

# Kluwer Trademark Blog

## “COVIDIOT” – trade mark censure or simply a sensible application of public policy considerations?

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Morality and public policy considerations are oft-forgotten as absolute grounds of refusal. However, in the recent “COVIDIOT” case, the EUIPO’s Grand Board of Appeal upheld an earlier decision to refuse an EUTM application pursuant to Article 7(1)(f) EUTMR on the grounds that the applied-for trade mark violated accepted principles of morality.

The application was for a device mark where the word “COVIDIOT” is featured prominently (with emphasis on the “IDIOT” element of the word) alongside a jester’s hat and strong colour elements.



Coverage was sought for the following goods: metal clips, computer gaming software and mobile apps, as well as board games and toys.

The application was filed in August 2020, when the effect of the Covid-19 epidemic was still being felt despite declining infection rates. A refusal was issued on the basis that the Examiner considered the word combination of ‘COVID’ and ‘IDIOT’ to be an insult to refer to people who do not believe that all the measures implemented by most governments, such as social lockdown or compulsory masking, are purposeful, proportionate, or even necessary. Therefore, the use of COVIDIOT, especially in relation to metal clips and games that could be used to label players as ‘Covidiot’ in a derogatory way, was likely to offend.

On review, the Board of Appeal felt that the mark should be refused under two additional grounds under Articles 7(1)(b) and (c) EUTMR: (i) a lack of distinctiveness (the mark would be seen as a buzzword referring to a phenomenon and not an indication of origin) and (ii) descriptiveness (the mark would be descriptive of the subject matter in respect of games). However, the case was

referred to the Grand Board in December 2021 due to the degree of legal complexity of the case and its importance, namely with respect to the impact of fundamental rights, such as the freedom of expression. As the Court of Justice had recently clarified in 2020 that the EUIPO must take into account fundamental rights when examining trade mark applications (see *Fack Ju Göthe*, C-240/18 P), this case gave rise to an opportunity to expand upon the principles of examination of fundamental rights in the context of absolute grounds.

Third party observations filed by the International Trade Mark Association (INTA) were critical of the lack of clarity around morality objections. However, the Grand Board disagreed and indicated that refusals issued under Article 7(1)(f) were a valid limitation to the freedom of expression as it protects the rights and interests of others whilst not unduly restricting freedom of expression.

The applicant was not prohibited from using the term whilst allowing the registration of “COVIDIOT” would result in an endorsement of activity that profits from an offensive name. The Grand Board held that the combined use of COVID alongside the term IDIOT and a figurative element of a jester’s cap in the commercial context of games creates an impression that the pandemic is something that can be laughed about. It grossly trivialises the pandemic’s deadly and devastating impact (having caused over 7 million deaths worldwide and ranked as 5<sup>th</sup> in the deadliest pandemics in history).

The values of solidarity and respect for human dignity are indivisible and are central to the spiritual and moral heritage of the EU. The EU had adopted measures to respond to the outbreak of COVID-19 and its consequences, and considerable efforts and resources have also been devoted to this at a local, national, EU and worldwide level. Whilst the accepted principles of morality can change over time, these must be examined at the point of filing. As the measures introduced by the EU were to safeguard citizens and to limit the propagation of the virus, the use of “COVIDIOT” in relation to games ridicules actions taken by the EU and would likely shock or offend victims of the disease, their families, and those of an average sensitivity and tolerance within the EU. Consequently, in a balance of interests between that of the applicant and public interests, public interest prevailed.

Overall, it seems that the nature of the goods being a game was the main driving factor behind the refusal so it would have been interesting to see if the objection would have been maintained solely for “metal clips”. It is also a reminder that just because you may be able to use a sign, this does not mean that you can automatically register it.

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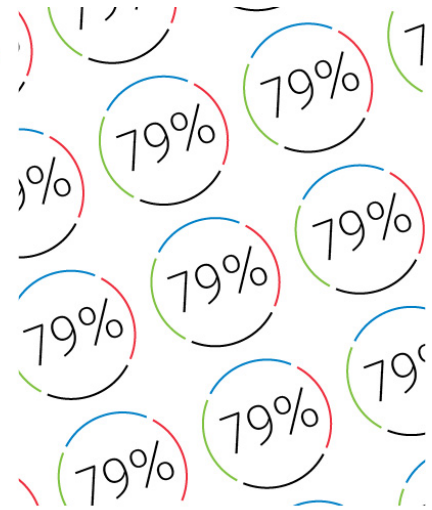
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