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EFTA and EEA: Is a (famous) work of art contrary to accepted principles of morality or public policy under Article 3 of the Trade Mark Directive?

Thomas Hvammen Nicholson (Protector IPC) · Monday, September 4th, 2017



ANGRY BOY



SCREAM

This is the main issue in the judgment [E-5/16](#) from the EFTA Court, the EFTA version of the EU Court of Justice, of 6 April 2017.

Briefly summarized, the EFTA Court concludes that a trade mark consisting of a work of art may contravene accepted principles of morality or public policy if the work of art is important enough.

The backdrop here is that Oslo Municipality, as benefactors of famous Norwegian artists [Gustav Vigeland](#) and [Edvard Munch](#), filed 100+ trade mark applications in Norway of marks containing

reproductions of their works of art.

The applications consist of figurative and 3D marks and cover goods and services that

1. comprise or are closely related to works of art (e.g. monuments of metal, cultural activities),
2. souvenirs (e.g. clothing) and
3. goods which are farther removed from the works of art (e.g. rice).

The Norwegian IPO refused some of the applications, citing that they are non-distinctive, descriptive and/or exclusively consist of a shape conferring substantial value. Most of the applications have been suspended, while some have also been registered for goods and services unrelated to works of art. Oslo Municipality has appealed the refusals to the Board of Appeal, who referred to the EFTA Court. One of the questions was what makes a trade mark contrary to public policy and morality under Article 3 of Directive 2008/95/EC.

The EU trade mark directive is part of the EEA Agreement, and therefore has EFTA relevance. It is, however, quite rare that the EFTA Court is called on in trade mark matters. Although the EFTA Court's jurisdiction is limited to the EFTA States, it will be interesting to see if courts in the EU will look to this decision the same way Norwegian courts look to decisions from the EU for the purpose of harmonized interpretation.

The EFTA Court finds that although there is nothing in principle precluding the registration of works of art as trade marks, there is an interest in safeguarding the public domain against the appropriation of exclusive rights to works of art.

Due to the potentially everlasting exclusivity provided by a trade mark registration, a trade mark must *inter alia* not be descriptive, it must be distinctive and it must not exclusively consist of a shape which gives substantial value. However, according to the EFTA Court, these conditions do not sufficiently safeguard the public domain in relation to works of art.

First, these grounds for refusing a trade mark application must be assessed in light of the goods and services for which protection is claimed. Although ANGRY BOY may be descriptive for "monuments of metal", it is probably not descriptive for "rice".

Secondly, most of these grounds may be overcome if the work of art has acquired distinctiveness as a trade mark.

The assessment of accepted principles of morality and public policy on the other hand is irrespective of the goods and services in the application and cannot be overcome by acquired distinctiveness.

According to the Court, the registration as a trade mark of a work of art in the public domain is not in itself contrary to accepted principles of morality or public policy.

However, if a work of art is important enough for a nation's cultural heritage, it cannot be ruled out that registration of it as a trade mark may be perceived as contravening accepted principles of morality or as a genuine and serious threat to fundamental interests of society.

This ruling sets out a high threshold for refusing marks consisting of works of art as offensive to accepted principles of morality, and a very high threshold for the "contrary to public policy"

alternative. As a minimum, the work of art has to be well known and have a special standing in the relevant country.

It would not be an overstatement to say that these works of art have importance in Norway, and therefore the Board of Appeal may yet find that the applications for registration as trade marks of the works of Vigeland and Munch are contrary to accepted principles of morality and public policy.

We expect a decision from the Board of Appeal any moment. Stay tuned for part 2.

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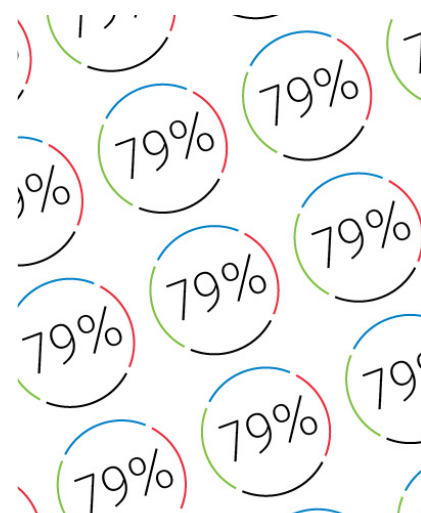
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