

10 Dec 2020

EUIPO finds no likelihood of confusion between purely figurative marks

European Union - [ITEM doo](#)

- **Virtually Live opposed the registration of a figurative mark in Classes 9, 35, 38, 41, 42 and 45 based on an earlier figurative EUTM**
- **The EUIPO agreed with applicant Oryx that the signs coincided merely insofar as they consisted of a depiction of a sphere containing a white figurative element**
- **The visual comparison revealed substantial differences that would allow the relevant consumer to distinguish between the signs**

In [Virtually Live \(Switzerland\) GmbH v Oryx doo](#) (Case B 3 087 083, 21 September 2020), the Opposition Division of the European Union Intellectual Property Office (EUIPO) has held that two purely figurative trademarks consisting of the depiction of a sphere containing a white figurative element were not confusingly similar. The interest of the decision lies in the visual comparison of the trademarks.

Background

In 2018 Slovenian company Oryx doo applied for the registration of an international trademark designating (among others) the European Union for goods and services in Classes 9, 35, 38, 41, 42 and 45:



WIPO assigned the number 1462544 to the application.

The EU part of the trademark was opposed by Virtually Live (Switzerland) GmbH based on the following EU trademarks (EUTMs) covering goods and services in Classes 9, 38, 41 and 42, and Classes 9, 38 and 41, respectively:

- EUTM No 014733356:



- EUTM No 016641607:



Decision

The Opposition Division decided to first examine the opposition in relation to EUTM No 014733356.

The goods and services

The Opposition Division noted that some of the goods and services were identical or similar. However, for reasons of procedural economy, a full comparison of the goods and services was not undertaken, and the Opposition Division proceeded to compare the signs as if all the contested goods and services were identical to those covered by the earlier trademark.

The relevant public

The relevant public was found to be the public at large, as well as business customers with specific professional knowledge or expertise. The average consumer of the category of products concerned was deemed to be reasonably well informed and reasonably observant and circumspect. Moreover, the public's degree of attentiveness was held to vary from average to high, depending on the price, specialised nature, or terms and conditions of the goods and services purchased.

Comparison of the signs

The Opposition Division agreed with Oryx that the relevant public would perceive the signs at issue as purely figurative, since their degree of stylisation and the appearance of the white element would not recall any clear and specific verbal elements. It was not possible to compare the signs aurally or conceptually for the following reasons:

- purely figurative signs are not subject to a phonetic assessment; and
- neither of the signs had a meaning for the public in the relevant territory (ie, the European Union).

With regard to the visual comparison of the signs, the Opposition Division concurred with Oryx that the signs coincided merely insofar as they consisted of a depiction of a sphere containing a white figurative element. Moreover, several differences between the signs were noted:

- the spheres were depicted in different colours - that is, different shades of blue in the earlier mark, and violet in the contested sign; and
- the white element contained in the spheres was represented in a substantially different manner:
 - it consisted of a rather irregular asymmetric image in the earlier trademark, but of a uniform (symmetric) image in the contested sign;
 - the line of the left in the earlier trademark was notably thicker, which substantially contributed to differentiating the signs visually;
 - the place where the lines merged was different (namely, in the centre in the earlier trademark and in the bottom in the contested application); and
 - the effect on how the lines ended, touching the perimeter of the sphere, was different.

Based on the above, the signs were found to be visually similar only to a low degree.

Likelihood of confusion

In its global assessment of the likelihood of confusion, the Opposition Division emphasised that the visual comparison had shown several substantial differences between the signs, enabling the relevant consumer to distinguish between them. Noting the varying degree of attention of the relevant public, it was held that the differences between the signs were capable of maintaining a sufficient distance between the overall impressions given by the signs, even in the mind of the highly attentive consumer. The Opposition Division concluded that there was no likelihood of confusion on the part of the public, even assuming that the goods and services were identical.

As the other earlier right invoked by Virtually Live contained the additional verbal element 'virtually live', the Opposition Division noted that it was even less similar to the contested sign. Hence, the opposition was not examined in relation to this earlier right and was rejected in its entirety.

Comment

This decision serves as a reminder that visual differences play an important role in the global assessment of the likelihood of confusion in cases involving purely figurative trademarks.

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ITEM doo

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