

## **TM availability searches never consist in “Blind test”**

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When you have a look at the wording “blind test” on the main search engine on the web from France, i.e Google, most of the first results refer to a musical quiz where the player listen to musical extracts in order to find out the name of the interpreter and the title of the song.

Nevertheless, the French Court of Appeal in Paris has just confirmed with a decision dated October 2, 2013, the BLIND TEST constitutes a valid trademark in relation with some kind of games, such as multimedia, online, phone, TV or radio games, etc.

Indeed, the French owner of in particular 3 French and community word marks BLIND TEST applied from 2001 to 2003 and covering the above kind of games has initiated an infringement action against a French company using the name “blind test” on its website and within the domain name “blindtest.com” and related website, to designate a musical quiz game on the Internet.

In reply, the defendant of course requested

- the nullity of the marks BLIND TEST on the ground of lack of distinctiveness,
- their cancellation on the ground of degeneration,
- their invalidation on the ground of non serious use

For the first question, Judges searched whether the trademarks were not distinctive at the time of their applications and found from the pertinent elements given by the defendant (some of them were not dated at all), that BLIND TEST was the title of 3 magazines with explanations stating that it designate a musical game or quiz, these explanations demonstrating that the meaning of BLIND TEST was not known from the most part of the French public. Judges also found that the name BLIND TEST was used to designate blind marketing tests of products or oenological and gustatory tests.

Consequently, the marks were not annulled.

Concerning degeneration, Judges examined whether the marks had become the usual designation of the concerned activities. They noted from the evidences given that the words BLIND TEST were frequently used in relation with musical quiz games but rarely alone and most often with an explanation of the content of the game. This was also the case on the defendant website. Considering that the French Law requests that degeneration must come from a defect of its owner, Judges also confirmed that the owner had taken steps to defend its rights (with only two opposition decisions from INPI in 2001 and 2011 and one judgement from the Court of Appeal of Paris in 2008 recognizing infringement).

The marks were not considered as degenerated.

Finally, the ground of non use has not been retained considering that the owner showed a continued use of the marks from 2002 to 2012 to designate musical quiz games on CD supports, that were sold in multimedia libraries and their websites as well as on the owner website [www.blind-test.com](http://www.blind-test.com).

Then, the defendant's argumentation not having been considered, it was easy for Judges to confirm infringement by imitation and also unfair competition regarding the specific use of the domain name blindtest.com, with a total award of damages awarded up to 20.000€.

It is obvious, but can be recalled, that quality and relevance of the submitted evidences are able to tip the balance at least as much than the legal argumentation.

Moreover, this judgment mainly shows that when a commercial project integrating a special or new name (intended to be filed as a trademark or not) is on the way, it is never sufficient to just check the chosen denomination on the Web and see that the name seems to be a usual one, that should so be freely usable. This kind of investigation may give a first idea but legal work on availability searches must not be forgotten unless you want to blindly embark on your new task.

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