

# Human rights in the practice of OHIM

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# Overview

- Procedural rights
- Equal treatment
- Property rights, public interests and other rights
- Consumer rights

# Legal basis

1rst Thesis:

The first source of fundamental rights is the Community trade mark Regulation (CTMR) itself.

# Sources of human rights

- CTMR
- the EU Treaties,
- the Charter of Fundamental Rights (ChFR),
- the Convention of Human Rights
- general principles of the Member States.

# Procedural rights

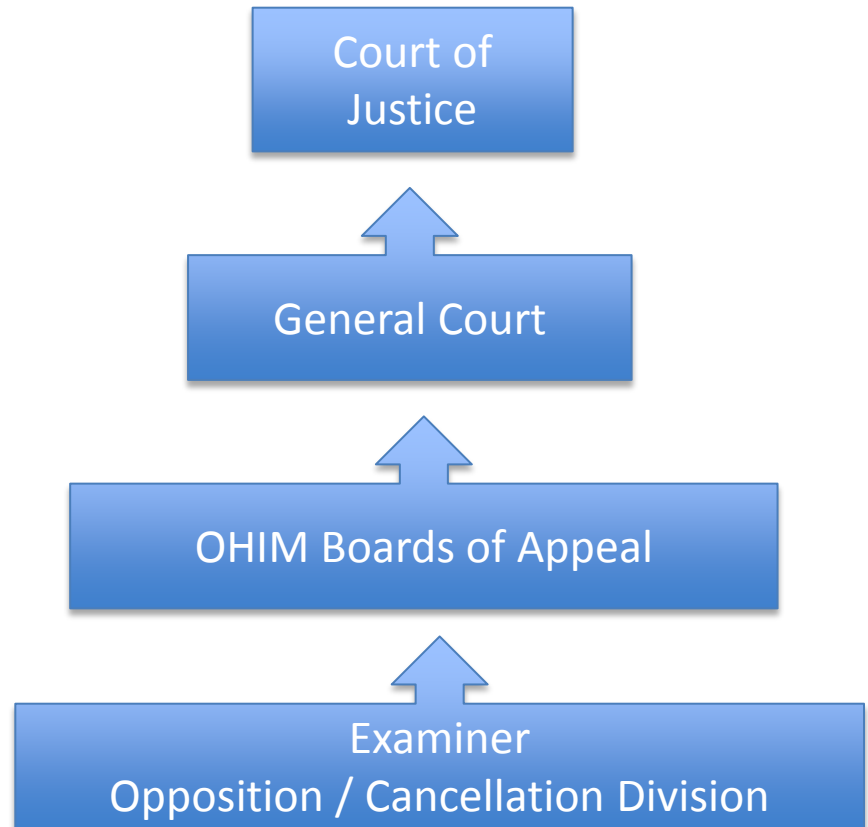
- Second thesis:
- Procedural fundamental rights are of primary, very day importance in our daily work.

# Procedural rights

- **Article 41 ChFR – good administration**
- Right to be heard (Article 75, 37 CTMR)
- Reasoned decisions (Article 75 CTMR)
- Impartial examiners (Article 132 CTMR),
- Fair proceedings,
- Timely decisions (enforcability? ISO)
- Language of the Treaties when writing to Institutions (Article 120 CTMR?, CJEU Kik).

# Fair trial

- Third thesis:
- Every party to proceedings before the Office has the right to effective remedy before a Tribunal, ...



# Fair trial

- Every party to proceedings before the Office has the right to effective remedy before a Tribunal, ...
- except the Office itself!
  
- The Boards of Appeal are independent, but no Tribunal ('quasi-judicial'),
- BoA decisions may not be appealed by OHIM,
- OHIM is not obliged to defend the position of the Boards.



# Equal treatment

- 4th thesis:

Equal treatment does not apply in the examination of absolute and relative grounds for refusal.

# Are these signs descriptive indications?

- GOLF USA,
- Volks.handy,
- Deutscher Ring Sachversicherungs AG

  
**Cheapflights**

# Equal treatment

- Article 20, 21 ChHR
- Absolute and relative grounds for refusal
  - bound decisions
  - no binding effect of wrong decisions
- Procedural discretion? Then self binding effect of administration (not the BoA?!)

- 5th thesis:
- Trade marks are very strange objects of property, compared to other assets.

# Property rights

- Art 17 ChHR: Trade marks (and their applications) are objects of property.
- Peculiar nature:
  - No creative effort,
  - Life cycle:
    - Application,
    - publication,
    - Registered or unregistered,
    - 5 years after registration,
    - 10 years after filing,
    - immortal.

# Balancing property – public interests

- 6th thesis:
- Property rights v public interests (Art. 17 ChFR)
- Public interests are well defined in the list of absolute grounds for refusal (Art 7(1) CTMR).

# Property rights and public interests

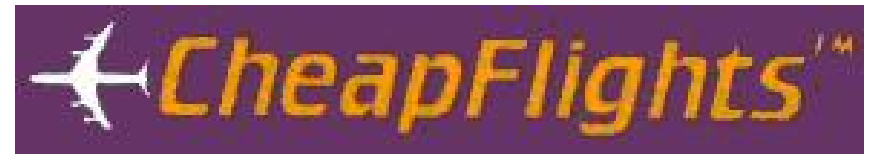
- principle: application is a property right,
- Exception: public interests
  
- Absolute grounds for refusal (Art 7 CTMR)
  - E.g. Public order and accepted principles of morality
  - E.g. Descriptive indications must be refused because of competitors' interests in free a access to descriptive indications
  - E.g. Freedom of expression

# Property rights and public interests

- 7th thesis
- Public interests are not well protected in the context of relative grounds for refusal.



# Likelihood of confusion?



Earlier Community trade mark

# Property rights and public interests

- No competence of OHIM Opposition Division to examine absolute grounds for refusal.
- But Opposition Division must define the scope of protection!
- Problem: Public interests in certain languages?



Matratzen

# Solidarity with whom?

- 8th thesis:
- Actual confusion is just an indication of ‘likelihood of confusion’!
- Should Trade mark law be about consumer protection?
- Art. 38 ChFR: Union policies shall ensure a high level of consumer protection!

# Consumer rights

- Art. 38 ChFR: Union policies shall ensure a high level of consumer protection!
- Political fundamental right ('solidarity')
- Pure consumer protection instruments:
  - Unfair business directive,
  - Pharmaceutical products,
  - Health claims regulation,
  - Publicity restrictions,
- But: what about trade mark law?

# Trade mark law in principle is not about consumer protection.

- Consumer orientated examination,
- but:
  - The reference consumer is reasonably well-informed and reasonably observant and circumspect,
  - relative grounds examined not examined ex officio,
  - Guarantee function? The market decides!

# Guarantee function hardly protected.

- Free transfer of trade mark without enterprise,
- No obligation for licensor to supervise quality of licensee's products.
  
- The main function of a trade mark is the function of origin.

# Summary

- Procedural rights are well protected.
- Equal treatment is not always guaranteed.
- Public interests limit right of property – but not always sufficiently.
- Trade mark law is not about consumer protection.

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