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Clarity over the confusion about the CULTCAMPER trade mark

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In January 2020, Volkswagen (VW, the Opponent) filed an opposition against [this trade mark application](#), alleging a likelihood of confusion with its [earlier 3D shape registrations](#). The Applicant's mark covered camping vehicles and camping equipment and VW's earlier marks cover broad vehicle and furniture terms.

The opposition was initially dismissed by the EUIPO Opposition Division and then overturned by the Board of Appeal (BoA) in December 2021.

In the first instance, the Opposition Division held that:

- The goods and services are identical (or at least similar) to those covered by VW's earlier marks;
- VW's earlier marks, which are considered to be 3D depictions of a camper van, have a low level of distinctiveness;
- The word element (CULTCAMPER) is the dominant part in forming the overall impression of the mark and therefore distances the marks from one another; and
- The figurative element of the applied-for mark is similar to VW's earlier rights to a low degree and therefore insufficient to lead to a likelihood of confusion.

The BoA overturned the Opposition Division's decision, rejecting the Applicant's mark in its entirety, and held that:

- The CULTCAMPER word element is merely laudatory and descriptive of VW's camper van depiction on the basis that it is a combination of the words 'cult' and 'camper', which would be perceived by English speakers as describing a 'camper van which is greatly admired or regarded as fashionable';
- Although the figurative and verbal elements of the Applicant's mark are visually co-dominant,

the figurative design is more dominant and distinctive because of the laudatory meaning of the word CULTCAMPER; and

- The relevant public would perceive the Applicant's mark to be another version of VW's earlier marks, rather than as a separate trade mark indicating a different commercial origin.

This decision was reached despite the finding that VW's evidence did not support their claim that the marks had acquired enhanced distinctiveness; the assessment of a likelihood of confusion was based on inherent distinctiveness alone.

Furthermore, it is worth noting that the BoA found that some goods and services are similar to a low degree, the marks are similar to a low to medium degree, and the average consumers have a high level of attention, which was sufficient to establish a likelihood of confusion. The BoA did not give much regard to the average consumer in this case, which is key in establishing whether a likelihood of confusion exists. It appears here that if the goods and services are considered to be similar *and* the marks are considered to be similar, this could be sufficient for the finding of a likelihood of confusion.

Despite the poor efforts from VW in submitting enhanced distinctiveness evidence, it appears that the Applicant did not explore all possibilities. The Applicant could have filed a non-use cancellation action given VW's earlier marks were registered in 2008 and 2012. It is unlikely that VW would be able to demonstrate that the average consumer would rely on the existence of their 3D marks when making purchases in respect of at least some of the terms covered in their specification, such as camping furniture and equipment. If VW's marks are cancelled, even partially, this could result in the Applicant successfully registering their mark for some of the goods and services, such as camping furniture and equipment.

There is also the option of submitting an invalidation action on absolute grounds, for example by submitting that VW's marks are descriptive and/or consist exclusively of a shape which 'gives substantial value to the goods'. It can be argued that, drawing on the *Bang & Olufsen* case, certain features of VW's camper van do add substantial value, since design features of a vehicle would factor into a potential buyer's decision. Although the Applicant did mention that VW's marks were descriptive, this could not be properly tested in an opposition proceeding and had the Applicant put VW's marks to the test, the validity of VW's rights may have been looked at differently.

Finally, this case impresses on brand owners the issue of dilution of their marks over time and the importance of taking action when a similar mark arises. This could lead to the marks becoming generic (or at least weak), in turn making it more and more difficult to take enforcement action against infringers and unauthorised use of the marks.

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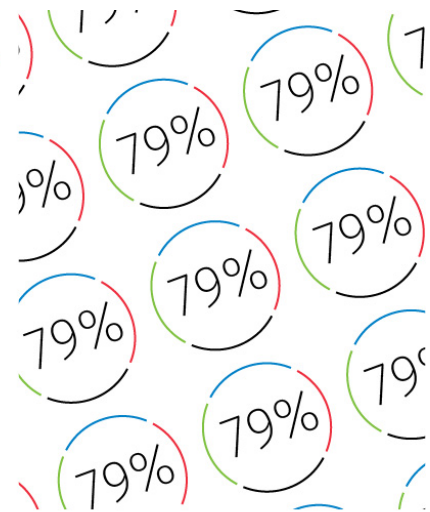
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