The purpose of a trade mark is to enable the consumer to distinguish the goods and services offered to him by their original enterprise. In this respect a trade mark is a sign that can be perceived through any sense the consumer uses to communicate with the outside world. In principle, any message capable of being perceived by the senses can constitute an indication for the consumer to identify the message covered by the trade mark. The consumer can memorise it and recall it whenever he is called upon to select the goods or to use the services so marked.

Therefore, the perception process and its rules play an essential role in judging the distinctiveness of the trade mark and how it can be assumed to be confusingly similar to another sign. Case law, that is emerging in particular from the CFI and CDJ on Community trade mark law, has not yet sufficiently explored that process nor understood how the consumer reacts when he is confronted with a trade mark. This absence affects the grounds of the legal judgements both in relation to the assessment of the distinctive character and the comparison between trade marks. Some problems in the protection of shape and non-conventional trade marks originate precisely from disregarding the way some messages are conveyed to the consumer and processed at the level of perception which is meant to be the key factor driving the consumer’s decisional behaviour.

Indeed, it is apparent from the above-mentioned jurisprudence that the application of some legal standards (such as, for instance, the one on the so-called ‘average consumer’) err on the side of abstraction and subjectiveness. In this respect, the contribution of the science of psychology may be of some assistance in supporting certainty in law and substantiating the grounds of judgements.

This science and, in particular, the German theory of Gestaltung, has for some time developed a set of rules governing the visual perception of the sign that can also be transferred to the conceptual and auditory perception.

In psychology and the cognitive sciences, perception means the process of acquiring, interpreting, selecting, and organising sensory information. According to Gestaltung, perception is the active psychological process in which stimuli are selected and organised into meaningful patterns. The fundamental “formula” of Gestalt theory might be expressed in this way: "Es gibt Zusammenhänge, bei denen nicht, was im Ganzen geschieht, sich daraus herleitet, wie die einzelnen Stücke sind und sich zusammensetzen, sondern umgekehrt, wo - im prägnanten Fall - sich das, was an einem Teil dieses Ganzen geschieht, bestimmt von
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inneren Strukturgesetzen dieses seines Ganzen.” ([WERTHEIMER] ("There are wholes, the behaviour of which is not determined by that of their individual elements, but where the part-processes are themselves determined by the intrinsic nature of the whole. It is the hope of Gestalt theory to determine the nature of such wholes."). In the course of time the science of perception developed dozens of rules, which have been substantiated by tests, research and investigation.

This article, without assuming to be exhaustive, aims to illustrate, by way of example, two cases where the application of some of the rules of perception, might have led to different conclusions than envisaged in the relevant judgments:

- The rule of Prägnanz
- The rule of Redundance

II

The Rule of Prägnanz

as applied to: CFI, 3 December 2003, T-305/02, shape of a transparent bottle, Nestlé Waters France vs. OHIM.

The German word Prägnanz means “conveying the essence of something”. The tendency to Prägnanz refers to our perceptual inclination to see a figure as being as regular, simple, stable, harmonious, ordered or symmetrical as possible under given stimuli conditions.

Now let us look at the shape of this transparent bottle
On 7 September 1998 Nestlé Waters France (NESTLE'), filed an application for a Community three-dimensional trade mark with OHIM under Council Regulation (EC) No 40/94 (CTMR). The Office dismissed the application on the ground that the mark applied for was devoid of any distinctive character.

The Court of First Instance (CFI) annulled the contested decision since the OHIM, in their view, erred in finding that the mark applied for was devoid of any distinctive character within the meaning of Article 7(1)(b) CTMR. The judgement pointed out that particular note should have been taken of the manner in which the various elements (the bottle's bobbin shape and the oblique, horizontal grooves) were put together.

In this respect, "the combination of the above-mentioned elements of presentation, which make up the mark applied for, is truly specific and cannot be regarded as altogether commonplace ". "Thus – explained the CFI - the nearly cylindrical main section of the bottle bears oblique grooves which, first, completely cover the bobbin-like part of the bottle and accentuate the curved, rounded effect of the bottle's upper part and, second, are highlighted by the presence on the lower part of the bottle of grooves running in the opposite direction, the whole forming a design which is striking and easy to remember."

(par.41)

While the Gestaltic part-whole principle is correctly recalled, albeit not directly expressed, the idea that the different orientation of the grooves (i.e. the oblique grooves in the upper part of the surface of the bottle, and the horizontal ones in the lower one) should be striking and easy to remember is completely inconsistent with the Prägnanz Rule.

In drawings (arrangements of simple geometrical figures), figures tend to be placed along the horizontal, vertical or diagonal lines passing through the centre of the background, and the centre of gravity in a composition is formed by preferred positions which tend to coincide with the centre of the background. A diagonal line, however, must be crossed in a specular way in order to balance and compensate the disruptive effect that otherwise one single line inclined toward a direction would cause to the well balanced and organised gestaltung as warranted by the basic cross between vertical and horizontal lines.

The photograph sequence of the German artist Elmar Baumann shows how the left sloping arm of the human figure is counterbalanced by the specular
movement of the right arm, as marked by the two white lines (fig.a) and b). In fig. c) it is apparent that the diagonal lines cross in the centre as well as the ideal vertical and horizontal lines of the shape.

The admirable sense of balance and movement (‘Diagonalen und Schrägen sind dynamisch, sorgen für Bewegung’) that the work conveys to the observer is strengthened by the fact that the centre of gravity in the composition agrees with the centre of the background (see fig. d), where the light upper part of the composition is compensated in the middle by the dark heavy lower part of the same).

Adversely, in the shape and decoration of the Nestlé bottle the diagonal lines in the upper part cross each other, but they conflict and strongly contrast with the grooves in the lower part running in a horizontal direction - and not opposite, as wrongly stated in the grounds of the judgement.

The basket-network formed by the grooves is unable per se to ‘accentuate the curved, rounded effect of the bottle’s upper part’ and it is clearly incompatible with the soft, linear and smooth impression given by the horizontal and wavy grooves. In this respect, the grooves, as a part, do not concur to determine the whole and live their independent and separate lives.
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Fig. e) here below, illustrates, by way of example, how the combination between two grooves of opposite directions might have resulted in an acceptable, consistent and organised system.

The impossibility of reconciling the terms of perception between the two shapes leads the 3-D trade mark’s absolute lack of distinctiveness. The consumer is unable to perceive the sign as distinctive. The rule which should have been applied here should have been Article 7(1)(a) CTMR, which provides that signs which are not capable of distinguishing goods or services of one undertaking from those of other undertakings, shall not be registered as a trade mark.

III

The Rule of Redundance

as applied to: CFI, 15 June 2005, T-7/04, trade mark Fig. Limoncello-Limonchel, Shaker di L. Laudato & C. Sas vs. Limiñana y Botella, SL.

According to Gestaltung the term ‘redundance’ is not retained in the dominant meaning of ‘extreme’, excess’, ‘as an embarrassment of riches’, but in a broad sense as ‘reminder or repetition’. In particular, iconic-plastic figures can be disjoint or conjoint, and either plastic with iconic redundant, or the reverse. By extension, “Redundance is obviously the same as the order under which the elements are joined. The simplest redundance is, by the way, symmetry.”

It is much more probable to perceive this set of lines

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as a sequence of 6 figures (3 + 3), than a strip of 12 vertical lines. This happens precisely because there is an inner tendency to organise stimuli according to symmetry and this applies also to the connection between a figurative sign and a verbal indication. Through the redundance effect the latter sign is highlighted by the former one, in such a way that a divergence from what is expected in one layer of the sign is reduced to normality with the aid of information contained in the other layer.

Let us now look at this case. On 20 October 1999 an Italian company filed an application for a Community trade mark with OHIM for the figurative sign reproduced below:
On 1 June 2000 Limiñana y Botella, SL, a Spanish company, filed a notice of opposition pursuant to Article 42(1) CTMR against the registration of the mark applied for, based on its prior right in the registered Spanish trade mark 

LIMONCHELO

the goods covered by the earlier mark encompassed those covered by the mark claimed, that the dominant element of the mark claimed was the word ‘limoncello’ and that the trade mark claimed and the earlier trade mark were visually and phonetically very close to one another and that there was consequently a likelihood of confusion between the two marks. The Court of First Instance (CFI), by judgement of 15 June 2005, reversed OHIM’s decision.
As already underlined in the introductory remarks of this article, pursuant to case law of the CFI itself “the perception in the mind of the average consumer of the goods or services in question plays a decisive role in the global assessment of the likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details”. On the other hand, with regard to the assessment of the dominant character of one or more of the given components of a complex trade mark, account must be taken, in particular, of the intrinsic qualities of each of those components by comparing them with those of the components of the other complex trade mark. In addition, account may be taken of the relative position of the various components within the arrangement of the complex mark. Consequently, it must be held that a complex trade mark, one of whose components is identical or similar to another mark, cannot be regarded as being similar to that other mark, unless that component forms the dominant element within the overall impression created by the complex mark. It seems apparent, therefore, that the Court plainly applied the main principles of the Gestaltung.

By contrast the Court considers that the representation of the round dish decorated with lemons must be regarded as being the dominant component of the mark claimed. This conclusion goes against the rules of perception, namely the Rule of Redundance. Notwithstanding this reference should be made to the perception which the relevant public has of the signs and goods in question. The judgement fails to consider the relevant consumer and the way he perceives the sign. In this case, indeed, the goods, soft alcoholic beverages, are intended for everyday consumption and are normally taken orally.

If the trade mark is composed by denominative and figurative elements, the former should be considered, in principle, more distinctive than the latter, since it is easier for the average consumer to refer to the products in question by citing their names instead of describing their figurative element (the label). The predominance of the semantic value of the sign in respect to its visual representation is corroborated by the scientific investigation in the perception process.

The Court detects that the round dish shows realistic depictions of lemons on its border. However, the Court fails to connect this image to the conceptual representation of lemons (Limoncello and Limonchelo). In the case at hand the highlighting of the semantic message in both the trade marks is clear and prevails over the figure of the dish. The redundance effect drives the relevant consumer’s attention to the significance of his perception which irresistibly associates the idea of the yellow fruit to the relevant liqueur. In addition the visual perception of the image of lemons is easier to remember, as the image belongs to our experiences and backgrounds and can thus be easily recognised, whereas the verbal indications which embody the idea of a lemon implies a two step rational recollection of the item.

The statement in the legal considerations, that the round dish should have a high degree of distinctiveness as compared with the other components of the mark claimed and in particular as compared with the word limoncello” is apparently in contrast with the principle of a global evaluation of the sign understood as a whole, it obliterates the redundance rule of perception and undermines the semantic value of the figurative and verbal components of the trade mark applied for. This defective situation may also explain a number of legal discrepancies, if not errors, which affect the judgement which is now pending on appeal before the Court of Justice.

For the sake of clarity the analysis carried out in the two above-mentioned cases using the perception rules is not intended to supersede the legal parameters that, at present, govern the assessment of the distinctiveness of a trade mark when it is confusingly similar to another. A careful consideration of the contribution provided by the science of perception could, however, be of some assistance in attempting to reach more certainty in law.
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The text of this article corresponds to the presentation given by Mr Sandri at the ERA 2005 Conference on 10-11 November in Alicante.

The literature on the science of psychology goes back more than one century. Following Gestaltungpsychology in the 20th century, philosophical, epistemological, physiological, therapeutical, computer, virtual-intelligence and science-historical literature may lead to some disorientation. In the References below the End Notes, Mr Sandri has included a list of some titles which relate directly to the visual, phonetic and semantic perception and the problem examined by him in his article.

End Notes:

1 * “... the perception in the mind of the average consumer of the goods or services in question plays a decisive role in the global assessment of the likelihood of confusion” (CFI T-6/01, 23 October 2002, Matratzen Concord GmbH v UAMI, 26)
2 At the ECJ Judges IVth Symposium, last September in Alicante. J.PIRRUNG, ECJ, admitted: “The methodological approach to examining the overall impression has not yet been definitively established”.
3 In this respect a strong criticism has been raised lately against the case law of the ECJ: “... the Court has not articulated a clear view as to how the distinctiveness provisions, as a whole, ought to be interpreted...The law is thus in a state of flux” (M. HANDLER, The Distinctive Problem of European Trade Mark Law, (2005) E.I.P.R., issue 9.)
7 A broad and recent definition can be drawn from The American Heritage® Dictionary of the English Language, Fourth Edition: “A structure, configuration, or pattern of physical, biological, or psychological phenomena so integrated as to constitute a functional unit with properties not derivable by summation of its parts”.
8 I would recall, inter alia- the rule of Figure and Ground, Similarity, Proximity or Contiguity, Continuity, Closure, Area, Symmetry, Grouping, Simplification, Driving Tensions. These factors have been significantly called the laws of organization (Kearsley, G., 1998, Explorations in Learning & Instruction: The Theory Into Practice Database: Gestalt Theory. George Washington University [On-line].)
9 See for an application of Closure and Driving Tensions Rules, SANDRI S., Identità dell’opera e violazione del diritto d’autore sul design alla luce della teoria della percezione visuale, in www.IP-Italjuris.it, 05/2005.
10 KOFFKA, Principles, cit., pag.185.
15 KOFFKA, 1935, cit.; KOHLER, 1940, cit.
16 See Matratzen judgement, which also quoted SABEL, paragraph 23, and Lloyd Schuhfabrik Meyer, paragraph 25.
18 The judgement in examen, paragraph 50.
REFERENCES:
