

General Court confirms rejection of FACK JU GÖHTE; rare application of Article 7(1)(f) Examination/opposition International procedures
European Union - Granrut Avocats

February 12 2018

- Court confirmed that FACK JU GÖHTE is contrary to public policy or accepted principles of morality
- Relevant German-speaking public would perceive pronunciation of 'fack ju' as identical to 'fuck you', which is inherently vulgar
- Refusals under Article 7(1)(f) remain rare

Constantin Film Produktion GmbH v European Union Intellectual Property Office (EUIPO) (Case T-69/17, January 24 2018) is one of the rare cases in which registration of a mark was refused by the EUIPO based on Article 7(1)(f) of [Regulation 207/2009](#) (now [Regulation 2017/1001](#)) - in other words, on the ground that it is contrary to public policy or to accepted principles of morality.

The application at issue concerned the word mark FACK JU GÖHTE, which was the title of one of the most successful comedy movies of 2013 in Germany, with a sequel in 2015. The application covered various products and services in Classes 3, 9, 14, 16, 18, 21, 25, 30, 32, 33, 38 and 41.

The application was refused by the examiner on the basis of Article 7(1)(f), in combination with Article 7(2), of Regulation 207/2009 (both articles have kept the same numbering under the new regulation). An appeal was rejected by the Fifth Board of Appeal of the EUIPO. The board's decision was based mainly on the fact that the relevant German-speaking public, including children, could perceive the pronunciation of 'fack ju' as identical to the English 'fuck you', which is inherently vulgar. The addition of 'Göhte' was a *post mortem* insult to the famous German writer Johan Wolfgang von Goethe, with the typo in his name adding to the insult, even though the film had a large success.

The Board of Appeal's decision was challenged in front of the General Court on two counts: violation of Article 7(1)(f) of Regulation 207/2009, and violation of Article 7(1)(b).

The first ground concerned the rejection of the application based on accepted principles of morality under Article 7(1)(f). This absolute ground of rejection is based on the general interest of the public. Its assessment must be made by reference to the perception of the sign when used as mark by the relevant public in the European Union or part of it.

The General Court first took into consideration the fact that the products at issue were basic products used by the average consumer. However, the public which could be shocked by the mark went beyond the average consumer buying the products, as it included other people who could come into contact with them during their day-to-day life. In addition, even if consumers generally look at a mark as a whole, they will identify the words that have an actual meaning or look like words that they know. In the present case, consumers would see that the sign is similar to the frequently used expression 'fuck you', with the addition of 'Göhte', which is similar to the name of the German writer and poet Johann Wolfgang von Goethe. This justified taking into consideration the public of both Germany and Austria as the relevant public.

Interestingly, the court took into account the fact that the meaning of the word 'fuck' had changed over time, moving away from its sexual and vulgar connotations; it can also be used to mean anger, defiance or distaste towards somebody. However, the word remains intrinsically vulgar; the addition of the word 'Göhte' shows whom the expression is aimed at, but does not hide its vulgarity.

Arguably, there is a contradiction in this part of the reasoning, since the relevant public is German speaking. Usually the court, following its case law, does not consider that German people - contrary to Swedish and Dutch people - have a good understanding of English. Implicitly, this means that German people may have a better knowledge of rude words than of basic English, but this is not written in the decision. In addition, the decision could have been better motivated by stating that Goethe, like Shakespeare and a few other writers, is part of a worldwide pantheon of writers and, therefore, the relevant public was the public of the European Union. Moreover, the court did not take into consideration the fact that several million people had seen the film *Fack Ju Göhte*.

For all those reasons, the court confirmed the Board of Appeal's decision on accepted principles of morality. Nevertheless, it also examined the other arguments raised by the applicant before rejecting them:

- Firstly, the applicant argued that public policy and accepted principles of morality are two different issues which should have been subject to a different examination. The court stated that this is not compulsory, on the basis of both the text of the regulation and of the EUIPO assessment guidelines.
- Secondly, it was argued that the spelling 'fuck ju' is different from 'fuck you' and that the mark at issue is distinctive, satirical and ironic, which can be easily understood by the relevant public. The court stated that it was clear that this was a phonetical transcription in German of the English expression 'fuck you Goethe', and that the spelling was not sufficient to create a satirical and ironic sign.
- Thirdly, it was claimed that the mark, in combination with the film, described the way in which pupils may feel frustration at school, and that the expression was close to the language used by adolescents. The court answered that the analysis was made based on the sign as filed, in relation to the products and services claimed, and that the freedom of expression which exists in the domains of art and culture does not similarly exist in the field of trademarks. In addition, since the products and services at issue are commonplace, it is not certain that the relevant public would see the sign as a joke.
- Fourthly, it was claimed that the sign had no sexual connotation. However, the board had stated that, even if the relevant public found that the mark had no sexual connotation, the expression was still vulgar. Therefore, this did not change the outcome of the case.
- Fifthly, it was argued that the sign was aimed at teenagers, and more particularly at students, as a joke. The court pointed out that the decision must not be based on the perception of the part of the public which is not easily shocked, or the perception of the part of the public which is easily offended, but based on the relevant public - that is, a reasonable person with an average level of sensibility and tolerance.
- Finally, it was claimed that the EUIPO had accepted the registration of the sign DIE WANDERHURE, which means 'the wandering prostitute'. The court pointed out that the EUIPO must respect all the relevant rules when assessing an application, and that the situation was not similar: *Die Wanderhure* was the title of a film and DIE WANDERHURE described the content of the film, but this was not the case for FACK JU GÖHTE in relation to the relevant film. Moreover, the court found that DIE WANDERHURE was less chocking from the point of view of the relevant public.

The court thus rejected the plea based on accepted principles of morality.

Since the rejection of the sign was confirmed on this basis, it was not necessary to examine whether it had distinctive character under Article 7(1)(b) of Regulation 207/2009.

The action was dismissed and the Board of Appeal's decision was confirmed.

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