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General Court: car shape found not registrable (decision of 25 November 2015, case T-629/14)

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Once again, the General Court has found a three-dimensional mark consisting of a product shape not sufficiently distinctive for registration. This time, the shape in question was that of a vehicle, and it was held non-distinctive in relation to automobiles and related goods.

Background of the case

Jaguar Land Rover Ltd. had applied for the registration of the car design shown here as a 3D trademark (in the following “Evoque design”) for goods in classes 12, 14 and 28.



The examiner refused the registration of the application in relation to a variety of goods in classes 12 and 28, namely those in relation to cars or vehicles. Before the Board of Appeal, Jaguar Land Rover’s luck was only partial, in that it prevailed in relation to apparatus for locomotion by air or water. The Board of Appeal considered that it would be quite remarkable if the Applicant succeeded in producing an airplane or a ship looking like the vehicle applied for. However, for that which mattered – cars – the Board upheld the refusal considering that the Evoque design was just another variation of the typical shape of a car, being defined as a SUV or another type of car.

Decision of the General Court

As regards cars and land vehicles, also the General Court agreed that the mark was not distinctive, applying the regular criteria: “the mere fact that [a] shape is a ‘variant’ of a common shape of that type of product is not sufficient” to establish distinctiveness. What is necessary to show is that the mark applied for **departs significantly from the norm** or customs of the sectors concerned. This was not the case here as the line drawings showing the applied-for shape did not allow that to be considered sufficiently different from other SUV models in the market.

The Applicant relied on independent third party reviews confirming the distinctiveness. This was rejected by the Court on the basis that these reviews concerned a ready-made car or photographs of such a ready-made car, but not the line drawings in the application. While the photographic representations submitted brought out a number of features, these were not visible in the line drawings. The Board of Appeal was correct to base its decision solely on the representation of the sign as filed.

Comment

This decision shows how important it is that the new or most distinctive features of a shape are clearly visible in a trademark application to allow a conclusion that a design departs significantly from the existing products in the market. Of course, shapes of vehicles have been registered by OHIM before. These include the shapes of the Beetle (both old and new), of the new Mini, the Porsche 911 and Boxter, the Smart car and the Lotus. Fiat's old 500 model was allowed registration (based on line drawings) while photos of the new Fiat 500 were refused, both in 2004. Many other car shapes have been refused protection in relation to cars, including, notably, also the Porsche Cayenne. While the admitted shapes can be considered iconic, they were registered without evidence of acquired distinctiveness. Nevertheless, it does appear that OHIM views both vehicle parts (such as tyres) and historic (or revised historic) car models more favourably than newer car shapes.

Bearing in mind that the distinguishing features of the shape at issue here were not sufficiently visible in the line drawings, it will be interesting to see whether the recently filed photographic representations showing the same shape fare better in Alicante or perhaps Luxembourg.

Finally, applicants for shape marks must be careful when arguing that their design is so special and unique that it must be considered sufficiently different from the norm: this would not be the first shape to then fall in the trap of aesthetic functionality, which, following the Bang & Olufsen debacle and the CJEU's judgment concerning the Tripp Trapp chair, is now more frequently applied.

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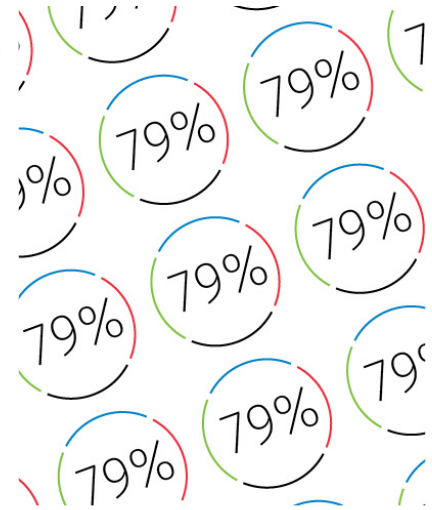
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