

**DECISION
of the Second Board of Appeal
of 17 January 2019**

In Case R 1732/2018-2

Huawei Technologies Co., Ltd.

Administration Building Huawei
Technologies Co., Ltd. Bantian,
Longgang District
Shenzhen, Guangdong 518 129
People's Republic of China

Applicant / Appellant

represented by Grünecker Patent- und Rechtsanwälte PartG mbB, Leopoldstr. 4,
80802 Munich, Germany

APPEAL relating to European Union trade mark application No 17 875 170

THE SECOND BOARD OF APPEAL

composed of H. Salmi as a single Member having regard to Article 165(2) and (5) EUTMR, Article 36 EUTMDR and Article 7 of the Decision of the Presidium on the organisation of the Boards of Appeal as currently in force

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 15 March 2018, Huawei Technologies Co., Ltd. ('the applicant') sought to register the word mark

FreeBuds

for the following list of goods:

Class 9 - Headsets; earphones.

- 2 On 28 March 2018, the examiner informed the applicant of the provisional refusal of the mark applied for since relevant consumers would perceive the sign as providing information that the goods in Class 9 were devices that did not cost anything or that they were not limited to being used to listen to radio, recorded music or telephone communications only. He stated that the element 'BUDS' was commonly used on the market to refer to earphones and headsets as could be seen from an internet search. Therefore the mark applied for described the kind and quality of the goods in question. Given that the sign had a clear descriptive meaning, it was also devoid of any distinctive character.
- 3 The examiner also provided the following examples, regarding use of the word 'BUDS' on the market as referring to a radio, recorded music or telephone communications system, retrieved during an internet research carried out on 28 March 2018:

Pixel Buds: £159, Google Store



The sound and battery life of the Pixel Buds are both great. The pair also follows the Pixel line's trend of looking good, both in and out of the charging carry case. However, that case is a little fiddly to have to deal with when you're out and about. For Pixel and Pixel 2 owners, the live translation features are impressive, taking the translation features of Google Assistant. Say someone speaks French to you, your microphone can pick this up and in your ears you'll hear a translation into English. In practice it works well, although stumbles a little bit when complicated phrases get thrown out at speed, but we're fairly certain the use cases of this feature will be relatively minimal at the moment, anyway. Overall it's a good first shot from Google - decent fit, decent battery life, but iOS users will be left by the wayside.

<http://www.independent.co.uk/extras/indybest/gadgets-tech/headphones-earphones/best-wireless-in-ear-headphones-review-bluetooth-buy-budget-beats-bose-apple-1040521.html>

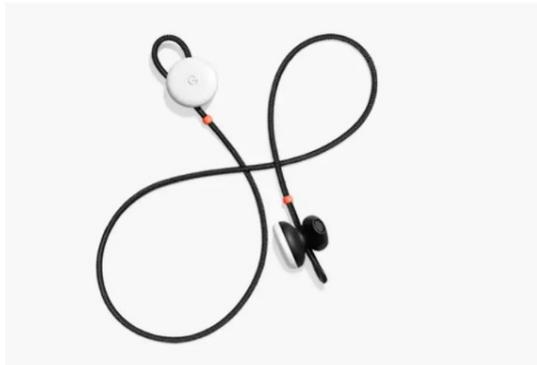


<https://www.skullcandy.eu/earbuds/SMOKINBUDS2.html#63cUsKsTI4eQod6L9>

Google's new headphones can translate foreign languages in real time



3



CREDIT: GOOGLE

By Matthew Field

4 OCTOBER 2017 • 7:32PM

Google has launched its first pair of wireless headphones featuring real time language translation from Google Translate.

The headphones, called Google Pixel Buds, connect to an Android or Google Pixel smartphone, connecting to the voice-controlled Google Assistant to make phone calls, play music or even understand other languages.

Google revealed the Pixel Buds alongside a host of new hardware at an event in San Francisco, including [two new smartphones](#), [a laptop](#) and

<https://www.telegraph.co.uk/technology/2017/10/04/googles-new-headphones-can-translate-foreign-languages-real/>



Bose has unveiled its first truly wireless earphones, called the SoundSport Free, aimed at those needing buds to use while exercising. Because of this, they're water and sweat resistant, and each earbud is quite small, weighing just 0.35 ounces and measuring 1.1 inches high and 1.2 inches deep.

Bose claims the earbuds house a new antennae system that provides a reliable connection between them. They can work with devices up to 30 feet away and last for about 5 hours each charge. The charging case magnetically keeps the earbuds snugly in place, and can provide two additional full charges, adding about 10 hours of more listening time.

<https://www.theverge.com/circuitbreaker/2017/9/21/16343382/bose-soundsport-free-price-date>

- 4 The applicant failed to submit observations within the time limit.
- 5 On 6 July 2018, the examiner took a decision ('the contested decision') entirely refusing the trade mark applied for, under Article 7(1)(b) and (c), in conjunction with Article 7(2), EUTMR.
- 6 On 4 September 2018, the applicant filed an appeal against the contested decision, requesting that the decision be entirely set aside. The statement of grounds of the appeal was received on 2 November 2018.

Grounds of appeal

- 7 The arguments raised in the statement of grounds may be summarised as follows:
 - The Office disregarded the fact that the element 'FREE' does not convey any clear and obvious information in connection with the goods at hand in none of its possible meanings.
 - It is unlikely that consumers might think that the goods at hand sold by a private company under a trade mark that contains the element 'FREE' are offered at no cost.
 - The examples provided in the contested decision in support of the arguments that the element 'BUDS' is commonly used on the market to refer to 'earphones and headsets' are not sufficient to show that the word element is descriptive.
 - The mark applied for consists of a fanciful combination of the word elements 'FREE' and 'BUDS' which taken as a whole does not convey any clear and obvious meaning with regard to the goods claimed. Rather, the element 'FREE' conveys the vague impression of freedom. The element 'BUDS' does

not have any meaning for the goods at hand and is not a commonly-used abbreviation for the English word ‘earbuds’.

Reasons

- 8 All references made in this decision should be seen as references to the EUTMR (EU) No 2017/1001 (OJ 2017 L 154, p. 1), codifying Regulation (EC) No 207/2009 as amended, unless specifically stated otherwise in this decision.
- 9 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.

Article 7(1)(c) EUTMR

- 10 Article 7(1)(c) EUTMR provides that signs shall not be registered as EU trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the services, or other characteristics of the goods or services. Article 7(2) EUTMR provides that this shall apply notwithstanding that the grounds of non-registrability obtain in only part of the European Union.
- 11 According to case-law, Article 7(1)(c) EUTMR prevents the signs or indications referred to therein from being reserved to one undertaking alone because they have been registered as trade marks. That provision thus pursues an aim in the public interest, which requires that such signs or indications may be freely used by all (23/10/2003, C-191/01 P, Doublemint, EU:C:2003:579, § 31).
- 12 Furthermore, signs or indications which may serve, in trade, to designate characteristics of the goods or services in respect of which registration is sought are, by virtue of Article 7(1)(c) EUTMR, regarded as incapable of performing the essential function of a trade mark, namely that of identifying the commercial origin of the goods or services, thus enabling the consumer who acquired the goods or services designated by the mark to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition (23/10/2003, C-191/01 P, Doublemint, EU:C:2003:579, § 30; 27/02/2002, T-219/00, Ellos, EU:T:2002:44, § 28).
- 13 For a sign to fall in the prohibition set out in that provision, there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned to perceive immediately, without further thought, a description of the goods or services in question or one of their characteristics (20/07/2004, T-311/02, Limo, EU:T:2004:245, § 30).
- 14 Therefore, the mark may only be assessed, first, in relation to the understanding of the mark by the relevant public and, second, in relation to the goods or services concerned (27/02/2002, T-34/00, EUROCOOL, EU:T:2002:41, § 38).

Relevant public

- 15 The goods at issue in the present appeal proceedings are directed at the public at large and at business customers with specific professional knowledge who purchase the goods for professional/business purposes. Accordingly, the level of care and attention of the average end consumer will be average, i.e. they will be reasonably well-informed and reasonable observant and circumspect. The level of attention, as regards the professional public, will be elevated (14/03/2018, R 1047/2017-1, KOTION EACH (fig.) / KOOTION (fig.), § 17; 12/01/2017, R 444/2016-5, TINYPHONES (fig.), § 13; 14/11/2016, R 1112/2016-5, DEVICE OF AN EXCLAMATION MARK (fig.), § 11).
- 16 Since the trade mark consists of English words, the relevant public in relation to whom the absolute grounds for refusal has to be assessed consists of English-speaking consumers in the European Union (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26; 27/11/2003, T-348/02, Quick, EU:T:2003:318, § 30).

Meaning of the mark applied for and descriptiveness in relation to the goods and services

- 17 According to the case-law, when assessing Article 7(1)(c) EUTMR, the overall impression created by that mark should be taken into consideration. That does not, however, mean that an examination may not first be made of each of the various components of that mark. It may be useful, in the course of the overall assessment, to examine each of the components of the mark concerned (08/02/2011, T-157/08, INSULATE FOR LIFE, EU:T:2011:33, § 50 and the case-law cited).
- 18 In the present case, the sign is composed of two words, ‘Free’ and ‘Buds’.
- 19 As to the word ‘Free’, it is well known that this term is common in English and, when used as an adjective, designates, for the English-speaking public, a way of doing something freely, without constraints or barriers (05/12/2017, T-213/16, FREE STYLE, EU:T:2017:867, § 26).
- 20 The word ‘Buds’ literally means a small pointed lump that appears on a tree or plant and develops into a leaf or flower (<https://www.collinsdictionary.com/dictionary/english/bud>, 17/12/2018). However, as shown by the examples retrieved by the examiner, it is commonly used on the market as a synonym for earphones.
- 21 The fact that these words may have several meanings is irrelevant. According to the case-law, it is not necessary for a term to have only one, namely a descriptive, meaning in order to be ineligible for registration (23/10/2003, C-191/01 P, Doublemint, § 32).
- 22 In the present case, the sign ‘FreeBuds’ is descriptive in relation to the relevant goods, i.e. ‘headsets; earphones’ in Class 9. In particular, it will be immediately and without any further reflexion understood by the relevant public as a reference to the kind and characteristics of the relevant goods namely to the fact that the contested goods are earphones (or headsets) in the form of earbuds that allow

listening to music/radio/telephone communications/etc. freely, i.e., without constraints or barriers.

- 23 The stylisation of the sign applied for is unable to change the above assessment. In particular, the fact that the words 'Free' and 'Buds' are written together and each starts with a capital letter, does not change the immediate meaning of the sign as described above.
- 24 Consequently, the examiner did not err in concluding that the mark applied for, conveying a meaning directly referring to the kind and characteristics of 'headsets; earphones', falls within the scope of the prohibition laid down in Article 7(1)(c) EUTMR.

Article 7(1)(b) EUTMR

- 25 For a trade mark to possess distinctive character for the purposes of Article 7(1) (b) EUTMR, it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (29/4/2004, C-456/01 P & C-457/01, P, Tabs, EU:C:2004:258, § 34 and the case-law cited).
- 26 The distinctiveness of a trade mark must be assessed both by reference to the goods and services in the application and to the perception of them by the relevant public (12/02/2004, C-363/99, Postkantoor, EU:C:2004:86, § 34-35).
- 27 In the present case, taking into account the relevant goods – 'headsets; earphones' – the sign 'FreeBuds' will be immediately understood by the relevant public as a purely laudatory term appealing to the customers' sense of freedom and referring to the fact that the headsets and earphones are particularly handy and convenient to wear. Accordingly, the mark applied for is devoid of any distinctive character and incapable of performing the essential function of a trade mark, namely that of identifying the origin of the goods concerned.
- 28 In light of the foregoing, it is also confirmed that the examiner rightly rejected the trade mark applied for at hand for the goods under appeal pursuant to Article 7(1) (b) EUTMR.
- 29 In any event, according to the case-law, it is sufficient that one of the absolute grounds for refusal listed in that provision applies for the sign to be ineligible for registration as an EU trade mark (13/02/2008, C-212/07 P, HAIRTRANSFER, EU:C:2008:83, § 2; 19/04/2016, T-261/15, Daylong, EU:T:2016:220, § 67).

Conclusion

- 30 In view of the foregoing, the Board upholds the contested in relation to Article 7(1)(b) and (c) EUTMR. The appeal is dismissed.
- 31 The current decision is in line with the following Court's case-law and the following decisional practice of the Office: 05/12/2017, T-213/16, FREE STYLE, EU:T:2017:867; 06/12/2018, R 1744/2018-4, PLASTIC FREE; 26/06/2018, R 74/2018-1, Free; 09/11/2017, R-1638/2017-2, Wind-Free and 24/01/2017, R 1031/2016-2, FREECHOICE.

Order

On those grounds,

THE BOARD

hereby:

Dismisses the appeal.

Signed

H. Salmi

Registrar:

Signed

H.Dijkema

