

Registrability- Three Dimensional Marks

“Şimşek Chest Peynir/ Ülker Çizi Peynirli Kraker” Trademarks

11th Civil Chamber of Supreme Court, Decision no. 2001\4502-2001\6197

An action (*) was instituted for the determination and stopping of trademark infringement and unfair competition and for compensation for moral and material damages. The plaintiff alleged that the unregistered trademark “SIMSEK CHEST PEYNİR” infringed plaintiff’s registered trademark “ÜLKER CIZI PEYNIRLI KRAKER”.

The judgment of the first instance Court was unfavourable to the plaintiff as the Court held in the view of the evidences and the expert report that the trademark “SIMSEK CHEST PEYNİR” did not infringe the trademark “ÜLKER CIZI PEYNIRLI KRAKER” and that the conditions for unfair competition have not been materialized.

The plaintiff appealed this decision before the Supreme Court.

The Supreme Court has found that the registered mark of the plaintiff covers the packaging of the product itself and that the mark of the defendant is not registered; that the both products have been commercialized in similar shaped and sized packagings and that the designation “PEYNIRLI KARAKER BISKÜVİ” (meaning «cheesy cracker») has appeared beneath both trademarks’ distinctive elements. The Court held that the word, “CIZI” (which reads as «cheesy» in Turkish), the dominant element of the plaintiff’s mark which refers the word “cheese” in English is phonetically similar to the word “Chest” which constitutes the main element of the defendant’s unregistered mark. The Court further observed that the designation of the defendant’s mark is a foreign term and that the two designations would be almost identical in case the letter “y” is added to the said designation. The Court further held that the green color used on both packages is the dominant color and that the calligraphy of the both word is identical and therefore concluded that there is a similarity in appearance between two trademarks. As a consequence, the Supreme Court found that there is a likelihood of confusion considering the risk that the average consumers may mix up the products of plaintiff and defendant.

On such grounds, the Supreme Court has favorably received the appeal and reversed the initial decision whereby it overturned this decision in the plaintiff's interest.

This case has been cited in the Journal of Istanbul Bar Association (Issue No. 2003/7) where the names of the parties concerned and the court of first instance are not cited.

