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Trade Mark case: FACK JU GÖHTE - Constantin Film Produktion v EUIPO

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“What the FACK just happened?!”, some thought, when the CJEU delivered its judgment on the registrability of the trademark FACK JU GÖHTE on 27 February 2020.

In case you are unfamiliar with the case, FACK JU is a phonetic transcription in German of “fuck you” and GÖHTE alludes to the late German writer Goethe.

Following the success of the German comedy film FACK JU GÖHTE, the appellant, Constantin Film Production GmbH, filed for the word mark FACK JU GÖHTE in several classes including class 9 for recorded media and class 41 for film entertainment. The EUIPO refused the application on the basis of Article 7(1)(f), which excludes from registration trademarks that are contrary to public policy or to accepted principles of morality. The appellant appealed this decision and was unsuccessful at the Fifth Board of Appeal and the General Court. However, the CJEU found there were errors in the interpretation and application of Article 7(1)(f) and the decision should have been annulled. How did the CJEU reach this more liberal stance on the registrability of this mark?

The appellant relied on the following submissions for infringement of Article 7(1)(f):

- The General Court did not examine the mark applied for - FACK JU GÖHTE - but instead, “Fuck you, Goethe”. It was submitted that the expletive expression had lost its vulgar meaning due to the evolution of language in society. The EUIPO had also allowed such marks on the Register, e.g. “Fucking Hell” and “Macafucker”;
- The General Court applied the ground for refusal too broadly and no account was taken of the overall impression of the sign, which was meant to be a playful expression;
- The General Court wrongly found that it had not been established that the German-speaking public is not shocked by the sign applied for in relation to the goods and services at issue. The perception of the mark by the relevant public cannot be determined in an abstract manner or based on subjective values but should take account of the factors that provide clues to the actual perception by the public;
- The General Court erred when balancing the interests of the appellant in the registration of its mark applied for and the public interest.

The CJEU reiterated that the fundamental moral values and standards to which a society adheres to is likely to change over time and vary in space. Therefore, the assessment should take into account the social consensus prevailing in that society at that time. Due account should also be taken of the social context and other diversities in order to carry out the assessment objectively. There needs to be more than simply bad taste.

The CJEU also emphasised that where an applicant for a sign relies on factors that may cast doubt on the sign being perceived by the relevant public as contrary to accepted principles of morality, the examination cannot be confined to an abstract assessment, it must be established that it is indeed so. The fact that the film was one of the greatest film successes in 2013 in Germany, that access to it by young people had been authorised and that the Goethe Institute itself uses the film for educational purposes should have been given more weight in determining how the relevant public perceived the sign. In particular, in terms of Article 76(1), in proceedings concerning absolute grounds for refusal, the EUIPO is required to carry out an ex officio examination of the facts. Therefore, the CJEU concluded that there was error in the interpretation and application of Article 7(1)(f).

The cases concerning the signs THE SLANTS and the REDSKINS in the US have shown the Courts placing more emphasis on the freedom of expression. The CJEU also confirmed in this case that the Regulations expressly emphasise the need to apply the Regulations in a way that ensures respect for fundamental rights and freedoms.

We feel this was the right decision. As always, one must take all the facts and circumstances of the case into consideration when making a judgment. At least we know Advocate General Bobek is not offended; he must be pleased the CJEU accepted his opinion to set aside the decision!

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