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Denmark: MAGENTA and CREAM – color designations or distinctive trademarks?

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A trademark registration of a color per se is notoriously difficult to achieve, but what about the name of a color? In two recent decisions from the Danish Board of Appeal (BOA) regarding the registration of the words MAGENTA and CREAM respectively, the question regarding the descriptiveness of color designations was the main issue. In both cases the BOA found that the words would in fact be considered designations of the color of some of the applied goods, and in relation to those goods the words could therefore not be registered as trademarks.

In the MAGENTA case (AN 2018 00014 of the 20 February 2019) Deutsche Telekom AG had applied for the word MAGENTA for a number of goods in classes 7, 9, 10, 11, 12, 16, 28 and for various services. The mark was refused for some of the goods on the ground that it lacked distinctive character for those goods, because it might serve to designate a characteristic of the goods, namely that they have a reddish-purple color in terms of the color magenta.

The applicant argued that in relation to the specific goods which would not normally be chosen on the basis of their color, the word MAGENTA would not be perceived as a characteristic of the goods, but as a distinctive trademark.

The BOA confirmed the overall position of the Danish Patent and Trademark Office (DKPTO) which during its argumentation had specified that in order to assess whether a color designation is descriptive, the following criteria need to be assessed:

- Can the word be perceived as a name of a color?
 - This will typically be the case for the common color designations such as red, green and blue, but also for other terms with additional meanings such as rose, emerald and ruby.
- Can the word designate a characteristic of the good, for instance its color?
 - Most goods will have a color and a color designation may therefore often serve to designate a characteristic of the good. However some goods will not have a color as such (for instance downloadable software) or in some cases it will be highly unlikely that a certain good has a certain color. As an example the DKPTO mentioned that it will for instance be unthinkable that a warning triangle will have the color black.
- Will the word reasonably be perceived by the public as a description of a characteristic of the good?

- The underlying consideration in relation to the refusal of descriptive marks should be taken into consideration when making this assessment, which means that descriptive terms should not be monopolized. However if a color does not have any esthetic or technical function in relation to a certain good, it cannot reasonably be assumed that the public will perceive the name of that color as a description of a characteristic in relation to that specific good.

In support of the refusal the DKPTO had presented proof that several of the products covered by the refusal were in fact offered in different colors. The BOA in its decision stressed that the assessment of descriptiveness is not dependent on whether it has been proven that the color is actually being used in relation to the goods which the mark is applied for, but that it should also be considered whether it is reasonable to assume that such an association may be established in the future (a reference was made to the reasoning in C-108-109/97 Chiemsee).

In a similar case regarding a color designation issued by the BOA a few days before the MAGENTA decision, the BOA confirmed one of its previous decisions in which the word CREAM had been refused on the basis of lack of distinctiveness in relation to goods in class 18 and 25.

In the CREAM decision (AN 2019 00003 of the 15 February 2019) the BOA held that since the word CREAM could be perceived as the name of a color and since the specific color designation was actually being used within the relevant industry (the fashion and textile industry) to indicate the color of goods in question, the word would serve to designate a characteristic of the goods. In this matter the applicant had also submitted a large amount of proof that the mark had acquired distinctiveness through use which the BOA however did not find convincing. The CREAM case is now pending before the Danish Maritime and Commercial Court.

To sum up, the bar for registering color designations as trademarks seems rather high according to Danish practice – at least in relation to goods, since most goods will have a color, thereby making it reasonable to assume that a given color designation will be perceived by the public as a characteristic of those goods.

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