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The registration of an iconic movie theme as a trade mark: only ‘diamonds are forever’

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Abstract – 2022 was a landmark year for the James Bond franchise. It saw the 60th anniversary of the first Bond film *Dr. No* but also the death of the British composer Monty Norman who composed the hit music theme underlying some of the Bond universe’s most iconic and nostalgic moments. On the 25th of February of that same year, a part of the musical score also achieved trade mark registration. However, this development attracted little attention by academics and practitioners. The article takes Case R 1996/2020-5 on the registration of the sound of the famous James Bond theme as a case study and considers the broader question of when a movie theme is sufficiently distinctive to be a worthy contender of a sound mark. It reflects on the potential scope of protection afforded to key acoustic identifiers of films, alongside any copyright protection that may otherwise subsist in the sound.

Keywords: trade marks, sound marks, registrability, EU law, movie themes, film industry, James Bond, copyright

Introduction

The year of 2022 was a significant milestone in the James Bond universe. It marked the 60th anniversary of the first Bond film *Dr. No* but also saw the death of the British composer Monty Norman who notably gave birth to the hit music theme for the Bond films. On 25 February of the same year, a part of the musical score, which underlines some of the franchise’s most iconic and nostalgic moments, was registered as a trade mark following a successful appeal before the European Union Intellectual Property Office (EUIPO) by the company that co-owns the copyright in the existing and controls the right to produce future Bond films. This development seems to have been lost sight of in the wave of excitement that swept through audiences following the delayed global premiere of *No Time to Die*, the latest instalment of the spy classic.

The value in sonic or audio branding may go some way in explaining the interest behind obtaining trade mark protection for the Bond theme. Just as its earliest visual elements are deemed iconic today (e.g., the gun barrel sequence in the opening titles that has become synonymous with the 007 character), sonic branding will likely acquire a similar status tomorrow. The strategic development of an audio DNA ‘can play an important role in positively differentiating a product or service, enhancing recall, creating preference, building trust, and even increasing sales’ (Minsky and Fahey, 2014). The appellant’s success in this case

is likely to boost their merchandising and licensing arrangements spanning some of the world's most famous luxury (and other prestigious) brands.

The article first sets the scene by looking at the wider EU legal framework surrounding the registrability of trade marks as sounds and moves on to consider the question of when a movie theme is sufficiently distinctive to benefit from protection as a sound mark. Using the recent registration of the sound palette allied with the Bond storytelling as a case study (EUTM registration date 25 February 2022 following Case R 1996/2020-5, EUIPO Fifth Board of Appeal), the analysis sheds light on some of the implications of broadening the intellectual property protection of highly distinctive sounds through the trade mark – copyright interface.

The broader legal context

Before examining the Bond theme ruling and its implications, it is important to look first at the broader legal context concerning the registration of sound marks in EU law. Under Art. 3(3)(g) of the Commission Implementing Regulation (EU) 2018/626, a sound mark is a trade mark that consists exclusively of a sound, or a combination of sounds, and can be represented either by an audio file that reproduces the sound for which protection is sought (e.g., MP3) or an accurate representation of the same using musical notation. Similar to other types of marks, sound marks are required to meet the well-established 'Sieckmann' criteria which fulfil three key functions aimed at facilitating the 'the sound operation of the trade mark registration system' (*Ralf Sieckmann v Deutsches Patent- und Markenamt*, C-273/00, para. 47 and Recital 9 of the Amending Regulation (EU) 2015/2424), i.e., the property, publicity and administrative functions (*Ralf Sieckmann v Deutsches Patent- und Markenamt*, C-273/00, paras. 48-54). Descriptions of sounds in words or sequences of musical notes alone that make it impossible to determine the pitch and duration of the sounds forming the melody, as well as onomatopoeia, do not adequately serve these functions and are therefore very unlikely to be accepted as representations of sound marks in EUTM applications (*Shield Mark BV v Kist (t/a Memex)*, C-283/01, paras. 59-61).

The acceptability of a sound mark typically depends on whether the sound at issue is distinctive *per se*, namely the average consumer can perceive a sound sequence as a memorable one, indicating that the goods or services covered are exclusively associated with one trader. So, a short tune of two musical notes (e.g., the sound of a door bell) or sounds characterised by excessive simplicity would only be perceived as very banal and would have no impact on the consumer. Likewise, sounds that are too long to be considered as indications of origin or are commonly associated with specific goods (e.g., typewriter end-of-line bell ring and carriage return for stationery and office requisites or sounds that computers emit when booting applied to computer hardware) are unlikely to pass the distinctiveness threshold, save for those cases where there is evidence of factual distinctiveness.

But, what if the sound for which trade mark protection is sought corresponds to the music theme of a movie? The musical score written to accompany a film is one of its core elements alongside the plot, which is the brick and mortar a film is founded on. Sound considerably enriches a film's texture and is closely interlinked with its narrative (e.g., brooding synths and beats can tell us when a character is plotting a dastardly revenge). As sonic or audio branding is increasingly turning into a significant commercial asset in contemporary audio-enabled media environments, the EUTM application to protect the familiar Bond theme presents an

opportunity to consider the under-explored question of when a movie theme is sufficiently distinctive to attract a trade mark registration.

Background to the dispute

In Case R 1996/2020-5, the appellant, Danjaq LLC, was a California-based holding company that co-owns the copyrights in the existing James Bond films and controls the right to produce future Bond films. Its UK-based affiliate, EON Productions, makes the James Bond films. Both Danjaq and EON control the rights to all worldwide Bond merchandising. The trade marks associated with the books and other non-film productions are held, however, by Ian Fleming Publications. In December 2019, Danjaq filed an application with the EUIPO to register a snippet of the ‘James Bond theme’ as a sound mark. The mark can be retrieved on the EUIPO’s website (EUTM filing number [018168977](#)).

The original Bond theme is credited to the British film composer Monty Norman who received a special Ivor Novello Award for it. The musical work was first used in the opening of *Dr. No*, released in 1962. It was subsequently played throughout Sean Connery’s tenure until 1967. Since then, it has been re-arranged (e.g., with different tempo) and modernised, including by composer John Barry, whose continued involvement with the Bond films led many to believe that he had written the original music. In 2001, Norman won £30,000 in libel damages over a *Sunday Times* article which had falsely claimed that Barry had written the distinctive twangy surf guitar riff. During the two-week jury trial in London’s High Court, the tune was described as ‘one of the most famous pieces of music in the world’ (BBC News, 2001). Since its first release, the main signature theme remains as much an integral part of the franchise’s iconography as shaken-not-stirred martinis and resourceful ‘Bond girls’. It would hardly be an exaggeration to say that James Bond has become a British institution, with two separate generations of royals attending the premiere of the latest 25th Bond title *No Time to Die* (BBC News, 2021).

Interestingly, the mark applied for represents an extract from a recording of the arrangement that was made in 1997 by Grammy Award-winning English film composer David Arnold. Arnold has scored four Bond films, including *Casino Royale*. His composition is not too dissimilar from the original theme and incorporates the characteristic guitar riff too. The precise extract that was applied for in the *Bond* case was described by the Board of Appeal as a 25-second sound sequence comprising three musical parts that are devoid of word elements, yet ‘distinctively interacting with each other’ (Case R 1996/2020-5, para. 17):

It begins with the characteristic trumpet fanfare (seconds 1-5); a kind of dangerous and lingering ‘creeping up’ sequence, slow part (seconds 6-11); followed by a guitar solo (seconds 12-25).

The goods covered by the application were partly for everyday consumption and partly specialised: skin care products and perfumery (Class 3); audio-visual, telecommunication and computer equipment (Class 9); jewellery and watches (Class 14); stationary (Class 16); leather, luggage, card holders and business bags (Class 18); glassware (Class 21); clothing, footwear and headgear (Class 25); toys, board games, sporting articles and video game apparatus (Class 28); beers and non-alcoholic drinks (Class 32); alcoholic beverages (Class 33) as well as

tobacco and smokers' articles (Class 34). The goods are all by and large associated with the Bond sphere and are often commercialised in the entertainment sector.

In September 2020, the EUIPO examiner rejected the application on the grounds that the sign at issue consisted of a structure of musical segments that made it difficult for consumers to immediately perceive it as an indication of origin of the claimed goods and thus considered that it could not function as a trade mark. The EUIPO's Fifth Board of Appeal disagreed.

When can a movie theme attract protection as a sound mark?

In line with previous case law, the Board confirmed that, although the criteria for assessing the distinctiveness of sound marks within the meaning of Art. 7(1)(b) EUTMR 2017/1001 are not different from those applying to other categories of marks, the targeted public's presumed perception is not necessarily the same in relation to each of those categories. The public is used to perceiving instantly more 'traditional' marks, like word or figurative marks, as identifiers of commercial origin, but the threshold might be higher in the case of signs that consist solely of a sound element.

However, it is not uncommon for consumers to identify goods or services linked to certain sectors, like television or radio broadcasting (*Globo Comunicação e Participações S/A v EUIPO*, Case T-408/15, paras. 41-43) by means of sound elements which enable them to align a media output with its commercial origin, such as the recognisable BBC News start-up tune. The relevant public is accustomed to sounds as origin indicators in the entertainment sector too, such as the famous Metro-Goldwyn-Mayer lion roar in the film industry (EUTM filing number 005170113). In such cases, sound marks are not very different from other conventional trade marks: consumers are more likely to perceive them as designations of origin and it is not a lot harder to establish their distinctive character (as it is, for instance, in the case of shapes or colours).

The Board was critical of the examiner's 'sweeping assumption regarding the behaviour of the relevant consumers, namely that the mark applied for was too long to be easily and instantly memorised as an indication of origin' (Case R 1996/2020-5, para. 20). The goods and services covered were quite disparate, they fulfilled different purposes and targeted different consumers; hence, such a global assessment of the facts was inappropriate.

The Board accepted the appellant's analogy to slogans, which have been held to serve as origin identifiers and possess distinctiveness when they are capable of exhibiting a certain originality and resonance that enable the relevant public to commit an expression to memory easily (*Audi AG v OHIM*, Case C-398/08 P, para. 57). In a similar way, sound marks can be distinctive, provided that they exhibit a certain resonance that enables the target consumer to perceive them as a trade mark and not as a functional element or as an indicator without any inherent characteristics (*Globo Comunicação e Participações S/A v EUIPO*, Case T-408/15, para. 45; see also *Ardagh Metal Beverage Holdings GmbH & Co. KG v EUIPO*, Case T-668/19 and Antoniou, 2022). In the present case, the Board had 'no doubt' that the sound at stake had originality, as it formed part of an existing original musical work, and resonance too, since the melody and its three distinct parts formed a dramatic, dynamic and memorisable entity in which consumers would recognise an indication of commercial origin for the goods covered.

As far as the duration of the musical sequence is concerned, the Board disagreed with the examiner's view that the sound was 'too long to be easily memorised'. It noted that there was no concrete test by which the originality and memorable nature of a sign could be measured to establish the distinctive character of a trade mark (*View Inc v EUIPO*, Case T-49/19, para. 34). That said, the assumption of an original distinctive character is likely to be more readily questioned when a sound mark falls at the opposite ends of a notional spectrum of length, i.e., on the one hand, simple and extremely short sounds and, on the other hand, whole songs (usually around three minutes) or even entire symphonies that only professionals could possibly remember. The 25-second sound sequence applied for in this case lay somewhere in the middle, if not in the lower end, of this axis.

Also, there was no requirement that the consumer memorises the sign 'down to the smallest detail' for it to be eligible for registration (Case R 1996/2020-5, para. 32). It was sufficient for a sign to be capable of triggering in the target consumer a memory effect. The striking and fairly short sound sequence applied for in the *Bond* case could enable recognition of a wide variety of goods, like a catchy and instantly appealing advertising jingle. In addition, the sound sign was found to be capable of indicating the commercial origin of the goods for which registration was sought because the Bond theme - alongside the elements '007' and 'James Bond' - shows not only artistic but also commercial origin, i.e., that its commercial origin is the production company of the films in the Bond series (Case R 1996/2020-5, para. 37). The fact that the public is unlikely to be familiar with the name of that company (Danjaq LLC) did not however appear to carry any legal weight in the Board's view. It was sufficient that the sound mark has come to distinguish the film franchise from others.

For all these reasons, the contested decision was annulled, and the application proceeded to registration for all the goods applied for.

Practical considerations

Contrary to the EUIPO's examiner, who took the view that the applied for extract of the famous Bond theme was too long and too complex to serve as an indication of commercial origin, the Board of Appeal rightly concluded that the tune for which protection was sought is eminently distinctive and *can* function as a trade mark. The sound palette allied with the Bond storytelling is memorable not only because it is melodically strong but also because it is recurring in its entirety, or in part several times, throughout a film. In so far as it is a widely known theme that has been used by the long running spy film series for nearly six decades, it cannot be excluded that members of the relevant public are used to establishing the link between that sound sequence and the films made by the applicant company, thereby making it easier for that public to identify the commercial origin of the goods covered.

Although not expressly addressed in the appellate ruling, the choice of the particular extract of David Arnold's composition in the application raises the question of what the primary focus of registration should be when a sound is implemented varying across an entire film franchise. This acquires special significance in light of the fact that protection is limited to the form of the trade mark which is applied for or represented on the register (for a recent articulation of the relevant principles, see *Chanel v EUIPO*, Case T-44/20). For instance, since its first release in 1967, the rollicking and suspenseful Mission Impossible tune has been updated by famous composers (like Hans Zimmer, Danny Elfman and more recently Lorne Balfe) and employed

in somewhat different versions across the franchise. However, its more memorable motifs (e.g., five beats to the measure instead of the more commonplace three or four, simple syncopation, the chase sequence etc.) have been retained. When looking to protect a sound through a trade mark registration, it is worth concentrating primarily on those core elements of the sound in question that unify the different renditions as well as on the underlying melody that is consistently employed without changing significantly over time. These traits are more likely to make the tune distinctive and recognisable, thereby maximising the chances of a successful registration.

The *Bond* ruling also helpfully highlights to applicants and practitioners that very short or very long sound sequences are less likely to be accepted as valid EUTMs. The EUIPO has previously registered sound marks of duration similar to the portion of the *Bond* theme applied for or even longer (e.g., EUTM filing number 010114858 for a 35-second sound mark in Classes 11, 20 and 35). Rather than applying to register the entire theme tune, an application for a short sound bite that is often replicated throughout a movie and represents the key acoustic identifier of a brand is more likely to succeed. Sounds of very limited duration are likely to fare less well. For instance, the EUIPO's Examination Division rejected in February 2019 Netflix's application to register the 4-second 'Netflix sound mark' for audio-visual streaming and entertainment services because of lack of distinctiveness pursuant to Art. 7(1)(b) EUTMR (Case R 752/2019-1). However, whilst the length of a sound sequence is considered, it should be borne in mind that it is not of itself a decisive criterion and should not be divorced from the sound's specific composition. A non-distinctive sound which nonetheless comprises other distinctive elements, like words/lyrics, will be considered as a whole. An unusual arrangement of sound elements may also confer distinctiveness to a sound mark in its totality (consider, for instance, Mancini's slinky swing tune for *The Pink Panther*) and may be a worthy contender for trade mark protection.

The scope of protection

The James Bond theme and its several specific recordings are protected under copyright and related rights. As of 17 February 2022, a 25-second extract from a 1997 rendition of the theme became a registered trade mark, broadening the scope of intellectual property protection afforded to the universe of the world's most well-known suave spy agent.

So, the *Bond* theme sound mark now benefits from two strands of intellectual property. It can be protected both as an original creative work through copyright *and* as a badge of commercial origin through trade marks. Trade mark and copyright systems are not mutually exclusive. In principle, the cumulation of trade mark protection with protection based on other intellectual property rights *is* permitted under EU law. For example, Art. 16 of the Directive 98/71/EC on the legal protection of designs makes clear that the Directive's regime applies 'without prejudice' to other forms of protection under the provisions of EU law (or of the law of a Member State) relating to trade marks or other distinctive signs, patents, typefaces etc. A significant advantage of the dual level of protection effectively gained in the *Bond* case is that, although the term of protection for the copyright in the underlying musical work is finite, i.e., the creator's life, plus 70 years, calculated from the end of the calendar year which sees the death of the creator (Council Directive 93/98/EEC), the trade mark can provide infinite protection.

Thus, the sound mark is capable of outlasting copyright protection. This potentially monopolises the sound on an indefinite basis, provided that it is renewed by its owner and is put to genuine use as a trade mark (but, if not, it will be vulnerable to cancellation, possibly long before the copyright protection expires). The different configuration of the trade mark and copyright systems means that their overlap can evidently lead to tensions within the sphere of intellectual property protection. This may be explained to an extent by the differences between the purpose of the two systems. Whilst trade marks aim to enhance market transparency and contribute to the foundations of fair competition, the underlying premise of copyright essentially serves to promote creativity and cyclical cultural innovation. The latter is supported, among others, by rules of limited terms of protection which stand in marked contrast to the indefinite protection conferred by marks. The time limits imposed by the legislature in the case of copyright reflect the need for a balance between the economic interest in protecting creativity and the public interest in the free availability of copyright works after the expiry of the limited term of protection (this allows for the possibility of exploiting other people's intellectual achievements in the interests of promoting future socio-economic development). Perpetually renewable trade mark rights can, however, disrupt this balance by unduly extending the life of other rights which the EU legislature has sought to make subject to limited periods and ultimately frustrate the overarching objective underlying the copyright system, i.e., the constant enrichment of the public domain. As Advocate General (AG) Szpunar put it in one of his Opinions (*Hauck GmbH & Co. KG v Stokke A/S and Others*, Case C-205/13, para. 37 and resulting judgment, para. 19; see also Opinion of AG Szpunar in *Simba Toys GmbH & Co. KG v EUIPO*, Case C-30/15 P, para. 35):

Exercise of a trade mark right in order to extend an exclusive right to immaterial assets protected by other intellectual property rights could — after those rights have expired — jeopardise the balance of interests which the legislature established inter alia by limiting the scope of protection conferred by those other rights.

The intellectual property maximisation of the Bond theme through cumulative protection may further interfere with the said balance in cases where infringement is claimed. The assessment is likely to necessitate a comparison between the overall impression created by the allegedly infringing sound sequence and the registered sound mark. However, the infringement criteria across the trade mark and copyright systems are not harmonised. The questions that will normally be asked in the context of trade mark infringement will be different from those asked in respect of copyright infringement. As regards trade mark law, the originality of a sign does not refer to the creator's proper intellectual creation as such, as in the context of copyright protection (Cases *Infopaq International A/S v Danske Dagblades Forening*, C-5/08, *Eva-Maria Painer v Standard VerlagsGmbH and Ors*, C-145/10, and *Cofemel v G-Star Raw CV*, C-683/17). Trade mark rights differ in that they constitute rights of use - not creation - and thus the originality (or creative facet) of a sign is assessed for its impact on the perception of the sign's distinctiveness on the minds of the targeted public, rather than for itself. A registered trade mark can thus notionally protect the sound, but also prevent the use of sound sequences that are confusingly similar to the protected sound. Unlike copyright enforcement, trade mark enforcement does not require proof of copying on the part of the alleged infringer to succeed in a claim; rather, a trade mark infringement claim can succeed if it is established (among other

requirements) that the average consumer is likely to be confused. Therefore, a trade mark registration for distinctive sounds that are instantly recognisable upon hearing can be a valuable form of supplemental protection for consideration. Alongside the trade mark registration of other related visual identifiers, the resultant armoury of protection can prove to be a powerful enforcement tool. A rights holder enjoying protection through the accumulation of rights could succeed in bringing a trade mark infringement claim, even if the alleged offending use would not amount to a copyright breach.

That said, it should be underlined that copyright and trade marks are separate legal entities and confer different sets of rights which are granted on the basis of distinct qualities: i.e., the original nature of a creation, in the case of copyright (regardless of whether it is in a commercial context or not), and the ability of a sign to serve for commercial purposes as a badge of origin for the goods and services covered, in the case of trade marks (*Cassegrain v OHIM*, Case T-73/06, para. 32). So, even though a musical work representing the theme of a film can be protected as an independent artistic creation and will not in principle be precluded from being registered as a trade mark, it does not automatically follow that it can enjoy the protection afforded to indicators of commercial origin, since this is reserved for signs which exhibit (or develop) characteristic trade mark functions. Where, however, there are enhanced possibilities for the interface of copyright and trade mark rights to affect more traditional categories of works, like musical compositions, trade mark examiners and courts need to develop and apply stricter safeguards that go beyond the distinctiveness threshold (Senftleben, 2021). It is important to have in place robust mechanisms that control more rigorously the acquisition of trade mark rights which may exact a high social price by impeding follow-on cultural innovation and ultimately result in abuses of the trade mark system.

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