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Can you smell the “Cndy Brz”?

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In a recent case, the German Federal Patent Court had to deal with an interesting phenomenon among word marks called “disemvoweling”, a wordplay whereby the vowels of a word or text are removed (German Federal Patent Court, Dec. of Feb. 1, 2021 – 26 W (pat) 576/18).

In this context, the word mark “Cndy Brz” – applied for tobacco and water pipe-related goods and services in classes 04, 34 and 35 on December 2, 2017 – was the subject of the Court’s decision on an appeal by the applicant. The German Patent and Trademark Office (= GPTO) had previously rejected the appellant’s application due to lack of distinctiveness and its descriptive character in relation to the applied for goods and services applied for.

The GPTO had argued that the use of disemvoweled words showed a common type of wordplay often utilised for advertising purposes. The public is used to the fact that vowels are removed and they will still easily recognise the words “Cndy Brz” to mean “Candy Breeze”. Furthermore, the target audience of tobacco and smoking products is aware that producers regularly introduce new flavours which are creatively described with a variety of word combinations. The relevant public will therefore correctly understand the subject mark as “Candy Breeze” in the sense of “scent of candy”, which is merely descriptive of the nature of the goods concerned (e.g. the flavour of the tobacco, or the specialisation of a tobacco distributor for a certain flavour) and lacks inherent distinctiveness.

The applicant was of the opinion, that the targeted public could only understand the term behind the disemvoweled word in obvious cases. “Cndy Brz” is further not automatically associated with “Candy Breeze”, but numerous other terms come into mind, so that it requires several steps of thought to arrive at the meaning “Candy Breeze”.

After initially appealing the decision of the GPTO in whole, the applicant later withdrew the trademark application for all goods and services except for “charcoal for water pipes” in class 04, giving the Federal Patent Court the opportunity to decide on the issue of disemvoweling.

The Court supported the GPTO’s line of argument in relation thereto, confirming that at least professional trade circles for tobacco and water pipe products will understand the subject mark “Cndy Brz” to be the disemvoweled version of “Candy Breeze” by supplementing it with the appropriate vowels.

The Court argued that studies have shown the human brain does not necessarily need vowels to understand the meaning of a text and notes in this context that Semitic languages, such as Arabic

and Hebrew, do not use (written) vowels at all. The trend for disemvoweling was already well established in Germany by the time the subject trademark was filed and at least professional trade circles will effortlessly supplement the mark “Cndy Brz” with the respective vowels to understand it as “Candy Breeze”. Particularly, due to regulations preventing distributors of tobacco and related goods from directly describing the flavour of such products, the use of disemvoweling in the tobacco business is common.

Contrary to the GPTO, however, in relation to the only remaining term of the application, “charcoal for water pipes”, the Court found “Candy Breeze” to be neither descriptive nor devoid of inherent distinctiveness since charcoal does not usually have a flavour property to it.

Regarding the understanding of the average consumer, given that the trademark would neither be descriptive nor devoid of inherent distinctiveness in either case, the Court did not address whether or not the consumer would understand “Cndy Brz” as “Candy Breeze”.

The case shows that the GPTO and the Federal Patent Court are familiar with the phenomenon of disemvoweling among word marks, which could be the subject of further decisions. It is unfortunate that the Federal Patent Court did not take the opportunity to also comment on the understanding of the average consumer. Regardless, trademark applicants have to be aware that disemvoweling is not a safe way to register an otherwise non-registrable trademark.

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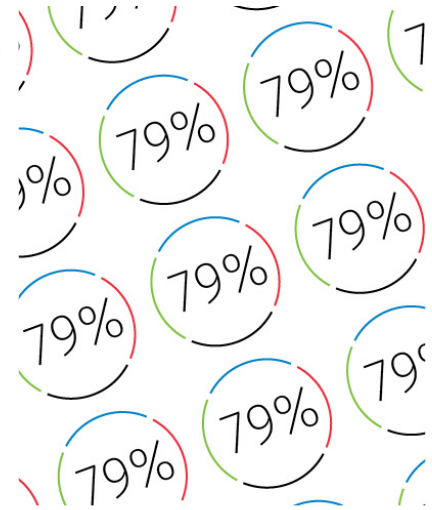
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