

### General Court: simple line combining slants and curves is not distinctive European Union - *Klos Morel Vos & Schaap* Examination/opposition International procedures

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In *Vans Inc v Office for Harmonisation in the Internal Market* (OHIM) (Case T-53/13, November 6 2014), the General Court has upheld a decision of the Fifth Board of Appeal of OHIM in which the latter had found that a figurative sign consisting of a wavy line which slants and curves was devoid of any distinctive character and had not acquired distinctive character through use.

*Vans Inc* applied for registration as a Community trademark (CTM) of the sign depicted below, covering clothing, footwear and other goods in Classes 18 and 25 of the [Nice Classification](#):



The application was rejected by the examiner. The Fifth Board of Appeal of OHIM maintained that decision, and *Vans* filed an appeal with the General Court.

*Vans* argued that the Board of Appeal had failed to state its reasons by not taking into account certain pieces of evidence. However, according to the General Court, although the Board of Appeal's line of reasoning did not take into account certain documents, it did show its reasoning with regard to the assessment of any distinctive character acquired through use. Consequently, the Board of Appeal had not infringed Article 67(1) of the [Community Trademark Regulation](#) (207/2009).

*Vans* also argued that the goods covered by the mark applied for could not be regarded as constituting a homogenous category in respect of which one general statement of reasons regarding the distinctive character was sufficient. However, according to the General Court, the goods at issue did constitute a homogenous category, also because the applicant itself had implicitly admitted in its written pleadings that there was a link between the goods in question.

With regard to the inherent distinctive character of the mark applied for, the Board of Appeal had held that the mark would be perceived by the relevant public as being solely decorative. In response to *Vans'* appeal of this conclusion, the General Court reiterated that, although a finding that a mark has distinctive character is not subject to a specific level of linguistic or artistic creativity or imaginativeness on the part of the trademark owner, a sign that is excessively simple is not, in itself, capable of conveying a message which consumers will be able to remember, with the result that they will not regard it as a trademark, unless it has acquired distinctive character.

Taking into account these principles, the relevant public (the general public in the Community) and the fact that the applicant had not challenged that single lines and stripes are commonly used as a decorative motive for goods in Classes 18 and 25, the General Court ruled that the Board of Appeal had rightly observed that the mark applied for did not have any striking element capable of attracting the consumer's attention. *Vans* had not substantiated its argument that the mark applied for would be perceived as a somewhat exceptional stripe and an eccentric and evocative form. Consequently, the General Court came to the conclusion that the simple line would not make it possible to individualise any of the goods in question in relation to competing goods, and that the Board of Appeal had been right in finding that the sign was devoid of any distinctive character.

*Vans* also relied on other CTM registrations to argue that, in other cases, OHIM had allowed comparable simple lines to proceed to registration. The General Court pointed out that these cases were not comparable to the case at hand because they either designated a specific place for the line on the products or because they covered different goods.

With regard to other CTM registrations that did cover the same goods, the General Court concluded that the mere fact that other marks, although equally simple, have been regarded as being able to identify the commercial origin of the goods in question was not conclusive for the purpose of establishing whether the mark at issue also had the minimum degree of distinctive character necessary for protection in the Community.

The last issue that had to be examined by the General Court was *Vans'* claim of acquired distinctiveness. In this respect, the General Court came to the conclusion that the evidence produced by *Vans* before OHIM proved only that the mark applied for had been used in various member states of the European Union; none of the items submitted made it possible to establish that the relevant class of persons, or at least a

significant proportion thereof, identified the goods covered by the mark applied for because of that mark.

This case shows that, in order to be able to claim successfully that a simple sign that is inherently devoid of distinctive character has nevertheless acquired distinctive character through use, the applicant cannot rely on evidence that merely demonstrates that it has used the sign as a trademark to a certain extent - it must submit proof that (a significant proportion of) the relevant public has come to recognise the sign as an indicator of origin. Arguments based on decisions previously taken by OHIM are deemed to fail, because no matter how comparable in nature they may be, they will not be deemed conclusive for the purpose of establishing whether the mark at issue also has the minimum degree of distinctive character necessary for protection in the Community.

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