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iMessage managed to acquire distinctiveness

Peter Schramm (MLL Meyerlustenberger Lachenal Froriep AG) · Friday, July 21st, 2017

The Federal Administrative Court partially overturned a decision of the Swiss Federal Institute of Intellectual Property (IGE) refusing protection for Apple's word mark "iMessage" for telecommunication services in class 38.

The Administrative Court agreed with the IPO that "iMessage" lacked original distinctiveness for messaging services, because such services were closely linked to the internet, and the "i" would be understood by the relevant consumers – the general public – as an abbreviation for "internet".

However, unlike the IPO, the Administrative Court held that Apple had shown that "iMessage" had acquired distinctiveness on the Swiss market. The IPO considered that Apple had not submitted enough evidence for the French and Italian speaking Swiss regions. Since its practice requires – for word marks, anyway – a showing of acquired distinctiveness for all three language regions of Switzerland, it stopped its assessment there. The Administrative Court (sensibly) disagreed: the evidence for acquired distinctiveness in the German speaking region was overwhelming. Since there were no indications that Apple's market position was any weaker in the other language regions, it could be assumed that "iMessage" had acquired distinctiveness there, too.

This decision is interesting because – without saying it in so many words – the Administrative Court shifted the burden of proof that the sign had *not* acquired distinctiveness in the other language regions to the IPO once acquired distinctiveness was established for the German speaking market. This is an interesting development. It remains to be seen whether the IPO will adjust its practice (do not hold your breath).

[Federal Administrative Court of 13 June 2017, Apple Inc. vs. IGE](#)

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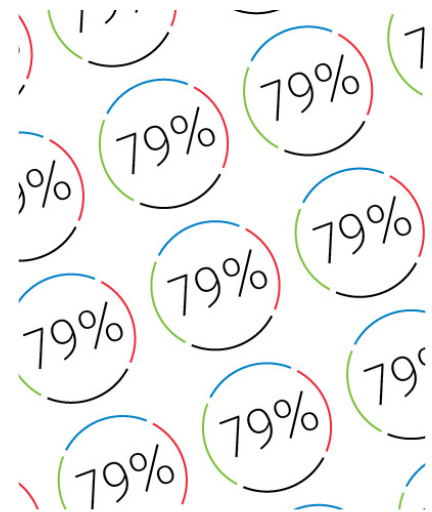
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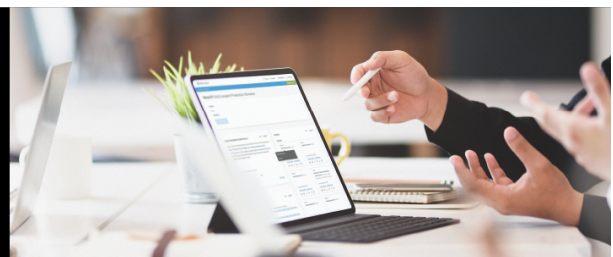


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