

Recent decision by the EUIPO Board of Appeal: Sound marks representing the acceleration of a vehicle cannot be registered for vehicles

Reported by Claudio A. Reineke

The EUIPO (Fifth Board of Appeal, “BoA”) has rejected the registration of a sound mark that represents the effect of acceleration or increased performance of a vehicle. According to the EUIPO, such a sign lacks the necessary distinctive character. However, the EUIPO did not comment on the question of whether such a sound mark is also descriptive or whether there is a need to keep it available. In Germany, however, the Applicant, Porsche AG, was successful in obtaining protection for this mark.

I. General protectability of sound marks in the EU

Perceivable signs can be registered as trademarks if they are capable to distinguish the goods or services of one undertaking from those of other undertakings (Art. 4 European Trademark Regulation, EUTMR). Apart from the most common types of trademarks, such as wordmarks or figurative marks, signs that can be perceived in other ways are, in principle, also eligible for protection. This includes signs that can be perceived acoustically, i.e. sounds. The trademark eligibility of “sound marks” is therefore explicitly stipulated in Art. 4 EUTMR.

Protected on this basis in the EU are, in particular, signature tunes, mainly used in advertising. These include iconic “jingles” such as the intros of the major film studios MGM Metro-Goldwyn-Mayer (the iconic “Lion Roar”, EUTM [005170113](#), accessible [here](#)) and Twentieth Century Fox (EUTM [012438628](#), accessible [here](#)), which can be heard in the opening credits

of many well-known film productions. Also, the sound of booting up an Apple computer is protected (EUTM [011051951](#), accessible [here](#)).

However, sound marks play a relatively insignificant role in trademark law practice. Only some 300 sound marks are currently registered and therefore protected with the EUIPO – not a very significant number, considering that overall, more than 130,000 new trademarks are registered by the EUIPO every year. Accordingly, the practice of the offices and case law regarding sound marks has not yet been extensively discussed.

A recent decision of the EUIPO’s Board of Appeal now adds to this.

II. The decision of the EUIPO

The German sports car manufacturer Porsche AG had applied for the registration of a new sound mark in late 2022 (EUTM [018795489](#), accessible [here](#)) for, *inter alia*, “Vehicles and parts thereof” in



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Class 12. According to Porsche, this sound is a futuristic, melodious and dynamic sequence of tones which was artificially generated. It should not be understood as an engine sound, as it has nothing in common with the sound of neither an internal combustion engine (which sounds completely different) nor an electric engine (which is completely silent). Rather, it could also be used universally as a “label”, e.g. when opening a door or locking a vehicle.

The EUIPO already took a different view at its first instance when reviewing the application (decision dated August 25, 2023, accessible [here](#)). In particular, the EUIPO assessed the public’s perception of the sound sequence differently. According to the EUIPO, the sound could be perceived as an “*electronically synthesized sound reproducing the accelerating sound of an engine*”. It is therefore a sound that imitates the sound of an internal combustion engine, which is why the overall sound sequence is typical of an engine noise. Moreover, the decisive factor is that the sound does not contain any “*striking or memorable elements*”. It is therefore impossible for the public to assign this exact sound sequence to a specific manufacturer. Consequently, according to the EUIPO’s first instance examination, this sound mark lacks any distinctive character. Therefore, it is not capable of distinguishing the Applicant’s goods or services from those of other undertakings pursuant to Art 4 EUTMR, and thus not eligible for protection. Therefore, the application was refused.

Porsche filed appeal against this decision, pointing out in particular that the sound sequence has not been produced by or in connection with the claimed goods or services (i.e. vehicles or parts thereof, e.g. engines)

but has been specifically composed and artificially generated. If the sequence of sounds is however not realistic, it cannot be typical of real goods or services (i.e. vehicles). Moreover, since the sound sequence is not a real engine sound, but an “unrealistically” altered engine sound, this precisely speaks in favor of the distinctiveness of the sound.

This argument did not convince the EUIPO’s Board of Appeal. In its decision (dated June 20, 2024, accessible [here](#)), it confirmed the previous decision and ultimately rejected the application in the office proceedings. In doing so, the Board of Appeal primarily confirmed the reasoning of the previous decision. The Board of Appeal upheld the finding that the sound sequence reproduced the effect of acceleration or increased power of a vehicle. It was thus clear that the sound sequence “*does not represent a sound image that is completely independent of and unrelated to the goods claimed*”. On the contrary: the Board of Appeal held that the sound sequence reproduces the effect of acceleration or increased performance of vehicles and cars, which is a *typical* feature of the goods and services claimed. Particularly with regard to the claimed goods and services (relating to vehicles and cars), the public will therefore immediately perceive this sequence of sounds as an acceleration or an increase in performance of such goods or services.

III. Remarks

This decision of the EUIPO, first instance and Board of Appeal alike, appears to be comprehensible and an appeal to the General Court does not seem promising for the Applicant. Nevertheless, the decision gives cause to question a central aspect on which it is based.

1. No consideration regarding the ground for refusal of a descriptive character

The legal reasoning of the Board of Appeal is based exclusively on the lack of distinctiveness pursuant to Art. 7 (1) (b) EUTMR. A possible ground for refusal based on descriptive character of the sound sequence pursuant to Art. 7 (1) (c) EUTMR was, however, not assessed. The decision does not even consider this ground for refusal. If the reasoning of the EUIPO in both instances is, however, carefully examined, it becomes quite clear that the EUIPO considers the sound sequence applied for to be *descriptive* because it “*represents a typical characteristic of cars*”, namely the effect of acceleration or increased performance of a vehicle. In this respect, a legal discussion would also have been desirable on the question of which particularities apply to the descriptive character as ground for refusal for sound marks, i.e. the extent to which a sound mark can be descriptive under Art. 7 (1) (c) EUTMR – a circumstance on which one of the first decisions of the General Court concerning sound marks had already remained silent (EGC T-668/19; ECLI:EU:T:2021:420 – *Combination of sounds on opening a can of soft drink*, accessible [here](#)).

In this respect, the EUIPO’s decision appears correct in its outcome. However, in the opinion expressed here, the EUIPO has provided the correct reasoning, but applied it incorrectly from a legal point of view. After all, the sound mark does not seem to be inherently devoid of any distinctive character. Instead, the registration of the mark should have been refused because it is descriptive with regard to the goods and services claimed.

It is recognized under trademark law that the mere existence of a minimum degree of distinctiveness precludes the ground for refusal of registration under Article 7 (1) (b) EUTMR (EGC T-34/00; ECLI:EU:T:2002:41 – *Eurocool*, accessible [here](#)). The European General Court (EGC) has not accepted that such a minimum level of distinctiveness is reached by simple geometric basic figures such as a circle, a line or a rectangle, for example in the case of figurative marks (EGC T-139/08; ECLI:E U:T:2009:364 – *Representation of half of the smiley face*, accessible [here](#)). If this idea is transposed to sound marks, then very simple sounds (individual notes or banal tone sequences) would lack sufficient distinctiveness. However, as soon as this minimum degree of distinctiveness is exceeded, such mark can be considered distinctive.

In the case of the application discussed here, the Board of Appeal concludes that the sign is “*overall simple and banal*”. At the same time, however, the Board of Appeal finds that it is a “*progressively intensifying tone sequence*” and describes the sound pattern that continuously changes over a period of 16 seconds. In the opinion expressed here, such findings are difficult to reconcile with the assumption of only a very banal or simple sound sequence. However, it is to be concurred with the Board of Appeal’s assessment that the sound sequence is perceived by the public as a representation of the acceleration of a vehicle and thus “*represents a typical feature of cars*.” In this respect, the same should apply to the sound of an acceleration in relation to a sound mark as applies to the word “acceleration” in relation to a word mark: both signs have an inherent descriptive character that deprives the signs of

protectability under Article 7 (1) (c) EUTMR. However, as already explained, this circumstance should therefore correctly be located within the scope of Article 7 (1) (c) EUTMR, i.e. within the scope of the ground for refusal of descriptive character, not within the scope of Article 7 (1) (b) EUTMR, i.e. the lack of distinctive character.

The EUIPO was therefore correct in rejecting the application. However, the decisive ground for refusal was likely to have been the descriptive character of the sign rather than its lack of distinctiveness.

2. Comparison with a pre-registered sound mark in Class 12

In this context, a comparison with an earlier sound mark registered for German car manufacturer BMW (EUTM [018424124](#), accessible [here](#)) also in Class 12 for, *inter alia*, vehicles, is also worthwhile. Porsche had also referred to this comparison in the proceedings and was of the opinion that it spoke in favor of the registrability of their application, since both sound marks (the registered one by BMW and the applied for by Porsche) were comparable. Irrespective of the fact that prior registrations are generally not binding, this comparison however nicely illustrates the differences between the two sound marks. While Porsche's refused application does indeed describe a sequence of sounds typical of acceleration, BMW's registered sound mark does not evoke any comparable (or different) association, much less is it descriptive.

3. No consideration of the requirement of availability

It would also have been appropriate to take a position on the question of the requirement of availability. For if the EUIPO assumes that the sound mark applied for is to be denied protection because the sound refers to the acceleration of cars (irrespective of whether the ground for refusal is a lack of distinctiveness or descriptiveness), then the assumption of a requirement to keep the mark available (e.g. for cars) is also plausible. In the above-mentioned decision on soft drink cans (EGC T-668/19; ECLI:EU:T:2021:420 – *Combination of sounds on opening a can of soft drink*, accessible [here](#)), the General Court had already established that a requirement of availability can also be considered for sound marks.

4. Contrary decision of the German Patent and Trade Mark Office (DPMA)

Finally, it should also be mentioned that the Applicant, Porsche AG, is not without protection with regard to the now rejected sound mark, even after the final refusal by the EUIPO. Interestingly, the German Patent and Trade Mark Office (DPMA) has registered the exact same sound mark without questioning its distinctiveness or assuming a descriptive character (German Trademark [DE302022118770](#), accessible [here](#)).