

The ELECTRIC PLAYGROUND case: a controversial approach to descriptiveness and distinctiveness

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- **ELECTRIC PLAYGROUND** was found descriptive and devoid of distinctiveness in Türkiye, but was registered as a trademark for the same services in the US
- The approach adopted by the Turkish IP Office and courts was arguably excessive and disproportionate
- The application was refused for sports, culture and entertainment services in Class 41

A recent IP case has evaluated the descriptiveness and distinctive character of English-language word marks with respect to Turkish consumers

Background

The plaintiff applied to the Turkish IP Office to register the following mark in Class 41:



The application was partially refused for sports, culture and entertainment services in Class 41 due to its descriptiveness and lack of distinctive character. Further to the applicant's appeal, the Higher Board within the IP Office sustained the partial provisional refusal.

The applicant filed a court action to cancel the office's decision, alleging that:

- the mark was not associated with the services subject to the partial refusal; and

- the mark had acquired distinctiveness through intensive use.

IP Court decision

The First Instance Court agreed with the applicant and cancelled the office's decision partially refusing the application by evaluating that:

- the sign was distinctive and non-descriptive for the services in Class 41 as it would be perceived as a sign that promotes services of a particular commercial enterprise and distinguishes it from the same type of services of other enterprises; and
- the sign was distinctive and not descriptive of the services that were partially refused in terms of type or quality.

In terms of the argument that the mark had acquired distinctiveness through use, the court found that such claim was not substantiated by the plaintiff.

Regional Court of Appeals decision

The Regional Court of Appeals overturned the lower court ruling, concluding that it was not possible for the phrase 'electric playground' to indicate any commercial origin. Therefore, the trademark did not fulfil the essential requirement of distinctiveness. The court determined that consumers would perceive the sign as designating a standard electric playground, and the coloured stylisation would not change this.

For these reasons, the Regional Court of Appeals concluded that:

- the sign was descriptive and non-distinctive for sports, culture and entertainment services in Class 41;
- the plaintiff had failed to substantiate its argument that the trademark had acquired distinctiveness through continuous use in the marketplace; and
- the IP Office's decision was thus legitimate.

Court of Cassation decision

At the final stage, the case was adjudicated by the Court of Cassation upon the plaintiff's appeal. The Court of Cassation upheld the Regional Court of Appeals' decision without a detailed analysis.

Therefore, the partial provisional refusal of the trademark ELECTRIC PLAYGROUND became final and binding.

Comment

Arguably, both the IP Office and the IP-specialised courts adopted an excessive and disproportionate approach to the descriptiveness and distinctive character of a phrase in the English language, considering that the mark included a unique stylisation and positioning of the phrase – and especially bearing in mind that the relevant consumers are Turkish consumers, whose native language is Turkish and English-speaking skills are very limited.

It is noteworthy that an identical phrase, without stylisation, was registered as a trademark (albeit in the name of a different owner) for the same services in the United States, where English is the mother tongue. The present case-law by the Turkish authorities thus implements a far-fetched approach to the absolute grounds for refusal based on descriptiveness and lack of distinctive character, and reflects an interpretation of the relevant refusal grounds that is narrower than that of the US authority.

In cases where trademarks with foreign word elements are provisionally refused by the Turkish IP Office due to descriptiveness and lack of distinctiveness, the ultimate strategy for success could be to draw attention to the registration of the same or similar signs in foreign jurisdictions, and underline that it is neither accurate nor proportionate to provisionally refuse such applications in Türkiye.



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