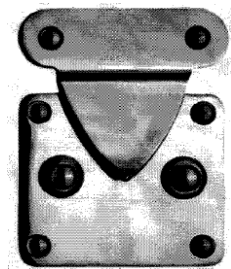


The CJEU has maintained a decision of the General Court (GC) (Case T-237/10) in which it had partially annulled a decision of OHIM's Board of Appeal that Louis Vuitton's ("LV") two-dimensional (2-D) registration of a locking device was invalid.

In 2005, LV obtained a CTM registration of the following 2-D figurative mark for a wide range of goods in classes 9, 14, 18 and 25:



In 2007, Friis Group International ApS ("Friis"), applied to invalidate the registration on grounds of non-distinctiveness. The application was dismissed at first instance because the trade mark was deemed to contain the minimum degree of distinctiveness necessary for registration. Friis appealed in relation to classes 9, 14 and 18. The Board of Appeal held that the mark lacked distinctiveness and held that LV had failed to prove that the mark had acquired distinctiveness through use throughout the EU.

LV appealed to the GC which assessed the application as if it were a 3-D trade mark, because it was a figurative mark consisting of a shape of a product. It concluded that the trade mark did not depart from the norm in the sector for certain goods covered by the application which would normally contain locking devices, such as jewel boxes, bags and spectacle cases. However, it held that the trade mark was distinctive for goods such as nutcrackers, candlesticks, jewellery, watches, leather, imitations of leather, and umbrellas, because these goods do not normally contain locking devices and there was no conceptual link between the trade mark and these goods.

LV appealed to the CJEU, claiming that the GC had mistakenly invoked case law relating to 3-D marks, had infringed the rules regarding Friis's burden of proof and had distorted the clear meaning of the evidence.

OHIM cross-appealed, arguing that the GC had not given proper reasons why the mark was distinctive in respect of nutcrackers, candlesticks, leather and imitations of leather. It also claimed that the GC had provided contradictory reasons why the mark was found to be distinctive for other goods.

### **LV's Appeal**

LV argued that the 'depart significantly from the norm' test was not applicable and that the public's perception had not been properly considered. LV's claim that the trade mark was perceived as a logo and not a lock was deemed to be inadmissible as the figurative mark was clearly a 2-D representation of a product.

It was necessary to apply case law relating to 3-D marks in this case, because the figurative trade mark consisted of part of a shape of a product which it designated. In addition, the CJEU held that the relevant public would view the trade mark as an interesting detail of the product in question, rather than as an indicator of origin.

LV also claimed that Friis should have proved that the trade mark was not inherently distinctive. It also claimed that evidence filed by Friis was incorrectly dated and that as a result, the GC had distorted the evidence. As LV had not substantiated its claim that the evidence was distorted, the claim was rejected. The CJEU held that the burden of proof only lay with LV, to prove that the trade mark either had intrinsic distinctive character or was distinctive through use and therefore the GC had not infringed the rules regarding the burden of proof.

### **OHIM's Cross-Appeal**

OHIM argued that the GC had disregarded the additional reasons set out by the Board of Appeal in support of its finding that the trade mark was non-distinctive. The Board of Appeal had applied case law relating to 3-D marks and had not relied on other reasons to justify its decision. Therefore, no additional reasons had been disregarded by the GC and this ground of the cross-appeal was dismissed.

OHIM concurred that for 'spectacle cases' the mark lacked distinctiveness, because they were covered under the term 'optical apparatus and instruments'. However, it claimed that the GC should also have found that the trade mark in question lacked distinctiveness in respect of 'jewellery' and 'horological and chronometric instruments and apparatus', because, in respect of 'jewel boxes in precious metals, their alloys or coated therewith', the mark was found to lack distinctiveness.

The CJEU found that the GC had been correct in finding that for spectacle cases the mark lacked distinctiveness, because the word 'including' in the specification indicated that 'spectacles, sunglasses and spectacle cases' were specific articles falling within the category of 'optical apparatus and instruments'. However, as a semi-colon distinguished 'jewel boxes in precious metals, their alloys or coated therewith' from 'jewellery', in respect of these latter goods, the mark had been correctly deemed distinctive.

In addition, OHIM did not submit arguments which confirmed that the GC had distorted the facts or evidence produced before it in relation to 'horological and chronometric instruments and apparatus, including watches, watchcases, alarm clocks', so the claim was rejected.

In conclusion, both appeals were rejected. This case reiterates how 2-D trade marks are evaluated by European Courts when they are representations of the goods or of a potential component of the goods.

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