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## Non-textual elements in judicial opinions: overview<sup>2</sup>

### 1. Introduction

In 2014, the Court of Justice of the European Union (hereinafter: ‘CJEU’) adjudicated on *Coca-Cola v OHMI – Mitico (Master)*.<sup>3</sup> Its task was to establish the similarity of trademarks used by two companies. Modern Industrial & Trading Investment Co. Ltd (Mitico) sought to register a figurative sign as a community trademark (t.m. 1) at the Office for Harmonization in the Internal Market (Trade Marks and Designs; OHIM). However, the Coca-Cola Company filed a notice of opposition with regard to four earlier Coca-Cola Company community figurative marks (t.m. 2) and an earlier United Kingdom figurative mark ‘C’ (t.m. 3). The opposition and the appeal raised by the Coca-Cola Company were dismissed. In the next stage, the Court considered, *inter alia*, the similarity of the said trademarks. The evidence included screenshots (s.s. 4) of Mitico’s website, which demonstrated that Mitico was using the mark for which the company applied in the course of its trading. Consequently, the case was settled in favour of the Coca-Cola Company.



T.m. 1

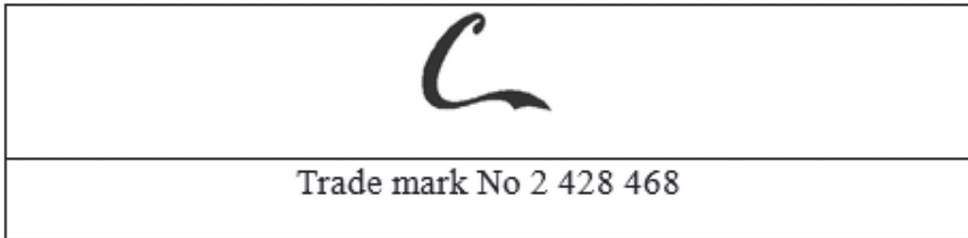
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<sup>3</sup> See judgment of the EU Court of First Instance of 11 December 2014, T-480/12, *Coca-Cola v OHMI – Mitico (Master)*, ECLI:EU:T:2014:1062.

			
Trade mark No 8 792 475	Trade mark No 3 021 086	Trade mark No 2 117 828	Trade mark No 2 107 118

T.m. 2



T.m. 3



S.s. 4

This case can be considered from various points of view. One perspective is the analysis of the judicial opinion. The court not only verbally described the reasons for its decision, but also used the images of the relevant trademarks and screenshots presented above. It is not typical to include such elements in a judicial opinion. Therefore, the question arises as to whether this practice was a one-off situation or if similar elements are frequently used in judicial opinions. I have analysed the case law, which presents numerous instances of the appearances of such elements in judicial opinions.<sup>4</sup>

<sup>4</sup> M. Wojdala, *Nietekstualne elementy w uzasadnieniach sądowych* [Eng. *Non-textual elements in judicial opinions*] (in print).

Several researchers<sup>5</sup> have noted this practice and refer to the elements in question as images or visual materials. In my opinion, these terms are insufficient to describe the phenomenon in question. I therefore propose my own term: ‘non-textual elements in judicial opinions’.

My objective is to present the practice of using non-textual elements in judicial opinions, as well as to explain the need for a new term and how I created it. In order to do so, I shall address a few questions. Firstly, I outline which elements are actually used in judicial opinions. I then demonstrate why terms such as image or visual material might not adequately describe the phenomenon in question and offer my reasons for creating a new term. I then outline what the elements have in common and introduce the concept of non-textual elements in judicial opinions. At this point, I examine whether distinguishing this category means that these elements can be treated as a homogeneous group. Finally, I consider if the presence of such elements in judicial opinions is new in legal reality and, if so, what their significance is to the functioning of judicial opinions.

## 2. What elements can be found in judicial opinions?

The answer to the question of whether non-typical elements can be found in judicial opinions should be preceded by the establishment of the meaning of this concept. I understand judicial opinions to be documents presenting the sources of a specific court decision and the reasons for it.<sup>6</sup> As a consequence of my approach, oral justifications for court decisions are beyond the scope of my research. Therefore, my analysis is limited to documents. Furthermore, I assume that a judge is the author of the judicial opinion. This assumption does not mean that the creator of the content of each judicial opinion is in fact a judge. The legal literature<sup>7</sup> commonly refers to the preparation of such documents by judicial assistants. However, the public is not very aware of this, while the content of judicial opinions needs to be accepted by a judge.<sup>8</sup> For these reasons, I use the concepts of the author of a judicial opinion and judge synonymously.

How are judicial opinions formulated? These documents are traditionally purely textual. A judicial opinion contains the judge’s written arguments specifying why the court made a certain decision. It might seem that text is the only tool for explaining the court’s reasoning, or more broadly, for creating any legal document. However, judges break this tradition by adding elements to textually expressed judicial opinions. An example of this practice is the case of *Coca-Cola v OHMI – Mitico (Master)*. This phenomenon is rare, although judges today increasingly use various tools of communication in their argumentation. This creates a need for its closer examination. I mention examples mostly from the Polish and U.S. legal systems, which demonstrate that the practice can be observed both in statutory law and common law. However, this phenomenon can also

<sup>5</sup> See: section 3.

<sup>6</sup> T. Stawecki, *Dorobek nauki prawa w uzasadnieniach decyzji sądowych* [Eng. *The legacy of legal science in the justification of court decisions*], in: I. Rzucidło-Grochowska, M. Grochowski (eds.), *Uzasadnienia decyzji stosowania prawa* [Eng. *Justification of the decision on the application of the law*], Warszawa 2015, p. 116.

<sup>7</sup> G. Lebovits, A.V. Curtin, L. Solomon, *Ethical Judicial Opinion Writing*, “The Georgetown Journal of Legal Ethics” 2008/21, pp. 304–307; M. Stępień, *Socjologiczna perspektywa badań uzasadnień sądowych* [Eng. *The sociological perspective of the research on judicial opinions*], in: I. Rzucidło-Grochowska, M. Grochowski (eds.), *Uzasadnienia decyzji stosowania prawa* [Eng. *Justification of the decision on the application of the law*], Warszawa 2015, pp. 461–462; I. Rzucidło, *Uzasadnienie orzeczenia sądowego. Ujęcie teoretyczne a poglądy orzecznictwa* [Eng. *Justification of the court decision. Theoretical approach and views of jurisprudence*], Warszawa 2020, p. 43.

<sup>8</sup> I. Rzucidło, *Uzasadnienie...*, p. 43.

be observed in other jurisdictions. In *Coca-Cola v OHMI – Mitico (Master)*, the judge of a court with transnational reach used the images of trademarks and screenshots.

After this introduction the question can be raised as to what elements can be found in judicial opinions. As they are used to fulfil various functions<sup>9</sup> in this document, mostly to strengthen the judicial arguments, their range is extensive. For this reason, I have decided to categorize them. However, it should be noted that this division is simplified for the purposes of building a model.

Firstly, judges use elements that present various kinds of data in judicial opinions. The purpose of using such materials is to depict quantitative, qualitative, or spatial (geographic) data<sup>10</sup> which is directly or indirectly related to a location or geographical area. This group of elements includes charts,<sup>11</sup> diagrams,<sup>12</sup> schematics,<sup>13</sup> tables,<sup>14</sup> or – in the case of spatial data – maps.<sup>15</sup> The data in these materials can therefore be expressed, *inter alia*, in the form of numbers, linguistic expressions, points on maps or colours on diagrams.

The second group of elements in judicial opinions consists of materials which are a record of real situations. They supplement the textual description of events or objects by presenting a vivid picture. For example, judges can use photographs<sup>16</sup> or even videos,<sup>17</sup> which can be included indirectly in the judicial opinion via a hyperlink to the website where they were stored. The use of photographs and video recordings in judicial opinions is particularly controversial.<sup>18</sup> This controversy arises, *inter alia*, from the fact that the content of videos may seem to be a simple record of events giving insight into reality, but in fact these materials require careful interpretation. Furthermore, the decision to use a photograph or video in a judicial opinion should take into account the issue of the right to the privacy of the people whose image appears in these materials.

The third group of elements that can be used in judicial opinions also constitutes images, but those which do not portray real events. This is an extensive group consisting of materials such as graphic designs,<sup>19</sup> figurative trademarks,<sup>20</sup> or even – surprisingly – reproductions of works of art.<sup>21</sup> These elements can be presented either figuratively, which means presenting the real shape of the object, or non-figuratively, which means this reality has been disturbed.

Judges use two tools in their opinions which constitute the framework for the elements mentioned above. Firstly, a multimedia presentation<sup>22</sup> which can have not only visual,

<sup>9</sup> For more about functions of non-textual elements see: M. Wojdala, *Nietekstualne...*

<sup>10</sup> R.A. Longhorn, M. Blakemore, *Geographic Information. Value, Pricing, Production, and Consumption*, Boca-Raton –London–New York 2008, pp. 2–7.

<sup>11</sup> See judgment of the District Court in Warsaw of 20 December 2019 (XXV C 1597/17), LEX No. 2834488.

<sup>12</sup> See judgment of the Supreme Court of the United States of 27 May 2014, *Wood v Moss*, 572 U.S. 2014.

<sup>13</sup> See judgment of the Supreme Court of the United States of 18 June 2012, *Williams v Illinois*, 567 U.S. 50, 2012.

<sup>14</sup> See judgment of the District Court in Warsaw of 24 October 2016 (XXII GWo 40/16), LEX No. 2246420.

<sup>15</sup> See judgment of the Supreme Court of the United States of 27 June 2018, *Florida v Georgia*, 585 U.S. 2018.

<sup>16</sup> See judgment of the Supreme Court of the United States of 18 June 2018, *Lozman v Riviera Beach*, 585 U.S. 2018.

<sup>17</sup> See judgment of the Supreme Court of the United States of 30 April 2007, *Scott v Harris*, 550 U.S. 372, 2007.

<sup>18</sup> See M. Dudek, *A Few Questions Concerning Photographs in Court Decisions*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2018/2, pp. 60–74.

<sup>19</sup> See judgment of the Supreme Court of the United States of 18 June 2015, *Walker v Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 2015.

<sup>20</sup> See judgment of the EU Court of First Instance of 30 September 2015, T-364/13, *Mocek v OHMI – Lacoste (KAJMAN)*, ECLI:EU:T:2015:738.

<sup>21</sup> See judgment of the Supreme Court of the United States of 22 March 2017, *Star Athletica, LLC v Varsity Brands, Inc.*, 580 U.S., 2017.

<sup>22</sup> See judgment of the United States District Court of Rhode Island of 29 September 2009, *Uniloc USA, Inc. v Microsoft Corp.*, 640 F.Supp.2d 150, 2009; judgment of the United States District Court of Appeals for Federal Circuit of 4 January 2011, *Uniloc USA, Inc. v Microsoft Corp.*, 632 F.3d 1292, 2011.

but also audio aspects. The second tool is a website<sup>23</sup> to which the hyperlink contained in the judicial opinion directs the reader. This categorization of a website may be controversial. It may seem that a hyperlink is simply an excerpt from the judge's written argumentation. However, I assume that a website is a medium that gives access to the content which the judge wanted to present but for some reason did not include it directly in the document. The premises for my assumption are discussed in the next section. From this perspective, a judicial opinion may be seen as a hypertext, namely, an utterance with a non-sequential or non-linear structure.<sup>24</sup>

### 3. Image and visuals – are these terms adequate?

As mentioned in the introduction, the existing literature has addressed the practice I am presenting. However, researchers have used the terms 'images'<sup>25</sup> or 'visuals'.<sup>26</sup> In my opinion, these terms are insufficient for analysing the non-conventional judicial opinions in question.<sup>27</sup> Both terms are ambiguous.

Firstly, it is difficult to define the term 'image'. This lack of clarity was demonstrated by William J.T. Mitchell,<sup>28</sup> who distinguished five types of understanding of the word 'image', namely graphic objects (physical or digital), optical phenomena, verbal metaphors, mental creations (e.g., dreams), and perceptual phenomena (e.g., the appearance of a person). Since the term image can be understood so differently and the boundaries of its meaning are so fluid, it is difficult to delineate a research framework with it. Elements such as photographs and graphic designs certainly fall into this category, but do maps? Identifying diagrams or charts as images is controversial and can extend beyond the intuitive understanding of the concept. This suggests the need to analyse the phenomenon of the presence of various elements in judicial opinions separately for images and other materials. Yet, their positioning in these documents demonstrates many similarities.

Secondly, the term 'visuals' is also unclear. The use of 'visual' is understandable when this word describes, for example, tools that require the audience's eyesight during speech. However, there is a lack of consistency in the use of this concept while disregarding the visual aspect of the text itself. Reading is an activity that is most often

<sup>23</sup> See: judgment of the Regional Court in Dzierżoniów of 7 January 2015 (V GC 804/13), LEX No. 2005270.

<sup>24</sup> W. Cyrul, *Wpływ procesów komunikacyjnych na praktykę tworzenia i stosowania prawa* [Eng. *Influence of communication processes on the practice of creating and applying the law*], Warszawa 2012, p. 151.

<sup>25</sup> For use of the term 'image' see: H. Dellinger, *Words are enough: the troublesome use of photographs, maps, and other images in Supreme Court opinions*, "Harvard Law Review" 1997/8, pp. 1704–1753; J. Silbey, *Images in/of law*, "New York Law School Law Review" 2012/1, pp. 171–183; N.S. Marder, *The Court and the Visual: Images and Artifacts in U.S. Supreme Court Opinions*, "Chicago-Kent Law Review" 2013/2, pp. 331–364; E.G. Porter, *Taking images seriously*, "Columbia Law Review" 2014/7, pp. 1687–1782; P. Goodrich, *Imago Decidendi: On the Common Law of Images*, Leiden 2017; P. Goodrich, *Pictures as Precedents. The Visual Turn and the Status of Figures in Judgments*, in: E.S. Anker, B. Meyler (eds.), *New Directions in Law and Literature*, Oxford 2017, pp. 176–192; M. Stepień, *Say it with Images: Drawing on Jerome Frank's Ideas on Judicial Decision Making*, "International Journal for the Semiotics of Law" 2019/2, pp. 321–334.

<sup>26</sup> For use of the term 'visual' see: C.R. Brunschwig, *On visual law: visual legal communication practices and their scholarly exploration*, in: E. Schweighofer (ed.), *Zeichen und Zauber des Rechts: Festschrift für Friedrich Lachmayer* [Eng. *Signs and magic of the right: Book for Friedrich Lachmayer*], Bern 2014, pp. 899–933; H. Dellinger, *Words...*, pp. 1704–1753; M. Dudek, *„Nie samymi słowami prawo żyje” – o prawie i wizualności* [Eng. *'Law does not live by words alone' – about law and visuality*], in: E. Średnicka (ed.), *Wzajemne relacje prawa i kultury* [Eng. *Mutual relations of law and culture*], Kraków 2015, pp. 37–71.

<sup>27</sup> I will use the concept of an image and visuals when they are used by quoted authors.

<sup>28</sup> W.J.T. Mitchell, *What Is an Image?*, "New Literary History" 1984/3, pp. 503–537.

performed through the sense of sight. For this reason, the distinction of text from visuality is inconsistent, as it is a distinction between two features on the basis of other criteria, one of which is the medium and the other the sense. Therefore, the very expression of visual culture does not fully reflect the scope of its meaning.

Given the above considerations, I believe it is worth using a different concept to describe the elements that appear in judicial opinions. The term should be less vague than 'image' or 'visuals' in order to define the research topic more precisely. Additionally, it should be broad enough to enable reference to a variety of elements in judicial opinions, because their use has common aspects.

#### 4. Do the elements in question have anything in common?

Diagrams, photographs, tables, graphic designs – the used in judicial opinions are various. Therefore, can any features connecting them be specified so as to create this new term? In my opinion, the materials in question have two common features. The first is positive – they are a part of a judge's substantive argumentation. The second is negative – the elements are not textual, and this feature is key.

Referring to the first positive feature, it should be noted that, by a judge's substantive argumentation, I mean the reasoning provided in a judicial opinion by its author. The expression 'a substantive part of the judicial opinion' is sometimes used to define the part of these documents that contains the legal reasoning.<sup>29</sup> In my considerations, the phrase refers to all the reasoning presented in a judicial opinion. I consider elements, which are irrelevant to a particular case being judged, such as the national emblem, which may have a symbolic function in a court decision, as non-substantive.

I assume that every part of a judicial opinion has its meaning. With this vision of judicial opinions, I consider that the materials in question, when used in such documents, should be seen as their integral part. My approach applies to all of these elements, regardless of where they are located in a judicial opinion. Therefore, in my approach, the materials attached in the appendix also constitute a part of a judge's argumentation. Each element of a judicial opinion, which necessarily includes the elements in question, is important in a judge's reasoning. Consequently, I assume they are not an ornament in judicial opinions, but rather present issues considered by the judge to be important in the case.

The second shared feature of the elements in question is that they are not text. This statement requires an explanation of what I understand by text. This concept is described by authors<sup>30</sup> in various ways. I have adopted the definition proposed by Teresa Dobrzyńska,<sup>31</sup> according to which text is a linguistic, closed and ordered sequence of sentences characterized, *inter alia*, by structural cohesion and semantic coherence. Based on negation, the concept of text cannot define non-linguistic expressions or linguistic expressions that are not both sequential and structurally and semantically consistent

<sup>29</sup> I. Rzucidło-Grochowska, „Część historyczna” uzasadnienia orzeczenia sądowego [Eng. 'Historical part' of the justification of the court decision], in: I. Rzucidło-Grochowska, M. Grochowski (eds.), *Uzasadnienia decyzji stosowania prawa* [Eng. *Justification of the decision on the application of the law*], Warszawa 2015, pp. 171–174.

<sup>30</sup> J. Bartmiński, S. Niebrzegowska-Bartmińska, *Tekstologia* [Eng. *Textology*], Warszawa 2009, pp. 22–25; M. Rzesutko-Iwan, *Pojęcie „tekstu” w badaniach tekstologicznych* [Eng. *The concept of 'text' in textological research*], in: Z. Bilut-Homplewicz, W. Czachura, M. Smykały (eds.), *Lingwistyka tekstu w Polsce i w Niemczech. Pojęcia, problemy, perspektywy* [Eng. *Text linguistics in Poland and Germany. Concepts, problems, perspectives*], Wrocław 2009, p. 57.

<sup>31</sup> T. Dobrzyńska, *Pojęcie...*, pp. 35–37.

sentences. This definition was important for me to distinguish the special group of materials used in judicial opinions that I call non-textual elements in judicial opinions.

Taking into account the above features, the conclusion should be drawn that images are not included in this category because they do not have a sentence structure. For the sake of clarity of the argument, however, it is important to examine whether images can be considered language from the point of view of semiotics.<sup>32</sup> An affirmative answer to this question arises if a broad meaning of the term language is assumed. I reject this approach, because it is counterintuitive for both the legal community and the general public. Referring to Susanne K. Langer's<sup>33</sup> reflections, I understand language in a narrow sense.

The non-textual nature of such elements as photographs and drawings is not controversial. However, doubts can arise from the inclusion in this group of materials such as schematics or tables, which can contain linguistic expressions. The inclusion of such materials in the group of non-textual elements was determined by the way in which I define a text. According to this definition, a text consists of sequential linguistic sentences which make up a whole. Charts, graphs, maps and tables generally do not satisfy this condition. It should be noted, however, that tables are a particularly controversial element, as, in rare situations, text can be included in them. Tables are therefore a borderline case and demonstrate that it is not always possible to clearly define certain categories. Tables containing text should be considered as tools operating on the borderline between textual and non-textual forms.

## 5. Is the category of non-textual elements homogeneous?

The discussion so far shows that there are various elements in judicial opinions, and what they have in common is mostly that they are not textual forms of expression. The criterion of being or not being text enables the division of the content of a judicial opinion into two kinds of material: textual and non-textual. Consequently, it could be tempting to analyse and evaluate the practice of judges of using non-textual elements as a homogeneous category and in isolation of the textual aspect of the document. However, non-textual elements are not a monolithic group. Furthermore, their content should be considered together with the text of the judicial opinion. Apart from the fact that various communication tools can be distinguished within the group of non-textual elements, there are further differences between them. On this basis, a typology of non-textual elements can be created in judicial opinions.

Firstly, non-textual elements can be categorized by character, as described in Section 2. Secondly, the materials in question can be also divided by reference to the sense which is involved in their perception. The most numerous group of non-textual materials is perceived by sight; however, there are also materials that are perceived audibly, such as videos.

Thirdly, non-textual elements are included in various types of judicial opinions. They are used in justifications for various types of court decisions at all levels of judicial

<sup>32</sup> See: K. Chmielecki, *Czy istnieje semiotyka obrazu? Myśl Rolanda Barthes'a w refleksji nad kulturą wizualną* [Eng. *Do semiotics of the image exist? Roland Barthes's thought in the reflection on visual culture*], in: A. Kaczmarek, K. Machtyl (eds.), *Imperium Rolanda Barthesa* [Eng. *Roland Barthes's Empire*], Poznań 2016, pp. 185–196.

<sup>33</sup> S.K. Langer, *Nowy sens filozofii: rozważania o symbolach myśli, obrzędzie i sztuce* [Eng. *Philosophy in a New Key. A Study in the Symbolism of Reason, Rite, and Art*], Warszawa 1976, pp. 162–166.

adjudication and are present in all types of judicial opinions, including majority opinions, dissenting opinions and concurring opinions.

A further criterion is the location of non-textual elements in a judicial opinion. They can be found either in the part of the document presenting the facts or the legal considerations. Furthermore, they can appear both in the body of the argumentation or as an attachment.

The fifth criterion on the basis of which non-textual elements can be categorized in judicial opinions is the branch of law within which the given judgment was issued. The lack of statistical data prevents the establishment of the degree of dependence between the branch of law and the frequency of use of non-textual materials. It can be hypothesized that particular interest in the practice can arise in branches of law where images are the subject, such as intellectual property law. However, non-textual elements can also be found in cases within branches of law that are seemingly unrelated to images, such as procedural law, election law, or banking law.

An additional important criterion for the division of non-textual elements is the source of their origin. Materials may be used because they are the subject of a given case or because they are evidence in the case. Their source may be the Internet or they may be prepared by a judge and do not have the status of evidence. A preliminary review of the case law allows for the conclusion that non-textual elements most often originate from the evidence of the case or are its subject. However, this thesis requires verification through further research.

The next criterion for the division of non-textual elements is similar to the previous one, namely their connection to the essence of the case in which the judgment was issued. On this basis, non-textual elements directly related to the case – for example, from the material in the evidence – can be distinguished from those that can only be related indirectly. This means that they do not have a direct and clear connection with the substantive issues of the case. These non-textual elements are included in a judicial opinion for rhetorical reasons. Such materials are a kind of comment from the judge, loosely related to the decision and through which the judge expresses an opinion on some subject.

The last criterion I consider is the presence or absence in judicial opinions of a comment on the non-textual element that is used. There are documents in which the author extensively refers to the material, those in which the comment is negligible, and documents in which the judge does not refer to the non-textual element at all in the argumentation.

As demonstrated above, non-textual elements in judicial opinions are not a homogeneous group. Therefore, the analysis of this phenomenon requires account to be taken of the context of the specific use of material in the particular case.

## 6. Non-textual elements and changes in judicial opinions

The use of non-textual elements in judicial opinions has a long history. Nancy S. Marder's<sup>34</sup> research found that images were included in judicial opinions as early as in the late 18th century. However, their presence was of a marginal nature. This situation remained unchanged until the turn of the 20<sup>th</sup> and 21<sup>st</sup> centuries. As a result,

<sup>34</sup> N.S. Marder, *The Court...*, pp. 333–334.



the practice in question today can be considered new. It is difficult to estimate its scale, because there has been no quantitative research on this to date and therefore there is no statistical data. This phenomenon is still very rare, but even so, it can be a sign of the current changes taking place in the structure of judicial opinions.

The use of non-textual elements by judges in their opinions suggests that communication tools are emerging, which extend beyond narrowly understood language in the application of law. This situation has important consequences. The use of non-textual elements can facilitate the clarification of difficult concepts, including legal ones, which can help the recipients of the document understand its content. Furthermore, the presentation of data in judicial opinions not in the form of text, but in the form of a table or graph, can positively contribute to the legibility of the document.

The ability to depict actual events through non-textual elements, such as a photograph or video, is of particular importance. Photographs and videos used in judicial opinions originate mainly from the evidence of the particular case. The appearance of visual evidence in judicial opinions changes the nature of the process of applying the law. Today, judgments are largely accessible to the public as a result of electronic legal databases. The presence of non-textual elements in judicial opinions can lead to a situation in which not only the court and the parties to the proceedings, but also the public can access the evidence. This level of access is a novelty, because the public could only previously see the court's description of such evidence. The possibility of accessing evidence in a judicial opinion has many consequences. For example, it can enable the public to evaluate the evidence and, as a result, strengthen or undermine support for a court decision. This issue can be also considered from the point of view of the transparency of the judiciary's actions. On the one hand, the presentation of evidence in judicial opinions can be used as proof of the correctness of the court's reasoning. But on the other, it can lead to the simplified public perception of the court's decision-making process. For these reasons, it is of great importance for judges to add an appropriate explanatory comment if they decide to use non-textual elements in their argumentation.

The above issues are only relevant if the non-textual element contained in a judicial opinion is available in an electronic database. However, non-textual elements included in the original document are sometimes not published in such databases or are published with some changes. This practice may be seen as interfering with the integrity of a particular judicial opinion. The degree of interference varies from jurisdiction to jurisdiction. For example, non-textual elements used in the contemporary judicial opinions of the Supreme Court of the United States are widely available. However, it is very difficult to find non-textual elements from Polish judicial opinions in electronic databases.

There are many reasons for the omission of non-textual material contained in the original document in electronic legal databases. The technical limitations and the cost-effectiveness of this practice have been of great importance in the past. However, these barriers are no longer sufficient justification for interfering with the integrity of a legal document. An important reason for the lack of non-textual content in electronic legal databases may be the need to protect the privacy of the parties to court proceedings. A further reason is the simple neglect of the presence of non-textual elements. If such an element is treated as irrelevant and devoid of substantive value in the judge's arguments, its publication may be deemed unnecessary by the publishers. This situation

of the omission of materials from electronic legal databases hinders the proper functioning of judicial opinions.

It is important to note the general discourse surrounding the use of images in legal documents and in judicial opinions. Some researchers<sup>35</sup> express a concern that the presence of images in judicial opinions can cause pop-style legal writing, which would pose a threat to the dignity of the court. Such concerns are not currently well-founded grounds. The use of non-textual elements in judicial opinions does not release judges from the obligation to prepare opinions in accordance with the law and the principles of legal ethics.

The assumptions presented above are not reflected in the legal reality, but the presence of non-textual elements does constitute some change in the method of creating judicial opinions. It can be hypothesized that the use of non-textual elements proves that the world of law is slowly opening up to the communication tools commonly used today in other fields of social reality. The use of non-textual elements in judicial opinions indicates that judges sometimes decide that text is not a sufficient way to express their arguments. Furthermore, citizens find judicial opinions, which are purely textual, full of legal jargon and longer than needed, difficult to read, which is acknowledged in the legal literature.<sup>36</sup> Further research is needed to understand how judicial opinions that contain non-textual elements are perceived by the public. However, it is possible that the use of elements such as a diagrams, maps, or photographs in a legal document can make these documents more understandable and less intimidating to citizens.

The forecast for the practice of using non-textual elements in judicial opinions is unambiguous. Researchers<sup>37</sup> predict that images will be increasingly frequently present in judicial opinions in the future and I agree with this view. The question is how lawyers should deal with the presence of such materials in legal documents. Lawyers are educated to read texts, express themselves through texts and, more generally, function in the world of text. The presence of other communication tools may be confusing for them. Therefore, it is important not to underestimate the implications of using non-textual elements in legal documents, and to develop a strategy for using them.

## 7. Conclusions

At first glance, the judicial opinion in *Coca-Cola v OHMI – Mitico (Master)* may seem to be an ordinary document containing several meaningless images. My objective was to demonstrate that, just as words in judicial opinions carry meaning, non-textual elements also convey meaning. They are not an ornament, but a relatively new category of legal expression, the appearance of which has consequences. There is ample room for research on the use of non-textual elements in judicial opinions. Although the phenomenon I described is still rare, it is worth examining because it relates to important

<sup>35</sup> V. Boehme-Neßler, *Pictorial Law, Modern Law and the Power of Pictures*, London–New York 2011, pp. 64, 90; E.G. Porter, *Taking...*, pp. 1694, 1744, 1780. See: R.K. Sherwin, *When Law Goes Pop. The Vanishing Line between Law and Popular Culture*, Chicago 2000; R.K. Sherwi, *Visualizing Law in the Age of the Digital Baroque. Arabesques and Entanglements*, London–New York 2011.

<sup>36</sup> See: G. Lebowits, A.V. Curtin, L. Solomon, *Ethical...*, pp. 21–26; R.A. Leflar, *Some Observations concerning Judicial Opinions*, "Columbia Law Review" 1961/5, pp. 815–816; E. Łętowska, *Pozaprocusowe znaczenie uzasadnienia sądowego* [Eng. *Non-procedural significance of a judicial opinion*], "Państwo i Prawo" 1997/5, pp. 3–17.

<sup>37</sup> H. Dellinger, *Words...*, p. 1705; N.S. Marder, *The Court...*, p. 331; E.G. Porter, *Taking...*, p. 1782; M. Stepień, *Say it...*, p. 321.

topics of the philosophy and sociology of law, such as the comprehensibility of legal documents, public access to the court decision-making process, transparency of the actions of the authorities, and communication between the judiciary and the citizens. The practice of using non-textual elements in judicial opinions should be viewed from the perspective of the broader question of new communication tools in legal documents. The concept of non-textual elements may be an aid to analysing this matter and may help change the focus of the discourse from anxiety about the appearance of images in law to solving actual problems regarding the use of tools other than text in legal practice.

### **Non-textual elements in judicial opinions: overview**

**Abstract:** The objective of the article is to present the practice of using non-textual elements in judicial opinions, as well as to explain the need for a new term and the way in which it was created. In order to do so, several questions have been addressed. First, the elements actually used in judicial opinions are specified. Next, the reasons why terms such as image or visual material cannot adequately describe the phenomenon in question are presented and reasons are offered for the creation of a new term. What the elements have in common is then outlined and the concept of non-textual elements in judicial opinions is introduced. An examination of whether distinguishing this category means that these elements can be treated as a homogeneous group is then presented. Finally, whether the presence of such elements in judicial opinions is new in legal reality is considered and, if so, what their significance is to the functioning of judicial opinions.

**Keywords:** judicial opinion, non-textual elements, images

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