Greece: Pharmaceutical Trademarks

By Dr Nikolaos Lyberis, Vayanos Kostopoulos Law Firm, Greece

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The most important legislative sources for pharmaceutical trademarks are:

- the new Trademarks Law (4072/2012), as modified by Law 4155/2013;
- the EU Community Trademark Regulation (207/2009);
- the EU Trademark Directive (95/2008/EC);
- the Madrid Protocol (to which Greece acceded in 2000); and
- the EU IP Rights Enforcement Directive (48/2004/EC).

Pharmaceutical products are strongly regulated in Greece with regard to their branding, promotion and sale. In connection with pharmaceutical trademarks, the Trademarks Office and the Health Registration Authority (EOF) are the two main authorities which handle the grant and maintenance of such marks. The difference in the roles of these two authorities is that the former deals with the grant and protection of IP rights under Greek, EU and international trademark law (the **sui generis** private law right), while the latter is concerned with public health issues, including the grant of market authorisations (public order issues). Due to these different examination criteria, a pharmaceutical trademark may be granted by the Trademarks Office after its examination on both absolute and relative grounds, but the use thereof may then be rejected by the EOF for contravening aspects of public health (eg, a conflict with another pharmaceutical with a confusingly similar name for which a market authorisation was previously granted).

Selection, clearance and registration

In an attempt to simplify and accelerate the registration procedure, the new Trademarks Law introduced the position of examiner, who now examines new trademark applications instead of the Administrative Trademarks Committee. The examiner has one month from the filing date to raise any objections; otherwise, the mark is accepted and proceeds to publication on the Trademarks Office's website. The opposition term has been shortened to three months following the electronic publication date, so the registration procedure has been shortened considerably, giving applicants a faster, more reliable response as to the validity of a chosen pharmaceutical name.

Absolute grounds for refusal

The examiner applies EU harmonised law on absolute grounds for refusal, taking into account the case law and guidelines of the Office for Harmonisation in the Internal Market (OHIM). Accordingly, an application for the mark LASER CLINIC to distinguish aesthetic services was rejected as descriptive (Supreme Court 1529/2008, DEE 2009, 682). Moreover, the rights holder must be vigilant and energetically pursue its rights against unauthorised use in order to maintain the mark's protection and avoid it becoming a generic term that cannot be monopolised. A registered pharmaceutical trademark may become vulnerable due to extensive use by competitors without a timely response by the rights holder (eg, VASELINE). Such a risky situation can be overcome if the rights holder or licensor makes proper, genuine use of the mark and brings a cease and desist claim against the infringer before the competent court or authority without undue delay. This is the case with, for example, the well-known ASPIRIN mark, which is regularly protected against unauthorised use; its proprietary nature as a registered trademark has been confirmed by both the courts and the EOF.

INN protection
Signs consisting exclusively of an international non-proprietary name (INN) are devoid of trademark protection and are rejected as such on absolute grounds. More difficult to assess are signs consisting of invented names resembling INNs to a varying degree, or containing word elements that are included in INNs (so-called 'stems') to indicate that the substance belongs to a group of pharmaceuticals with similar pharmacological activity. This ambiguity is often reflected in case law – for example, the mark LEFLOXACIN was rejected being an abbreviation of INN LEVOFLOXACIN (ATC Dec 3626/2009). In principle, combinations of an INN and a company name are registrable as trademarks: thus, VALSARTAN MIKLICH LABORATORIOS was accepted as a trademark despite VALSARTAN being registered as an INN (ATC Dec 8265/2009). RAMIPRIL/ZEINCRO was also accepted as a trademark (the INN is RAMIPRI) in the name of Zeincro Hellas SA (ATC Dec 10663/2008); and OXALIPLATIN/MEDICUS was accepted as a trademark (the INN is OXALIPLATIN) in the name of MEDICUS SA. However, the mark OXALIPLATIN UKR was rejected (the INN is OXALIPLATIN) because, according to the court, the applicant's initials UKR were insufficiently distinctive compared to the INN.

Similarity to INN stems is rarely considered to constitute absolute grounds for refusal. Nevertheless, this may not always be the case – for example, a trademark application for BIOGRASTIM was refused due to confusing similarity with the INN FILGRASTIM (Adm Court of Appeal Dec 1347/2008), and a trademark application for VALARTAN was also refused due to confusing similarity with the INN VALSARTAN (ATC Dec No 4698/2011).

Relative grounds for refusal
The examiner may raise citations based on prior national, Community or international trademarks with extension to Greece under the Madrid Protocol. When assessing the risk of confusion between conflicting pharmaceutical trademarks, case law has always interpreted the 'average consumer' restrictively, and even more so in the case of prescription pharmaceuticals. Thus, the intermediation of a professional such as a doctor or a pharmacist would considerably diminish the risk of confusion in a way that even a one-letter difference might be considered sufficient for the later mark to be judged as registrable. Recently, however, there has been a gradual shift in case law from the criterion of an intermediating professional (eg, a doctor or pharmacist) who would ensure the avoidance of any confusion, even between quite similar marks, to the average patient who is above averagely attentive with regard to pharmaceuticals, but who may:

- have to take both medicines at different times and doses;
- be an older person obliged to choose from among other pharmaceuticals; or
- be a night nurse or other person who assists a patient in this respect (see **XENICAL v BENICAL**, DProtA 1866/2012; Council of State 2758/2006).

Consequently, a risk of confusion which was previously assessed to be rather limited (Supreme Adm Court 345/2001, EEmpD 2002, 442) may now be considered higher, depending on the circumstances of each case.

Trademarks with reputation
Enhanced legal protection is reserved for pharmaceutical trademarks with reputation according to the general case law of the Greek and EU courts. The court can find a mark to be reputed even if it coincides with the brand name of the manufacturer and is used on the product and its packaging in combination with another specific name (eg, **MERCK v MERX**, **ASPIRIN v ANOPYRIN**). The assessment of the reputation of prescription pharmaceuticals for which advertising is prohibited is based on product awareness. This is the case not with regard to the general consuming public, but rather in relation to awareness among prescribing doctors who show their preference for a reputed trademark by repeatedly choosing it in clinical practice.

Non-traditional trademarks
While the Administrative Trademarks Committee tends to reject pharmaceutical pictorial trademarks (without a word part), claiming that - at least in case of a prescription pharmaceutical - a design without a word part could not be pronounced and therefore identified safely by the prescribing doctor and the pharmacist, the ordinary administrative courts have repeatedly reversed such decisions by confirming the registrability of pictorial trademarks for goods in Class 5. In fact, the courts have accepted that pictorial marks are either accompanied by a word mark on the packaging or used as an

umbrella brand by pharmaceutical manufacturers for the whole series of products, which are then individually identifiable through another word mark (DProtA 12740/2012).

Slogans
The new trademarks law explicitly provides for slogans as one of the forms of sign that may be registrable as trademarks. This legislative development may facilitate the future registration of such signs. Slogans are gaining importance in promotional campaigns and in connection with over-the-counter and health services, as well as education offered by numerous manufacturers. They are considered to be a specific category of pharmaceutical trademarks, but until now case law does not seem to have reached a satisfactorily transparent level of examination criteria. Thus, an application for the slogan “Lose weight, gain life” was accepted, but the slogan “We change diabetes” was rejected at first instance (an appeal is now pending).

Licensing
The licensing of trademarks has been made simpler, faster and cheaper for the parties involved. Specifically, licences are now registered immediately without prior examination by the Administrative Trademarks Committee. The official fees for recordal of a licence agreements has been reduced to €90 a mark.

Parallel imports and repackaging

Significant discrepancies in the prices set by the government for pharmaceuticals in Greece and other EU member states have led to much parallel trade. In cases where the prices in Greece are considerably lower than those charged abroad – a policy that favours the national health system, including social funds in their efforts to improve their precarious financial condition – parallel exports of pharmaceuticals have occasionally led to a serious shortage of products. This situation has been dealt with through the mobilisation of state-owned production, especially when such shortage concerns irreplaceable pharmaceutical preparations, the lack of which could affect the health of severely or chronically suffering patients. Parallel imports are also common in the domestic market, where higher domestic prices make them profitable for importers.

In view of the principle of exhaustion of trademark rights within the European Economic Area (EEA), parallel trade between Greece and EEA member states is legal (Article 128(1) of the Trademarks Law) and is not considered to violate the manufacturer’s trademark rights if the relevant pharmaceuticals were put in circulation by it or with its consent in another EEA state (PProtThess 699/2011, EEmpD 2012, 168).

In specific circumstances, parallel imports may be considered illegal under both trademark law and unfair competition law. Trademark legal protection is granted against a parallel import in which the place of origin of the trademarked goods is outside the EEA (MProtLar 505/2009, EpiskED 2010, 266). The parallel import of genuine goods from another EEA state may violate trademark law if it gives a misleading impression to the consuming public – namely, that the importer belongs to the rights holder’s commercial agent or distributor network (PProtThess 699/2011, EEmpD 2012, 168).

A parallel import is considered to violate the Law against Unfair Competition (146/1914) if additional illicit circumstances concur (EA 5136/2005, DEE 2005, 939). Such additional illicit circumstances may constitute the violation of legal provisions of an ethically imperative nature (eg, employing people without social security) or breach of contractual obligations (eg, concerning pricing policy). Parallel importers are also prohibited from creating confusion among consumers regarding their business organisation and the fame of the goods they circulate in the market (PProtThess 699/2011, EEmpD 2012, 168).

The repackaging of parallel imported pharmaceutical products will violate Article 128(2) of the Trademarks Law by not falling under the exhaustion principle if the rights holder invokes a reasonable justification such as a change or deterioration in the condition of its genuine trademarked goods.

If trademark infringement is thus proven, various enforcement alternatives are available, including cease and desist claims, withdrawal of infringing goods from the market, removal of the trademark from the goods, destruction of the goods, a damages claim, publication of the court’s decision

acknowledging the infringement and criminal penalties (Article 150, 156 and 157 of the Trademarks Law).

Anti-counterfeiting and enforcement

The prevention of pharmaceutical counterfeits is mainly achieved through market vigilance in combination with timely and diligent customs registration of trademarks of major products, according to the EU Customs Regulation (1383/2003), as currently applicable. This approach is confirmed by the most recent announcements of the Central Customs Direction in cooperation with the Piraeus Container Terminal, which evidence the number of detentions of counterfeit goods. The destruction of such goods is also a key issue in light of rising warehousing costs, especially in the major ports of Piraeus and Thessaloniki.

Improved enforcement is sought through coordinated raids by the recently established Central Coordination Service, including the police, coastguard, the Body for Combating Economic Crime, the municipal police and officers of the Ministry of Development. This is a promising initiative.

Advertising

The advertising of prescription pharmaceuticals, as well as of psychotropic substances and narcotics targeted at the general consuming public, is prohibited. Nevertheless, non-prescription pharmaceuticals and diagnostic appliances may be advertised under certain conditions. Such conditions are in compliance with EU law and take into account the nature of the advertised products as medicines.

Generic substitution

According to the most recent legislation (Law 4052/2012) and various implementing ministerial decisions, doctors' prescriptions must make reference to INNs only. Pharmacists are obliged by law to deliver to the patient the cheapest pharmaceutical containing the prescribed substance (INN) available in the Greek market by choosing out of an official list of products that correspond thereto. As an exception, the prescribed substance may be accompanied by the trademark of a specific pharmaceutical:

- for certain limited categories of pharmaceutical provided for by law (eg, drugs potentially causing allergies or other reactions; and
- in case of patients suffering from chronic diseases (eg, cardiovascular disease).

These exceptional cases in which a pharmaceutical trademark may be referred to in the doctor's prescription together with the INN must be well reasoned in writing by the doctor through a relevant entry in the electronic prescription system. Moreover, each doctor cannot exceed 15% of his or her total annual prescription volume with such exceptions of reference to pharmaceutical trademarks, while keeping the general rule of prescription based solely on the substance. Should the doctor decide to prescribe a medicine other than the cheapest available product corresponding to the INN, he or she should inform the patient of his or her obligation to pay the price difference.

Online issues

Under a ministerial decision issued in April 2013, non-prescription pharmaceuticals may be sold to consumers online. However, the necessary implementing provisions regulating the establishment and operation of e-pharmacies are still pending. It remains to be seen whether all over-the-counter products will be covered by these provisions, or only certain categories such as vitamins or additives.

For more information, please contact:

Dr Nikolaos Lyberis
Managing director

Vayanos Kostopoulos Law Firm
37 Stournara Street, Athens, 10682 Greece
Tel +30 210 3808501
Fax +30 210 3816685
n.lyberis@vklaw.gr
www.vklaw.gr

Nikolaos Lyberis graduated from Athens University Law School in 1983 and received his PhD in European economic law from the University of Hamburg Law School.

Since 1993 Dr Lyberis has been a partner at VAYANOS KOSTOPOULOS, the oldest and one of the leading IP law firms in Greece, and in 1997 he became managing director. He specialises in prosecution and litigation for trademarks, patents and other IP rights. He also handles counterfeiting matters before Customs and courts. Dr Lyberis also successfully handles contract law, IP licensing, consumer protection law, internet law disputes and unfair competition matters. He is fluent in German and English.