

Michaël De Vroey | 17 August 2023

Brussels Enterprise Court denies copyright protection for cosmetic device and graphical user interface, and invalidates EU trademarks “Oxygeneo” and “Tripollar”.

IN BRIEF

By a judgment of 5 May 2023, the Brussels Enterprise Court dismissed a claim brought by Israeli company Pollogen Ltd. against Belgian companies LA Poppe BV and i-Learning VZW for alleged trademark infringement and infringement of copyright in a cosmetic device and its graphical user interface. On counterclaim, the Court invalidated Pollogen’s EU trademarks “Oxygeneo” and “Tripollar” for lack of distinctive character.

FACTS

Pollogen commercialises treatment devices and products in the aesthetic sector, including the Geneo device for skin treatment. LA Poppe operates as a wholesaler of beauty products. i-Learning is a non-profit organisation operating a beauty school offering training in aesthetic and non-invasive medical treatments. LA Poppe offers a device called ‘Oxygen+’ for sale on its website. Pollogen, believing that the Oxygen+ device infringed its rights, sent a cease-and-desist letter to LA Poppe in July 2020, claiming infringement of its alleged copyright in the Geneo device and of several EU trademarks. Pollogen summoned LA Poppe and i-Learning for these alleged infringements on 4 February 2022.

DECISION

By a decision of 5 May 2023, the Brussels Enterprise Court sided with LA Poppe and i-Learning and dismissed Pollogen’s infringement claims:

1. **No copyright infringement:** The Court found that Pollogen had failed to provide sufficient evidence to establish the originality and copyright protection of its Geneo device and graphical user interface. With reference to the CJEU’s decisions in *Cofemel* and *Brompton Bicycle*, the Court held that judges should be wary of granting excessive protection via copyright to product designs that cannot (or no longer) enjoy protection as a Community design, especially works of applied art with an

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Oxygen+



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industrial purpose. In other words, copyright protection is not a safety net in the absence of design protection. There is an originality threshold to overcome and the onus is on the claimant.

2. **Trademarks invalid:** On counterclaim, the Court declared that Pollogen’s trademarks “Oxygeneo” and “Tripollar” were purely descriptive and therefore lacked distinctiveness, making them ineligible for trademark protection. In particular, the Court found that “Oxygeneo” is nothing but the contraction of ‘oxygenium’ and ‘neos’ or ‘νέος’, meaning new. The trademark “Oxygeneo”, used to advertise treatments and products that claim to introduce new oxygen into the skin, is purely descriptive of the goods and services for which it was filed. “Tripollar” refers to tripolar or tri-polarity. References to multipolar radio frequencies are common when communicating about beauty treatments with radio frequencies to the public.
3. **Unfair practices** by Pollogen: On counterclaim, the Court found that Pollogen had engaged in unfair trade practices by making false and disparaging statements about LA Poppe’s Oxygen+ device, including false allegations of counterfeiting and lack of regulatory compliance. As a result, the Court issued an order prohibiting Pollogen from making such statements, on pain of daily penalties in case of non-compliance.

Pollogen has appealed the decision.

IP Partner **Michaël De Vroey** represented LA Poppe and i-Learning in this case. If you want to know more about this case or about IP protection/enforcement in general, please contact michael.devroey@simontbraun.eu.

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