

EUIPO Board of Appeal upholds refusal to register virtual firearm as a trademark

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- The case involved an application for registration of a figurative mark representing a rifle for goods and services focused on the virtual environment
- The Board of Appeal found that the representation of the mark did not enable it to ensure its essential function in relation to the goods and services in question
- The argument relating to the registration of the rifle as a Community design was rejected as wholly unfounded

In [Case R 275/2023-4](#), the Fourth Board of Appeal of the EUIPO has dismissed an appeal against the examiner's refusal under Article 7(1)(b) of [Regulation 2017/1001](#) and referred the case back to the Examination Unit to assess the applicant's secondary statement on the acquired distinctive character of the mark under Article 7(3) of the regulation.

Background

Colt CZ Group SE filed an application for registration of a figurative mark (depicted below) for goods in Class 9 and services in Classes 35 and 41, associated with virtual firearms and focused on the virtual environment:



The trademark applied for was found to be not eligible for registration under Article 7(1)(b).

The applicant submitted the following main observations:

- The trademark is clearly recognisable from other representations of a rifle and has distinctive character.
- The range of relevant consumers will be very specific.
- There is no direct and obvious link with the products and services claimed.

The applicant referred to evidence to prove the acquired distinctive character of the mark applied for. The declaration of acquired distinctive character under Article 7(3) was meant to be incidental, as confirmed by the applicant upon the EUIPO's request.

The application was rejected for all goods and services for the following main reasons:

- The trademark does not depart significantly from how it is generally represented.
- It cannot be concluded that the relevant public is composed only of supporters of (virtual) weapons. At a time of widespread use of virtual spaces, the goods and services in question are used by persons without prior detailed knowledge of (virtual) weapons.
- The sign is immediately recognisable to the relevant public as an image of a virtual firearm, without any mental effort.
- Prior use of the trademark does not affect its registrability.
- The sign is therefore devoid of any distinctive character.

Arguments on appeal

The applicant appealed, requesting the annulment of the decision and arguing as follows:

- A consumer interested, at least marginally, in weapons will distinguish the application from other virtual rifles.
- Although the virtual world is increasingly popular, those services and products are not widely accessible to the public.
- The relevant public was incorrectly defined.
- The application contains the word element 'CZ BREN 2'.
- The shape and appearance of the application is registered as a Community design and has individual character.
- The application has inherent distinctive character and fulfils the essential function of a trademark.

Decision

The Board of Appeal ruled as follows:

- A high level of attention on the part of consumers does not mean that the sign is subject to the absolute grounds of refusal to a lesser extent. In fact, it may be the opposite.
- The trademark constituted a banal representation of the object which was the essence of the goods and services claimed.
- The non-distinctive and small-sized word elements could not influence the absence of distinctive character.
- The evidence supporting the secondary declaration of acquired distinctive character could not be considered in the appeal proceedings, since the board deals exclusively with inherent distinctiveness. Nevertheless, the documents filed did not support the assertion that the figurative element was complex.
- The argument relating to the registration as a Community design was wholly unfounded.
- Designs and trademarks are distinct types of IP rights. A registered design cannot have a direct effect on a trademark's distinctive character.
- The representation of the mark did not enable it to ensure its essential function in relation to the goods and services in question.
- The mark applied for lacked any distinctive character and fell within the obstacles to registration under Article 7(1)(b) of the regulation.

The board thus concluded that the appeal should be dismissed and the application rejected. The case was returned to the examiner to settle the applicant's ancillary statement under Article 7(3).

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