

RESUMÉ:

AN 2012 00029 – MP 1080281 NANOMASS <w> - Manglende særpræg

Patent- og Varemærkestyrelsen afslog at registrere MP 1080281 NANOMASS <w> i klasse 9 med den begrundelse, at det ansøgte mærke manglede det til registrering fornødne særpræg. Denne afgørelse blev indbragt for Ankenævnet for Patenter og Varemærker, som stadfæstede den påklagede afgørelse.

KENDELSE:

År 2013, den 25. april afsagde Ankenævnet for Patenter og Varemærker

(Hans Chr. Thomsen, Hanne Kirk Deichmann, Jens Schovsbo og Knud Wallberg)

følgende kendelse i sagen **AN 2012 00029**

Klage fra

Endress+Hauser Flowtec AG,
v/Endress+Hauser

over

Patent- og Varemærkestyrelsens afgørelse af 23. oktober 2012 vedr. afslag på registrering af MP 1080281 NANOMASS.

Ankenævnet har behandlet sagen skriftligt.

Ankenævnet udtaler:

Det fremgår af Varemærkelovens § 13, stk. 2, nr., 1, at et varemærke er udelukket fra registrering, hvis det udelukkende består af en angivelse, der i omsætningen kan tjene til at betegne varens anvendelse. Varemærket NANOMASS er søgt registreret for videnskabelige apparater og instrumenter, apparater og instrumenter til måling, signalering og kontrol, samt for software til brug for måleapparater i klasse 9, og ankenævnet finder, som styrelsen, at mærket, der kombinerer ordene ”nano” (en måleenhed) og ”mass” (”masse”), som udgangspunkt savner særpræg for sådanne varer, da det er egnet til at angive de pågældende varers anvendelse. Da det ikke overfor ankenævnet er dokumenteret eller på anden måde godtgjort, at brugen af de omhandlede produkter skulle være begrænset til en særlig afgrænset

kreds, kan det efter ankenævnets opfattelse ikke føre til et andet resultat, at denne gruppe af specialister, som anført af ansøgeren, ikke vil opfatte mærket som beskrivende.

Herefter bestemmes:

Den påklagede afgørelse stadfæstes.

Sagens baggrund:

Den 7. juli 2011 notificerede World Intellectual Property Organization (WIPO) Patent- og Varemærkestyrelsen om, at Endress+Hauser Flowtec AG som indehaver af den internationale registrering MP 1080281 NANOMASS <w> havde designeret Danmark den 3. maj 2011.

Det internationale mærke var registreret for:

Klasse 09: Scientific, measuring, signaling and checking apparatus and instruments; measuring apparatus, namely electric and electronic measuring apparatus measuring process parameters in industrial automation and measuring technology, namely flow meters for measuring flow in liquids, mixtures or gases through a piping system; density measuring apparatus; viscosity measuring apparatus; software for turning on, monitoring, controlling, maintaining and powering measuring apparatus.

Den 23. oktober 2012 afslog Patent- og Varemærkestyrelsen at registrere varemærket for de ansøgte varer i klasse 9. Styrelsen fandt, at mærket manglede særpræg og begrundede sin afgørelse med følgende:

“... We refer to the provisional refusal of 12 October 2011, as well as further correspondence concerning the above trademark.

We refuse your designation because the trademark lacks the distinctive character which is required in order to be granted validity in Denmark.

The mark NANOMASS is a combination of the prefix "nano" and the word "mass". According to Longman Dictionary of Contemporary English (www.ldoceonline.com) "nano" is defined as "a billionth part of a unit". It is also used loosely in the meaning "very small". According to the same dictionary "mass" can be defined as "the amount of material in something". When combined, the mark means a very small amount of material. The mark can be seen used as a generic term with this meaning.

All of the goods applied for in class 9 are, or relate closely to, measuring instruments. The word NANOMASS may describe a characteristic of these instruments and accessories, namely that they are used to measure nano mass.

We have included extracts from internet searches which show this generic use of the words "nano mass". These can be found on the last pages of this letter.

Please note that it does not make a difference that the mark is written in one word. This does not change the overall impression of the mark, and consumers will therefore view the mark NANOMASS as descriptive, whether written in two words or one.

Consequently, the mark may serve to designate a characteristic of the goods “scientific, measuring, signaling and checking apparatus and instruments; measuring apparatus, namely electric and electronic measuring apparatus measuring process parameters in industrial automation and measuring technology, namely flow meters for measuring flow in liquids, mixtures or gases through a piping system; density measuring apparatus; viscosity measuring apparatus; software for turning on, monitoring, controlling, maintaining and powering measuring apparatus” in class 9.

The decision has been made pursuant to the Danish Trade Marks Act Section 20 (2), cf. Section 13...”

Denne afgørelse blev med brev af 17. december 2012 fra Endress+Hauser Flowtec AG indbragt for Ankenævnet for Patenter og Varemærker med følgende påstand:

”...In the name and behalf of the holder Endress+Hauser Flowtec AG, Kägenstrasse 7, 4153 Reinach, Switzerland, we hereby file an

APPEAL

Against the Final Refusal dated October 23, 2012 issued by the Danish Patent and Trademark Office we received on October 25, 2012 with respect to the international registration mentioned above.

We hereby apply for:

1. A withdrawal of the Final Refusal dated October 23, 2012 and
2. A registration of the trademark NANOMASS in Denmark.

GROUNDINGS:

Our grounds for the appeal are as following:

The trademark consists of two parts: “NANO” and “MASS”. “NANO” designates one billionth of a measurement unit, i.e. serves as a unit prefix for the factor 10⁻⁹.

When judging the distinctive character of a trademark the alleged understanding of the customers the goods are aimed at, has to be applied. In cases where the addressed customers are professionals, it can be assumed that such customers show an increased attentiveness and have specific know-how.

The claimed good are capital goods and can cost several thousand Swiss francs. Therefore, they are chosen according to the specific technical needs by qualified purchasers, who usually have a technical academic degree. The same applies to the operators of the claimed goods.

Taking this into consideration the relevant customers are professionals who are well educated in the field of technology and therefore have specific know-how when selecting or operating the goods in question. Such consumers do not interpret “NANO” in terms of “very small”. Such consumers know that “NANO” designates one billionth of a measurement unit, i.e. serves as a unit prefix for the factor 10⁻⁹. In connection with flow meters and densitometers the relevant customers interpret “MASS” as the physical quantity “mass”. The mass measured by flow meters or densitometers is indicated in the basic unit kilogram. The unit prefix “NANO” indicates one billionth of a kilogram, i.e. one nanogram. If a professional who is well educated in the field of technology really understood “NANOMASS” as a term describing the type of flow meters or densitometers in question, he or she would expect, that

such flow meters or densitometers are capable of measuring mass flow in the dimension of nanograms per time unit or density in the dimension of nanograms per volume. A professional who is well educated in the field of technology actually knows that it is not possible or imaginable to measure the flow or density of liquids, mixtures or gases in such small units like nanograms per time or nanograms per volume. If the specific technical know-how of the addressed customers is applied when judging the distinctive character of the trademark, it is clear that the addressed customers cannot make sense of a descriptive understanding of "NANOMASS".

Therefore, the addressed customers will not interpret "NANOMASS" as a descriptive term but as an indication to the origin of the goods in question.

For the reasons mentioned above, it also follows that it is not possible that the goods in class 9 the holder applies for are used to measure nano mass.

Therefore, we kindly ask you for a withdrawal of the Final Refusal dated October 23, 2012 and for a registration of the trademark NANOMASS..."

Med brev af 4. januar 2013 afgav Patent- og Varemærkestyrelsen udtalelse i sagen:

"... Som svar på Ankenævnets brev af 19. december 2012 skal styrelsen udtale følgende:

Under behandlingen for Ankenævnet ses der ikke at være fremlagt sådanne nye væsentlige argumenter, at styrelsen har anledning til at ændre opfattelse.

Styrelsen fastholder derfor afgørelsen af 23. oktober 2012 og den under behandlingen fremførte argumentation og vurdering.

Styrelsen skal således henstille til Ankenævnet, at den trufne afgørelse stadfæstes..."

Udskriftens og fotokopiens rigtighed bekræftes.

Ankenævnet for Patenter og Varemærker, 25. april 2013.