

DECISION
of the First Board of Appeal
of 23 July 2020

In Case R 2821/2019-1

B. Braun Melsungen AG

Carl-Braun-Str. 1
34212 Melsungen
Germany

Applicant/Appellant

represented by FRIEDRICH GRAF VON WESTPHALEN & PARTNER mbB,
Kaiser-Joseph-Str. 284, 79098 Freiburg i. br., Germany

Appeal relating to European Union trade mark application No 18 063 460

issues

THE FIRST BOARD OF APPEAL

composed of G. Humphreys (Chairperson), Ph. v. Kapff (Rapporteur) and A. Kralik (Member)

Registrar: H. Dijkema

gives the following

Decision

Facts

- 1 By an application filed on 13 May 2019, B. Braun Melsungen AG ('the applicant') sought to register a sound mark, which can be accessed at the following link <http://euipo.europa.eu/trademark/sound/EM500000018063460>, as a European Union trade mark in respect of goods and services in Classes 3, 5, 9, 10, 11, 41 and 44.
- 2 On 11 June 2019, the application was partly objected to owing to a lack of distinctive character, specifically in respect of goods and services in Classes 9, 10, 11, 41 and 44. The examiner stated that the sound mark applied for would not enable the public to distinguish the goods and services identified thereby in terms of their business origin. Such noises are widespread, in order to indicate willingness to use in the electronic devices of Classes 9, 10 and 11 after pushing a starting taste. With regard to the services in Classes 41 and 44, such sound communicates merely an inspiring sound or motivational.
- 3 On 29 July 2019, the applicant submitted observations on the objection, in which it maintained its request for registration. In particular, it stated that the sound mark applied for consisted of a 'Jingle -like' sound sequence consisting of a recognisable, very striking and easily remembered melody. The applicant took the view that the application was an expression in the Office's previous registration practice for sound marks, and referred to several prior registrations that consisted of, of comparable or partially simpler notches.
- 4 By decision of 29 November 2019 ('the contested decision'), the examiner refused the application pursuant to Article 7(1)(b) EUTMR in respect of some of the goods applied for ('the goods that are the subject of these proceedings'), specifically:

Class 9 — Apparatus for the recording, transmission and reproduction of sound and images; Data processing equipment, computers; Computer software; Recorded content; Recorded media; Electronic publications recorded on computer media; Electronic databases recorded on computer media; Instruction manuals in electronic format; Prerecorded CDROMS; Pre-recorded DVDs; Downloadable image files; Downloadable educational media; Digital music downloadable from the Internet; Digital music downloadable from the internet; Downloadable ring tones for mobile phones; Downloadable music sound recordings; Telephone ring tones [downloadable]; Downloadable video recordings featuring music; Downloadable templates for designing audiovisual presentations; Audio books; Downloadable ring tones for mobile phones; Prerecorded compact discs featuring music; Pre-recorded DVDs featuring music; Musical sound recordings; Downloadable music files; Musical recordings; Downloadable instruction manuals in electronic form; Training manuals in the form of computer programs; Sound chips containing musical recordings; Sound and video recordings; Audio recordings; Digital music downloadable provided from a computer database or the internet; Virtual reality models; Software; Software downloadable from the internet; Computer software supplied on the Internet; Computer software platforms, recorded or downloadable; Interactive software; Mobile software; Software for cellular phones; Software for smartphones; Software for digital electronic hand-held devices; Software for monitoring, controlling and running physical world operations, web applications and server software; Application software; Computer application software; Educational applications of computers; Computer application software for mobile phones; Application software for smart phones; Application software for mobile devices; Computer application software for use with wearable computer devices; Computer software for the medical field; Educational computer software; Mobile app's; Educational mobile applications; Downloadable smart phone application

software; Downloadable mobile applications for use with wearable computer devices; Downloadable software applications; Downloadable software applications for computers; Downloadable applications for use with mobile devices; Training software; Simulation software; Simulation software [training]; Simulation software for use in digital computers; Instruction software; Educational tablet applications; It, audiovisual, multimedia and photographic devices;

Class 10 -Veterinary apparatus and instruments; Surgical apparatus and instruments; Dental apparatus and instruments; Medical apparatus and instruments; Therapeutic and assistive devices adapted for the disabled; Massage apparatus; Apparatus, devices and articles for infants; Physical therapy equipment; Therapeutic apparatus for conducting rinsing; Transcutaneous electrical nerve stimulators; Transcutaneous electrical nerve stimulation instruments; Transcutaneous electrical nerve stimulation electrodes; Assistance for preparing food; Apparatus for electrical muscle stimulation; Apparatus for the electrical stimulation of groups of muscles; Apparatus for administering intravenous solutions; Applicators for antiseptic preparations; Applicators for medications; Applicators for antibacterial preparations; Applicators for pharmaceutical preparations; Automated blood collection apparatus; Automated analysers for body fluids (for medical use); Apparatus for taking blood; Dialysis apparatus; Dialysis machines for medical use; Electronic nerve stimulators for medical purposes; Electronic stimulator for medical use; Apparatus for enteral feeding; Infusion apparatus for therapeutic purposes; Injection utensils; Infusion pumps to deliver medication; Injection device for pharmaceuticals; Enema apparatus; Medical apparatus for renal dialysis; Medical apparatus; Medical apparatus for the relief of pain; Medical apparatus for introducing pharmaceutical preparations into the human body; Medical devices; Medical aids for use in stoma; Medical infusion pumps; Medical inhalers; Medical instruments for animal bodies; Medical instruments for application in animal bodies; Medical instruments for application in animal bodies; Medical instruments for application in animal bodies; Medical instruments for application in human bodies; Medical instruments for application on human bodies; Medical instruments for application on human bodies; Medical instruments for application on human bodies; Pumps for medical use in dispensing pharmaceuticals from containers; Pumps for medical use in delivering pharmaceuticals from containers; Suction drainage sets for medical use; Mucus extractors; Urological apparatus and instruments; Analysers for medical purposes; Blood glucose meter; Blood glucose testing apparatus; Blood glucose monitoring apparatus; Electronic apparatus for medical purposes; Electronic medical instruments; Endoscopes; Endoscopes for diagnostic purposes; Endoscopes for medical use; Endoscopes for therapeutic use; Endoscopic equipment for medical purposes; Endoscopic apparatus; Finger guards for diagnostic purposes; Endoscopic equipment; Devices for medical diagnostics; Meters for measuring blood glucose; Apparatus for nerve stimulation; Medical apparatus for testing the level of glucose in the blood; Optical instruments for medical endoscopy; Probes for medical purposes; Rigid endoscopes; Rigid medical endoscopes for medical purposes; Urinary flow monitors; Surgical probes; Electrical nerve stimulators; Electronic endoscopes for surgical use; Electronic endoscopes for medical use; Endoscopes for surgical use; Epidural analgesia apparatus for surgical use; Cystometric apparatus; Apparatus for orthopaedic purposes; Cystometric apparatus; Urethral probes; Infusion pumps; Cystometric apparatus for measuring; Cystometric apparatus; Intravenous infusion pumps for medical purposes; Medical pumps; Medical cutting devices; Medical and surgical milling cutters for cutting human or animal tissue and organs; Pumps for medical purposes;

Class 11 — Sanitary installations, water supply installations, water purification installations, water desalination installations and water purification installations; Installations for water treatment under osmotic process; Apparatus for water-demineralisation by means of reverse osmosis; Reverse osmosis elements for industrial use in reducing the salt content of water; Reverse osmosis elements for reducing the salt content of water; Reverse osmosis filtration units [water treatment equipment]; Water conditioning installations; Water treatment apparatus for water softening; Water conditioning units; Water disinfection apparatus; Water purification units and machines.

- 5 The examiner based the refusal on the following reasons in particular:
 - The sound mark objected to, which consists of four letters, is incapable of attracting the attention of the consumers. This sort of sound that is commonly

used in the field of electronic apparatus ‘conveys, does not give the relevant public the commercial origin of these goods.

- The trade mark applied for does not therefore enable the consumer of the goods in question, who is reasonably well informed and reasonably observant and circumspect, to distinguish the product concerned from those of other undertakings without conducting an analytical or comparative examination and without paying particular attention. In particular because the high number of different signals detected in electronic devices makes it difficult to attract consumers’ particular attention.
- The sound sequence is very simple and commonplace and does not have any recognition value. The first two sounds are leveraging than the last two sounds and are separated from one another by a break. The first two sounds are therefore barely noticed, but merely the last two sounds.
- As a result, the consumer will not recognise in the sound sequence ‘genuine melody’, which is easily remembered or resonant. On the contrary, because of this break or such an interruption in the sound sequence, the overall sound sequence will not be perceived as a jingle or as a memorable identification report.
- The focused and echo-effects are not enough to create a perceptible or conceivable musical statement. The sound sequence in question therefore does not differ from other sound sequences or sounds that are usually to be heard on the market through many different electrical and electronic devices nowadays.
- The sign applied for does not have any degree of recognition, and does not enable the relevant public to remember this sequence easily and immediately as a distinctive trade mark in respect of the goods in question.
- The prior registrations mentioned by the applicant do not form the basis of or claim relating to the registration of the present trade mark application.

Grounds

- 6 The applicant on 11. The request for a declaration of invalidity was filed on 28 December 2019 and requested that the contested decision be annulled insofar as the application was refused. Its arguments in the grounds of appeal of the same date may be summarised as follows:
 - The refusal of the present sound mark is based on excessive requirements, which are also inconsistent with the decisions of the Boards of Appeal (R 0087/2014-5 and R 2056/2013-4) and the Guidelines of the Office.
 - The examiner has applied the same standards of eligibility for registration of musical jingles according to the same standards as for shape or 3D marks. By contrast, in the case of musical jingles, consumers are accustomed to them having an indication of origin function, which means that the standards

applied by the examiner for shape marks do not have any effect on shape marks.

- A hearing mark consisting of a short and concise sound sequence does not have to differ to a significant extent from other jingles that are customary in the trade to be distinctive. If a jingle were so significantly different from other sound sequences, it could be unusable as an indication of commercial origin, since it would be perceived as a commercial indication by the public.
- The trade mark applied for is not a simple device or signal. It is true that the



sound sequence applied for is certainly not particularly complex, purely to be completely complex. However, a musical jingle must be short, so that it is easily stamped and has a high recognition value. This claim is represented by the contested sound sequence.

- The sound mark consists of four marks and is bright through the somewhat muted beginning with the beginning and blast blast, as well as the then rising volume and height of sound a noticeable dynamism.
- The application will be perceived by the consumers targeted as a uniform sound sequence that refers to a particular undertaking. In this respect, it can remain open whether other information, such as the functionality of a device, conveys either.
- Reference is made once again to the registration practice in respect of sound marks by the Office.

Reasons

- 7 All references to the EUTMR in this decision relate to Regulation (EU) 2017/1001 (OJ 2017 L 154, p. 1), which codifies the amended text of Regulation (EC) No 207/2009, unless expressly stated otherwise.
- 8 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.
- 9 The appeal is also well-founded, since the trade mark application is not precluded by the ground for refusal under Article 7(1) (b) EUTMR.

Article 7(1)(b) EUTMR

- 10 According to settled case-law, for a trade mark to possess distinctive character for the purposes of Article 7(1)(b) EUTMR, it must serve to identify the goods and services in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish those goods and services from those of other undertakings (09/09/2010, C-265/09 P, *α*, EU:C:2010:508, § 31).

- 11 However, a minimum degree of distinctive character is sufficient to render the absolute ground for refusal set out in Article 7(1)(b) EUTMR inapplicable (26/02/2014, T-331/12, Yellow curve at the bottom edge of an electronic display unit, EU:T:2014:87, § 19).
- 12 With regard to the distinctive character of sound marks, it should firstly be noted that the European Union trade mark regulation does not establish any particular criteria for the assessment of distinctive character or other grounds for refusal (13/09/2016, T-408/15, SON D'UN JINGLE SONORE PLIM, EU:T:2016:468, § 41).
- 13 The decisive factor alone for the purposes of Article 7(1)(b) EUTMR is whether, in order to enable the relevant public, the sound sequence applied for enables the relevant public to identify the goods and services in respect of which registration is specifically made as originating from a particular undertaking and thus to distinguish these goods and services from those of other undertakings.
- 14 When assessing distinctive character, reference must therefore be made to the perception of the sign through the public targeted by the goods or services claimed (12.7.2012, C-311/11 P, Wir machen das Besondere einfach, EU:C:2012:460, § 24).
- 15 In this case, the goods that are the subject of these proceedings in Classes 9, 10 and 11 target average consumers and specialist consumers in the relevant sectors, particularly IT, health and medical or sanitary preparations . The relevant public will pay an average to high level of attention to these goods.
- 16 As a pure sound sequence without text components, account must be taken of the entirety of consumers in the European Union for the assessment of the trade mark claimed.

The trade mark applied for

- 17 The trade mark applied for is a sound mark defined under Article 3(3)(g) EUTMIR, which 'consists exclusively of a sound or combination of sounds'. In the present case, it is a two-day sequence of approximately two seconds which is generated electronically.
- 18 There are four points at the heart of the sound: D3, A3, followed by a eight-break, for E6 and A5, the sound of which is changed by perushioning and echo to echo. As the applicant depicted, this clay sequence has a certain dynamism thanks to the somewhat vague beginning with perceptible and as a result of the subsequent increasing volume and height of clay. Accordingly, it is certainly a musical statement that allows a certain melody and structure. The sound sequence is short and memorable (a so -called 'Jingle'). However, it is not too short for it to be perceived as a sign at all.
- 19 Contrary to the examiner's assertion, it is not a sound sequence that is customarily used when operating electronic devices, and this has also not been proven by the examiner either. The present weingle has a somewhat more complex sound sequence than the normal operating signals for electronic apparatus that are

merely perceived as simple signalling beams (such as the banal ‘Plim-Plim’ Ton of the judgment cited by the examiner, T-408/15, SON D’UN JINGLE SONORE PLIM, EU:T:2016:468, § 41, or the functional ‘ping’ -Ton a Christmas tree stand in the final decision of the Board of Appeal of the 31/10/2014, R 2444/2013-1 -4, HÖRMARKE, which had a functional significance). There are, indeed, doubts as to the assumption of original distinctiveness in relation to sound marks in the case of extremely short, banal sounds, as is the case with very simple characters from other categories.

- 20 General life experience demonstrates that sound sequences, for instance in the length of the sound sequence applied for in this case, certainly enable recognition of different goods and services or can also be perceived as memorable in terms of advertising (radio or television). In this regard, the Boards of Appeal decided in Cases 19/09/2019, R 620/2019-4 -1, KLANG EINER TONFOLG E (otherwise.), § 26 and 16/12/2013, R 2056/2013-4, Hörbrand, § 12. The present sound mark can therefore also trigger a reminder effect.
- 21 Even if the sequence of words applied for were to show the functionality of a device, this does not mean that it cannot also be perceived as an indication of origin. The very fact that sound sequences often sail when the various electronically operated devices are launched means that consumers, at least in relation to those goods, are accustomed to them and perceive them as an indication of origin provided that they are memorable (e.g. sound sequences used by mobile telephones to identify producers).
- 22 The examiner has failed to prove that the sound sequence applied for is connected with the goods in question. As already stated above, this does not constitute a simple operating signal. Nor has the examiner explained that this tone was customary in the field of the goods that are the subject of these proceedings, primarily in the area of information technology, health and medical and sanitary preparations at the time of application.
- 23 It must therefore be concluded that the trade mark applied for is a jingle with a rhythm of four sounds, which is likely to ‘go into the ear’ among relevant consumers who are relevant here. It is not apparent why the sound sequence applied for, as stated by the examiner, should be too simple. There is no reason why this sound sequence differs from other and is capable of identifying the goods that are the subject of these proceedings as originating from a particular undertaking.
- 24 The sign cannot therefore be denied the distinctive character required pursuant to Article 7(1)(b) EUTMR. The sign is capable of performing the individualising function of a trade mark, specifically of distinguishing the goods concerned in terms of their origin.
- 25 The appeal is upheld and the contested decision is annulled to the extent that it refuses the trade mark application in respect of the goods that are the subject of these proceedings.

The operative part of the decision

On these grounds,

THE BOARD

as follows:

- 1. Annuls the contested decision;**
- 2. Remits the European Union trade mark application for continuation of the trade mark.**

Signed

G. Humphreys

Signed

Ph. von Kapff

Signed

A. Kralik

Registrar:

Signed

H. Dijkema

