

In **skytron energy GmbH & Co KG v Office for Harmonisation in the Internal Market** (OHIM) (Case T-321/09, February 2 2012), the General Court has upheld OHIM's refusal on absolute grounds to register the word mark ARRAYBOX.

In February 2008 the predecessor in title of skytron energy GmbH & Co KG applied to register ARRAYBOX as a Community trademark for goods and services in Classes 9, 37, 38 and 42 of the Nice Classification. The goods and services included:

- "Electric apparatus and instruments to use for power generation" in Class 9;
- "Repair, installation and maintenance services in relation to power generation equipment" in Class 37;
- "Telecommunication and data transfer services" in Class 38; and
- "Engineering services related to power generation" in Class 42.

In September 2008 the OHIM examiner rejected the application on the grounds that ARRAYBOX was descriptive within the meaning of Article 7(1)(c) of the Community Trademark Regulation (40/94) (now the Community Trademark Regulation (207/2009)). Furthermore, the OHIM examiner refused registration because the mark was devoid of distinctive character pursuant to Article 7(1)(b).

The First Board of Appeal of OHIM upheld the refusal in June 2009. skytron appealed to the General Court. It raised two pleas: infringement of Article 7(1)(c) and of Article 7(1)(b).

Before the court, skytron claimed that 'arraybox' was an invented word. It stated that the word 'array' had many meanings other than purely an arrangement of elements. It therefore claimed that the term 'arraybox' was not common in spoken English. As a consequence, skytron submitted that the term could not be deemed to be directly descriptive of the goods and services applied for. Moreover, the term 'arraybox' could not be deemed to be descriptive for all of the goods and services for which OHIM refused registration. Therefore, skytron requested that the General Court, at the very least, annul the Board of Appeal's decision in respect of these goods and services.

OHIM disputed skytron's arguments, claiming that the mark ARRAYBOX was descriptive in relation to the essential characteristics of all of the goods and services concerned for the purpose of Article 7(1)(c). It argued that the word 'array' referred to an arrangement of elements and that 'box' refers to a container in the shape of a crate or a box. Hence, taken as a whole, the mark ARRAYBOX referred to a box which saves, stores, processes and evaluates data.

The General Court referred to established case law and recalled the principle that a mark consisting of a neologism or word composed of elements, each of which is descriptive of the characteristics of the goods or services in respect of which registration is sought, is itself descriptive for the purpose of Article 7(1)(c), unless there is a perceptible difference between the neologism and the mere sum of its parts. This can only be the case if the neologism creates an impression which is sufficiently far removed from that produced by the mere combination of meanings of the elements of the mark. The General Court agreed with the Board of Appeal's interpretation of the term 'arraybox' in that it referred to a box which saves, stores, processes and evaluates data.

The General Court then considered whether ARRAYBOX had the direct and specific relationship required in relation to all of the goods and services for which registration was sought. The General Court agreed with the First Board of Appeal that the function of the apparatus and instruments to be used in conjunction with power generation in Class 9 required, among other things, the use of arrays which are commonly arranged in data boxes. Moreover, the services applied for in Classes 37, 38 and 42 required the provision of such data boxes or directly referred to the repair, installation or maintenance of these boxes. The court therefore upheld OHIM's decision that, because of the descriptive meaning of ARRAYBOX in relation to all of the goods and services, the application had to fail.

As the application could be refused for descriptiveness, the General Court felt that it was not necessary to consider the second plea under Article 7(1)(b) regarding the distinctive character of the mark ARRAYBOX.

This decision reaffirms that applicants will struggle to obtain registration of a mark which has a descriptive meaning in at least one language that is spoken or understood in parts of the European Union. The General Court reiterated the principles underlying the refusal to register a mark in the form of a neologism on the grounds of descriptiveness.

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