

STYRIAGRA 2.0 - Austrian pharma company at loss against Pfizer's VIAGRA

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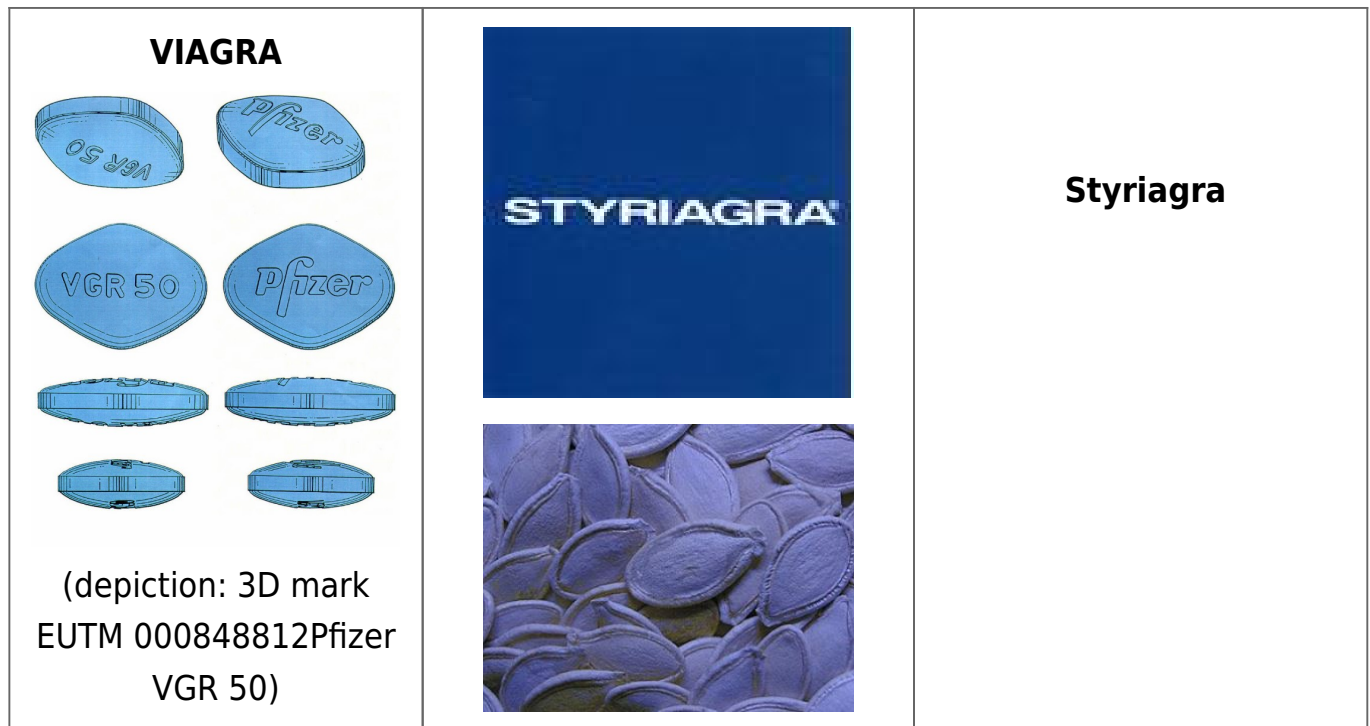
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Already in 2009, the Austrian Supreme Court granted an injunction against a pumpkin seed farmer from the Austrian province of Styria, who had had the ingenious idea to “parody” Pfizer’s famous VIAGRA brand by selling pumpkin seeds in a blue sugar coating under the name “STYRIAGRA”, and registering that name as trademark. Unsurprisingly, Pfizer didn’t like the “parody” so much and successfully sued the farmer. The Austrian Supreme Court (“OGH”) considered Pfizer’s mark to have a substantial reputation in Austria. It found that use of STYRIAGRA was a parody and thus ruled out fair use, holding that it was primarily an exploitation of the reputation of the earlier mark (decision of 22.09.2009, case 17 Ob 15/09v).

Even though the case has generated quite some media echo, years later, in September 2013, the Austrian company Gall Pharma GmbH applied for a CTM (now EUTM) for the word mark “STYRIAGRA” in class 29, for the goods ‘*preserved, frozen, dried fruits and vegetables, in particular pumpkin seeds*’.

Claimant's / Opponent's trademark:	Defendant's trademark and use in Austrian case	EUTM appl. no. 12161469 of Gall Pharma GmbH
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The EUIPO Opposition Division rejected the opposition filed by Pfizer, but the EUIPO Board of Appeal (“BoA”) upheld Pfizer’s appeal, and the General Court (short “GC”), in its decision of 3 May 2018, case T-662/16, dismissed the applicant’s appeal, agreeing in full with the BoA’s reasoning.

The GC discarded the applicant’s argument that the marks at issue STYRIAGRA and Viagra are dissimilar and confirmed the BoA’s finding that there is a **low degree of similarity** between the marks, but sufficient for the relevant public to **establish a link** between the marks, considering the **significant reputation** of VIAGRA for the treatment of erectile dysfunction. This reputation was found to extend not only to the consumers of drugs for erectile dysfunction, but also to the **entire population of the European Union**. Evidence of reputation included sales figures for most of the countries of the European Union for the period 2001-2013, evidence of advertising campaigns and wide press coverage, and, specifically in Austria, a survey from 2008 showing a public awareness of VIAGRA of 90% amongst a sample population of men and women above the age of 18.

The relevant public for establishing detriment to reputation and distinctiveness, though, was found to be the **general public in the EU**, which is addressed by the mark applied for (and not the relevant public addressed by the earlier mark). With reference to the Austrian judgment, the BoA had found that in particular **Austrian consumers** would associate the marks, as they would single out the name of the region of Styria and would perceive the mark applied for as a combination of ‘Styria’ and ‘agra’ or even as a play on words between ‘Styria’ and ‘Viagra’.

The undersigned (and born Styrian) can only confirm this finding. Notably, the black-green Styrian pumpkin oil made from pumpkins seeds is not only a very popular seasoning for salads and flavoring for different dishes in Austria, protected by a geographical indication, but is also said to be healthy, and – rather ironically – also to have aphrodisiac effects. Whether this fame is true or not did not matter for the GC: it found that the general public with an average degree of attention would be inclined to purchase the goods at issue, thinking that it will **find similar qualities**, such as an image of improving sex life, **owing to the transfer of positive associations** projected by the image of the earlier mark. Consequently, by using the mark STYRIAGRA, the applicant would take unfair advantage of the reputation of the earlier mark VIAGRA.

The appeal deadline is still open as at the time of posting this blog, but it would be surprising if the CJEU came to a different conclusion, in case an appeal were brought at all.