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**DECISION
of the Fifth Board of Appeal
of 1 December 2016**

In Case R 2205/2015-5

Constantin Film Produktion GmbH

Feilitzschstr. 6
80802 Munich
Germany

Applicant / Appellant

represented by Hofstetter, Schurack & Partner Patent- und Rechtsanwaltskanzlei,
PartG mbB, Balanstrasse 57, 81541 Munich, Germany

APPEAL relating to European Union trade mark application No 13 971 163

THE FIFTH BOARD OF APPEAL

composed of G. Humphreys (Chairperson), A. Szanyi Felkl (Rapporteur) and
A. Pohlmann (Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 21 April 2015, Constantin Film Produktion GmbH ('the applicant') sought to register the word mark

Fack Ju Göhte

as a European Union trade mark in respect of the following goods and services:

Class 3 – Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices.

Class 9 - Recorded data carriers of all kinds; electronic publications (downloadable), namely audio, video, text, image and graphics data in digital form; photographic, cinematographic and teaching apparatus and instruments; apparatus for recording, transmission or reproduction of sound or images; data processing equipment and computers and parts thereof; software.

Class 14 – Jewellery, precious stones; horological and chronometric instruments.

Class 16 – Printed matter; photographs; stationery; office requisites (except furniture); instructional and teaching materials (except apparatus).

Class 18 - Trunks and travelling bags; umbrellas and parasols; walking sticks; luggage; luggage tags; bags; wallets and other carriers.

Class 21 – Glassware, porcelain and earthenware not included in other classes; candlesticks.

Class 25 – Clothing, footwear, headgear.

Class 28 – Games and playthings; gymnastic and sporting articles, not included in other classes; decorations for Christmas trees.

Class 30 – Coffee, tea, cocoa and artificial coffee; rice; tapioca and sago; flour and preparations made from cereals; bread, pastry and confectionery; ices; sugar, honey, treacle; yeast, baking-powder; salt; mustard; vinegar, sauces (condiments); spices; ice.

Class 32 – Beers; mineral and aerated waters and other non-alcoholic beverages; fruit beverages and fruit juices; syrups and other preparations for making beverages.

Class 33 – Alcoholic beverages (except beers).

Class 38 – Telecommunications services, providing of internet chat rooms and internet forums, transmission of data via the internet, in particular of audio, video, text, image and graphics data in digital form, including video on demand.

Class 41 - Education; providing of training; entertainment, in particular film and television entertainment, compilation of radio and television programmes, radio, television and film production, rental of films, presentation of films in cinemas; sporting and cultural activities.

- 2 An objection was made to the application, whereupon the applicant maintained its application for registration.

- 3 By decision of 25 September 2015 ('the contested decision'), the examiner refused the application pursuant to Article 7(1)(f) EUTMR in conjunction with Article 7(2) EUTMR in respect of all of the goods and services applied for, since the application was contrary to public policy or to accepted principles of morality. The examiner based his decision on the following reasons in particular:
- The goods and services applied for primarily targeted general consumers with a normal sensitivity and tolerance threshold. However, persons other than the target group of the goods and services might also encounter the trade mark.
 - In German 'Fack ju' was known as a slang expression for the English 'Fuck you' and 'Göhte' would be equated with the writer Johann Wolfgang von Goethe, inter alia because of the 2013 German hit film 'Fack ju Göhte'.
 - 'Fack ju' would be understood by the German public as corresponding to the insult 'Fick dich' and hence as a demand to 'have sexual intercourse with oneself in a manner that was customary'. This vulgar insult was used to express dislike in relation to another person.
 - For the German-speaking consumers, there was visual similarity and aural near-identity between 'Fack ju' and 'Fuck you'.
- 4 On 5 November 2015, the applicant filed a notice of appeal against the contested decision and requested that the contested decision be annulled. The statement of grounds of appeal was submitted on 4 December 2015.

Grounds of appeal

- 5 The applicant's arguments in the statement of grounds of appeal may be summarised as follows:
- The strikingly incorrect spelling of the English expression 'Fuck you', namely 'Fack ju', would in any case be associated by the German consumer with the successful film title 'Fack ju Göhte'.
 - The vulgar nature had been analysed and found only for the component 'Fack ju'. However, the full trade mark application is 'Fack ju Göhte' and would have to be contrary to accepted principles of morality as a whole in order to fall under the ground for refusal pursuant to Article 7(1)(f) EUTMR.
 - The expression 'Fuck you' did not have a sexual meaning but was a common expletive. The trade mark application 'Fack ju Göhte' accordingly verbalised, in a humorous and youthful way, the very well-known phenomenon of being frustrated with school, with the author merely being a placeholder.
 - On account of the reputation and commercial success of the film of the same name, the German-speaking consumers understand the sign as a reference to the film and not as a vulgar, rude expression. Thus, the application is also

intended precisely to protect the film's success under trade mark law, also with a view to the sequel 'Fack ju Göhte 2'.

- In order to prove the resonance of the films 'Fack ju Göhte' and 'Fack ju Göhte 2' in Germany and Austria, a number of documents are submitted, inter alia a list of all the awards the film has received and audience figures (both parts were each seen by well over 7 million viewers at the cinema alone).
 - In this context and on account of its connection to the famous school comedy, the trade mark application 'Fack ju Göhte' conveyed the idea of amusement and entertainment.
 - Both films received funding from various financing organisations, which are involved in cultural promotion and obviously did not think that the film title was offensive or insulting.
 - With reference to decision R 2889/2014, Die Wanderhure, of 28/05/2015, a restrictive interpretation of Article 7(1)(f) EUTMR is required, which takes due consideration of the right to freedom of expression.
 - The registration by the German Patent and Trade Mark Office of the semantically comparable trade mark 'LECK MICH SCHILLER' in respect of the same goods and services under register number 30 2014 001 097 also argued in favour of the registrability of the trade mark application that is the subject of these proceedings.
 - Finally, the contested decision did not assess the trade mark application in the context of the goods and services applied for, but instead disregarded these completely.
- 6 By communication of 19 September 2016, the Board of Appeal informed the applicant that, following a preliminary examination, there were objections against the registration also in respect of non-German-speaking consumers within the European Union, in particular in respect of English-speaking consumers. Moreover, on account of its purely offensive nature, the trade mark application might also lack the minimum degree of distinctive character required, and as such the sign would also have to be refused on the basis of Article (7)(1)(b) EUTMR.
- 7 In its observations of 18 October 2016, the applicant objected that a possible breach of accepted principles of morality within the European Union had to be assessed uniformly; any possibly stricter national considerations should not be taken into account.

Reasons

- 8 The appeal complies with Articles 58, 59 and 60(1) EUTMR in conjunction with Rules 48 and 49 CTMIR. It is therefore admissible.
- 9 It is, however, unfounded. The sign is contrary to public policy and to accepted principles of morality on account of its vulgar and offensive meaning

and is therefore to be refused registration pursuant to Article 7(1)(f) EUTMR in conjunction with Article 7(2) EUTMR.

Ratio legis of Article 7(1)(f) EUTMR

- 10 Article 7(1)(f) EUTMR prohibits the registration of trade marks that are contrary to public policy or to accepted principles of morality. This of course includes all signs whose use is prohibited by a provision of EU law or national law (05/10/2011, T-526/09, Paki, EU:T:2011:564, § 12).
- 11 The purpose of Article 7(1)(f) EUTMR is not to identify and filter out signs whose use in the course of trade must be prevented at any cost. Instead, this provision has the purpose of not granting the privileges of a trade mark registration to signs that are contrary to public policy or to accepted principles of morality. In other words, state and administrative bodies should not actively support those who use trade marks that are contrary to certain basic values of a civilised society in order to promote their commercial purposes (06/07/2006, R 495/2005-G, SCREW YOU, § 13).
- 12 There is also a public interest in ensuring that in particular children and young people are to the greatest possible extent spared from being confronted, in the general course of trade, with words that have an offensive, obscene or upsetting effect (01/09/2011, R 168/2011-1, fucking freezing! by TÜRPIZ (fig.), § 25; 23/02/2015, R 793/2014-2, FUCK CANCER, § 13).
- 13 A judicious application of this provision necessarily entails balancing the right of traders to freely employ words and images in the signs they wish to register as trade marks against the right of the general public not to be confronted with disturbing, abusive, insulting and even threatening trade marks (06/07/2006, R 495/2005-G, SCREW YOU, § 14).
- 14 The following are indisputably excluded from registration as a trade mark: signs that obviously make use of degrading speech or contain gross obscenities (14/11/2013, T-52/13, Ficken, EU:T:2013:596; 14/11/2013, T-54/13, Ficken Liquors, EU:T:2013:593; 26/09/2014, T-266/13, Curve, EU:T:2014:836), signs that consist of obviously malicious disparagements alluding to race or culture (05/10/2011, T-526/09, Paki, EU:T:2011:564), or that glamorise terrorism or insult victims of terrorism (20/09/2011, T-232/10, Coat of arms of the Soviet Union, EU:T:2011:498).
- 15 The refusal of a registration as a trade mark does not deprive the market participant of the opportunity to market its goods and services under the sign and also does not in any way restrict its right to freedom of expression (09/03/2012, T-417/10, ¡Que buenu ye! Hijoputa, EU:T:2012:120, § 26; 14/11/2013, T-52/13, Ficken, EU:T:2013:596, § 44).

The relevant public

- 16 The examination as to whether a sign is contrary to public policy or to accepted principles of morality must be carried out with regard to how this sign will be perceived when it is used as a trade mark by the relevant public

within the European Union or a part of the same. This part may consist of a single Member State (20/09/2011, T-232/10, Coat of arms of the Soviet Union, EU:T:2011:498, § 50; 26/09/2014, T-266/13, Curve, EU:T:2014:836, § 14).

- 17 In the present case, the trade mark application ‘Fack Ju Göhte’ is the phonetic reproduction in German of the expression ‘Fuck you Göhte/Goethe’. In this respect, reference must be made primarily to the perception of the German-speaking consumers within the European Union, namely those consumers in Germany and Austria.
- 18 The goods and services that are the subject of these proceedings are those that primarily target general consumers. In particular, some of the goods applied for in Classes 16 (stationery; instructional and teaching materials) and 28 (games, playthings) moreover primarily target children and young people. The education and entertainment services and sporting activities applied for in Class 41 also directly target children and young people.
- 19 In this connection, it must be held that, according to the case-law, in assessing the existence of the ground for refusal pursuant to Article 7(1)(f) EUTMR, it is not possible to refer to the perception of the part of the relevant public that is easily offended or to the perception of the part of that public that is impervious, but rather the criteria of a reasonable person with an average sensitivity and tolerance threshold must be taken as a basis (05/10/2011, T-526/09, Paki, EU:T:2011:564, § 12; 14/11/2013, T-52/13, Ficken, EU:T:2013:596, § 18; 26/09/2014, T-266/13, Curve, EU:T:2014:836, § 28).
- 20 Purely for the sake of completeness, it should also be mentioned that the relevant public cannot be limited to the public directly targeted by the goods and services claimed by the trade mark applied for. In other words, account should be taken of the fact that the signs covered by this ground for refusal will cause offence not only to the public targeted, but also to other people who encounter the sign by chance in everyday life without being interested in the specified goods and services (05/10/2011, T-526/09, Paki, EU:T:2011:564, § 18; 14/11/2013, T-52/13, Ficken, EU:T:2013:596, § 19; 26/09/2014, T-266/13, Curve, EU:T:2014:836, § 19).

Perception of the sign applied for by the relevant public

- 21 The applicant itself argues that the component ‘Fack ju’ is the ‘strikingly incorrect spelling’ of the English phrase ‘Fuck you’ (see page 2 of the observations of 6 July 2005).
- 22 Besides, it is in line with consumer perception for a sign composed of several components to be broken down into word components that suggest a specific meaning or resemble known words (06/10/2004, T-356/02, Vitakraft, EU:T:2004:292, § 51; 06/09/2013, T-599/10, Eurocool, EU:T:2013:399, § 104). Put more generally, this means that consumers tend to perceive sequences of letters or characters as they are known to them or as they seem to make sense.
- 23 Furthermore, the pronunciation of the component ‘Fack ju’ is identical to the expression ‘Fuck you’. Therefore, its meaning is identical (26/11/2008, T-184/07,

Anew alternative, EU:T:2008:532, § 26; 30/04/2013, T-640/11, Rely-able, EU:T:2013:225, § 20). In any event, the aural impression of a word mark is also always crucial in assessing the registrability thereof (12/02/2004, C-363/99, Postkantoor, EU:C:2004:86, § 99).

- 24 As rightly stated in the contested decision, ‘Fuck you’ is however an extremely vulgar and rude insult. The applicant itself argues that ‘Fuck you’ [is] ‘an expletive that is used millions of times every day in many different countries’ (see page 3 of the observations of 6 July 2015). Interpreted literally, this insult has a sexual connotation, if the person targeted with the exclamation is invited to sexually satisfy his/herself: ‘fuck you(rself)’, that is to say, corresponding to the German ‘fick Dich’. Since masturbation activities in particular are part of the intimate personal sphere, the demand uttered in a hostile atmosphere has a derogatory, obscene and vulgar effect, since it reduces the person spoken to in this way to their sex drive in an uncalled-for manner.
- 25 In the figurative sense – the way in which the insult is used and understood for the most part – it shows that the person using the exclamation is angered or disgusted by an interaction with the person spoken to and is demanding that they mind their own business. At the same time, ‘Fuck you’ conveys to the person spoken to that they are not being paid any respect. This again happens by reducing that person to their sex drive, in other words, in a derogatory and crudely obscene manner.
- 26 Even if the public that is the subject of these proceedings were not to attribute a sexual connotation to the expression ‘Fuck you’, it is nonetheless an insult that is not only tasteless but also offensive and vulgar.
- 27 Purely for illustration of the obvious and generally known fact (22/06/2004, T-185/02, Picaro, EU:T:2004:189, § 29; 13/04/2011, T-523/09, Wir machen das Besondere einfach, EU:T:2011:175, § 41; 20/07/2016, T-11/15, SUEDETIROL, EU:T:216:422, § 40) that ‘Fuck’ or its German counterpart ‘Ficken’ and the expressions incorporating this swear word, such as ‘Fuck you’ or ‘Fick Dich’, is highly offensive linguistic usage, the dissemination of which should not be promoted by state and administrative bodies, reference should be made to the case-law of the European Court (14/11/2013, T-52/13, Ficken, EU:T:2013:596; 14/11/2013, T-54/13, Ficken Liquors, EU:T:2013:593), to the decision-making practice of the Boards of the EUIPO (01/09/2011, R 168/2011-1, fucking freezing! by TÜRPIITZ (fig.); 23/02/2015, R 793/2014-2, FUCK CANCER) and to the registration practice of the EUIPO (purely by way of example, the refusal of the following applications: No 13 037 296 ‘FML Fuck My Life’ in respect of goods and services in Classes 3, 25 and 38, No 12 906 673 ‘Fuck Art, Let’s Dance!’ in respect of goods and services in Classes 9, 16, 25, 26, 35 and 41 and No 11 587 573 ‘Fuckin’ Monday’ in respect of goods and services in Classes 25, 41 and 43).
- 28 Furthermore, reference should likewise be made to decisions of German courts and authorities which, without being binding or decisive for the Office, nonetheless may be taken into consideration as points of reference in the assessment of the facts of the case (18/03/2016, T-501/13, WINNETOU, EU:T:2016:166, § 36 with further references). In this connection, the case-law

of the German Federal Court of Justice and the German Federal Patent Court should be mentioned (decision of the Federal Court of Justice ‘READY TO FUCK’, 2 October 2012, file reference I ZB 89/11; decisions of the Federal Patent Court ‘headfuck statement fashion’ of 3 December 2015, file reference 28 W (pat) 125/12 and ‘Fucking Hell’ of 17 December 2013, file reference 27 W (pat) 507/13)) and also the registration practice of the German Patent and Trade Mark Office (purely by way of example, the refusal of the following applications: No 30 2013 016 805 4 ‘Fuck You Thunder’ in respect of goods and services in Classes 24, 25 and 35, No 30 2011 048 313 2 ‘FUCK THE BACKMISCHUNG’ in respect of goods and services in Classes 16, 30 and 43 and No 30 2013 047 651 4 ‘Fuck Fashion’ in respect of goods and services in Classes 18, 25, 40 and 42).

- 29 Since, in the context of Article 7(1)(f) EUTMR, it also holds true that a trade mark application has to be assessed as a whole (04/06/2014, R 203/2014-2, AIRCURVE, § 14), it is then questionable whether the addition of the element ‘Göhte’ is able to significantly alter the perception of the insult ‘Fack ju’ (see with regard to the rejection of particular figurative and word elements, 14/11/2013, T-54/13, Ficken Liquors, EU:T:2013:593, § 16). The applicant is of the opinion that the trade mark application merely verbalised the phenomenon of being frustrated with school in a humorous and youthful way, and ‘Göhte’, or the author Goethe, had only a placeholder effect.
- 30 Goethe is undoubtedly one of the most famous and renowned German authors in the world who still has many fans today and enjoys continued recognition. This is also demonstrated by the fact that his works are still part of the compulsory curriculum in German schools even almost 200 years after his death and his plays continue to be staged in theatres; the Goethe-Institut for the dissemination of German language and culture which is active all over the world is named for him. The applicant did not randomly select ‘Göhte’ of all things as an attention-grabbing ‘placeholder’ for unpopular school subjects.
- 31 However, the fact that the respected and revered Goethe, as well as being misspelled, is now being posthumously disparaged in such a derogatory and vulgar way cannot in any way significantly deflect from the nature of the insult ‘Fack Ju/Fuck you’ which is offensive and contrary to accepted principles of morality. In some circumstances, the reference to Goethe even takes the breach of accepted principles of morality to another level by disrespecting this monument of the German language in an obscene and degrading manner.
- 32 However, the decisive factor is that the dominant component at the beginning of the trade mark application ‘Fack ju’ is already so insulting and offensive that the relevant public will be offended by it (01/09/2011, R 168/2011-1, fucking freezing! by TÜRPIZ (fig.); 23/02/2015, R 793/2014-2, FUCK CANCER, § 19).
- 33 This is all the more true since the goods applied for, which are objects for everyday use and consumption, such as ‘soaps’ in Class 3, ‘computers’ in Class 9, ‘horological instruments’ in Class 14, ‘stationery’ in Class 16, ‘bags’ in Class 18, ‘glassware’ in Class 21, ‘clothing’ in Class 25, ‘playthings’ in

Class 28, 'bread' in Class 30, 'fruit beverages' in Class 32, 'alcoholic beverages' in Class 33, are harmless and inoffensive in nature, such that the consumer does not have to expect and is not prepared to be confronted with an obscenity of this kind when purchasing such goods. The same applies to the telecommunications services applied for in Class 38 and in particular to the 'education, training and entertainment' applied for in Class 41. The latter serve precisely for the intellectual and moral instruction of children, young people and other people interested in further education and for relaxation and edification. Consumers with a normal sensitivity and tolerance threshold do not expect to have to deal with a vulgar obscenity in these areas of life. Children and young people are not prepared to deal with offensive terms of a sexual nature in an atmosphere that is intended for the education of their character.

- 34 The objections raised by the applicant are incapable of removing the trade mark application 'Fack Ju Göhte' from the scope of application of Article 7(1)(f) EUTMR.
- 35 For example, the applicant mentions that, owing to the commercial success of the film comedy 'Fack ju Göhte', the relevant consumers immediately recognised the film title in the trade mark application and associated the sign with amusement and entertainment.
- 36 It is indisputably clear from the documents submitted by the applicant as proof of the film's success that 'Fack ju Göhte' was in fact the most successful German film of 2013 with just under 7.4 million viewers and, together with the likewise successful sequel from 2015, 'Fack ju Göhte 2', is indeed one of the most successful German film projects since the beginning of audience figures. The comedies also topped the cinema charts in Austria for a while. It can therefore realistically be assumed that the relevant German-speaking general consumers have at least heard of the comedy.
- 37 Unlike in the decision 'Wanderhure' (28/05/2015, R 2889/2014-4, § 8 & 9) cited by the applicant, it cannot be inferred from the broad public success that the relevant public is not offended by the film title that corresponds to the trade mark application. The title is certainly not descriptive of the content of the film and in particular Goethe does not play a role in it at all. Instead, the use of the insult 'Fack ju' as a film title does not say anything about the acceptance of that insult in society.
- 38 Although, when assessing a trade mark application, reference must be made to the way in which it is perceived by consumers at the time of filing the application, for the ground for refusal pursuant to Article 7(1)(f) EUTMR it holds true that it cannot be overcome pursuant to Article 7(3) EUTMR on account of proof of acquired distinctive character. It follows that the commercial success of the cinema film cannot be drawn upon to aid the registration of the offensive trade mark application. This is also consistent in the context of the unlimited temporal existence of a trade mark registration, even if it were to be assumed that, at the time of filing the application, the sign 'Fack ju Göhte' would actually solely convey the idea of amusement and

entertainment, namely in the context of the film with that title, it is not guaranteed that this connection would still exist many years later.

- 39 With regard to the objection that both films had received funding from various funding organisations, this should be countered by the argument that the criteria according to which these funds were allocated are not known and accordingly no conclusions can be drawn in relation to the endorsement of the sign applied for by consumers.
- 40 Lastly, the applicant cites its German trade mark registration ‘LECK MICH SCHILLER’, No 30 2014 001 097, as an indication of the registrability of the sign that is the subject of these proceedings. In this respect, it should first be noted that those registrations are not the subject of the proceedings. The fact that a trade mark that the applicant considers to be similar was registered by a national office may be taken into consideration by the Office but is not binding (21/03/2013, T-353/11, *eventer Event Management Systems*, EU:T:2013:147, § 58 with further references). According to settled case-law, the European Union trade mark regime is an autonomous system with its own set of objectives and rules peculiar to it; it applies independently of any national system. Consequently, the question whether a sign may be registered as a European Union trade mark must be assessed solely on the basis of the relevant regulation. Therefore, neither EUIPO nor, as the case may be, the Courts of the European Union are bound – even if they may take them into consideration – by decisions adopted in a Member State, even in a situation where the decisions were adopted under harmonised national legislation. In addition, there is no provision in the EUTMR requiring the Office to come to the same conclusions as those arrived at by national authorities or courts in similar circumstances (12/01/2006, C-173/04 P, *Standbeutel*, EU:C:2006:20, § 49 with further references). Pursuant to the sixth recital in the preamble to the EUTMR, the European Union law relating to trade marks does not replace the laws of the Member States on trade marks. Therefore it is possible that, because of linguistic, cultural, social and economic differences, a trade mark is not protected in one Member State, but is protected in another Member State or at Union level (25/10/2007, C-238/06 P, *Plastikflaschenform*, EU:C:2007:635, § 57-59 with further references; 15/07/2015, T-611/13, *HOT*, EU:T:2015:492, § 21, 60, 61).

- 41 The appeal remains unsuccessful.

On those grounds,

THE BOARD

hereby:

Dismisses the appeal.

Signed

G. Humphreys

Signed

A. Szanyi Felkl

Signed

A. Pohlmann

Registrar:

Signed

H. Dijkema

