

**European Union Intellectual Property Office
Grand Board of Appeal**

Alicante, Spain

Date June 3, 2022

Re: Case R-260/2021-1; *Matthias Zirnsack vs. EUIPO*

Amicus Brief (Third Party Observations) – International Trademark Association

The International Trademark Association (“**INTA**”) has prepared this brief in relation to Case R-260/2021-1 *Matthias Zirnsack vs. EUIPO*, pending before the Grand Board of Appeal of the EUIPO (“**GBoA**”) regarding the registrability of a figurative European Union trademark comprising the word “**COVIDIOT**” and the design of a jester cap, for goods in Classes 6, 9 and 28 as depicted below:



Article 37(6) of Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and the Council on the European Trade Mark, and repealing Delegated Regulation (EU) 2017/1430 (“**EUTMDR**”) allows for interested groups or bodies in appeal proceedings before the European Union Intellectual Property Office (“**EUIPO**” or the “**Office**”) referred to the Grand Board.

A. About INTA

INTA is a global association of brand owners and professionals dedicated to supporting trademarks and complementary intellectual property (IP) to foster consumer trust, economic growth, and innovation. Members include nearly 6,500 organizations, representing more than 34,350 individuals (trademark owners, professionals, and academics) from 185 countries, who benefit from the Association’s global trademark resources, policy development, education and

training, and international network. Founded in 1878, INTA is headquartered in New York City, with offices in Brussels, Santiago, Shanghai, Singapore, and Washington, D.C., and a representative in New Delhi. For more information, visit www.inta.org.

An important objective of INTA is to protect the interests of the public by the proper use of trademarks. In this regard, INTA strives to advance the development of trademarks, related IP and unfair competition laws and treaties throughout the world, based on the global public interest in avoiding deception and confusion. INTA has been an official non-governmental observer to the World Intellectual Property Organization (“WIPO”) since 1979 and actively participates in all trademark related WIPO proposals. INTA has influenced WIPO trademark initiatives such as the Trademark Law Treaty and is active in other international arenas, including the Asia Pacific Economic Cooperation Forum (“APEC”), the Association of Southeast Asia Nations (“ASEAN”), the European Union (“EU”) and the World Trade Organization (“WTO”).

INTA provides expertise concerning trademark and other IP-related laws to courts and intellectual property offices around the world through the submission of *amicus curiae* (“friend of the court”) briefs or similar filings, playing a neutral role and addressing only the legal issues. Since 1916, INTA has intervened as *amicus curiae* in the US and in other jurisdictions, including before both the Court of Justice and the General Court of the European Union (respectively, “CJEU” and “GCEU”), as well as before the EUIPO GBoA. A list of some of these submissions is attached as **Annex A** to this brief.

B. INTA’s interest in the case

INTA is not a party in the case. INTA however believes that the case is significant to the development of trademark law and presents itself as a “friend of the court” in this matter and as done in the past (see the cases listed in Annex A).

As mentioned above, through its International Amicus Committee, INTA provides expertise concerning trademark and other IP-related laws to courts and trademark offices around the world through the submission of *amicus curiae* briefs or similar filings. Through these kinds of filings, INTA takes advantage of procedures that allow an independent third party to a proceeding voluntarily to offer an opinion on a legal matter, such as the proper interpretation or application of the law, or an explanation for why certain policies are superior.

The purpose of INTA’s intervention in such cases is to ensure that the court or tribunal is fully informed about the relevant issues that may impact the law in a given jurisdiction. Unlike the parties in litigations, who typically focus on the specific facts of a case and argue for a particular outcome, INTA plays a neutral role, addressing the legal issues. INTA hereby acts in the interests of the represented manufacturers, producers, suppliers of services, traders or consumers, who are affected by the various issues of concern in this case regarding registrability of marks.

In particular, this submission was prepared by INTA’s International Amicus Committee – Europe Amicus Subcommittee, with the approval of INTA’s Executive Committee of the Board of Directors, following a strictly independent procedure. In order to maintain INTA’s independence, the preparation of the enclosed submission took place confidentially. INTA did

not disclose its deliberations to either of the parties and did not consult with the parties on the issues in the cases.

In this case, INTA has an interest in looking into the legal background of the absolute grounds for refusal under the provision of Article 7 (1) f EUTMR, which is defined by the interplay between the interests of the applicant, the legitimate reasons for refusal behind the terms “public policy” and “accepted principles of morality”, the (human) right of property and the (human) right of freedom of speech. INTA contends that the complexity of this legal background calls for developing tests to be applied by the EUIPO – as well as by the other judicator bodies within the EU – in a uniform manner and with a predictable outcome. Therefore, INTA will focus on general issues in regard to Article 7 (1) f EUTMR, without looking into the details of this case, including possible other grounds for refusal under review of the GBoA.

INTA hopes that its comments may be of assistance to the GBoA.

C. Background

1. Case

By interlocutory decision of December 12, 2021 (“**Referral Decision**”), the EUIPO’s First Board of Appeal (“BoA”) has referred to the GBoA the question of whether or not the application for a figurative mark -



- to be registered for clamps made of metal in Class 6, gaming software and mobile apps in Class 9 and board games and toys in Class 28 falls within the ground of refusal set forth in Article 7 (1) f of the EUTMR, for being contrary “*to public policy or to accepted principles of morality*”.

The BoA agreed with the findings of the examiner that the word “covidiot” is a compound of the words “covid” and “idiot”, which will be understood, at the very least, by both German and English-speaking consumers. It is a term of the pandemic which bears a general meaning in that it designates a person who does not behave correctly during or in the wake of the Covid-19 pandemic. More specifically it designates an individual who (i) either ignores the information available concerning the danger of the Covid-19 virus or (ii) fails to take the precautionary measures imposed by government to protect him – or herself and others from becoming infected or which (iii) stores household goods in large quantities making those goods unavailable for others.

The BoA notes a possible application of Article 7 (1) f EUTMR in its second alternative, i.e. the mark bearing a content contrary to accepted principles of public morality. It contends that the word “COVIDIOT” designates a person or a group in a derogatory manner in connection with “COVID”.

Furthermore, the BoA appears to perceive a risk that the term may develop against public policy should it become, for example, a term that, by trivializing the actual message, incites a breach of the public pandemic measures.

The BoA further questions if the term may become just a fashionable term devoid of the capacity to indicate the origin for the goods applied or being perceived as a mere descriptive indication, a matter which shall not be examined herein.

Lastly, the BoA wonders whether, and to what extent, the principle of freedom expression – as resulting out of Article 11 of the Charter of Fundamental Rights of the European Union and Article 10 of the European Convention of Human Rights – should have an impact on the assessment of the grounds of refusal set forth in Article 7(1) f EUTMR.

The BoA refers the case to the GBoA for examination because of the “*degree of legal complexity of the case and its importance*” (see to this extent, Referral Decision paragraph 11).

2. Legislative Background

Article 7 (1) f EUTMR bans from registration, as an absolute ground for refusal, trademarks

“...which are contrary to public policy or to accepted principles of morality”.

The language of this provision is unchanged from the first Community Trademark Regulation (CTMR 40/94) of December 20, 1993, there is however no further definition or guidance in the legislation as to the content and scope of application of the terms “*public policy*” and “*accepted principles of morality*”.

3. Relevant Case Law

Among the decisions applying the absolute grounds of refusal set forth in Article 7 (1) f EUMR (and its earlier legislative equivalents), it is worth mentioning:

- GBoA, July 6, 2006, R-0495/2005-G, denying the registrability of the mark “Screw You” in Classes 3, 25 and 33.
- GCEU, September 11, 2011, T-232/10, *Couture Tech Ltd v. OHIM*, EU:T:2011:498, denying the registrability of a figurative mark depicting the coat of arms of the former Union of Soviet Socialist Republics (USSR) -



in Classes 3, 14, 18, 23, 26 and 43.

- GCEU, March 9, 2012, T-417/10, *Federico Cortés del Valle López v. OHIM*, EU:T:2012:120 (unpublished), denying the registrability of a figurative sign “*¡Que bueno ye! HIJOPUTA*”.

- GCEU, November 14, 2013, T-52/13, *Efag Trade Mark Company v. OHIM*, EU:T:2013:596, denying the registrability of a wordmark “*Ficken*” in Classes 25, 32, 33 and 43.
- CJEU, February 27, 2020, C-240/18-P, *Constantin Film Produktion GmbH v. EUIPO*, EU:C:2020:118, setting aside the GCEU’s judgement of January 24, 2018 (T-69/17, EU:T:2018:27) which had refused registration of the word mark “*Fuck Ju Göthe*”.

D. Observations and Legal Analysis of INTA

1. General Observation and Starting Point

The terms “*public policy*” and “*principles of morality*” are inherently vague and therefore carry with them a risk of an inconsistent application and a danger of each examiner being tempted to follow personal preferences rather than clear legal guidance. The lack of dictionary guidance and the heavy influence of the subjective views of the examiners, which lead to inconsistencies, has been pointed out by INTA in its [amicus brief](#) filed in *lanca vs. Brunetti* before the US Supreme Court. Brief for INTA at page 21-27, *lanca v. Brunetti*, (U.S. Supreme Court 2019) (Case No. 18-302).

Furthermore, as the CJEU has observed in the *Fack Ju Göhte* case (in particular at paragraph 39), the values and norms “*are likely to change over time and vary in space.*”

Adding the need to take account of the principle of free speech does not necessarily solve this problem as it just transports the uncertainty and vagueness to a higher level. Furthermore, it appears that the clearer the language and the scope of application of Article 7 (1) f EUTMR has been defined, the lesser there is a need to take freedom of speech into account in order to “rescue” applicants from an inconsistent and too broad interpretation of this provision.

2. Structural Analysis of the Provision in Dispute

Article 7 (1) f EUTMR forms part of an exhaustive list of absolute grounds for refusal. These barriers are invoked not only in the rare case where a concern exists in the whole of the territory of the European Union, but where a concern exists “*in only part of the Union*” according to Article 7 (2) EUTMR¹. Otherwise, for example, only word marks which are understood in all languages of the EU would qualify for an absolute ground for refusal. Therefore, the GCEU has rightfully held in case T-232/10, *Couture Tech Ltd v OHIM* (see *supra*, Section C, paragraph 2) that also public policy from a single member state may suffice to refuse an application under Article 7 (1) f EUTMR (see, to this extent paragraph 26 of the relevant decision).

Furthermore, it follows from this concept that for assessing the perception of the relevant public, the examiner may take into account the public of a single member state (see case T-232/10, *Couture Tech Ltd v OHIM* (see *supra*, Section C, paragraph 2) paragraphs 31-34.

¹ Article 7 (2) EUTMR notes expressly that paragraph 1 shall apply notwithstanding that the grounds of refusal obtain in only part of the Union.

Therefore, the perception of the national public of a single Member State may suffice to justify a refusal under this provision.²

3. The Examiner's Perspective

The examiner represents the EUIPO. As an institution, the EUIPO is neither involved in the public policy of EU-member-states nor does it form part of any national public. As a consequence, the examiner necessarily has to undertake investigations into the local perception of the mark and public policy or accepted principles of morality at stake. The examiner however may well not be the final body to judge on the mark applied for registration. In the case of a dispute, the matter will be reviewed again before the Board of Appeal and possibly also before the GCEU/CJEU.

Against this background, the examiner necessarily can only rely for his/her ruling on public policy and/or accepted principles of morality which emanate from the level of EU member states, with a sufficient degree of clarity and reliability to be reviewed in a contentious process and on different levels, without causing doubts as to their existence and impact.

It is worth noting that in the case here, the examiner and the BoA have taken great effort to identify the possible connotations and public perception of the term "Covidiot" and that their findings do not raise any concerns in that regard. However, it also appears that the second step of the investigation as to whether the established content of the mark will be perceived as adverse to accepted principles of morality or adverse to public policy is somewhat weak and tentative and may therefore not satisfy the necessary degree of clarity and reliability mentioned above.

4. Interpretation of the Term "Public Policy"

Both the EUIPO Guidelines for Examination³ and the BoA's recent report on trademarks contrary to public policy or accepted principles of morality⁴ stress that "*it appears from case-law that 'public policy' entails an objective assessment made in relation to imperative legislative or administrative norms, while for 'accepted principles of morality', a subjective assessment is to be made in relation to normal, accepted conduct in a society at a certain point in time*" (see, to this extent, the BoA's report at paragraph 18).

However, the truth of the matter is that the term "*public policy*" is just as broad and vague as the term "*principles of morality*." It raises a barrier to trademark registration and thus creates a tension with the principle of protection of intellectual property which under Article 17 (2) forms part of the EU Charter of Human Rights⁵. Against this background to safeguard the right of acquiring intellectual property, INTA takes the view that examiners of the EUIPO (and where appropriate the courts considering the same question) must be cautious when invoking public policy against the registrability of trademarks.

An examiner should therefore take a narrow approach and identify only those issues of public policy which (i) have been firmly established as an expression of the majority of the relevant national public and (ii) are laid down in a manner to be publicly understood and quoted

² Accordingly, there is no reason to object to the approach of the examiner to rely only on the public of Germany and the UK for which a common understanding of the term "Covidiot" was evidenced.

³ See Guidelines for Examination in the Office, Part B Examination, Section 4, Chapter 7, Trade marks contrary to public policy or acceptable principles of morality (Article 7(1)(f) EUTMR).

⁴ See Boards of Appeal, October 21, Case-law Research Report – Trade marks contrary to public policy or accepted principles of morality.

⁵ Charter of Fundamental Rights of the European Union, (2012/C 326/02).

in a uniform manner. Ideally, as it was the case in *Couture Tech Ltd v. OHIM* (T-232/10, see *supra*), public policy should also be clearly set out in applicable national laws.⁶ In any case, the assessment should be determined according to the social consensus prevailing in society at the time of the assessment (CJEU, C-240/18 P, *Fack Ju Göthe*, paragraph 39; see *supra*, Section C, paragraph 2).

5. Interpretation of the Term “Principles of Morality”

Article 7 (1) f EUTMR does not make reference to the principles of morality as such.⁷ It rather refers to “accepted” principles of morality. This prefix gives an indication to the perception of the relevant public. As the perception of the relevant public also plays a decisive role in other areas of trademark law (for example for the process of establishing the content of a mark or the risk of confusion), there is at least some logic to taking this reference as a filter to better integrate the somewhat abstract and vague ground for refusal of “*principles of morality*” into the overall framework of EU trademark law.

In fact, this is exactly the approach which the Office and European courts appear to have taken:

- In case R/0495/2005-G for the application of a word mark “Screw You”, the Office refused registration by express reference to a majority of the British and Irish public:

“In the Office’s opinion, a substantial proportion of ordinary citizens in Britain and Ireland whose values and standards are representative of society as a whole, would find the words “Screw You” offensive and objectionable”.

- The General Court seeks to establish a relevant majority as the decisive factor as it excludes the perception of (irrelevant) minorities of either exceptionally puritan citizens or those citizens, who find even gross obscenity acceptable (see *Efag v. OHIM*, T-52/13 concerning the German word “Ficken” under paras 18- 27 with reference to the cases T-526/09 – Paki Logistics and T-417/19 - *¡Que buenu ye! HIJOPUTA!*);
- The CJEU finally in its recent judgment on “*Fack Ju Göhte*” refers as well to the usual standard of the “perception of the relevant public” as follows:

*“[43] The examination to be carried out cannot be confined to an abstract assessment of the mark applied for, or even of certain components of it, but it must be established, in particular where an applicant has relied on factors that are liable to cast doubt on the fact that that mark is **perceived by the relevant public** as contrary to accepted principles of morality, that the use of that mark in the concrete and current social context would indeed be **perceived by that public** as being contrary to the fundamental moral values and standards of society.”*

Namely, in this case the CJEU confirmed that the assessment of contradiction to accepted principles of morality is a concrete factual and not an abstract legal assessment. As the CJEU observed (paragraph 42, C-240/18 P), reiterating the

⁶ The examiner was able to refer to Article 269/B of the Hungarian Criminal Code prohibiting the swastika, the insignia of the SS, the arrow cross, the hammer and sickle, the five-point red star or any other symbol representing one of those signs.

⁷ It therefore somewhat deviates from the language of Section 2 (a) Lanham Act of the US which directly quotes “immoral” or “scandalous” matter.

factual nature of the assessment, the context in which the mark may be encountered is to be taken into account and, where appropriate, the particular circumstances of the part of the Union concerned, namely elements such as legislation and administrative practices, public opinion and, where appropriate, the way in which the relevant public has reacted in the past to that sign or similar signs, as well as any other factor which may make it possible to assess the perception of that public, are relevant.

6. Procedure for Establishing Adverse Principles of Morality

In the cases which have been decided so far, the Office and the European courts have been happy to identify a reliable common understanding of the content of a term in dispute and to rather take this as the perception of the relevant public without further consideration. The latest ruling of the CJEU concerning the Anglo-German word-construction “*Fack Ju Göthe*” however, already suggests by its artificial construction that there is a connotation to parody which may cause a different perception of the public than the underlying terms “Fuck” or “Ficken”. So, there may be more to the establishment of “*accepted principles of morality*” by reference to the relevant public than just looking at dictionaries and use in literature and media.

In this regard, INTA notes that the perception of the relevant public involves a factual assessment. In particular, and on the basis of excluding minorities as already established by case law, even the broader public may have a split perception. Against this background, INTA contends that to reliably support a narrow approach, it necessarily has to be **a majority of the relevant public** which perceives the mark in dispute as immoral to invoke this barrier to registration⁸, also with a view to ruling out the risk – acknowledged in the EUIPO Guidelines for Examination and the BoA’s recent report on trademarks contrary to public policy or accepted principles of morality – that the wording of Article 7(1) f EUTMR could be applied subjectively so as to exclude trademarks that are not to the examiner’s personal taste.

Further, INTA takes the position that as this is ultimately a factual assessment, the procedural rules of the EUIPO for the administration of filings and objections come into play. It follows that in cases where there is a doubt as to perception of a majority of the relevant public, the requirements of Article 95 (1) in cases other than an assessment of relative grounds (“*In proceedings before it the Office shall examine the facts of its own motion*”) should be observed. The burden of proof therefore, should be on the EUIPO and the examiner must at least identify supportive factual circumstances – i.e. “contextual factors” – for a majority of the relevant public to invoke the bar of Article 7 (1) f EUTMR against an application. This is exactly in line with the approach of the CJEU in the “*Fack Ju Göthe*” ruling to take the “ex officio” competence of the EUIPO as an obligation:

“As regards the latter claim in particular, it is important to note, first, that the General Court was required, in the judgment under appeal, to ascertain that EUIPO had not infringed Article 76 (1) of Regulation 207/2009 which, in proceedings concerning absolute grounds for refusal, requires the latter to carry out an ex officio examination of the facts and establish to the requisite legal standard the presence of such grounds.” (paragraph 55, C-240/18 P)

As the CJEU observed (paragraph 42, C-240/18 P), reiterating the factual nature of the assessment, the context in which the mark may be encountered is to be taken into account and, where appropriate, the particular circumstances of the part of the Union concerned,

⁸ By this argument, INTA takes a further step from the notion in *Fack Ju Göthe* under para 52 of the judgment to take account of the great success of the movie under the same title, as a side-aspect of consideration.

namely “contextual” elements such as legislation and administrative practices, public opinion and, where appropriate, the way in which the relevant public has reacted in the past to that sign or similar signs, as well as any other factor which may make it possible to assess the perception of that public, are relevant.

7. Impact of Human Rights and Freedom of Speech

At the outset, it is worth stressing that with regard to the EU Charter of Human Rights there is an immediate conflict between the catalogue of absolute grounds for refusal under Article 7 (1) EUTMR and the guarantee of protection for Intellectual Property Rights under Article 17 (2) of the EU Charter of Human Rights. Such tension is inherent to the EUTMR as a whole, as the principle of IP protection emanates on lower level in Article 9 (1) and 9 (2) EUTMR from the rights conferred by an EU trademark. Against this background there is no need specifically to refer to Article 17 (2) of the Charter of Human Rights. It is a much narrower and easier approach to note a tension in the sense of conflicting principles between Article 9 (1) (“*The registration of an EU trade mark shall confer on the proprietor exclusive rights therein*”) and 7 (1) EUTMR.⁹ Such principles have to be balanced in each single case in which a trademark application might give rise to absolute grounds for refusal.

With specific regard to the freedom of expression and information as conferred under Article 11 of the EU Charter of Human Rights and – other than the guarantee of Intellectual Property Rights – also under Article 10 ECHR, it is not referred to in the operative text of the EUTMR. It is, however, noted expressly towards the end of recital No. 21 as follows:

“Furthermore, this Regulation should be applied in a way that ensures full respect for fundamental rights and freedoms, and in particular the freedom of expression.”

In the *Fack Ju Göhte* case the CJEU made it clear that freedom of expression applies also in the field of trademark law, and specifically in the assessment of the contrariety of a sign to the principles of morality under Article 7 (1) f EUTMR, by pointing out that “*freedom of expression, enshrined in Article 11 of the Charter of Fundamental Rights of the European Union, must, as EUIPO acknowledged at the hearing and as the Advocate General states in points 47 to 57 of his Opinion, be taken into account when applying Article 7(1)(f) of Regulation No 207/2009. Such a finding is corroborated, moreover, by recital 21 of Regulation No 2015/2424, which amended Regulation No 207/2009 and recital 21 of Regulation 2017/1001, both of which expressly emphasise the need to apply those regulations in such a way as to ensure full respect for fundamental rights and freedoms, in particular freedom of expression*” (see, to this extent, paragraph 56 of the relevant judgement).

Freedom of speech has a similar position to the absolute grounds for refusal which stand for various interests of the general public, and which have their impact on trademark law from the outside. Against this background, freedom of speech however has an opposite impact as it bears the potential to overrule the concerns from absolute grounds of refusal and to effect registration contrary to objections on absolute grounds. Moreover, freedom of speech has a particular impact on the grounds of public policy or public morals. Looking at the function of these two grounds to restrict the access to registration, freedom of speech has the capacity of limiting the impact of these two grounds i.e. to re-open the door to registration. In that regard, freedom of speech functions as a **reverse restriction**.

⁹ For a respective approach to the interpretation of Articles 3 (1) and 5 (1) TMD, see ECJ C-104/01 – libtel, paras 50 and 51.

In the role of a reverse restriction, freedom of speech limits the impact of Article 7 (1) f EUTMR in those cases in which it is invoked. As a practical guidance, one may take this into account in practice by not only asking for public policy, but rather public legal standards to object to registration on the one hand and not only for a possible majority of the relevant public, but rather for an existing established majority of the relevant public, on the other hand.

Further, INTA takes the position that it would be wrong to discount freedom of speech concerns because absolute grounds of refusal only affect the registrability of a trademark (and is therefore a restriction on the existence of a property right) while the use of the term by others remains free and unrestricted.¹⁰ The value of a trademark registration is not tantamount to an unregistered trademark, even in jurisdictions where such unregistered rights are recognized. This follows from the very existence of trademark registration systems, which otherwise would be redundant and from the substantial benefits conferred by registration. In that context, what is called into play is on the one hand the applicant's interest in the registration of a "speaking" mark and on the other hand the public interest in not being confronted with marks which are contrary to accepted principles of morality. The right of free speech is affected, even by a mere denial of registration.

The right of property (Article 17 of the Charter on Human Rights) is effectively relevant as well as the right of freedom of speech. First of all, there is a group of trademarks which convey political messages as an indicator of origin for example for NGO's which have a need for registration to be protected. Secondly, recital 21 EUTMR would be redundant if the right of free speech would not already have its impact on registration. Thirdly, the approach to exclude the application of the principle of freedom of speech in the assessment of the registrability of a trademark would be tantamount to make the right of free speech subject to a condition and thus violate its character as a constitutional principle.

E. Conclusions

1. No Majority of the Relevant Public

From the facts set out so far, neither the examiner, nor the First Chamber of the Board of Appeal, have been able to establish that the relevant public of the UK and of Germany would – aside from some negative connotations – consider the term "COVIDIOT" as violating public morality. In particular, there is no indication as to a majority of the relevant public being guided by such a perception. Moreover, there is no indication that public policy has been established to ban or to restrict the use of "Covidiot". Quite contrary, the absence of factual guidance concerning an adverse position of the relevant public against the usage of the term "COVIDIOT" prohibits the Office to invoke Article 7 (1) f EUTMR against the application for trademark registration.

2. Impact of the Right of Free Speech

Preliminarily, by clearly stating that freedom of expression applies in the field of trademark law, and specifically in the assessment of the contrariety of a sign to the accepted principles of morality under Article 7 (1) f EUTMR, the judgement of the CJEU in *Fack Ju Göhte* has overruled the previous case law, whereby refusing a mark would not adversely affect the right to freedom of expression because it would not deprive the applicant of the opportunity to market its goods under the relevant mark.

¹⁰ This false argument appears in GC T-52/13 – "Ficken", paragraph 40 and in the objection of the examiner dated December 9, 2020, against the registrability of "Covidiot".

Turning to the case at issue, it appears that the term “COVIDIOT” has been chosen on purpose to make use of a trademark in the public discourse about how to deal with the challenges of the COVID 19-pandemic. The individual intention of the applicant however is irrelevant. For the right of free speech to be invoked it suffices to note that the word “COVIDIOT” has emerged from public debate and designates attitudes and a behavior which is under dispute. Although it follows already from the application of inherent trade mark law, that abstract public morals cannot create a barrier to registration, in the absence of evidence of public perception of a majority of the relevant public, this result is even more supported by the impact of the right of free speech. To overcome this impact, controversial public policy must be laid down expressly and on the level of laws, or opposite principles of morality must be supported by a large majority of the relevant public. Neither of these provisos apply here. The freedom of speech clearly dominates and overrules any (tentative) concerns one may have in regard to the term COVIDIOT not being fully in line with public standards.

ANNEX A

INTA has filed the following *amicus-type* submissions before European Courts and Bodies:

- Letter of submission on January 10, 2022, in the case *Harman International Industries, Inc v. AB SA* ([C-175/21](#))
- Letter of submission on December 2, 2021 in the case *Monz Handelsgesellschaft International mbH & Co. KG vs. Büchel GmbH & Co. Fahrzeugtechnik KG* ([C-472/21](#)).
- Letter of submission on August 16, 2021 in the case *X BV v. Classic Coach Company vof, Y, Z* ([C-112/21](#))
- Third Party Observations on July 2, 2021 in the cases *Iceland Foods Limited v. Icelandic Trademark Holding ehf* and *R 1238/2019-1 Iceland Foods Limited v. Islandsstofa (Promote Iceland), The Icelandic Ministry for Foreign Affairs and SA - Business Iceland* ([R 1613/2019](#))
- Letter of submission on June 28, 2021 in the case *Leinfelder Uhren GmbH & Co KG v. E. Leinfelder GmbH and others* ([C-62/21](#))
- Third Party Observations on April 1, 2021 in the [case EUROMADI IBERICA, S.A./ Zorka Gerdzhikova \(R 964/2020-4\)](#)
- Third Party Observations on March 3, 2021 in the cases *The Estate of the Late Sonia Brownell Orwell ./. EUIPO* ([R 1719/2019-5](#) and [R 1922/2019-5](#))
- Third Party Observations on February 24, 2021 in the case *The Estate of the Late Sonia Brownell Orwell ./. EUIPO* ([R 2248/2019-5](#))
- Letter of submission on December 23, 2020 in the [case ACACIA S.R.L v. Bayerische Motoren Werke Aktiengesellschaft \(C-421/20\)](#)
- Third Party Observations on December 1, 2020 to EUIPO Grand Board in [case Der Grüne Punkt Duales System Deutschland GmbH ./. Halston Properties, s.r.o. GmbH \(R 1304/2020-G\)](#)
- Letter of submission to Novartis AG on September 28, 2020, in Joint Cases *C-254/20 Novartis AG v. Impexco NV* and *C-254/20 Novartis AG v. PI Pharma NV* ([C-253/20](#) and [C-254/20](#))
- Letter of submission to Novartis AG on August 27, 2020, in Joint cases *C-147/20, Novartis Pharma GmbH v. Abacus Medicine A/S* and *C-224/20, Merck Sharp & Dohme B.V. et al. v. Abacus Medicine A/S et al.* ([C-147/20](#) and [C-224/20](#))
- Statement of Intervention on January 6, 2016, in the case *DHL Express (France) v EUIPO* ([T-142/15](#)).
- Statement of Intervention on April 25, 2014 in the case *Voss of Norway v OHIM* ([C-445/13 P](#)).
- Written Observations on March 16, 2010 in the case *Nokia Corporation v. Her Majesty's Commissioners of Revenue and Customs* (HMRC) ([C-495/09](#)).
- Letter of submission to Specsavers International Healthcare Limited on August 23, 2012 in the trademark case *Specsavers International Healthcare Limited & others vs Asda Stores Limited*

[\(C-252/12\)](#).

- Letter of submission to Intel Corporation on September 5, 2007, in the trademark case *Intel Corporation v. CPM United Kingdom Ltd.* [\(C -252/07\)](#).
- Letter of submission to Adidas and adidas Benelux on June 12, 2007 in the trademark case *Adidas and adidas Benelux* [\(C-102/07\)](#).
- Letter of submission to SARL Céline on April 25, 2006 in the trademark case *SARL Céline v. SA Céline* [\(C-17/06\)](#).
- Submission as intervener to the English Court of Appeals on October 16, 2006 in the case *Special Effects v L'Oreal SA* (HC 05C012224, Court of Appeal 2006 0744).
- Letter of submission to Bovemij Verzekeringen N.V. on June 17, 2005 in the case *Bovemij Verzekeringen N. V. v. Benelux Merkenbureau* (ECJ - C-108/05).
- Letter of submission to Schering-Plough Ltd. on December 5, 2003 in the trademark case *Schering-Plough Ltd v. European Commission and EMEA* (CFI T-133/03).
- Letter of submission to Merck Inc. on April 4, 2003 in the trademark case *Paranova A/S v. Merck & Co., Inc, Merck, Sharp & Dohme B. V. and MSD (Norge) A/S* (EFTA Court E-3/02).
- Letter of submission to Praktiker Bau - und Heimwerkermarkte AG on March 20, 2003 in the trademark case *Praktiker Bau - und Heimwerkermarkte AG* (ECJ C- 418/02).
- Letter of submission to Shield Mark on November 1, 2001 in the trademark case *Shield Mark v. J. Kist* (ECJ C-283/01).
- Letter of submission to Libertel Groep B.V. on July 6, 2001 in the trademark case *Libertel Groep B.V. v. Benelux Merkenbureau* (ECJ - C-104/01)
- Letter of submission to Glaxo Wellcome Limited on October 10, 2000 in the trademark case *Glaxo Wellcome Limited v. Dowelhurst Limited and Swingward Limited* (ECJ - C-143/00)