

OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET
(TRADE MARKS AND DESIGNS)

The Boards of Appeal

DECISION
of the Fourth Board of Appeal
of 27. September 2007

In Case R 708/2006-4

Edgar Rice Burroughs, Inc.
18354 Ventura Boulevard
Tarzana, California 91357
United States of America

Applicant/Appellant

represented by R.G.C. JENKINS & CO, 26 Caxton Street, GB - London SW1H 0RJ,
United Kingdom

APPEAL relating to Community trade mark application No 3 661 329

THE FOURTH BOARD OF APPEAL

composed of D. Schennen (Chairman and Rapporteur), I. Mayer (Member) and
F. López de Rego (Member)

Registrar: N. Semjevski

gives the following

Language of the case: English

Decision

Summary of the facts

- 1 By an application received by the Office by regular mail on 11 February 2004, the applicant filed a Community trade mark application for the following goods and services:

Class 9 -Electrical and electronic communications and telecommunications apparatus and instruments; optical, electro-optical, monitoring (other than in-vivo monitoring), radio, television, electrical control, testing (other than in-vivo testing), signalling, checking (supervision), radio paging, radio-telephone and teaching apparatus and instruments, telephones, mobile telephones and telephone handsets; paging apparatus, radio paging apparatus; radio telephone apparatus; computerised personal organisers, telecommunications apparatus and instruments; communications apparatus and instruments; apparatus and instruments for recording, transmission or reproduction of sound or images; video films; aerials; electrical and electronic apparatus and instruments all for processing, logging, storing, transmission, retrieval or reception of data; computers; discs, tapes and wires, all being magnetic data carriers; computer programmes; computer software; micro processors; magnetic cards; key boards; satellite transmitters and receivers; batteries; sound, video and data recording and reproducing apparatus; apparatus for recording, transmitting and reproducing sound and/or images; amusement apparatus for use with a television screen or video monitor; games and apparatus for games for use with a television screen or video monitor; computerised or electronic amusement apparatus; coin or token operated electrical or electronic amusement apparatus; computer games; electronic games; video games; CD-ROM games, audio output games; games cartridges for use with electronic games apparatus; sound and video recordings; cinematographic and photographic films; motion picture films and videotapes; instructional and teaching apparatus and instruments; sound recordings; phonograph recordings; records, discs, tapes, cassettes, cartridges, cards and other carriers, all bearing or for use in bearing sound recordings, video recordings, data images, games, graphics, text, programs or information; phonograph records and discs; game cartridges for computer video games and video output game machines and instructional materials sold as a unit; computer game cassettes, computer game programs, computer game tapes, and manuals sold as a unit; memory carriers, interactive compact discs and CD-ROMS; parts and fittings for all the aforesaid goods.

Class 16 - Paper; cardboard; paper articles and cardboard articles, all for promotional and merchandising purposes; printed matter; printed publications; periodical publications; books; newspapers; booklets; magazines; catalogues; guides; carrier bags; paper bags; pamphlets; brochures; news sheets; printed programmes; stationery; bookbinding materials; artists' materials (other than colours or varnish); paint brushes; instructional and teaching material (other than apparatus); writing instruments; pens, pencils, crayons; paint brushes; erasers; rulers; pencil sharpeners; pencil boxes and cases; pencil holders; posters; photographs; photograph albums; ring binders; folders; note-books; note-pads; diaries; calendars; postcards; greeting cards; drawings (graphic); stickers; transfers (decalcomanias); stencils; bumper stickers, fine paper, gift vouchers, labels, note-paper, paper packaging materials, paper tissues, printing paper, tickets, wrapping paper, writing paper, writing pads; ordinary playing cards; printed computer programs; paper tape and cards for use in data processing; parts and fittings for all the aforesaid goods.

Class 25 - Clothing, footwear, headgear.

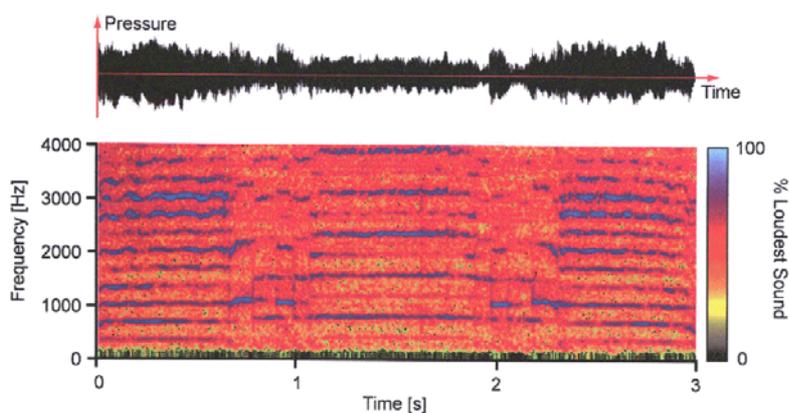
Class 28 - Electronic games and amusement apparatus other than for use with television receivers; video game machines, home video game machines and hand held video game machines, none being for use with television receivers; games and playthings; board games; gymnastic and sporting articles and apparatus; toys and dolls; parts and fittings for all the aforesaid goods.

Class 38 - Radio, television, cable and broadcasting services; broadcasting and transmission of television programmes; broadcasting of radio programmes; television, radio transmission and radio diffusion services; telecommunications, communications, telephone, facsimile, telex, message collection and transmission, radio-paging and electronic mail services; transmission and reception of data and of information; on-line information services relating to telecommunications; data interchange services; transfer of data by telecommunication; satellite communication services; broadcasting or transmission of radio or television programmes; hire, leasing or rental of apparatus, instruments, installations or components for use in the provision of the aforementioned services; advisory, information and consultancy services relating to all the aforementioned services.

Class 41 - Entertainment education and instruction by or relating to radio and television; film, music, sport, video and theatre entertainment services; radio and television entertainment services; production, preparation, presentation, distribution, syndication, networking and rental of television and radio programmes and of films, animated films, and sound and video recordings; production of live entertainment features, production of television features; services relating to motion picture entertainment, to television entertainment and to live performances and shows; services relating to the production of books, magazines and periodicals; production and rental of educational and instructional materials; publishing; organisation, production and presentation of events for educational, cultural or entertainment purposes; organisation, production and presentation of competitions, contests, games, quizzes, fun days, exhibitions, sporting events, shows, roadshows, staged events; theatrical performances, concerts, live performances and audience participation events; provision of entertainment and education for accessing via communication and computer networks; provision of information relating to any of the aforesaid services.

Class 42 - Computer services; maintenance, updating and design of computer software and programs; computer programming services; preparation and provision of information in relation to computers and computer network facilities; on-line computer services, programming services given on-line; provision of access to an electronic on-line network for information retrieval; provision of information and advisory services on line from a computer database or via the internet; provision of information and advice on the supplying and promotion of commodities and selection and display of goods; provision of information and advice to the prospective purchasers of commodities and goods; professional consultancy; management of gift lists; childcare and changing room services; provision of toilet or restroom facilities; reception and storekeeping services; retail and merchandising services; retail and merchandising services relating to clothing, toys, craft, books, food gifts and souvenirs, music, records, tapes, CDs, videos and video games.

- 2 The application was made for a ‘sound mark’. As ‘representation of the trade mark’, the application contained the following image:



and the following text:

‘The mark consists of the yell of the fictional character TARZAN, the yell consisting of five distinct phases, namely sustain, followed by ululation, followed by sustain, but at a higher frequency, followed by ululation, followed by sustain at the starting frequency, and being represented by the representations set out below, the upper representation being a plot, over the time of the yell, of the normalised envelope of the air pressure waveform and the lower representation being a normalised spectrogram of the yell consisting of a three-dimensional depiction of the frequency content (colours as shown) versus the frequency (vertical axis) over the time of the yell (horizontal axis).’

- 3 On 13 September 2004, the examiner notified the applicant that the trade mark application did not contain a representation of the trade mark and that a filing date could not be accorded to the application. In accordance with Rule 9 (1) of the Implementing Regulation (CTMIR), the applicant was given two months to remedy this deficiency, failing which the application would not be treated as a Community trade mark application.
- 4 The appellant replied on 24 September 2004 and stated that it did not understand the objection as it had in fact filed a colour representation of the mark. It filed further observations on 16 January 2006.
- 5 On 29 March 2006 the examiner gave notice of the closure of the file because the filing date deficiencies had not been remedied, pursuant to Rule 9(2) CTMIR. The application was not treated as a Community trade mark application and the filing fees would be reimbursed. The graphical reproduction submitted, namely a spectrogram, associated with a description was not considered an acceptable graphical representation by the Office. Pursuant to the case-law of the Court of Justice, such a representation had to be clear, precise, self-contained, easily accessible, intelligible, durable and objective.

Grounds for appeal

- 6 The appellant filed a notice of appeal against this notice on 23 May 2006 and a statement of grounds on 7 July 2006. It requests that the objection be waived, a filing date be accorded and that the application proceed to examination.
- 7 The applicant invokes the Board’s decision of 25 August 2003 in Case No R 781/1999-4 (‘Roar of a lion’ (sound mark)), in which it was stated that a sonogram was an acceptable graphic representation and submits that its application fulfilled all the criteria laid down in that Decision. The representation as filed contains a representation of both time axis and frequency axis. It is illustrated by a written description plus a waveform and a spectrogram (sonogram).
- 8 It maintains that it is perfectly clear what the present mark is. It is the sound of the fictional character Tarzan yelling, a sound that is well-known throughout the European Community. Virtually everybody would be able to tell you ‘what is the Tarzan yell?’. The mark applied for consisted of a description and a

representation of the precise nature of the sound that would be accessible to those with a musical background.

- 9 Also in the case of a musical notation, those who cannot read it will have to seek assistance to understand the mark and a musical tune might be played in various divergent manners. In that regard the present case is not different.
- 10 The applicant has licensed the Tarzan yell sound to enterprises such as Nokia as a ring-tone on mobile phones and Disney for motion pictures. That illustrates the recognition of the mark and its exclusive association with the applicant.
- 11 The applicant attaches an excerpt from '*Wikipedia*' for the term 'spectrogram'.

Reasons

- 12 The appeal is admissible. The appealed notice of the examiner dated 29 March 2006 constitutes a notice under Article 36 (2) CTMR and Rule 9 (2) CTMIR in that the application shall not be dealt with as a CTM application because it does not fulfil the minimum conditions for a filing date to be granted. This notice constitutes a decision within the meaning of Article 57 CTMR as it determines the final status of the application whilst dismissing the allegations of the applicant in reply to the Rule 9 (1) CTMIR objection. It does not constitute a case of a loss of rights without a decision within the meaning of Rule 54(1) CTMIR.
- 13 The appeal is not well-founded. Neither on the date of actual filing, 11 February 2004, nor within the two-month period set by the examiner or at any later date, did the application fulfill the minimum conditions under Article 26 (1) (d) CTMR in conjunction with Article 27 CTMR and Rule 9 (1) (a) (iv) CTMIR.
- 14 The appeal raises two issues, namely:
- does the representation as filed constitute a representation of the mark that fulfils the statutory requirements under the CTMR and CTMIR, and
 - if not, does this constitute not only an absolute ground for refusal under Article 7 (1) (a) CTMR in conjunction with Article 4 CTMR, but also a ground for the non-attribution of a filing date under Articles 26 and 27 CTMR and Rule 9 (1) CTMIR.
- 15 The Court of Justice has established clear precedents, and not merely guidance, as to what conditions a representation of a mark must fulfil. A trade mark may consist of a sign which is not in itself capable of being perceived visually, provided that it can be represented graphically, particularly by means of images, lines or characters and that its representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective (ECJ, Judgment of 27 November 2003, C-283/01, 'Shield mark' paragraph 56, ECR 2003 I – 5421; ECJ, Judgment of 12 December 2002 in Case C-273/00, 'Sieckmann', paragraph 55, OJ OHIM 2003, 728). In the case of sound marks, those

requirements are not satisfied when the sign is represented graphically by means of a description using the written language, such as an indication that the sign consists of the notes of a musical work, or the indication that it is the cry of an animal, or by means of a simple onomatopoeia, without anything else, or by means of a sequence of musical notes, by itself. On the other hand, those requirements are satisfied where the sign is represented by a stave divided into measures and showing, in particular, a clef, musical notes and rests whose form indicates the relative value and, where necessary, accidentals (ECJ, Judgment 'Shield mark', paragraph 64). In the 'Shield mark' case, the Court did not expressly consider sonograms or sound files (ECJ, 'Shield mark', paragraph 54) but the representation must in any case comply with the requirements that it be clear, precise, self-contained, easily accessible, intelligible, durable and objective.

- 16 It is to be recalled that Article 4 CTMR contains a definition of the type of signs a Community trade mark 'may' consist of but what is in issue in the present case is not whether and under what conditions sounds 'may' constitute a trade mark in the abstract but whether a given application as filed contains a representation of the mark that fulfils the legal requirements, as the CTM system is based on registration only (Article 6 CTMR, unlike national systems that also recognise unregistered marks) so that we ought to ask not whether a graphical representation is a possibility but in the present case a reality. The applicant expressly seeks registration of a sound mark and the Board only considers the representation of the mark as filed (Decision of the Second Board of Appeal of 31 July 2001 in Case No R 647/1999-2, 'Bottle with scale', paragraph 15; Decision of the Fourth Board of Appeal of 18 December 2006 in Case No R 884/2006-4, 'Shape of container I', paragraph 15).
- 17 According to the case-law of the Court of Justice, the requirements concerning a graphic representation of the mark serve a dual purpose, namely on the one hand to define the precise subject-matter of protection granted to the trade mark proprietor (and the Board adds that this ought not be confused with the scope of protection) and on the other hand that entry of the mark in the public Register makes it accessible to the competent authorities and the public, particularly to third parties who must be able to ascertain what is protected by their competitors (ECJ, Judgment of 12 December 2002 in Case C-273/00, 'Sieckmann', paragraphs 47 – 51).
- 18 Turning to the verbal circumscription of the mark as a 'yell of the fictional character Tarzan' etc., which the applicant does not wish to be considered as a description within the meaning of Rule 3 (3), 2nd sentence, CTMIR, but as a part of the graphical representation under Rule 3 (2) CTMIR, it is clear from the 'Shield mark' Judgment that irrespective of the precise wording, such a verbal circumscription of a sound is not a 'clear' and 'self-contained' representation of the sound itself.
- 19 Turning to the spectrogram, which the applicant also refers to as a sonogram, the Board wishes to make clear that to the extent that Decisions R 781/1999-4 of 29 March 2003 and R 295/2005-4 of 8 September 2005 contain language about the availability of sonograms as graphic representations for CTMs which

is inconsistent with this decision, the Board expressly dissents from the earlier decisions. In Case R 781/1999-4, the references to sonograms were merely *obiter dictum* and the mark was refused. Other Boards of Appeal have not dealt with sonograms. To the knowledge of the Board, no national office accepts sonograms *per se*.

- 20 A spectrogram, as filed or otherwise conceived taking into account the documents filed by the applicant, does not fulfil the criterion to be ‘self-contained’. With regard to the function of the CTM register as a public Register, the notion of ‘self-contained’ means that third parties viewing the CTM Bulletin should on their own and without additional technical means be able to reproduce the sound or at least to have a general idea of what the sound is. Nobody can read a spectrogram as such. The colour bar on the right-hand side of the spectrogram indicates how the colours represent loudness. Looking at the spectrogram, it appears as an extremely complex image where at various frequencies, *e.g.* around 3000, 2000 and 1000 Hertz, a stronger pressure (louder sound) occurs. However, it is impossible to deduce from the image as filed at what exact frequencies this occurs. It is also impossible to recognize from the image as filed whether the sound phenomena depicted therein is a human voice or something else, *e.g.* the tune of violins or bells or a dog’s bark. The pressure curve reproduced on top of the coloured spectrogram image merely shows the relative variation of loudness but does not allow one to discern any specific ‘sound’ or melody.
- 21 In that context the applicant’s references to problems of perceiving musical notations are irrelevant. The applicant ought to show that and how people could discern the sound from the graphic representation. It has advanced nothing in that regard. The Board adds that it considers it unlikely that anybody, even a superior specialist of spectrograms, could, on the basis of the spectrogram alone and without technical means, reproduce the sound.
- 22 For the same reason, the representation is not clear or intelligible.
- 23 Also, the representation is not easily accessible. The CTM Register is directed at third parties who want to ascertain whether the signs they want to use for their own goods or services can reasonably fall into the scope of protection of the registered mark, which presupposes that in the first place they can ascertain what the subject-matter of the registered mark is. For that to take place, a competitor should be able to transform the image into a sound, at least in his brain for himself, or otherwise by transforming it into a sound through technical means. That will not be possible on the basis of the image as filed. The Board does not see any technical means by which such an image, which allegedly constitutes the graphics of a sound and allegedly was produced by technical means than can transform sounds into ‘spectrogram’ images, could be re-transmitted or re-converted into a sound. It is not enough if the image filed would unambiguously and individually represent a given sound, as long as it is not possible to retransform the image into a sound. The requirement of being easily accessible means that the representation as filed has to be seen from the standpoint of the reader of the CTM Bulletin who asks himself ‘what does that

image represent?', and not from the standpoint of the creator of the image who asks himself 'was that image derived from the sound?'

- 24 These deficiencies cannot be cured by the fact that the coloured image (the spectrogram) is accompanied by a verbal circumscription that refers to Tarzan's yell. Those verbal clarifications may give some vague idea of what the applicant wishes to protect, but they are unrelated to the image as viewed by the reader of the CTM Bulletin. To put it bluntly: If the reader of the Bulletin was confronted with the same spectrogram image but with a verbal description 'this corresponds to the sound of a motorbike' or 'to the overture of Tristan and Isolde', he would likewise believe it or not but would not have any means to confirm or rebut such a statement. Therefore the two elements in issue, namely the coloured image and the verbal circumscription, also do not suffice if taken together.
- 25 Within the context of examination of the present case, the Board takes into account what is common knowledge and readily ascertained from scientific sources, within the scope of Article 74(1) CTMR; if, however, the applicant alleges specific facts, he has to bring forward the respective information and evidence himself (see Court of First Instance, Judgment of 15 March 2006 in Case T-129/04, 'Develey ketchup bottle', paragraph 21, OJ OHIM 2006, 943).
- 26 The '*Wikipedia*' article about spectrograms merely gives some technical reference. It explains that a spectrogram is the result of calculating a frequency spectrum of windowed frames of a compound signal. It goes on explaining that spectrograms are used to identify phonetic sounds, to analyse the cries of animals and in the field of music and that they are generated by an instrument called sonograph. They are generated by bandpass filters or from the time signal using the short-time Fourier transform. They can be expressed in various formats.
- 27 Nothing in this definition from '*Wikipedia*' explains how a spectrogram can be 'read'. It is certain that it can be produced by various means. It can perhaps be applied by comparing different spectrograms generated from sound to check whether they are identical or different, *e.g.* to check whether two animal cries stem from the same species. Nothing, however, suggests that the spectrogram alone lets a human being perceive how the sound sounds.
- 28 Again within the ambit of Article 74 (1) CTMR, the Board has considered the references in the '*Wikipedia*' article under the heading 'Creating sound from a spectrogram'. This is maybe the interesting part, as it might point out how the spectrogram could be retransformed into a given sound. This, however, is not the case. It states that spectrograms can be turned into a sound, but it does not state that this will be exactly the same sound as initially. It may be any sound and then the whole notion of spectrograms is practically useless.
- 29 In that context, '*Wikipedia*' refers to a few software programs. On the one hand, the use of these software programs, which are proprietary software, cannot be expected from the reader of a CTM Bulletin. It is unreasonable to expect a reader of the Bulletin to install very specific software on his computer in order

to access the sound. Readers of the Bulletin who work in a company or otherwise within a shared computer network environment are frequently not even allowed to install software on their own. In any case, it is up to the Community trade mark applicant and not a third party to invest the trouble and money in the technical means that would be needed to understand its mark.

- 30 Under ‘Creating sound from a spectrogram’, the ‘*Wikipedia*’ article refers to various software programs. However, none of them promises that they could transform spectrogram files into the underlying sound.
- 31 Under hem.passagen.se/rasmuse, an individual, Mr Rasmus Ekman, offered in 2003 a free program ‘Coagula’ for Windows 95 indicating that no retail version exists yet; since then, nothing seems to have happened. ‘Coagula’ is presented as a software ‘image synthesizer’, that is ‘both for creating and manipulating images and generating sounds from them’ and that can transform any image into a sound. It will transform any coloured lines by interpreting the pixels as a frequency. What is most important is that nowhere it is stated on that webpage that the sound represents a sound embedded in a spectrogram. Would the image filed by the applicant in the present case be retransformed into Tarzan’s yell by that program? The answer is no.
- 32 Under www.coppercloudmusic.com/enscribe, a program ‘Enscribe 0.0.4’ is offered for the free operating system Linux, as a source code to be compiled by the user. This requires command of the commands ‘make’, ‘configure’ and ‘install’, plus resolution of dependencies and if necessary installation of additional .lib library files, as ‘Linux’ only exists in the form of numerous distributions and versions such as SUSE, Red Hat, Knoppix, etc. The Board congratulates anybody who has ever succeeded in installing Linux software from source code. But even if we assume that the reader of the Bulletin has successfully spent some 30 minutes or so installing this software, what would it yield? Under the promising heading ‘Welcome to the wonderful world of’, it is announced that this free software ‘creates digital audio watermark images from photographic images’. The author states that the images can only be seen by using another software program, for which he recommends a program called ‘Baudline’. The author goes on: ‘How does it work? You give it an image file (JPG, PNG, WBMP) and it outputs an audio file ... The scanlines of the input image are converted into frequency components and then using an inverse Fast Fourier Transform, are converted into sound. The audio images sound like high pitch buzzing or hissing.’ Obviously, this means transforming any image into a sound that has nothing to do with acoustic information – and will sound like buzzing – but this is not software by which the applicant’s spectrogram could be transformed into the sound underlying the spectrogram.
- 33 The other two items mentioned in ‘*Wikipedia*’ are a Java applet and a program for the Macintosh operating system. A further reference is made that electronic music artists can hide images in their music.
- 34 To sum up, there are some very exotic software programs, none of them being part of a standard PC installation, that operate in the area of image/sound creation, but none of them pretends to have as its feature the ability to create

spectrograms from sounds and also then reconvert the spectrogram into the same sound.

- 35 Even if that were technically possible, it would still not render the filed representation ‘self-contained’ as this criterion requires the intelligibility of the sound without external technical support such as the installation of specific software.
- 36 The applicant chiefly relies on what it pretends to be a well-known fact, namely that most people would know the ‘Tarzan yell’. These arguments must be dismissed for a number of reasons.
- 37 Firstly, one fails to see how the alleged knowledge of how the applied-for sound would sound acoustically can render a non-self-contained image capable of representing that sound.
- 38 This is even true for animal cries that everybody knows from childhood, or famous classical melodies that everybody with a slight interest in music knows independently from the trade mark applicant’s activities, as was the case in ECJ ‘Shield mark’. *A fortiori* this must apply to a sound that the applicant pretends to have made known itself.
- 39 Next, that ‘everybody knew the Tarzan yell’, is a mere allegation, for which the applicant has not furnished any evidence.
- 40 However, the very inconsistency of this argument lies in that it implies that this sound has been used by the applicant or on his behalf and that the applicant’s ‘everybodies’ have actually seen one of the Tarzan movies. So in fact the applicant relies not on a graphic representation, but on the memory in the mind of an average consumer who remembers the Tarzan yell. This means nothing but that the sound itself, if heard, is distinctive. But for that it must be able to be heard in the first place.
- 41 Even then, the ‘Tarzan yell’ may take various forms. The applicant is the successor-in-title of the English author Edgar Rice Burroughs, who wrote the ‘Tarzan’ novels starting with ‘Tarzan of the Apes’ in 1912. The plot is that Tarzan, son of a British lord, grows up among apemen, is brought back to civilization, tries to live a civilised life but prefers to return to the jungle. Later the novels were filmed; the first ‘Tarzan’ of the sound film era was Olympic gold medal winner Johnny Weissmüller in 1932. Later movies were made from 1949 to 1953 with Lex Barker (five movies), from 1955 to 1960 with Gordon Scott (six movies) and 1981 with Bo Derek co-starring as ‘Jane’, as well as several others (see article about ‘Tarzan’ in *Wikipedia*). The applicant does not indicate which actor’s yell or the yell from which movie he wants to protect.
- 42 The applicant now wants to convert the yell into a source identifier for the goods and services claimed in its CTM application. It thus seeks to establish a distinctive sign for those goods and services. However, distinctiveness (Article 7(1)(b) CTMR) is not in issue. It might well be conceivable that a yell of the kind the applicant seeks to protect would fit perfectly as a unique source

identifier for goods and services of different kinds. This, however, is not the scope of this appeal proceeding, which is exclusively concerned with the representation of the trade mark as being one of the filing date requirements.

- 43 All the arguments advanced by the applicant on the well-known character of the ‘Tarzan’ character and his yell are pertinent to the notion of distinctiveness, whether or not with the assistance of Article 7 (3) CTMR, but if it were true that most people knew that yell, that would not render a spectrogram, even for that yell, easily recognisable and that would not render a verbal reference to that yell a clear and unambiguous representation of the yell itself, in the same way as the verbal reference to the sound of a cock’s crow did not suffice for the ECJ as a proper representation for a sound mark consisting of a cock’s crow (see ECJ, Judgment in Case C-283/01, ‘Shield mark’ paragraph 60).
- 44 The arguments of the applicant regarding the alleged inaccuracies of musical notations as representations of sounds do not assist its case. On the one hand, this is inconsistent with the ECJ’s Judgment ‘Shield mark’ which held that musical notations do satisfy the conditions of being clear, easily accessible, etc whereas no other type of graphic representation passed that test and if on the other hand it was true that musical notations were ambiguous, we fail to see how this could make a type of representation acceptable which is, undoubtedly, much less clear and intelligible.
- 45 As there have been many *obiter dicta* in and around this case, we should take the time to add a few on musical notations. A musical note represents a particular frequency of a sound wave that produces the pitch, which is the mathematical definition of a sound. For example 440 Hertz is defined as the standard a’ (as a sinus curve) and 880 Hertz is one octave higher. A sequence of musical notes in a single-staff thus represents a melody consisting of the respective frequencies and if that should be played by a symphony orchestra, more staves with more scores needed to be added. The fact that a piece of music can be played by a symphony orchestra or in different ways does not render a one-bar staff with a melody ambiguous. Many people can read musical notations. According to the ‘Deutscher Musikrat’ (German Council of Music, www.deutscher-musikrat.de and statistics on <http://www.miz.org/intern/uploads/statistik40.pdf>), 13 % of the whole German population above 14 years old play an instrument, and 6 % sing in a choir. Musical notation is taught at school. Musical notation is a language, like verbal languages. Also the official languages of the European Community are not spoken by all Community citizens. Beethoven’s music has survived until today only in the form of scores (musical notation) and his music is not ‘ambiguous’, only perhaps its interpretation. However, nobody would be able to hum the Tarzan yell from the spectrogram filed by the applicant in the present case and nobody reads spectrograms for entertainment.
- 46 It is precisely because sounds, not only music in the very sense, may function as a trade mark but their proper graphical reproduction in other than musical notation form is so difficult or even unconceivable, that the legislator has added, in July 2005, new Rule 3 (6) CTMIR that allows the filing of sound files, in an electronic CTM application (e-filing) and together with a graphical

representation. Such sound files do fulfil the requirements of being easily accessible and self-contained, as the Office publishes the sound file in electronic format and the reader of the CTM Bulletin will then be able to hear the sound.

- 47 The deficiency in the graphic representation extends not only to Article 4 and 7 (1) (a) CTMR or the corresponding provisions of First Council Directive No 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, which was in issue in the ‘Shield mark’ and ‘Sieckmann’ case, but also to the filing date requirements under Article 26 CTMR in conjunction with Rule 9 (1) CTMIR. The representation of the trade mark to which Article 26 (1) (d) CTMR refers certainly does not have to fulfil all the formality requirements (see also the difference made in Article 36 (1) (a) and (b) CTMR, as well as in Rule 9 (1) and (3) (a) CTMIR), but it has to fulfil the criteria of being clear, precise, intelligible, etc. Something that pretends to represent a sound but is not intelligible or clear cannot be considered as a representation of the mark at all. Something that is not intelligible as a representation is not a representation of a mark. The present case is different from the situation where a colour combination is filed but the applicant claims this combination in all conceivable arrangements (which is not allowable, cf. ECJ, Judgment of 24 June 2004 in Case C-49/02 ‘Heidelberger’, and Board of Appeal, Decision No R 1004/2006-2 of 13 December 2006, ‘Purple/white’); in that case, the representation as such was present but what harmed it was the applicant’s claim that he did not, or not only, wish to protect the mark as depicted in that representation but also in many other forms and combinations. In the present case, what has been filed as a graphic representation is from the outset not capable of serving as a graphic representation of the applied-for sound. The examiner was therefore correct to refuse the attribution of a filing date.

Order

On those grounds,

THE BOARD

hereby:

Dismisses the appeal.

D. Schennen

I. Mayer

F. López de Rego

Registrar:

N. Semjevski