European Union

“Wir Machen Das Besondere Einfach”

Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community Trade Mark, Art. 7(1)(b) – *Smart Technologies ULC v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*

**Decision of the European Court of Justice (Fifth Chamber)
12 July 2012 – Case No. C-311/11 P**

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1. Registration of marks made up of signs or indications also used as advertising slogans, indications of quality or incitements to purchase the goods or services covered by those marks is not excluded by virtue of such use.
2. Difficulties in establishing distinctiveness of such marks due to their nature do not justify laying down specific criteria supplementing or derogating from the criterion of distinctiveness. As such, an advertising slogan cannot be required to display “imaginativeness” or “conceptual tension which would create surprise and so make a striking impression” in order to attain a minimal level of distinctiveness.
3. The fact that a mark is perceived as a promotional formula, which could in principle be used by other undertakings, is not sufficient to support the conclusion that the said mark is devoid of distinctive character.
4. In so far as the public perceives the mark as an indication of that origin, the fact that the mark is at the same time understood as a promotional formula has no bearing on its distinctive character.
5. The fact that the relevant public is a specialist one cannot have a decisive influence on the legal criteria used to assess the distinctive character of a sign. Although the degree of attention of the relevant specialist public is higher than that of the average consumer, it does not necessarily follow that a weaker distinctive character of a sign is sufficient where the relevant public is specialist.
6. Findings in relation to the attentiveness, the perception and the attitude of the relevant public are appraisals of fact and, as such, do not constitute points of law subject to review by the Court of Justice on appeal.