

**Decision on the inherent distinctiveness of an application for  
a European Union trade mark  
(Article 7 EUTMR)**

Alicante, 12/07/2024

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*Application No:* **018928994**  
*Your reference:* **83647203**  
*Trade mark:* **X**  
*Mark type:* **Word mark**  
*Applicant:* **X Corp.  
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**I. Statement of the facts**

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The Office raised an objection on 10/11/2023 pursuant to Article 7(1)(b) and (c) and Article 7(2) EUTMR because it found that the trade mark applied for is descriptive and devoid of any distinctive character.

The objection was raised for the services in Classes 41, which after the amendments due to a classification deficiency read as follows:

Class 41 *Organizing and conducting exhibitions, events, workshops, seminars, and panel discussions; publishing of user-generated blogs on a web site; publishing of online journals, namely, publishing of blogs and video blogs featuring personal information and opinions in the field of general interest.*

The objection was based on the following main findings:

The relevant English, French and Spanish-speaking consumer would understand the sign as indicating that the services might have a content that is not suitable for minors due to its rude or sex related nature.

The abovementioned meanings of the sign 'X', of which the trade mark consists, is supported by the following dictionary references.

[https://www.oed.com/dictionary/x\\_n?tab=meaning\\_and\\_use#14043634](https://www.oed.com/dictionary/x_n?tab=meaning_and_use#14043634)

<https://dictionary.cambridge.org/dictionary/english/x-rated>

<https://dictionary.cambridge.org/dictionary/english/x-rated>

<https://dle.rae.es/x>

The relevant consumers would perceive the sign as providing information that the services in Class 41 which refer to the provision of blogs are (also) featuring content that should be accessible for adults only (i.e. is x-rated) and/or that these services specifically take into account the requirements to be respected for such content, i.e. the granting of access thereto to is made impossible for minors (e.g. under the age of 16 or 18 years old). Therefore, the sign describes the kind and/or intended purpose, of the services.

Given that the sign has a clear descriptive meaning, it is also devoid of any distinctive character and therefore ineligible for registration under Article 7(1)(b) EUTMR. This means that it is incapable of performing the essential function of a trade mark, which is to distinguish the goods or services of one undertaking from those of other undertakings.

In addition, by a part of the public in the European Union, the 'X' will be seen as a simple representation of two crossed lines, a representation that is commonly used to highlight a choice or to cross something out. It may also be used due to the extremely simple design as a purely decorative element.

Simple geometric figures such as circles, lines, rectangles or common pentagons cannot convey any message that will be remembered by consumers and will accordingly not be seen by them as a trade mark. The public targeted will therefore not perceive the sign 'X' as an indicator of commercial origin.

A cross is one of the simplest geometric shapes. Consumers are not accustomed to deriving the origin of goods or services from a simple geometric shape. This has been confirmed by the Court in numerous judgments (12/09/2007, T-304/05, 'Pentagon', EU:T:2007:271, § 22; 03/12/2015, T-695/14, 'DARSTELLUNG EINES SCHWARZEN QUADRATS MIT AUSLASSUNG' (fig.), EU:T:2015:928 § 18; 25/09/2015, T-209/14, 'Grünes Achteck' (fig.), EU:T:2015:701, § 43; 09/12/2010, T-282/09, 'Carré convexe vert', EU:T:2010:508, § 20-21; 13/07/2011, T-499/09, 'Purpur', EU:T:2011:367, § 25, 34). In the form represented, the public will therefore not perceive a sign that refers to a specific commercial origin [27/03/2019, R 1948/2018-2 -5, 'X' (fig.), § 35].

Therefore, the sign is devoid of any distinctive character within the meaning of Article 7(1)(b) EUTMR.

## II. Summary of the applicant's arguments

The applicant submitted its observations on 15/03/2024, which may be summarised as follows.

1. As far as the objection is based on the alleged perception of the letter X as a "simple geometric shape" the applicant points out that the application is for a word mark, i.e. for the verbal element X. Moreover CJEU and the Office's Boards of Appeal have confirmed in several decisions that there is no rule that a single letter a priori would lack distinctive character.

In any case the Office would have the duty to explain any deviation from its previous practice.

2. The letter X does not convey any meaning and is also not used to describe the services at hand. The definitions provided by the Office refer to films which have nothing in common with the blog related service of the application. Moreover the convention in relation to marking films was X-rated and not the single letter X.

Moreover the alleged descriptive meaning would not describe an intrinsic characteristic of the series, which is a prerequisite for an objection under Article 7(1) c as pointed out by the Court of Justice in T-423/18 (Vita).

The applicant points out that in its opinion the Office has to demonstrate the alleged descriptive meaning in relation to the services at hand.

3. The Office has previously registered the letter X for Class 41 services as can be seen from the attached list.
4. The Applicant claims that the sign under the Application has acquired distinctive character through use within the meaning of Article 7(3) EUTMR. The claim is a subsidiary claim.

## III. Reasons

Pursuant to Article 94 EUTMR, it is up to the Office to take a decision based on reasons or evidence on which the applicant has had an opportunity to present its comments.

After giving due consideration to the applicant's arguments, the Office has decided to waive the objection in part, namely as far as it was relying on Article 7(1) b EUTMR only and based on the argument that the sign would be perceived as a simple geometrical shape".

The objection is maintained for all services insofar as it was based on the understanding of the sign as meaning "X-rated" and relying on Articles 7(1) b and c EUTMR.

1. The objection has been waived insofar as it was based on the alleged perception of the letter X as a "simple geometrical shape". For reasons of procedural economy the Office therefore refrains from discussing the applicant's reply thereto in detail.

2. The Office agrees with the applicant that for a sign to be caught by the prohibition set out in Article 7(1) c EUTMR, there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods and services in question or of one of their characteristics (22/06/2005, T-19/04, Paperlab, EU:T:2005:247, § 25; 27/02/2002, T-106/00, Streamserve, EU:T:2002:43, § 40).

As regards the argument that the letter X in itself does not convey any clear meaning, it needs to be noted that the descriptiveness of a sign can only be assessed, first, in relation to how the relevant public understands the sign and, second, **in relation to the goods or services concerned** (13/11/2008, T-346/07, Easycover, EU:T:2008:496, § 42; 22/11/2018, T-9/18, STRAIGHTFORWARD BANKING, EU:T:2018:827, § 18).

As laid out in the objection letter and demonstrated by several dictionary references for different languages the letter X and the term X-rated are used synonymously depending on the context, that is the full term will be used when explaining or referring verbally to the concept connected therewith, while on the goods themselves or in advertising for the services concerned the letter X without further addition will be used. This is also demonstrated by the examples provided in the Wikipedia article which the applicant introduced to the procedure as Enclosure 1. All the examples of use of the x-rating show that it is done by depicting the letter X alone and without



further stylisation or verbal additions’.

The X was indeed used initially to classify films/movies. However, as indicated amongst other in the second definition provided in the objection letter dated 10/11/2023, the use has been extended along with the technical possibilities and encompasses ‘movies, electronic images, books, magazines, etc’, that is to say it is universally used and understood for all media.

Apart from the broadened understanding of X and X-rated that goes beyond movies/films/videos it needs to be noted that blogs are informational websites in a diary style that of course may contain (short) movies/films/videos or may even mainly use videos to provide information (video blogs or vlogs).

As far as the applicant is of the opinion that the characterization of the Class 41 as X or X-rated is not describing an intrinsic characteristic as required for a refusal by the Court of Justice in T-423/18 (Vita), the Office disagrees. Firstly in paragraph 45 of the decision the Court clarified the broad term “intrinsic characteristic” which may take several meanings and pointed out that it is referring to a characteristic that is ‘inherent to the nature’ of the goods and not a purely random and incidental aspect.

As for the Class 41 services at hand they all fall under the broad category of provision of content for the purpose of entertainment and information. The nature of the content provided by the services is defining their nature and thereby by no means a “purely random and incidental aspect”. Insofar the description of the subject matter as X, X-rated or in a larger sense as sexual content or pornographically content, is therefore indeed a description of an intrinsic characteristic of the services.

The Office also is not required to show actual use of a sign on the market.

The Court has confirmed that it is not up to the Office to show that other similar signs are used on the market:

[W]here the Board of Appeal finds that the trade mark sought is devoid of intrinsic distinctive character, it may base its analysis on facts arising from practical experience generally acquired from the marketing of general consumer goods which are likely to be known by anyone and are in particular known by the consumers of those goods ... In such a case, the Board of Appeal is not obliged to give examples of such practical experience. (15/03/2006, T-129/04, Plastikflaschenform, EU:T:2006:84, § 19).

It is on the basis of such acquired experience that the Office submits that the relevant consumers would perceive the sign applied for as non-distinctive and not as the trade mark of a particular proprietor. Since, despite the Office's analysis based on such experience, the applicant claims that the trade mark applied for is distinctive, **it is up to the applicant to provide specific and substantiated information** to show that the trade mark applied for has distinctive character, either intrinsically or acquired through use; it is much better placed to do so, given its thorough knowledge of the market (05/03/2003, T-194/01, Soap device, EU:T:2003:53, § 48).

The applicant has not provided any specific and substantiated information showing that the trade mark applied for has distinctive character in the relevant market sector that could disprove the Office's analysis, which is based on facts arising from practical experience generally acquired from the marketing of the goods and services concerned.

3. The applicant argues that the Office has accepted a large number of similar registrations. However, established case-law states that 'decisions concerning registration of a sign as a European Union trade mark ... are adopted in the exercise of circumscribed powers and are not a matter of discretion'. Accordingly, the registrability of a sign as an EUTM must be assessed solely on the basis of the EUTMR, as interpreted by the EU judicature, and not on the basis of previous Office practice (15/09/2005, C-37/03 P, BioID, EU:C:2005:547, § 47; 09/10/2002, T-36/01, Glass Pattern, EU:T:2002:245, § 35).

'It is clear from the case-law of the Court of Justice that observance of the principle of equal treatment must be reconciled with observance of the principle of legality according to which no person may rely, in support of his claim, on unlawful acts committed in favour of another' (27/02/2002, T-106/00, Streamserve, EU:T:2002:43, § 67).

Furthermore, it needs to be pointed out that the cases quoted by the applicant are figurative marks and already for that reason not directly comparable to the current application. Moreover many of them claim very different services from the case at hand, albeit covering Class 41.



For example EUTM 018727353 '' is stylized and the services claimed in Class 41 are *sporting and cultural activities; sports club services; organization of sporting events*. These activities and events will typically not have any sexual or offensive content and therefore the letter X will, independently of its stylization, not be perceived as indicating a X-rating.

Finally, market practices, languages and examination practices evolve over time and the majority of the marks cited and the registration of which dates back ten or more years, may, therefore, have been accepted as they were considered to be registrable at the time of application, though that may not be the case nowadays. Moreover, where marks are in fact registered *contra legem*, there is a mechanism in place to deal with such cases, namely that of cancellation proceedings (BoA decision R 2076/2022-4, LET INNOVATION MOVE YOU § 48).

#### IV. Conclusion

For the abovementioned reasons, and pursuant to Article 7(1)(b) and (c) EUTMR and Article 7(2) EUTMR the application for EUTM No 018928994 is declared to be [descriptive and non-distinctive in the English, French and Spanish speaking part of the EU, namely in Ireland, Malta, **Denmark, Finland, the Netherlands, Sweden**, France, Belgium, Luxembourg and Spain for all the services claimed.

According to Article 66(2) EUTMR, you have a right to appeal against this decision which does not terminate the examination proceedings. According to Article 68 EUTMR, notice of appeal must be filed in writing at the Office within two months of the date of notification of this decision. It must be filed in the language of the proceedings in which the decision subject to appeal was taken. Furthermore, a written statement of the grounds for appeal must be filed within four months of the same date. The notice of appeal will be deemed to have been filed only when the appeal fee of EUR 720 has been paid.

Once this decision has become final, the proceedings will be resumed for the examination of the subsidiary claim based upon Article 7(3) EUTMR and Article 2(2) EUTMIR.



**Volker Timo MENSING**