



## The Oatly slogan saga

### Considerations for trade mark eligibility

As 'Veganuary' draws to a close and National Nutrition Month creeps around the corner, it's hard to miss the huge number of food and drink adverts aimed at health conscious consumers. One food brand which has been getting a lot of attention recently is [Oatly](#), the Swedish drinks company which creates oat-based milk alternatives. Oat drink lovers will be pleased to know that this popular brand has had a win at the EU General Court resulting in the successful registration of its slogan "IT'S LIKE MILK BUT MADE FOR HUMANS".

Oatly's slogan has sparked controversy within the dairy industry even resulting in a lawsuit brought by the Swedish Milk Lobby. But what is it about this particular slogan that persuaded the EU General Court to overturn the earlier decisions of the Board of Appeal and EU Intellectual Property Office and allow it to register?

#### **Why is it so difficult to register a slogan as a trade mark?**

A question on the minds of marketing teams everywhere. The criteria for registration of a slogan is the same as any other type of trade mark insofar as it must (a) not describe the nature or a characteristic of the goods/services it's used for, and (b) be capable of performing the essential function of a trade mark, namely distinguishing the commercial origin of one product from that of another.

The struggle most brand owners have with their slogans is that, on their own, they often fall short of the necessary distinctiveness to be registrable. It's not that the threshold for distinctiveness is at all high, a minimum degree of distinctiveness will be sufficient, it's just that most slogans are designed to carry a promotional message rather than indicate trade origin.

#### **Distinguishing marketing puffery from trade mark function**

It has often been thought that if a trade mark is perceived as a promotional message then it must be devoid of any distinctive character. However, in the Oatly case the General Court found that a slogan can fulfil various functions (including a promotional function) without precluding it from also being perceived as a distinctive indication of origin.

Trying to decipher whether a consumer will perceive a slogan as more than mere marketing puffery is no easy feat. For Oatly, it was the fact that its slogan conveys a message which calls into question a commonly accepted idea (i.e. that milk is apt for human consumption). This surprising and contradictory message was considered by the General Court to spark a cognitive process in the minds of the relevant public, making it easy to remember and, as a result, imbuing the mark with the minimum necessary distinctive character.



## Acquiring distinctiveness

The saving grace for Oatly was that the seemingly laudatory message conveyed by its slogan was also controversial and surprising, rendering it inherently distinctive overall.

For other businesses whose slogans lack that innate quality it is still possible to achieve the gold standard of trade mark registration but only if the slogan in question has acquired a distinctive character through use such that consumers are accustomed to associating an otherwise purely promotional phrase with one particular trader. Achieving trade mark registration by this method is however challenging and generally requires substantial use over many years. Thanks to the General Court's ruling, Oatly did not have to jump this hurdle.

## Lessons from a slogan saga

While not impossible, it can be challenging to register slogans as trade marks. There is no one approach which will guarantee success. It's about putting your feet in the shoes of the consumer and thinking less about promotional messaging and more about creating something which is thought-provoking and memorable.

By considering trade mark eligibility at the outset, brand owners can be confident that they are spending their marketing budget on a slogan that they can protect.

For further information about brand protection, please contact the Carpmaels & Ransford [Trade Mark team](#).

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