma) filed notice of opposition to the trade mark application, an opposition which was not withdrawn following the aforementioned amendment to the application. The opposition is directed at the complete list of goods. Mundipharma claims that registration would be contrary to section 5(2)(b) of the Trade Marks Act 1994 (the Act). It relies upon a single earlier right, Community Trade Mark (CTM) 3230761:

OXYDOL

which is registered for:

Pharmaceutical preparations for human medical use, namely prescription-only analgesics.

3. Mundipharma's mark was applied for on 18 June 2003 and its registration procedure was completed on 4 July 2008. The application was published for opposition on 8 August 2008. Mundipharma's trade mark is therefore an earlier trade mark which is not subject to proof of use[1] because at the date of publication of the application it had been registered for less than five years.

[1] See section 6A of the Act (added by virtue of the Trade Marks (Proof of Use, etc.) Regulations) 2004 (SI 2004/946) which came into force on 5th May 2004.

4. Novartis filed a counterstatement denying the ground of opposition and filed evidence; Mundipharma filed evidence in reply and both sides filed written submissions. Neither side requested a hearing.

Evidence and submissions

5. Novartis has filed a witness statement by Patrick James Barry, who is a trade mark attorney acting for Novartis in this matter, and supporting exhibits. It is clear from Novartis' written submissions that the purpose of the evidence is to invite a conclusion that OXY is descriptive in the pharmaceutical trade. Included in exhibit PJB1 is an extract from the July 2008 edition of the MIMS publication. MIMS is an abbreviation for Monthly Index of Medical Specialities and is described within the publication as "providing GPs with independent information on prescription medicines every month since its launch in 1959." I note that the following OXY-prefixed terms appear in the extract:

Oxyal
Oxybuprocaine
Oxybutynin
Oxycodone
OxyContin
OxyNorm
Oxytetracycline
Oxytocin

From the way in which MIMS is set out, it appears that some of these are generic pharmaceutical names, which are presented as headings and some are trade marks which appear beneath those generic headings. My conclusions from the above entries in MIMS and the descriptions attached to each name are that:

Oxyal is a trade mark for an ocular lubricant;
Oxybuprocaine is a generic name for an ocular topical anaesthetic;
Oxybutynin is a generic name for pharmaceuticals for treating bladder disorders;
Oxycodone is a generic name for strong opoid pain relief, which is available under the trade marks OxyContin and OxyNorm;
Oxytetracycline is a generic name for pharmaceuticals for treating acne;
Oxytocin is a pharmaceutical for inducing labour.

Four of these OXY-names relate to pain-relieving pharmaceuticals, the others are unrelated to pain-relief. Of the four, two are generic names (Oxybuprocain and Oxycodone) and two are trade marks (OxyContin and OxyNorm). PJB3 repeats this information from MIMS August 2009.

6. Exhibit PJB2 is an extract from the June 2008 edition of "Chemist and Druggist" which appears to be a catalogue containing price lists and

manufacturer/distributor information applicable to pharmaceuticals and other goods sold in pharmacies. My interpretation of the MIMS extract is supported in relation to the same names as they appear in "Chemist and Druggist". In addition to some of the above names in MIMS, the following also appear:

OXY and OXY-10 which is a trade mark for acne treatment;
OXYCEL which is a trade mark for gauze;
OXYMETAZOLINE, which appears to be a generic name, undefined as to treatment area, redirecting to 'Lemsip max';
OXYMETHALONE, which appears to be a generic name, redirecting to Vicks
OXYMYCIN which is a trade mark for oxytetracycline (for acne)
OXYPOLYETHOXYDODECANE, which is a generic name, undefined as to treatment area, redirecting to 'Anacal' which is in ointment or suppository form;
OXYSEPT which is a trade mark for a contact lens cleanser;
OXYZYME which is a trade mark for wound dressings.

PJB4 repeats this information from the publication's August 2009 edition (although OXYMYCIN no longer appears). Mr Barry exhibits a print dated 1 July 2009 from a website called www.curehunter.com which states that oxypolyethoxydodecane is a 'local anaesthetic part of anacal rectal ointment combination'.

7. In relation to the strong pain reliever OXYCODONE, this is shown as a generic name which redirects the catalogue user to OXYCONTIN and OXYNORM (all the entries in this exhibit are in capital letters, unlike in MIMS). The price list shows OXYCONTIN and OXYNORM as being available from 'Napp Pharms'. Mundipharma has filed evidence showing prints from the Community Trade Mark register for the trade marks OXYNORM and OxyContin as being registered in Mundipharma's name. It claims the only 'sensible inference' is that it has given consent to Napp to use the names. This would have been preferable as evidence rather than inference. Indeed, Novartis has countered Mundipharma's statement by filing prints from the UK trade mark register showing the trade marks as being registered in the name of Napp Pharmaceutical Holdings Limited. Novartis says that there is "substantial use of the prefix OXY- in respect of trade marks and generic names in the pharmaceutical medical field", whilst Mundipharma says Napp Pharmaceutical Holdings Limited sells analgesics prefixed with OXY with the consent of Mundipharma.

8. PJB5 exhibits copies of entries in Dorlands Medical Dictionary, 28th Edition and Collins English Dictionary, 4th Edition. Dorlands gives oxy-, ox as "a combining form (a) meaning sharp, quick or sour, (b) denoting relationship to acid, or (c) denoting the presence of oxygen in a compound." Collins gives oxy- as a combining form "denoting something sharp; acute" and "1 containing or using oxygen"; "2 A former equivalent of hydroxy-."

Decision

9. Section 5(2)(b) of the Act states:

> "(2) A trade mark shall not be registered if because –
>
> ….
>
> (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark."

10. The leading authorities which guide me in this ground are from the European Court of Justice (ECJ): *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723. It is clear from these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG,*

(b) the matter must be judged through the eyes of the average consumer for the goods/services in question; *Sabel BV v Puma AG,* who is deemed to be reasonably well informed and reasonably circumspect and observant - but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.,*

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v Puma AG,*

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG,*

(e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc,*

(f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v Puma AG,*

(g) in determining whether similarity between the goods or services covered by

two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc,*

(h) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*,

(i) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV v Adidas AG and Adidas Benelux BV,*

(j) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*

Average consumer and the purchasing process

11. In *Mundipharma AG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-256/04, the Court of First Instance (CFI) stated:

> "44 Second, it has not been disputed in the present case that the relevant public for the goods covered by the mark applied for, namely therapeutic preparations for respiratory illnesses, is made up of patients in their capacity as end consumers, on the one hand, and health care professionals, on the other.
>
> 45 As to the goods for which the earlier mark is deemed to have been registered, it is apparent from the parties' written submissions and from their answers to the questions put at the hearing that some therapeutic preparations for respiratory illnesses are available only on prescription whilst others are available over the counter. Since some of those goods may be purchased by patients without a medical prescription, the Court finds that the relevant public for those goods includes, in addition to health care professionals, the end consumers."

The goods of the earlier mark are limited to those which must be prescribed, whilst the goods of the application are not limited in this way, and so could be purchased over the counter or via self-selection from a supermarket shelf. The relevant public for over the counter or self-selected goods is the general public; for prescription-only goods it is both the prescriber and the patient, although in the case of analgesics administered in hospital (e.g. intravenously), the relevant public is more likely to be the physician and hospital pharmacist.

12. The level of attention in relation to analgesics will vary according to the nature of the analgesic. The extracts from MIMS show analgesics which are very strong, for use in the treatment of severe cancer pain (OxyContin), but simple paracetamol analgesics can also be purchased from supermarket shelves at a low cost. In *Armour Pharmaceutical Co v OHIM*, Case T-483/04, the CFI stated:

> "79 The Court finds that the level of attention of the average consumer of pharmaceutical preparations must be determined on a case-by-case basis, according to the facts in the case-file, especially the therapeutic indications of the goods in question. Likewise, the Court finds that, in the case of medicinal products subject to medical prescription such as those being considered in the present case, that level of attention will generally be higher, given that they are prescribed by a physician and subsequently checked by a pharmacist who delivers them to the consumers."

Further in *Aventis Pharma SA v OHIM*, Case T-95/07, the CFI stated:

> "29 First, as noted in the case-law, medical professionals display a high degree of attention when prescribing medicinal products. Second, with regard to end-consumers, it can be assumed, where pharmaceutical products are sold without prescription, that the consumers interested in those products are reasonably well informed, observant and circumspect, since those products affect their state of health, and that they are less likely to confuse different versions of such products (see, to that effect, Case T-202/04 Madaus v OHIM – Optima Healthcare (ECHINAID) [2006] ECR II-1115, paragraph 33). Furthermore, even supposing a medical prescription to be mandatory, consumers are likely to display a high degree of attention when the products in question are prescribed, having regard to the fact that they are pharmaceutical products (ATURION, paragraph 27)."

The medical professional displays a high degree of attention in relation to prescribing analgesics, but the general public also displays a high degree of attention when given a prescribed analgesic. For products sold without prescription, even those of low cost, the general public will be reasonably well informed, observant and circumspect and will pay a reasonable level of attention to the selection of a product, without the benefit of a prescription and hence the medical professional's expertise. The consumer is more likely to be subject to the effects of imperfect recollection than the medical professional whose level of attention and expertise will be greater than those of a member of the general public.

Comparison of goods

13. In assessing the similarity of goods and services it is necessary to take into account, inter alia, their nature, their intended purpose[2], their method of use and whether they are in competition with each other or are complementary[3]. In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281, Jacob J gave guidance as to how similarity should be assessed[4].

For ease of reference, the goods are:

Mundipharma	**Novartis**
Pharmaceutical preparations for human medical use, namely prescription-only analgesics.	*Pharmaceutical preparations, namely analgesic/anti-inflammatory drugs*.

The Trade Mark Registry's Classification Manual states, at 5.2.27:

> "Note that specifications including 'namely' should be interpreted as only covering the named goods. Thus, in the above 'dairy products namely cheese and butter' would only be interpreted as meaning' cheese and butter' and not 'dairy products' at large. This is consistent with the definitions provided in Collins English Dictionary which states 'namely' to mean 'that is to say' and the Cambridge International Dictionary of English which states 'which is or are'."

The effect of introducing the word namely into the specification of the application[5] is that the specification now only covers the goods which follow 'namely', which are 'analgesic/anti-inflammatory drugs'. It no longer covers pharmaceutical preparations at large. The earlier CTM also begins with the wide term

[2] The earlier incorrect translation of 'Verwendungszweck' in the English version of the judgment has now been corrected.

[3] *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117.

[4] He considered that the following should be taken into account when assessing the similarity of goods and/or services:

> "(a) The respective uses of the respective goods or services;
> (b) The respective users of the respective goods or services;
> (c) The physical nature of the goods or acts of service;
> (d) The respective trade channels through which the goods or services reach the market;
> (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
> (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors."

[5] The amendment referred to in paragraph 1.

'pharmaceutical preparations for human medical use' but then qualifies the term with 'namely prescription-only analgesics'. I propose to adopt an interpretation of the effect of 'namely' in both specifications which is consistent, i.e. that 'namely' has the effect of confining cover to the goods which it precedes. In effect, my comparison is between Mundipharma's 'prescription-only analgesics for human medical use' against Novartis' 'analgesic/anti-inflammatory drugs'.

14. Analgesics are pain-killers. The analgesics in the earlier mark are limited to those which are only available on prescription, while the analgesics in the application are not limited to type and therefore cover those that are prescribed, those sold over the counter and those sold via self-selection. Prescription-only analgesics cover pain-killers for use post-surgery and for control of severe pain, as well as those prescribed by general practitioners, e.g. for migraine. The methods of use vary (tablet, intravenous, occasional, continual). Applying the jurisprudence above I conclude that if not identical, then over the counter or self-selection analgesics are very highly similar to those which are prescribed by healthcare professionals. I bear in mind that the Court of First Instance (CFI) said in *Gérard Meric v OHIM,* Case T-133/05:

> "29 In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme* v *OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser* v *OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial* v *OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi* v *OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42)."

The prescription-only analgesics in the earlier mark fall within the scope of the wider analgesic term in the application and so the goods are identical.

15. Novartis' specification also refers to anti-inflammatory drugs, but rather than being listed as goods which are separate to analgesic drugs, there is a forward slash between 'analgesic' and 'anti-inflammatory'. This suggests that Novartis views these goods as one and the same. Certainly, anti-inflammatory preparations reduce swelling which can cause pain. If anti-inflammatories are analgesics, then the goods are identical to the analgesics of the earlier mark. If anti-inflammatories are not analgesics, I consider they are highly similar to analgesics because their effect is to reduce swelling, which in turn reduces pain.

16. To sum up, the goods of the application are identical in respect of analgesics and analgesic drugs, and identical or highly similar in the case of analgesics and anti-inflammatory drugs.

Comparison of trade marks

17. The authorities direct that, in making a comparison between the marks, I must have regard to each mark's visual, aural and conceptual characteristics. I have to decide which, if any, of their components I consider to be distinctive and dominant. The marks are single invented words and there is no element that is distinctive or dominates either mark.

Mundipharma	Novartis
OXYDOL	OXYDUREL

The earlier mark is three syllables in length and the application is four; the earlier mark is six letters long and the application eight. The first four letters are indentical and both marks end in 'l'. In both marks the third syllable is commenced with a hard 'd' sound. The most likely pronunciation of the earlier mark is 'ox-ee-dol'. Mundipharma submits that the application will be pronounced as 'ox-ee-durr-ell'; but it could be that the fourth syllable (dur) will be pronounced with a long 'u', as in 'durable' or 'duration'. In both marks the first two syllables will more than likely be pronounced as 'ox-ee'. The words are not so short that the extra syllable will, of itself, put a distance between them in terms of similarity[6]. The first two thirds of OXYDOL and the first half of OXYDUREL are identical and both end in 'l'; there is a high level of both visual and aural similarity on account of the position of the identical letters, the proportion of the marks which are identical and the role of the hard 'd ' sound.

18. Invented words have a high inherent distinctive character, but no concept of their own. There is neither conceptual dissonance nor conceptual similarity. Overall, the strength of similarity on both the visual and aural levels leads me to conclude that there is a high degree of similarity between the marks.

[6] As per the CFI decision in *Inter-Ikea Systems BV v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-112/06: "54 As regards the visual comparison between the verbal element of the contested mark and the earlier word marks, the applicant claims that the only difference between them is the presence of the letter 'd' in the contested mark and the letter 'k' in the earlier word marks. However, the Court has already held in Case T-185/02 *Ruiz-Picasso and Others* v *OHIM – DaimlerChrysler(PICARO)* [2004] ECR II-1739, paragraph 54) that, in the case of word marks which are relatively short, even if two marks differ by no more than a single consonant, it cannot be found that there is a high degree of visual similarity between them."

Likelihood of confusion

19. It is necessary to consider the distinctive character of the earlier trade mark; the more distinctive the earlier trade mark (either by nature or nurture) the greater the likelihood of confusion[7]. The distinctive character of a trade mark can be appraised only, first, by reference to the goods or services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public[8]. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the mark to identify the goods for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings[9]. Mundipharma did not file any evidence of use of its mark which could have assisted in demonstrating an enhanced distinctive character, and so I can only take into account the inherent distinctive character of the mark.

20. Novartis has filed its evidence to show that the OXY element would not be viewed as distinctive or dominant and that I should weight my comparison of the marks towards the suffixes, ie. DOL against DUREL. Mundipharma submits that the lack of OXY-analgesics in MIMS and the dictionary references fall short of demonstrating OXY to be non-distinctive. I should guard against dissecting the marks so as to distort the average consumer's perception of them; the average consumer perceives trade marks as wholes and rarely has the opportunity to compare marks side by side, relying instead upon the imperfect picture he has of them in his mind. The relevant public is made up of more than one type of consumer: the medical professional and the patient. In *Hipp & Co KG v OHIM,* Case T-221/06, the CFI stated:

> "55 It should be noted that both the earlier Community trade mark and the mark applied for are word marks consisting of a single invented word. Accordingly, while the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details, he will nevertheless, perceiving a word sign, break it down into verbal elements which, for him, suggest a concrete meaning or which resemble words known to him (see, to that effect, judgment of 14 February 2008 in Case T-189/05 Usinor v OHIM – Corus (UK) (GALVALLOY), not published in the ECR, paragraph 62 and the case-law cited)."

It has not been proven in evidence whether OXY has a meaning or is evocative of a characteristic in relation to analgesics which would cause the consumer to

[7] *Sabel BV v Puma AG* [1998] RPC 199.

[8] *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91.

[9] *Windsurfing Chiemsee* v *Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

break the marks down into verbal elements which suggest a concrete meaning or which resemble known words. The MIMS entries show only three trade marks in relation to analgesia which use the prefix OXY, two of which are in the name of 'Napp Pharms'. Even if it were the case that OXY was meaningful for the healthcare professional, it does not follow that OXY would have any meaning within the context of invented words, as applied to analgesics, for the general public who are not medical experts and who do not engage in the dissection of trade marks[10]. The earlier mark is an invented word with a distinctive character at the higher end of the scale because it does not have any obviously allusive connotations in relation to analgesics. Further, in *Air Products and Chemicals OHIM*, Joined Cases T – 305/06 to T 307/06, the CFI stated:

> "59 With regard to the weak distinctiveness of the common components and of the earlier marks as a whole, it should be recalled that the finding of a weak distinctive character for the earlier trade mark does not preclude a finding that there is a likelihood of confusion. While the distinctive character of the earlier mark must be taken into account when assessing the likelihood of confusion (see, by analogy, *Canon*, paragraph 24), it is only one of a number of elements entering into that assessment. Even in a case involving an earlier mark of weak distinctive character, there may be a likelihood of confusion on account, in particular, of a similarity between the signs and between the goods or services covered (Case T-134/06 *Xentral* v *OHIM – Pages jaunes (PAGESJAUNES.COM)* [2007] ECR II-5213, paragraph 70; see, to that effect, Case T-112/03 *L'Oréal* v *OHIM – Revlon (FLEXI AIR)* [2005] ECR II-949, paragraph 61).
>
> 60 In addition, the argument of OHIM and of the applicant in that regard would have the effect of disregarding the notion of the similarity of the marks in favour of one based on the distinctive character of the earlier mark, which would then be given undue importance. The result would be that, where the earlier mark is only of weak distinctive character, a likelihood of confusion would exist only where there was a complete reproduction of that mark by the mark applied for, whatever the degree of similarity between the marks in question (order of the Court of 27 April 2006 in Case C-235/05 P *L'Oréal* v *OHIM*, not published in the ECR, paragraph 45). Such a result would not, however, be consistent with the very nature of the global assessment which the competent authorities are required to undertake by virtue of Article 8(1)(b) of Regulation No 40/94 (judgment of 15 March 2007 in Case C-171/06 P *T.I.M.E. ART* v *Devinlec*

[10] *Mundipharma AG v OHIM*, Case T-256: "73 Moreover, although, because of the interdependence of the relevant factors for the assessment of the likelihood of confusion and the fact that the more distinctive the mark on which the opposition is based the greater will be the likelihood of confusion (*Lloyd Schuhfabrik Meyer*, paragraph 20), the weak distinctive character of the earlier mark precludes any likelihood of confusion for the professional public, that fact is not sufficient in respect of the end consumers, for whom the opposing marks are highly similar."

and OHIM, not published in the ECR, paragraph 41, and *PAGESJAUNES.COM*, paragraph 71)."

21. I have noted that Novartis also relies upon a decision of OHIM (855/2000), between the marks EPIVIR and EPIGEN for pharmaceutical goods, in which OHIM found there was no likelihood of confusion. Novartis submits that I should be guided by the decision because it contends there are similarities with the case before me; Novartis states that EPI is not a distinctive prefix in the UK and it "is a prefix in common English usage, in particular in the medical field"; further, that the suffixes are visually and phonetically different. I am not bound by this decision and consider that it has little relevance; Novartis states that EPI is non-distinctive in the UK and that the different suffixes separate the marks (I note that the OHIM decision is concerned only with the average consumer in Austria, Denmark and Greece); unlike the case before me, the ends in the OHIM case do not share any letters whatsoever.

22. Bearing in mind the interdependency principle (*Canon*), whereby a lesser degree of similarity between trade marks may be offset by a greater degree of similarity between goods, and vice versa, the position here is of a strong degree of similarity between the marks, together with both identity and a strong degree of similarity between the goods. For patients/end users of prescription-only analgesics/anti-inflammatories and the purchasers of those which are not prescribed, the perception and memory of the marks will be similar. There is no conceptual distance which would counteract the visual and aural similarities between the marks [11]. Taking all the factors into account, I consider that there is a likelihood of confusion. The opposition succeeds under section 5(2)(b).

[11] As per *Devinlec Développement Innovation Leclerc SA v OHIM*, Case T-147/03, in which the CFI stated:

"98 It is true that, according to case-law, a conceptual difference between the marks at issue may be such as to counteract to a large extent the visual and aural similarities between those signs (BASS, cited in paragraph 60 above, paragraph 54). However, for there to be such a counteraction, at least one of the marks at issue must have, from the point of view of the relevant public, a clear and specific meaning so that the public is capable of grasping it immediately."

Costs

23. Mundipharma has been successful and is entitled to an award of costs on the following basis:

Preparing a statement and considering the other side's statement:	£200
Official fee:	£200
Evidence and considering the other side's evidence:	£600
Written submissions:	£400
Total:	**£1400**

24. I order Novartis AG to pay Mundipharma AG the sum of £1400. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 15 day of December 2009

Judi Pike
For the Registrar,
the Comptroller-General