

Kluwer Trademark Blog

Norway: Never stop exploring promotional slogans

Thomas Hvammen Nicholson (Protector IPC) · Monday, December 14th, 2020

Following the inspirational blogs by Agnieszka Sztoldman and Katharina Schmid's on slogans [here](#) and [here](#), I would like to share some fairly recent decisions from Norway. They show that there is "hope in a hanging snore" for the protection of promotional slogans in Norway.

It begins with the outdoor apparel slogan NEVER STOP EXPLORING. The applicant North Face Apparel Corp. appealed successfully to the Oslo District Court following commonplace slogan refusals by the Norwegian IPO and the Board of Appeal. The Board of Appeal appealed this decision to the High Court, which upheld the ruling of the District Court that the promotional slogan is distinctive.

Following this, the Board of Appeal has issued decisions allowing registration of several promotional slogans.

The CJEU's judgment of 21 January 2010 in C-398/08 P., *Vorsprung durch Technik* provides a backdrop to these decisions. Amongst other things, the Court states that a non-descriptive promotional slogan may be distinctive if it possesses "(...) a certain originality or resonance, requiring at least some interpretation by the relevant public, or setting off a cognitive process in the minds of that public" (para 57). Initially, the decision provided some optimism to the registrability of promotional slogan trade marks.

Any such optimism for promotional slogans post-Vorsprung evaporated with subsequent practice in the EU and in Norway. Promotional slogans have been routinely rejected by the Norwegian IPO and the Board of Appeal owing to lack of distinctiveness.

Under such circumstances it is sometimes necessary to try a deadlocked administrative practice before the courts to see if the practice can be altered.

In NEVER STOP EXPLORING, the High Court describes the mark as a promotional slogan consisting of commonplace English words which does not have any distinctive syntactical or semantic features or any other surprising and original elements. Nevertheless, the court finds that NEVER STOP EXPLORING is a forceful, lively and direct expression with positive associations to inquisitiveness and the urge to explore.

The court mentions that NEVER STOP EXPLORING may also give the average consumer a more philosophical association to the exploration of human existence. The court therefore concludes that the open formulation and large scope of interpretation is suitable to make the average consumer wonder about the meaning of the mark. The mark is forceful and direct and is therefore suitable to be recollected by the average consumer.

After this decision, the Board of Appeal has opened the door ajar for the registration of promotional slogans.

The first case before the Board of Appeal was an application for CREATE A BETTER TOMORROW, TONIGHT for alcoholic beverages. In this blogger's opinion a very catchy slogan which clearly should be registrable.

The Board finds that there is a tension between the semantic content of the mark and the goods in question. Most people would not associate alcohol or the use of such products as creating a better tomorrow, if anything rather the opposite.

As with NEVER STOP EXPLORING, it is held that the philosophical aspect of the mark helps make it distinctive.

In another decision, POWER FOR A BETTER WORLD, the Board finds that although POWER may be associated with energy, and forestry services have a connection to renewable energy, the connection between the slogan and the services is not immediate and direct. Instead, the mark as a whole invites for reflection.

In LOVE BEAUTY & PLANET, the Board finds that the placement of the word PLANET in the mark will initiate a cognitive process with several mental steps amongst the relevant consumers of soaps and perfumes. PLANET will only be perceived as a figurative reference to "organic, eco-friendly" etc.

The Board holds that BECAUSE IT'S YOU indicates that the customer is the chosen one. However, the mark requires several mental steps before it is perceived exclusively as a promotional slogan for perfumes and is therefore vague.

Finally, in LET'S WRITE THE FUTURE, the Board finds that WRITE THE FUTURE is meant figuratively. The average consumer will have to go through several mental steps in order to connect the mark with the relevant goods and services, leaving the mark with a minimum degree of originality.

Conclusion:

The takeaways of the Norwegian decisions seem to be that if a promotional slogan can be said to invite reflection, a cognitive process and/or mental steps, it may yet be registrable. Which means that we are back to "cognitive process" from Vorsprung after 10 years?

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