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Who thinks of “an apple” when it comes to computer games?

Peter Schramm (MLL Meyerlustenberger Lachenal Froriep AG) · Thursday, August 30th, 2018

The Federal Administrative Court finds that APPLE cannot be protected as a trade mark for jewelry (cl. 14) and electronical toys including computer games (cl. 28). The Court says that the shape of an apple is of common use and understood as a reference to a feature of those products.

The Institute for Intellectual Property (IPI) refused to protect (at least partially) the sign of APPLE for *jewelry goods* of cl. 14 and games and playing cards, but also for *electronic games, manually operated and electronic computer games, video games, interactive games and interactive computer toys* of cl. 28. According to the IPI it describes the shape or the motive respectively the three-dimensional features of those goods instead of indicating their commercial origin.

In its decision of 24 July 2018 (Case no. B-6304/2016) the Federal Administrative Court largely upholds this decision of the IPI. Since the applicant did not claim that its mark has been established as a trade trademark through use, the Court approves the opinion of the IPI that the word APPLE is part of the basic English vocabulary and therefore also understood by the average consumer in its lexical meaning.

Subsequently, the court clarifies that, only references on features which are common, characteristic or usual regarding the particular good, are in the public domain. Whether the shape of a good can be considered as usual should not be assessed in an abstract way but by examining the market conditions. Regarding the disputed goods of class 14, certain motives are particularly common for *jewelry, necklaces, bracelets and staples*. This also includes the motive of an apple, so that the word APPLE is easily perceived by the relevant public as a descriptive reference to the form of those products and has to be kept free for market participants.

More serious for the applicant than the refusal for jewelry is surely the refusal for *electronic games and game consoles*. For all goods applied in class 28, such as *toys, games, playthings, electronic toys, music toys and playthings, toy sound equipment, toy music boxes, battery-operated toys and playing cards* the Court finds that “apple” is a common and customary description both in shape of and motive for those products. Furthermore, an apple is, due to its simple form and its frequent occurrence in fairy tales, widespread known as a motive and is also frequently taken up thematically. Accordingly, the word APPLE is also an immediately recognizable indication of content for toys and games and therefore needs to be kept free for all goods the mark was applied for in cl. 28.

This is rather a broad interpretation of the range of the descriptive character of the word “apple”.

However, the applicant only relied on the inherent distinctiveness and a notorious reputation of the trademark APPLE, but not on acquired distinctiveness. It would have been interesting to know what results a consumer survey on the acceptance of the word apple would have revealed. Due to the high level of awareness of the Apple brand, it cannot be excluded that, at least in connection with *electronic games and game consoles* – which are surely the most important goods for the applicant in this application – consumers might have seen the word “Apple” as reference to the origin of a company rather than a mere descriptive term.

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