



# Public order and trademarks for art work

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IP Case Law Conference  
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## GJESTØMIK: Fortæren forni

### Sinnataggen

Vigeland fikk svarleieopphold i London i 1901, tegnet Vigeland en rask skisse av et sint lite gutt. Ti år senere, i 1911, brukte han denne skissen av liten skulptur. Rundt 1928 laget han en større versjon for gjestøping i Vigelandsparken. De utvalgte skissene og modellens gir et innblikk i arbeidet fra skisse til ferdig gipsavstøping.

Skulpturaggen i ulike stadier. Fra venstre til høyre:

1. Skisses: Vigeland, Sinnataggen, 1911. Gips.
2. Armering: Jernskjelettet ble laget av smedene i atelieret. Skjelettet var nødvendig for å støtte og forsterke leiremodellen. På skjelettet er det festet trekryss. Disse kryssene bidro til å holde leiren på plass.
3. Sinnataggen modellert i leire på satt deleblikk (tynne metallplater). Det skulle nå støpes en gipsform over leiremodellen. Deleblikket delte gipsformen i en hovedform og flere mindre delformer.
4. Støpeform bestående av en hovedform og flere delformer. Formen ble påført et slippmiddel, og deretter dekket med et ca. 2 cm tykt gipslag på innsiden.
5. Ferdig støp hugges ut. Resultatet er en gipsavstøping som er identisk med leireoriginalen. Navnet «forloren forms» kommer av at støpeformen blir ødelagt i prosessen.

## CASTING WITH PLASTER *Waste moulding*

### *The Angry Boy*

During an excursion to London in 1901, Vigeland drew a quick sketch of an angry little boy. Ten years later, in 1911, he used the sketch for a small sculpture. Around 1928 he made a larger version for the Vigeland Park. The sketches and models in this exhibition provide an insight into the working process from sketch to completed plaster cast.

*The Angry Boy* at different stages from left to right:

1. Gustav Vigeland, *The Angry Boy*, 1911. Plaster.
2. Armature. The armature was made by blacksmiths in the studio. This structure was necessary to support and reinforce the clay model. Wooden crosses were fastened to the armature with steel wire to stop the clay from slipping.
3. *The Angry Boy* modelled in clay. Thin metal plates (shim) have been stuck into the surface. The shim divided the plaster mould that was to be made from the clay original into a main mould and several minor moulds.
4. Mould consisting of one main and several minor moulds. The inside of the mould was coated with a release agent and then covered with an approximately two centimetre layer of plaster.
5. The mould is chipped away, resulting in a plaster cast of *The Angry Boy* identical to the clay original.



## Art work is not a distinctive trade mark

- GC, 30/6/2009, T435/05, DANJAQ vs OHIM, '**Dr No**'.
- C-488/16P Bundesverband Souvenir- Geschenke- Ehrenpreise/EUIPO (Neuschwanstein), GC, 5 July 2016, case T-167/15, Bundesverband Souvenir- Geschenke- Ehrenpreise/EUIPO (**Neuschwanstein**).
- German Federal Patent Court, 25 November 1997, case 24 W (pat) 188/96, **Mona Lisa**, in: Gewerblicher Rechtsschutz und Urheberrecht 1998, pp. 1022.
- Brussels Court of Appeal, 3 October 2013, cases 2013/7132 and 2013/7133, Anne Frank Foundation/Benelux Office for Intellectual Property, "**The Diary of Anne Frank**" and "**The Secret Annex**".

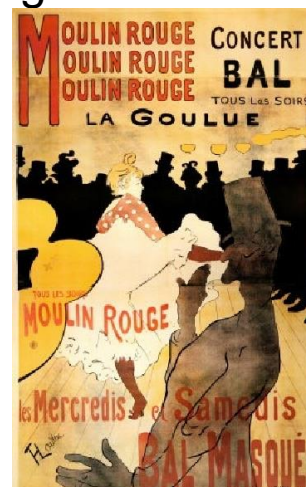
## Art work may give substantial value to the goods

-EFTA Court 6/4/2017 Municipality of Oslo the 'Vigeland case, application for this mark for toys?



## Art work may constitute a valid trade mark

- Board of Appeal, 31/8/2015, R 2401/2014-4, Anne Frank Fonds (“**Le Journal d’Anne Frank**”).
- Board of Appeal , 22/3/2018, R-1297/2016-2 “**WINNETOU**”
- EUTM 799 137 **La Gioconda** (fig) IR accepted on 25/3/2010 for Fresh fruits of all kinds, green vegetables and fresh vegetables, especially oranges and citrus fruits. In class 31
- EUTM 4031704 **DON QUIJOTE** registered on 26/5/2006 for goods in classes 32 and 33
- EUTM 9967829 registered on 17/10/2011 for the figurative mark below for goods in classes 9, 16, 21, 24, 25, 28



LA GIOCONDA

## Registering art work in the public domain as a mark is against public order

- EFTA Court 6/4/2017 Municipality of Oslo the ‘Vigeland case ‘,  
“An artwork may be refused registration, for example, under the circumstances that its registration is regarded as a genuine and serious threat to certain fundamental values or where the need to safeguard the public domain, itself, is considered a fundamental interest of society.”(para. 92).



## The new concept of public order vs classic definition

- EFTA Court 6/4/2017 Municipality of Oslo the ‘Vigeland case ‘,  
“A genuine and serious threat to certain fundamental values or where the need to safeguard the public domain, itself, is considered a fundamental interest of society.”(para. 92).
- UK “the notion of public policy should be applied restrictively. There are three situations that might trigger an application of Article 3(1)(f): (i) trade marks with criminal connotations (ii) those with offensive religious connotations; and (iii) those which are considered explicit or taboo.
- France “ PRAY for PARIS” or ‘Je suis Paris’ applications, concept of public order is either evocation of official services, regulated activity , illegal activities or non private events.(see INPI communique 20/11/2015 INPI Paris)

## The concept of public order of the GC

- GC 15/3/2018, T-1/17 ‘La Mafia se sienta a la mesa’
- the analysis should be undertaken from the point of view of ‘a reasonable person with average sensitivity and tolerance thresholds’,
- not to be limited to the public to which the goods and services in respect of which registration is sought are directly addressed. Rather, it should include also those consumers that may encounter the sign incidentally.
- the perception of a sign as contrary to public policy or morality may not be the same across the EU, also due to linguistic, historic, social, and cultural reasons.

It follows that the assessment to undertake is one that takes account of both the circumstances common to all EU Member States and those that are relevant in individual Member States.



## The concept of public order of the GC

- GC 15/3/2018, T-1/17 ‘La Mafia se sienta a la mesa’
- ‘la Mafia’ is understood world-wide as referring to a criminal organisation originating in Italy, whose activities extend beyond the Italian territory. Mafia usually resorts to intimidation, physical violence and murder in carrying out its activities, which include, inter alia, drug trafficking, arms trafficking, money laundering and corruption.
- ‘such criminal activities breach the **very values on which the EU is founded**, in particular the **values of respect for human dignity and freedom** as laid down in Article 2 TEU and Articles 2, 3 and 6 of the EU Charter of Fundamental Rights. The word element ‘la Mafia’ has also deeply negative connotations in Italy’.



## The concept of public order of the GC

- GC 15/3/2018, T-1/17 ‘La Mafia se sienta a la mesa’
- “The fact that there are many books and films ( i.e The Godfather) on the subject of the Mafia in no way alters the perception of the harm done by that organisation.”
- ‘by using a rose and the phrase ‘se sienta a la mesa’, conveys the idea of conviviality and relaxation: this, according to the GC, trivialises the illicit activities of the criminal organisation. The contested mark, considered as a whole, refers to a criminal organisation, conveys a globally positive image of that organisation and, therefore, trivialises the serious harm done by that organisation to the fundamental values of the European Union ... The contested mark is therefore likely to shock or offend not only the victims of that criminal organisation and their families, but also any person who, on EU territory, encounters that mark and has average sensitivity and tolerance thresholds.” (para 47)

