

**DECISION  
of the Fourth Board of Appeal  
of 3 July 2020**

In Case R 2630/2019-4

**Logitech Europe S.A.**

EPFL - Quartier de l'Innovation Daniel

Borel Innovation Center

1015 Lausanne

Switzerland

Applicant / Appellant

represented by HGF LIMITED, 1 City Walk, Leeds LS11 9DX, United Kingdom

APPEAL relating to European Union trade mark application No 18 006 517

**THE FOURTH BOARD OF APPEAL**

composed of D. Schennen (Chairman and Rapporteur), R. Ocquet (Member) and  
C. Bartos (Member)

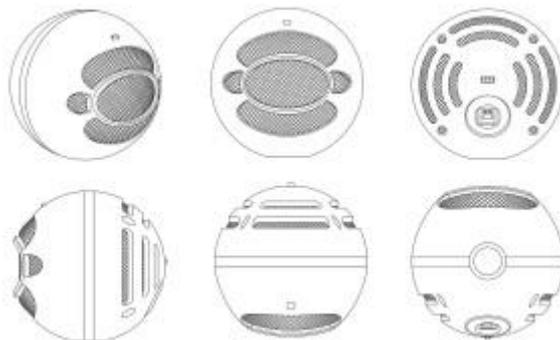
Registrar: H. Dijkema

gives the following

## Decision

### Summary of the facts

- 1 By an application filed on 7 January 2019, Logitech Europe S.A. ('the applicant'), sought to register the three-dimensional mark



for the following goods:

Class 9 – Microphones.

- 2 On 25 September 2019, the examiner took a decision ('the contested decision') entirely refusing the trade mark applied for under Article 7(1)(b) EUTMR, on the basis that the mark consisted of a combination of presentational features typical of the shape or appearance of a spherical microphone head with visible parts for the light which signals the on/off status, grids, connector socket and the part for attaching or fastening it to a holder. The sign, including the grid element, was not markedly different from various basic shapes commonly used in trade for the goods at issue. It was a mere variation, which did not constitute a significant departure from the norms and customs of the sector, such that the relevant public would see it as a trade mark.
- 3 The examiner took note that the applicant had made a subsidiary claim that the mark had become distinctive through use (Article 7(3) EUTMR) and noted that once the decision became final the examination of this subsidiary claim would be resumed.
- 4 On 20 November 2019, 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 27 January 2020.
- 5 The arguments raised in the statement of grounds may be summarised as follows: the appellant's first instance observations dated 10 June 2019 are reiterated and maintained. The ball shape of the microphone is not common or typical, nor is the grid element, as is clear from the evidence adduced (therein and at annex II), consisting of screenshots from online stores, advertising and third party statements. The examiner did not give due consideration to a comparable registration accepted by the Office (EUTM 4 348 348).

## Reasons

- 6 The appeal is unfounded and the principal claim fails. The sign applied for is devoid of distinctive character pursuant to Article 7(1)(b) EUTMR.

### *Article 7(1)(b) EUTMR*

- 7 For the trade mark applied for to possess distinctive character for the purposes of Article 7(1)(b) EUTMR, it must serve to identify the goods and services in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish those goods and services from those of other undertakings (29/04/2004, C-456/01 P & C-457/01 P, *Tabs*, EU:C:2004:258, § 34).
- 8 The average consumer does not tend to look at things analytically. A trade mark must therefore enable the average consumer of the goods in question, who is reasonably well informed and reasonably observant and circumspect, to distinguish the goods concerned from those of other undertakings without conducting an analytical or comparative examination and without paying particular attention (12/02/2004, C-218/01, *Perwoll bottle*, EU:C:2004:88, § 53; 12/01/2006, C-173/04 P, *Standbeutel*, EU:C:2006:20, § 29).
- 9 The criteria for assessing the distinctive character of three-dimensional marks consisting of the shape of the product itself are no different from or no more stringent than those applicable to other categories of trade mark. Nonetheless, the perception of the relevant public perception is not necessarily the same for a three-dimensional mark consisting of the shape of the product itself as it is for a word or figurative mark consisting of a sign which is independent from the appearance of the products. The consumers are not in the habit of making assumptions about the origin of products on the basis of their shape or the shape of their packaging in the absence of any graphic or word element. It could therefore prove more difficult to establish distinctive character in relation to such a three-dimensional mark than in relation to a word or figurative mark (29/04/2004, C-456/01 P & C-457/01, *Tabs*, EU:C:2004:258, § 34; 8/04/2003, C-53-55/01, *Linde*, EU:C:2003:206, § 40; 7/10/2004, C-136/02, *Maglite*, EU:C:2004:592, § 30).
- 10 The more closely the shape for which registration is sought resembles the shape most likely to be taken by the product in question, the greater the likelihood of the shape being devoid of any distinctive character. Only a trade mark which departs significantly from the norm or customs of the sector and thereby fulfils its essential function of indicating origin, is not devoid of any distinctive character for the purposes of Article 7(1)(b) EUTMR (29/04/2004, C-456/01 P & C-457/01, *Tabs*, EU:C:2004:258, § 39; 7/10/2004, C-136/02 P, *Maglite*, EU:C:2004:592, § 31; 25/09/2014, T-171/12, *Shape of a turnbuckle*, EU:T:2014:817, § 35, 41).
- 11 The trade mark representation filed consists of six views of a spherical device with markings, in black and white. The claimed goods are microphones in Class 9. The subject of the application is a three-dimensional mark, which shows the external appearance of said goods.

- 12 The goods ‘microphones’ target both general consumers, regarded as being reasonably well-informed and reasonably observant and circumspect, and professionals displaying a high level of attention, though even a high level of attention does not, in itself, permit the conclusion that distinctiveness may be inferred from the shape of the product (12/09/2007, T-358/04, Mikrofon, EU:T:2007:263, § 46, 47). Absent verbal elements of the mark, the ground for refusal exists with respect to the whole EU, i.e. to all its Member States (08/07/2009, T-28/08, Bounty-Riegel, EU:T:2009:253, § 47; 21/04/2015, T-360/12, Device of a checkerboard pattern, EU:T:2015:214, § 87; 25/07/2018, C-84/17, Shape of a four-fingered chocolate bar, § 67, 87).
- 13 The main plank of the appeal is that the examiner made an erroneous assessment of the evidence, which aimed to show that the sign constituted a significant departure from the norm, by reference to other microphones in the market and was therefore inherently distinctive (acquired distinctiveness being its subsidiary claim).
- 14 With specific regard to the statements which purport to demonstrate the quality of aspects of the spherical design, from individuals who are active in the audio-technology industry, it bears recalling at the outset, that such evidence does not mean that a mark consisting of the three-dimensional shape of those goods permits those goods to be distinguished *ab initio* from those of other undertakings for the purposes of Article 7(1)(b) EUTMR (see 07/10/2004, C-136-02, Maglite, EU:C:2004:592, § 68). Insofar as those statements relate to recognition of the shapes referred to, as a result of familiarity, they are outside the scope of the principal claim for inherent distinctiveness.
- 15 What is more, a feature displayed in a three-dimensional mark which is functional in nature and purpose will generally not be able to confer distinctiveness on the mark, as it will be associated by the target consumer merely with that specific function, and not as an indicator of commercial origin, and this, independently of whether the (much stricter) conditions of Article 7(1)(e) EUTMR are also fulfilled (12/09/2013, T-492/11, Tampon, EU:T:2013:421, § 23; 18/01/2013, Fun Factory, EU:T:2013:26, § 27; 14/11/2016, R 1067/2016-4, Schlüsselprofil, § 21).
- 16 The Ball shape: the mark applied for shows six views of a round microphone head. It is the applicant’s position that a conventional grey stick is what constitutes the norm for the goods in question, and that the spherical shape of the mark applied for represents a significant departure from that norm. However, this is not borne out by the appellant’s evidence. It is clear from the very first page of the first annex of the evidence provided, that microphones come in a variety of shapes, and that rounded microphone heads, displayed with and without handles, constitute one of the classic shapes within the sector, along with oblong, rectangular or stick shapes. The first page clearly displays a perfect sphere in among the examples, together with its handle which displays a logo (Annex 1, page 1, ‘gear for music’, dated 6 October 2019). Further sphere-shaped/ball-shaped microphone heads are displayed throughout the second page of the evidence, along with a variety of other shapes, and the trend for rounded microphone heads is repeated throughout the evidence, which includes screenshots from Amazon.

- 17 As indicated by the appellant itself, the ball shape serves as a receptacle for mechanical and electrical components which are necessary for it to function as a microphone i.e. it is an aspect of its shape which serves a particular function in a market which is characterised by a number of shapes, all of which are determined by function. In those circumstances, rounded microphone heads, including cylindrical or sphere-shaped types, do not represent a significant departure from the norm in respect of microphone shapes which are traditionally found in that market.
- 18 The grid shape: the appellant also makes the case that the four, connected, elliptical shapes of the sign (with particular reference to views 1 and 2) constitute a figurative element with additional distinctive character. The Board disagrees. The element in question covers most of the surface area of the views shown, and is shaded to depict mesh. The elliptical shapes simply represent the borders surrounding that mesh grille, which is known from general marketing experience, to be a characteristic of all microphones. The analogous elliptical grill shapes depicted in the evidence feature the large logo 'BLUE', (together with a tripod), unlike the present case which features the shape and further functional elements alone, and are also called 'BLUE', but any reference to the name of the applicant (Logitech) is missing. Those products are actually in the colour blue, whereas the mark under examination is in black and white. The examiner correctly dealt with the 'elliptical' aspect of the mark by stating that it simply represented a particular grid type, not a label or name or figurative element such as would confer distinctive character on the sign.
- 19 As with other microphone head shapes, the practical and/or aesthetic shape of that part of the grid shape which is visible, is influenced by the spherical shape of the microphone head discussed above, just as ribbed casing is more suitable to the oblong shape of what is described in the applicant's evidence as a studio microphone, and in respect of which, the appellant cites a prior registration by way of support for its case (EUTM 4 348 348). The prior registration relied on features a visible logo which gives it distinctive character, not its shape alone, and is therefore not genuinely comparable requiring consideration as alleged. The configuration of the protective casing relative to the mesh or membrane which it borders or protects, permits the entry of sound through the resulting apertures, for the purpose of amplification, and would not be considered a figurative or distinctive element by the relevant consumer in either case, but rather a variation of a common template adapted specifically to the spherical or oblong shape of the microphone in question. In both cases, form is dictated by both function and aesthetic considerations. The simple arrangement of an oval shape bordered by semi-circles is appropriate to the surface area of the sphere, and will not be seen as a departure from a norm, much less a significant one.
- 20 The average and professional consumer of microphones will perceive the grille as an essential characteristic of the shape which is dictated by function, and configured in a way which is practical and aesthetic (relative to its casing or background), and not in a distinctive, abstract or creative way. Therefore, insofar as the evidence purported to show that the fine wire mesh grille shape was inherently distinctive, in and of itself, it also fails.

- 21 The appellant did not put in issue the remaining aspects of the mark represented and applied for, as described and assessed at first instance and which are therefore endorsed by the Board. As a whole, the mark applied for, was therefore correctly refused pursuant to Article 7(1)(b), EUTMR, on the basis that it consisted of a combination of presentational features typical of the shape or appearance of a spherical microphone head with visible parts for the light which signals the on/off status, grids, connector socket and the part for attaching or fastening it to a holder and that the sign, including the grid element, was not markedly different from various basic shapes commonly used in trade for the goods at issue. It was a mere variation, which did not constitute a significant departure from the norms and customs of the sector, such that the relevant public would see it as a trade mark.
- 22 It is clear to the Board that the assessment of the inherent distinctiveness of the sign, on the basis of the evidence provided, was not conflated with the notion of acquired distinctiveness, as argued by the appellant. It is not that the purpose of the evidence was misunderstood, it is that the appellant failed to fulfil the stated purpose. With particular reference to annex 2, evidence which relates to a mark with radial grille slot mountings and/or a logo, is not relevant to the assessment of the inherent distinctive character of the imputed mark. As indicated at first instance, it was for the appellant to show that its mark was inherently distinctive. The annexed screenshots from microphone suppliers and the statements relied on fail to show how the appellant's product stands out in the marketplace, by reference to other shapes of microphone available. Therefore, the evidence was considered and found wanting, not incorrectly assessed.
- 23 The principal claim that the mark applied for is inherently distinctive, was not substantiated. Accordingly, the appeal is dismissed and the case may proceed with the subsidiary claim under Article 7(3) EUTMR.

**Order**

On those grounds,

**THE BOARD**

hereby:

- 1. Dismisses the appeal;**
- 2. Remits the case for further prosecution of the claim for acquired distinctiveness (Article 7(3) EUTMR).**

Signed

D. Schennen

Signed

R. Ocquet

Signed

C. Bartos

Registrar:

Signed

p.o. P. Nafz

