

# D YOUNG & CO TRADE MARK NEWSLETTER *no.137*

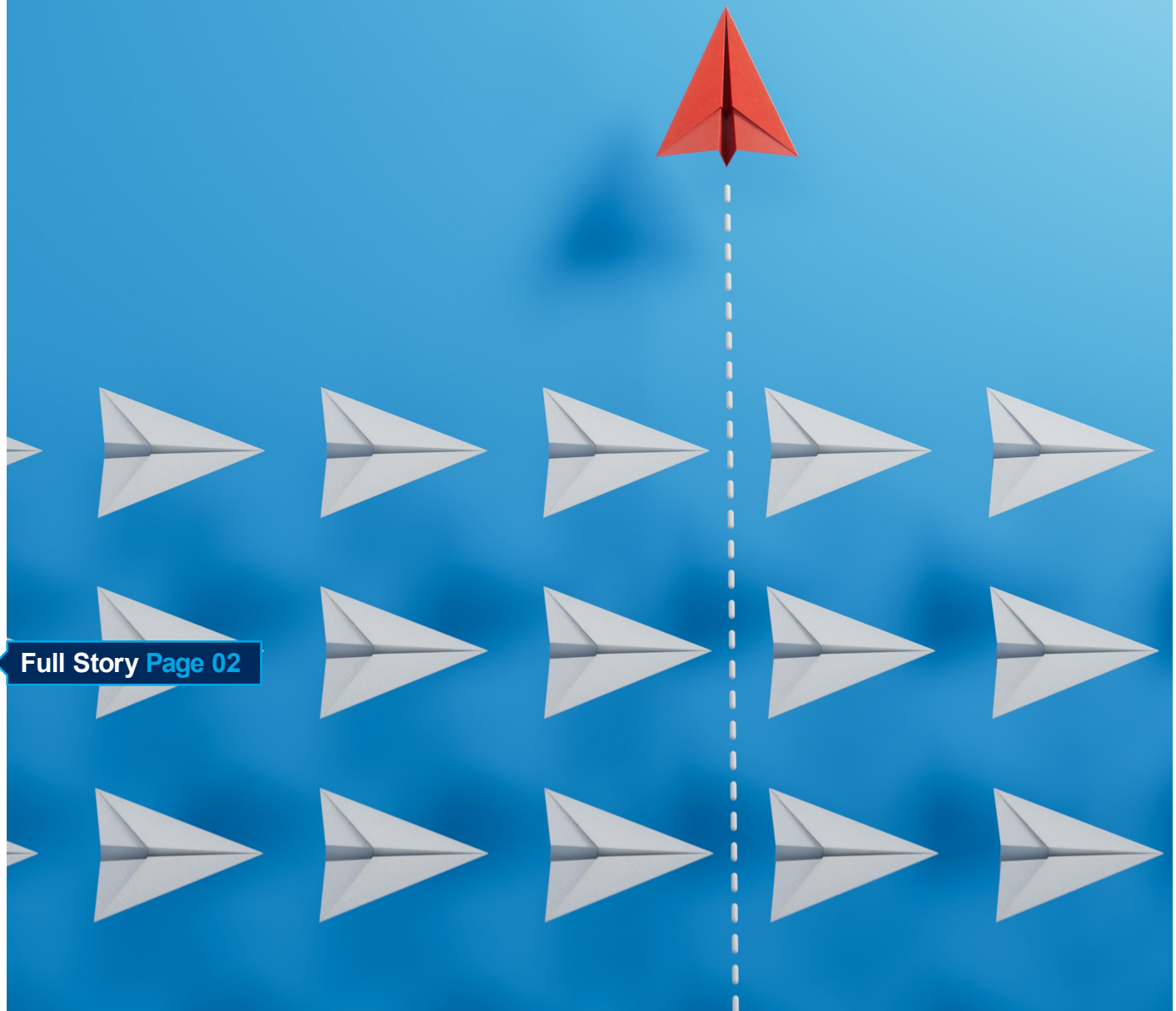
November 2024

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## Easier said than done Lessons for brands from the latest easyGroup loss

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With our last newsletter of 2024, we are happy to share our recent successes. We are especially proud of The Chambers & Partners UK guide ranking D Young & Co as a top tier UK trade mark firm for the fourteenth consecutive year. We were also once again ranked as top tier for UK trade mark services by the Legal 500.

Aside from that, there are some IP STARS Rising Stars in our team: in the UK, Senior Associate Peter Byrd, and, in personal news, myself for Germany. Moreover, our German team has been ranked as "regional tier 1 in Bayern for intellectual property law" by Best Law Firms Germany. It is great seeing so many (continued) recognitions as the year comes to an end.

We hope that the year has been a successful one for our readers as well and that everyone enjoys a well-deserved break over the festive period.

**Yvonne Stone,**  
Partner, Rechtsanwältin

Events



**INTA Leadership Meeting**  
New Orleans, USA, 12-15 November 2024  
Rechtsanwältin Jana Bogatz and Solicitor Anna Reid will be attending this year's 2024 INTA Leadership Meeting. This is an opportunity to participate in important conversations to help shape the future IP landscape, and to network with the INTA board and members who volunteer on committee and project teams.

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Descriptiveness

# Easier said than done

## Lessons for brands from the latest easyGroup loss

There are lessons for brands and trade mark owners from the recent easyGroup loss in *easyGroup Limited v easyfundraising Limited* and others.

**Descriptive = difficulties**

Does your trade mark or brand describe what you do? This can be super helpful. Customers will quickly understand the products or services you provide. It can even be memorable. But in the land of trade marks a descriptive name can be a nuisance, particularly when it comes to enforcing your rights. The basic argument is that consumers will either not focus on, or be unable to differentiate between, the descriptive elements in brands. Unless there is some other element in the brand that consumers recognise, enforcement of a descriptive trade mark can be difficult as consumers will not be confused by (or create a link between) two different brands just because both brands share a descriptive feature.

**easyGroup v easyfundraising**

This is increasingly becoming an issue for easyGroup's companies in litigation before the UK courts. Most recently, it failed to demonstrate that its rights in *easyJet*, *easyHotel*, *easyMoney* and *easyGroup* (amongst others) were infringed by *easyfundraising*, for the following reasons:

1. "Easy" is descriptive. For example, the "easy" in *EasyJet* is "descriptive of the uncomplicated and direct way in which flights on *easyJet* could be booked and its services used". Uncomplicated is not the word people generally use to describe squeezing a week's worth of clothing into a tiny on-board bag, but that is beside the point for trade mark claims.
2. The adjective "easy" is commonly used as a descriptive term by many non-easyGroup brands.
3. What is distinctive about the easy+ signs is the orange/white colour scheme font and the cooper black font. The parts of the *easyfundraising* signs that did not contain the word "easy" were different to the easy+ brand. The word "fundraising" was different, the font was different, and there was no use of the orange/black colours. The *easyfundraising* marks were found to have little similarity to the easy+ brands.



**No trade mark is an island**

When it comes to trade mark enforcement, understanding how products and services are provided under a brand name is really important. It is not generally enough for there to be a simple similarity between the visual elements of the brands in issue. It is important for trade mark owners to understand what goods and services fall under their trade marks, and whether the activities of another party actually maps onto those goods and services. If they do not, this can weaken an infringement claim.

**easyGroup v easyfundraising**

This is another issue that *easyGroup* encountered in the litigation against *easyfundraising*. The services that *easyfundraising* provided can be broadly split into two categories, B2C and B2B:

**B2C: "you spend, brands donate"**

Customers can access a range of retailers/brands via the *easyfundraising* portal (for example, John Lewis, Argos, Pets at Home). When a purchase is made with those retailers/brands via the *easyfundraising* portal, the retailers/brands pay a commission to *easyfundraising* as a donation to a chosen charity or cause.

It was concluded that consumers using the B2C services absolutely understood that they were purchasing goods and services from the retailers/brands, and **not** from *easyfundraising*. It was obvious to consumers that they passed through

🔍 **Case details at a glance**

*Jurisdiction: England & Wales*

*Decision level: High Court*

*Parties: easyGroup Limited*

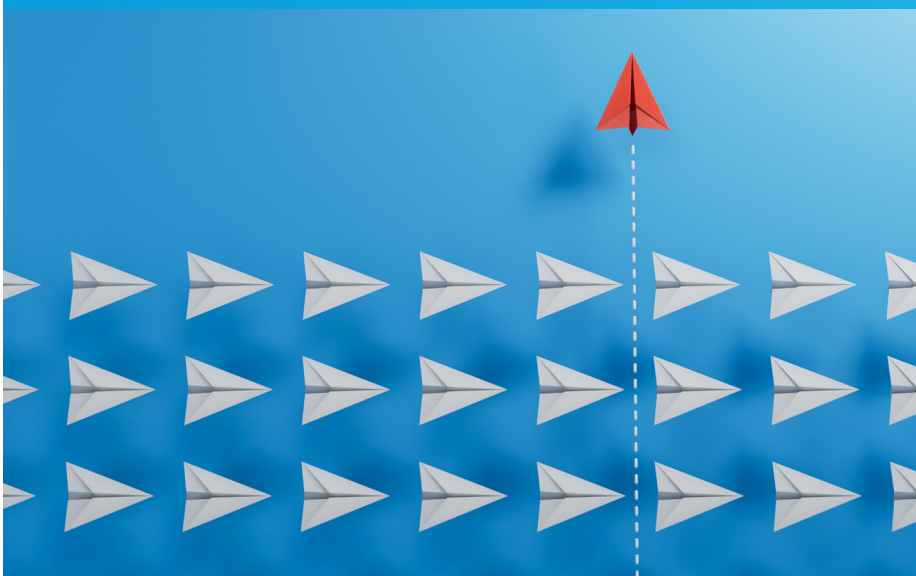
*v EasyFundraising Limited & Ors*

*Date: 11 September 2024*

*Citation: [2024] EWHC 2323 (Ch)*

*Decision: [dycip.com/easygroup-easyfundraising](https://dycip.com/easygroup-easyfundraising)*

**easyGroup failed to demonstrate infringement of easyJet, easyHotel and easyMoney**



down against easyfundraising. EasyGroup alleged that there was a substantial risk of confusion because average consumers would think that the easyfundraising services were connected in some way with the easy+ brands. But over the course of 19 years of side-by-side trading, there was minimal relevant evidence of actual consumer confusion. That fact, whilst not fatal, was highly persuasive in the finding that there was not (or was not likely to be) confusion between the easy+ brands and easyfundraising.

**People who live in glass houses should not throw stones**

It is important for brand owners to keep in mind that enforcement is not always a one-way street. Accusations of infringement are often met with counter-attacks. Those counter-attacks could focus on challenging your rights in a trade mark or pointing to activities of your company that weaken the infringement claims. Brand owners need to be aware of these vulnerabilities and factor them into their enforcement strategy.

**easyGroup v easyfundraising**

EasyGroup alleged (which is denied) that easyfundraising is posing as a charity when it is not. The purpose of that allegation was to demonstrate that if easyfundraising is seen as a bad apple by the public that reputational damage would rub off on the easy+ brands. The problem for easyGroup was that it (and its licensees) had made its services available through the easyfundraising portal for over a decade, generating over £1million of sales as a result.

The obvious question asked was: if easyfundraising was potentially so damaging to the reputation of the easy+ brands, why use it? The other consequence of easyGroup's gung-ho litigation strategy? It lost some of its trade mark rights, with its easy.com and easylife marks being revoked entirely (that is, struck from the register of trade marks) and the services protected by its easyJet mark being narrowed.

**Author:**

**Phil Leonard**



and left the easyfundraising platform and went on to purchase goods and services directly with the retailers/brands.

EasyGroup tried to argue that easyfundraising were providing, for example, tourism services (that were similar to the services under the easyJet marks) and hotel services (that were similar to the services under the easyHotel marks), by providing links to travel and hotel brands/retailers via the easyfundraising portal. The reality was that easyfundraising was not offering those services. Instead, it was offering fundraising services / a platform for fundraising by retail.

**B2B: retailers/brands can also pay for advertising space on the easyfundraising portal**

The other angle attempted by easyGroup was that the offer of advertising space by easyfundraising was similar to the licensing services or support to licensees covered by its easyGroup mark.

The reality was that easyfundraising provided advertising and promotional services to retailer clients. There was no licensee arrangement or services provided to licensees. These fundamental differences in the services provided by

easyfundraising and the services covered by the easyGroup trade marks counted against them in assessing infringement.

**Confusion reigns supreme**

When a trade mark owner has an issue with similar brands providing similar goods and services, an important infringement angle is that the consumers will be (or are likely to be) confused by those similar brands. Consumers will get mixed-up thinking that they are buying goods/ services from the trade mark owner, but are actually buying from another company. If a brand can find real-world evidence of consumers actually being confused this can be really helpful. For example, there may be social media comments or specific complaints that demonstrate consumers have actually been confused.

The opposite is also relevant: where two similar brands have existed on the market for a long time and there is no evidence of consumer confusion. This situation can be influential in supporting the position that consumers are not (or are not likely to be) confused by the brands in question.

**easyGroup v easyfundraising**

This is another area where easyGroup fell



# Pied off UKIPO gives guidance for food-related trade mark applications

Case details at a glance

Jurisdiction: England & Wales

Decision level: UKIPO

Parties: Rashid Ray v The Little Brown Box Pizza, LLC

Date: 09 September 2024

Citation: O/0870/24

Decision (PDF):

[dycip.com/pizzology-o-0870-24](https://dycip.com/pizzology-o-0870-24)

The applicant, Rashid Ray, applied to register the mark PIZZOLOGY in the UK in relation to various food services. This application was opposed, based on a UK trade mark for PIEOLOGY (covering food products and related services), owned by US-based entity, The Little Brown Box Pizza LLC.

First, Little Brown Box Pizza was not able to prove it had used the PIEOLOGY mark in relation to food services, and therefore the opposition proceeded only based on the food products in the mark (for which Rashid Ray did not challenge use).

## Comparisons of marks

Each mark would be seen as a food product followed by the suffix “OLOGY”. Visually and aurally these are similar. Consideration was given as to whether UK consumers would understand that PIE in the PIEOLOGY mark would be a reference to PIZZA (as the opponent’s business is a pizza restaurant). The hearing officer was not convinced that UK consumers would understand this, despite the popularity of “The Godfather” films and the song “That’s Amore”.

Conceptually OLOGY is a reference to science (in this case, the creation of pizza). The hearing officer found that

the earlier mark would bring to mind the science behind the creation of pies and the application the science behind the creation of pizzas. So, there was held to be a medium degree of conceptual similarity.

## Comparison of goods and services

The hearing officer conducted a relatively forensic assessment of the similarity between the food products in the earlier registration and food services in the application. It was found that the standard “restaurant type” services were similar to pizzas to a medium degree and that food preparation services were similar to a low degree.

There was a distinction with restaurant services in that “food preparation” in this context was really the provision of sliced vegetables for a restaurant to use on its pizzas. “Food sculpting” services means the artistic crafting of food, and this was therefore held to be not similar to food products: the purpose is aesthetic, not to satisfy hunger.

Contract foods services are catering to businesses, and the trade channels may overlap with food services, so these were held to be similar but only to a low degree.

## Conclusions

All services (other than food sculpting) were held to be similar to a low or medium

degree to food products. However, there was no likelihood of direct confusion: UK consumers would not assume that a pie maker has opened a pizza restaurant. For the restaurant-type services and contract foods services, it was held that “at most the earlier mark might be called to mind, but that is mere association, not confusion”. In relation to food preparation, however, it would be a logical brand extension for a business selling fruit and vegetables to branch into the sale of prepared food products. Therefore, there was a likelihood of direct confusion.

Overall, the opposition failed, other than in relation to food preparation.

## Takeaways

On the face of it, this is a somewhat unsatisfactory decision. It would quite possibly have been different had the opponent been able to prove use of its mark (or indeed if the applicant had challenged the opponent to prove use of the prior mark in its entirety). The overly forensic assessment of the services within the application is somewhat artificial.

This decision may serve as a helpful guide in relation to the UKIPO’s different approach to such comparisons in the future.

The application was opposed based on a UK trade mark for PIEOLOGY



It does not seem that the hearing officer was presented with much evidence of use of the suffix OLOGY in the market. In the absence of significant use it is not clear why PIZZOLOGY would not be a natural brand extension of PIEOLOGY (especially in the UK where consumers do not routinely describe pizzas as pies). It is interesting to see another decision in which a finding that there may be “mere association” was not enough to succeed. Given that a likelihood of association is specifically noted in the statute as enough to succeed on a s.5(2)(b) opposition, perhaps a different choice of phrase would have been helpful here.

Author:  
Peter Byrd



# Robert Kneschke v LAION eV Photographer must accept use of his image in AI database

While the Getty Images v Stability AI case, which is currently pending before the High Court, is hotly debated in the UK, the Hamburg District Court (judgment of 27 September 2024, case number 310 O 227/23) had to address whether artificial intelligence (AI) training data sets infringe German copyright law.

The defendant in this case was a non-profit organisation called LAION eV. LAION provides a publicly accessible database with nearly six billion image-text pairs that can be used to train AI systems. One of the images in this database was taken by Robert Kneschke, a photographer who sought a court order to prohibit its use.

LAION had previously obtained the image and metadata itself from another provider, Bigstock, where Robert Kneschke had uploaded his works, and used software to check it for matches with the associated image description for its database. Bigstock had, however, included a restriction in its terms of use, stating that it was not allowed to “download” or “scrape” the images using “automated programs”.

The decision was eagerly awaited, since it involves the highly debated legal question of whether the scientific text and data mining exceptions in Sections 60d and 44b of the German Copyright Act justify using copyrighted works for AI training. The provisions go back to Art. 3 and 4 of the Directive on Copyright in the Digital Single Market (the DSM Directive), and allow the collection and automated analysis of digital or digitised content in order to extract information, in particular about patterns, trends and correlations.

## Copyright law privileges text and data mining for scientific purposes

The court agreed with this position and dismissed the lawsuit. It made clear that LAION’s act of reproduction, the downloading of such an image, was covered by the exception of Section 60d of the German Copyright Act.

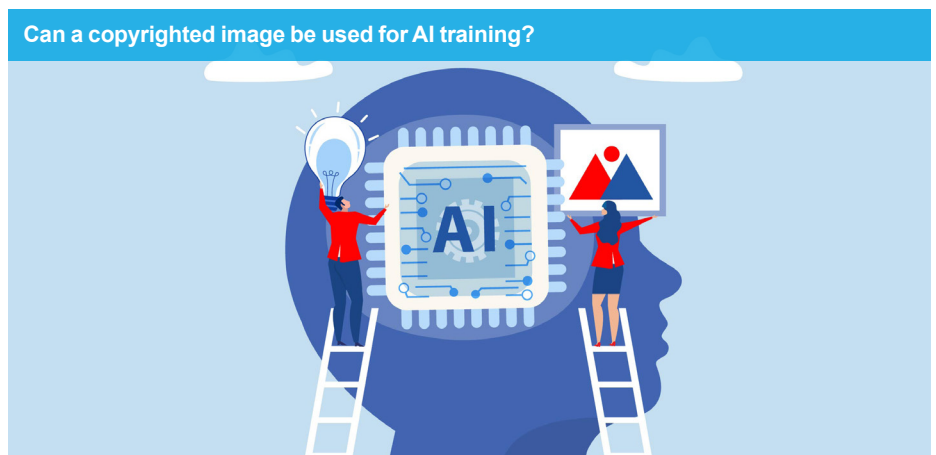
## Case details, useful links & related articles

Jurisdiction: Germany  
Decision level: District Court of Hamburg  
Parties: Robert Kneschke v LAION eV  
Date: 27 September 2024  
Citation: 310 O 227/23  
Decision: [dycip.com/kneschke-laion](https://dycip.com/kneschke-laion)

The DSM Directive, European Parliament: [dycip.com/dsm-directive](https://dycip.com/dsm-directive)

EU Regulation 2024/1689 (AI): [dycip.com/eu-regulation-2024-1689](https://dycip.com/eu-regulation-2024-1689)

UK High Court AI technology infringement challenges: *Getty Images v Stability AI*: [dycip.com/getty-stability-ai-jul24](https://dycip.com/getty-stability-ai-jul24)



In the opinion of the Hamburg District Court the comparison of image and description is a privileged analysis for the purpose of obtaining information about correlations (in this case between image content and image description) and, therefore, a privileged scientific purpose. The fact that the data set could later be used to train AI applications did not lead to a different assessment, since the original purpose of data collection was for scientific research.

## Obiter dictum on machine-readability of rights reservations

Interestingly, the court then devoted a great deal of attention to a question that was no longer relevant to the case, namely, the exception for text and data mining in Section 44b (3) of the German Copyright Act, according to which reproductions of “lawfully accessible” works are permitted for text and data mining. A work is “lawfully accessible” if it is freely available on the internet or if users are authorised to access it. A restriction of use must be declared in “machine-readable” format in order to be effective.

However, the exact meaning is still disputed. The court took the position that the restriction of use on Bigstock’s website was written in “natural language”. The court hinted that such a disclaimer in natural language in the website’s terms might be effective, and considered them “machine-readable”, since modern technology must also be able to recognise and process licence conditions by machines, thereby making

reference to the AI Act (Art. 53 (1) (c) of EU Regulation 2024/1689 for providers of AI models who need to ensure that any asserted restriction of rights is observed).

## Takeaways and outlook

The judgment is a significant first step in terms of the copyright permissibility of training AI training, though it does not provide clarity on the question whether an image can generally be used for AI training. LAION was allowed to download the image in order to compare it with the image description for its database due to the text and data mining exception, that is, the use of images for scientific purposes is permissible under certain circumstances.

But the judgment also creates further discussion; the court applied a wide interpretation of the term “scientific purposes”, extending the privilege of “scientific” text and data mining to the data collection, in particular, irrespective of the fact that the AI training data set could later be used to train potentially commercial AI applications. Further, the *obiter dictum* raises a lot of questions in terms of the machine-readability of rights restrictions and their significance in the context of the development and use of AI.

It remains to be seen whether the Hamburg District Court’s interpretation will prevail in a possible appeal.

Author:  
Gabriele Engels





# Wazdan Holding v Novomatic

## A sizzling appeal to the appointed person

Case details at a glance

Jurisdiction: England & Wales

Decision level: UKIPO

Parties: Wazdan Holding

Limited v Novomatic AG

Date: 14 August 2024

Citation: O/0779/24

Decision: [dycip.com/wazdan-novomatic](https://dycip.com/wazdan-novomatic)

At first instance, the opponent, Novomatic AG, successfully opposed Wazdan Holding Limited's applications for SIZZLING KINGDOM, SIZZLING MOON, SIZZLING BELLS and SIZZLING REELS, based on likelihood of confusion with its earlier marks for SIZZLING HOT, SIZZLING FORTUNES and SIZZLING COIN, covering identical and similar casino-related goods and services in classes 9, 28 and 41.

### Appeal to the appointed person

Wazdan appealed the hearing officer's decision to the appointed person, Dr Brian Whitehead, raising four grounds:

#### Ground 1

Wazdan argued that the hearing officer had erred in the assessment of the average consumer's degree of attention. It suggested that the majority of the goods in classes 9 and 28 are expensive and would therefore require a higher degree of attention by the average consumer when making a purchase. This was dismissed by the appointed person. While Wazdan provided good reasoning in the appeal for the fact that the average consumer would pay a much higher degree of attention than the hearing officer suggested, no evidence or argument was submitted to this effect at first instance. Therefore, the appointed person held that this was not relevant and could not be taken into account as too late.

#### Ground 2

This was based on Wazdan's assertion that the hearing officer was wrong to find that the word SIZZLING was in any way striking or dominant within the earlier marks.

The appointed person dismissed this ground of appeal. He found that the hearing officer

had conducted her analysis in a stepwise manner and had made it clear that she had looked at the earlier marks as whole. The hearing officer did not make a finding that SIZZLING dominated the overall impression of any of the earlier marks, but held that the word was more dominant and distinctive than the second word in the second and third earlier marks, given that the second words are allusive of the goods being offered.

#### Ground 3

Wazdan submitted that the hearing officer had erred in her comparison of the marks. The hearing officer held that the second words in the applications could be viewed as themes or features of the games, and the word SIZZLING is therefore the more dominant and distinctive component of the applications. However, the hearing officer was wrong to solely focus on the meaning of the second words within the applications without comparing their visual, phonetic and conceptual characteristics with the earlier marks.

The appointed person did not agree and dismissed this ground of appeal, as it was clear from the hearing officer's analysis that she did take the second word into account when assessing visual, aural and conceptual similarities. The precise weight given to each word was a matter for the hearing officer, and she made no error of principle.

#### Ground 4

Finally, Wazdan criticised the hearing officer's finding of an indirect likelihood of confusion. Wazdan argued that the hearing officer wrongly held, in the absence of evidence, that SIZZLING would be seen as a house mark of Novomatic AG, such that it had a family of marks and did not adequately outline the special set of circumstances that

led her to reach the conclusion that there was a likelihood of indirect confusion.

This was dismissed by the appointed person. The term "house mark" is not a defined technical term in trade mark law. However, in the context of the decision, the appointed person held that it was clear that the hearing officer was not using it to refer to a family of marks. Rather, it is clear from her analysis that throughout she considered each of the earlier marks individually. Her finding was that indirect confusion was likely in respect of each of the second and third earlier marks, but not the first earlier mark. In relation to indirect confusion, the appointed person held that the hearing officer did give "proper basis" for her finding, as each of the applications is conceptually similar, in that they carry the concept of something being sizzling (hot). The same could be said of two of the earlier marks (SIZZLING FORTUNES and SIZZLING COIN), whereas SIZZLING HOT has a meaning independent of this, as recognised by the hearing officer. The likelihood of indirect confusion arises because the applications would be considered to be a sub-brand or brand extension of each of the second and third earlier marks.

#### Author:

Kate Cheney



#### In short

This case reaffirms how essential it is to put forward all evidence and submissions at first instance as nothing new can be adduced at the appeal stage. It also confirms that at the appeal stage there is a high reluctance to overturn original decisions based on likelihood of confusion, as the hearing officer is experienced and will have conducted a full review of the facts and evidence before them at the time of making the original decision.

Novomatic opposed Wazdan's trade mark applications for casino-related goods and services



# No EUIPO green light for colour combination mark(s) MARQUES and INTA see red

**T**rade mark associations (MARQUES and the International Trade Mark Association) have intervened in a General Court case on the registrability of a colour combination mark.

OMV Aktiengesellschaft, an Austrian oil and gas company which operates fuelling stations, filed for EU designation of international registration no. 1593116 on 27 January 2021. The mark consists of a combination of gentian blue and yellow green, in a ratio of 1:7, separated horizontally, that is, a thin green line and a thick line in blue above it, as shown below:



The European Union Intellectual Property Office (EUIPO) partially refused registration of the sign for goods and services in classes 1, 4, 35, 37 while accepting registration for other services in classes 35, 37, 39, 40, 42, 43 and 44. The Board of Appeal confirmed the examiner's decision. The case is now pending before the General Court. Marques and INTA, in support of OMV's appeal, filed statements in intervention. The highly anticipated decision will be an important step in the development of EU trade mark law.

## Registrability of colour marks

The Court of Justice of the European Union (CJEU) and the General Court hold the view that, in principle, single colour marks are non-distinctive and only registered in exceptional cases or upon acquired distinctiveness. This is due to the limited availability of colours and the risk of monopolisation of them. Further, single colours are found not capable of indicating origin, and consumers are not used to inferring the commercial origin based on colours.

The EUIPO agrees with this principle regarding single colours but, according to the current guidelines, finds colour combination marks generally acceptable unless specific facts or arguments warrant a refusal.

## The Board of Appeal's decision

In the OMV decision, however, the

## The EUIPO refused registration of OMV's colour combination mark



EUIPO rejected registration of a colour combination mark, relying on the principle that "distinctiveness without any prior use is inconceivable save in exceptional circumstances". It found that the colours blue and green were basic and simple colours, and common in the field of business as they stood for certain concepts and qualities (for example, blue signifies the ocean, sky, and reliability while green evokes ecology, normal, and positive. Both colours suggest environmentally friendly). Therefore, individually, the colours were non-distinctive. Their combination was not more than the sum of its elements and would primarily be perceived as serving aesthetic purposes. OMV's surveys on the distinctiveness were only relevant regarding the subsequent claim of acquired distinctiveness but not for the question of inherent distinctiveness.

## Intervention of MARQUES and INTA

To summarise the interveners' arguments, they found that colour combinations required a different threshold for registrability than single colour marks. The arguments for the strict handling of single colour marks could not be transferred. The Board of Appeal disregarded that the application consisted of 1) specific colours (hues), 2) in combination, and 3) a systematic arrangement. This came with a higher level of distinctiveness and posed a lesser risk for monopolisation. With such a colour combination a nuanced and specific communication was possible. The fact that the colours occurred in nature did

not render them non-distinctive. Further, it was established practice that petrol stations used colours to distinguish their services, which was relevant for the public's perception and the inherent distinctiveness. In general, the argument that colours are not perceived as origin indicators lacked evidence.

Mere speculations as to the association of colours were not enough to shift the burden to establish distinctiveness to the applicant.

## Outlook

When it comes to colour combination marks, a specific and fact-based framework, taking into account an established market practice, would be needed to provide certainty for market operators. Currently, supposed ideas associated with colours are given so much weight that, on that basis, any colour combination could, and is, easily refused registration. As poetic as this allegorical approach might be, colour combinations can effectively differentiate the origin of goods and services, and the risk of monopolisation of colours is reduced.

With the intervention of MARQUES and INTA, the spotlight is now on the General Court, which will (hopefully) pave the way for a specific and fact based framework for assessing the inherent distinctiveness of colour combination marks.

## Author:

Jacqueline Feigl



## Case details at a glance

Jurisdiction: European Union

Decision level: EUIPO Board of Appeal

Parties: OMV Aktiengesellschaft v EUIPO

Date: 08 November 2023

Citation: R 798/2023-5

Decision (PDF): [dycip.com/omv-euipo](https://dycip.com/omv-euipo)

## Useful links

INTA Amicus Brief: T-38/24, OMV AG v EUIPO, 24 July 2024: [dycip.com/t-38-24-inta-brief](https://dycip.com/t-38-24-inta-brief)

MARQUES Statement in intervention T-38\_24: OMV v EUIPO, 16 July 2024: [dycip.com/marques-t-38-24](https://dycip.com/marques-t-38-24)

14.2 Colour combinations, EUIPO: [dycip.com/euipo-colour-combinations](https://dycip.com/euipo-colour-combinations)

# D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

## Likelihood of confusion / similarity

# Virtual v real EUIPO draws the line

In a recent decision, the opposition division of the EU Intellectual Property Office (EUIPO) has ruled that virtual and real-world goods cannot automatically be considered similar.

The case arose when UAE-based Artessence FZC opposed an application by Italian luxury retailer Vinicio SRL for a trade mark covering both retail services for physical and virtual goods, such as cosmetics and soaps for use in virtual reality (for example, in the metaverse).

Artessence, which holds a trade mark for perfumes and cosmetics, argued that there was a likelihood of confusion with Vinicio’s retail services for these virtual goods.

The opposition division disagreed. It emphasised that most of the retail services for virtual goods in class 35 of the application relate to the real-world counterparts of the goods covered by the earlier mark. While they may depict or emulate their

real-world counterparts, this is not *per se* sufficient for a finding of similarity: “It is not a well-known fact whether it is customary to bring together and offer for sale virtual goods and their real-world counterparts through the same distribution channels”.

The decision highlighted that virtual goods are new technologies and that there is no established market practice for linking them to their physical counterparts. Although virtual goods may mimic real-world items this is not sufficient to establish similarity.

The decision essentially came down to the EUIPO not having enough knowledge on the current market practice. Therefore, this does not mean “no” for all future cases. However, it is a reminder for all trade mark owners of their burden of proof in that regard.

**Author:**

**Julian Graf Wrangel**



**Case details at a glance**

*Jurisdiction: European Union*

*Decision level: EUIPO*

*Parties: Artessence FZC v Vinicio SRL*

*Date: 08 July 2024*

*Citation: B 3 199 946*

*Decision: [dycip.com/artessence-vinicio](https://www.dycip.com/artessence-vinicio)*

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