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Oxfordshire' snipers: multimedia marks are best served cold

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media LAWS

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Once upon a time there was "American Sniper". And it was a movie, quite good indeed.
This time our sniper is European and, surprisingly enough, he comes from the Oxfordshire – maybe, the poshest side ever of the UK. Almost a reverse "Pretty Woman", isn't it?
Of course it is. And in fact, this story is not real but it is about a videogame. And violence. And trademarks – as pretty much always lately.
For the sake of clarity, our story started more than one year ago, in October 2017, when a young chap, Jason Kingsley, ex work-for-hire developer and current CEO of **"Rebellion"- a fiercely independent British videogame studio –** decided to file, together with his brother Christopher, **a trademark application before the EUIPO for a multimedia mark representing the "Sniper Elite 4 kill cam mechanic"(https://youtu.be/WvGurDybTm4)**[1].The application, which includes a 25 second video clip, was filed for Class 9 (software), 28 (games) and 41 (among the others, entertainment and education) of the International Nice Classification.

Multimedia marks: a definition

Now, the thing is quite singular in a number of ways. **First of all, due to the kind of trademark applied for. This is, in fact, a "multimedia mark"** [2], i.e. one of those trademarks recently introduced under the new Trademark Regulation, which according to Article 3(3)(i) EUTMR "consists in, or extends to, the combination of images and sound". In this sense, due to the extreme novelty of the category, the same notion of registrable subject matter is yet to be clarified. Similar issues arise with regard to what, in this context, is to be meant by "distinctiveness" [3].

Public policy and morality: drawing the line

Secondly, indeed, the fact that **the multimedia trademark consists in a "kill cam mechanism**" is, at least, questionable. And in fact, to date there are very few [4] examples of successful applications for multimedia marks and they include, among the others, a lovely flagpole saying "hi" to its imaginary public and a– not that lovely- moving logo of the University of Catalunya. Differently, for the ones of you who are not as much geeks as they'd like to be, a "kill cam mechanic", as defined by the Urban Dictionary, is "a second person view of your death".
Indeed, this tool shows to the general public which goals the wonderful world of technology is now able to achieve. And in fact, as Jason Kingsley proudly claims, Rebellion is a privately owned company that can "do what it wants to do".
Well, this is all very good to say and great to hear. Still, under trademark law "public policy and morality" does represent a limit to trademark registrations. And in fact – guess what – the application for the "kill

cam mechanic" is currently still pending before the EUIPO.

Namely, Article 7(1)(f) EUTMR excludes from registration trademarks that are contrary to public policy or accepted principles of morality [5]. In this regard, as made clear by the EUIPO, **a balance has to be found**. And in fact, the underlying policy of the ground assumes the difficult role of promoting commercial solutions which are, in the same time, persuasive but not outrageous. In other words, if on one side the EUIPO shall not assist traders wishing to further their business by using trademarks that offend certain basic values of civilized society, on the other, it will not base its analysis on the perception of that "small minority of exceptionally puritanical citizens" [6].

Moving back to the case at stake, according to Tim Jones, Rebellion's head of creative, Sniper Elite kill cam is the result of an evolution. Namely, as he says, "the x-ray kill cam [was introduced]to track it through the body and see how it breaks bones, punch holes through skulls, and all the rest of it".

Therefore, the question arises. **Would the "kill cam" application be regarded as outrageous**?

Or would it simply be in line with the generally accepted principles of morality (as consumers are used to it)? And, if so, would this imply the mark is not distinctive enough?

In this regard, for what it's worth, the same Donald Trump included in his "violence in video games" supercut the "Sniper Elite 4" videogame, posting the video on the White House YouTube channel.

Right now, we are definitely looking forward to the Examiner decision on the matter. Meanwhile, as a recap of the issues potentially involved, we can just quote what Rebellion's head of creative declared in an interview: "Ultimately what we're doing is entertaining. I think **there's a fine line between horror, shock and humour**. But it's up to the audience to decide why it's funny. I wouldn't deny that it is. Sometimes it's just shocking".

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[1] EUTM application number 017282203 https://youtu.be/WvGurDybTm4.

[2] According to Article 3(3)(i) EUTMR, multimedia marks represent a new category of trademark (as and from October 2017) consisting in, or extending to, the combination of images and sound.

[3] According to the Guidelines published by the EUIPO, in the absence of relevant case-law, the general criteria will apply also to the newly introduced marks (hologram, multimedia, motion marks). With the consequence that the mark will be distinctive within the meaning of Article 7(1)(b) EUTMR if it can serve to identify the product and/or services for which registration is applied for as originating from a particular undertaking, and thus to distinguish that product/service from those of other undertakings. Also, according to the mentioned Guidelines, this distinctiveness will be assessed by reference, first, to the goods or services for which registration is sought and, second, to the relevant public's perception of that sign, bearing in mind that these marks will not necessarily be perceived by the relevant public in the same way as a word or figurative mark.

[4] To date, based on the data available on the relevant database, in more than 1 year time, only 20 applications/registrations have been filed before the EUIPO.

[5] Article 7(1)(f) EUTMR mirrors that of Article 6 *quinquies*(B)(3) of the Paris Convention 1, which provides for the refusal of trademark applications and for the invalidation of registrations where trademarks are 'contrary to morality or public order'. See, EUIPO Examination Guidelines. For more details on the ground, http://www.medialaws.eu/la-mafia-se-sienta-a-la-mesa-the-subtle-line-between-outrageous-and-appealing/

[6] Plus, there is no need to establish that the applicant **wants** to shock or insult the public concerned; the

fact that the EUTM applied for **might** be seen, as such, to shock or insult is sufficient (decision of 23/10/2009, R 1805/2007-1, PAKI, EU:T:2011:564, § 27, confirmed by judgment of 05/10/2011, T-526/09, PAKI, EU:T:2011:564, § 20 et seq.).

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