

OPPOSITION No B 3 160 450

TikTok Information Technologies UK Limited, Kaleidoscope 4 Lindsey Street, EC1A 9HP London, United Kingdom (opponent), represented by **Taylor Wessing N.V.**, Parnassusweg 821B, 1082 LZ Amsterdam, Netherlands (professional representative)

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Shenzhen Shangsi Yimao Technology Co., Ltd., 427, Wisdom Valley Innovation Plaza, No. 542 Minzhi Avenue, Longhua District, 518000 Shenzhen, China (applicant), represented by **Metida**, Business Center Vertas Gyneju Str. 16, 01109 Vilnius, Lithuania (professional representative).

On 01/03/2023, the Opposition Division takes the following

DECISION:

1. Opposition No B 3 160 450 is upheld for all the contested goods.
2. European Union trade mark application No 18 554 307 is rejected in its entirety.
3. The applicant bears the costs, fixed at EUR 620.

REASONS

On 16/12/2021, the opponent filed an opposition against all the goods of European Union trade mark application No 18 554 307 for the word mark 'fikfok'. The opposition is based on EUTM registration No 18 184 341 for the word mark 'TikTok' (earlier mark 1) and EUTM registration No 17 913 208 for the word mark 'TIK TOK' (earlier mark 2). The opponent invoked Article 8(1)(b) EUTMR in relation to earlier mark 1, and Article 8(5) EUTMR in relation to earlier mark 2.

The opposition is based on more than one earlier trade mark. The Opposition Division finds it appropriate to first examine the opposition in relation to the opponent's EUTM registration No 18 184 341 (earlier mark 1).

LIKELIHOOD OF CONFUSION – ARTICLE 8(1)(b) EUTMR

A likelihood of confusion exists if there is a risk that the public might believe that the goods or services in question, under the assumption that they bear the marks in question, come from the same undertaking or, as the case may be, from economically linked undertakings. Whether a likelihood of confusion exists depends on the appreciation in a global assessment of several factors, which are interdependent. These factors include the similarity of the signs, the similarity of the goods and services, the distinctiveness of the earlier mark, the distinctive and dominant elements of the conflicting signs, and the relevant public.

a) The goods

The goods on which the opposition is based are, inter alia, the following:

Class 20: *Furniture; magazine racks; wardrobes.*

The contested goods are the following:

Class 20: *Luggage racks being furniture; magazine racks; mattresses; office furniture; sofas; tables; wardrobes; shelving; shelves for storage; inflatable furniture.*

The relevant factors relating to the comparison of the goods or services include, inter alia, the nature and purpose of the goods or services, the distribution channels, the sales outlets, the producers, the method of use and whether they are in competition or complementary.

Magazine racks; wardrobes are identically contained in both lists of goods.

The contested *luggage racks being furniture; office furniture; sofas; tables; shelving; shelves for storage; inflatable furniture* are identical to the opponent's *furniture*, either because they are identically contained in both lists (including synonyms), or because the opponent's goods include, are included in, or overlap with, the contested goods.

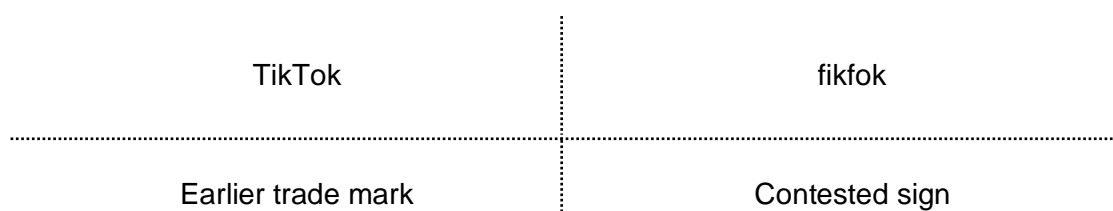
The contested *mattresses* are similar to the opponent's *furniture*. In this regard, *furniture* includes beds, which are pieces of furniture that are designed for sleeping or resting. A mattress is a large, rectangular pad for supporting a lying body, designed to be used on a bed. These goods have the same purpose, namely to enhance the user's rest and sleep. As they are intended to be used in combination in order to perform their function, these goods are also complementary. Furthermore, they target the same end users and are distributed through the same channels.

b) Relevant public – degree of attention

The average consumer of the category of products concerned is deemed to be reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's degree of attention is likely to vary according to the category of goods in question.

In the present case, the goods found to be identical or similar target the public at large and business customers with specific professional knowledge or expertise.

The degree of attention may vary from average to high, depending on the specialised nature of the goods, the frequency of purchase and their price.

c) The signs

The relevant territory is the European Union.

The global appreciation of the visual, aural or conceptual similarity of the marks in question must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23).

The unitary character of the European Union trade mark means that an earlier European Union trade mark can be relied on in opposition proceedings against any application for registration of a European Union trade mark that would adversely affect the protection of the first mark, even if only in relation to the perception of consumers in part of the European Union (18/09/2008, C-514/06 P, Armafoam, EU:C:2008:511, § 57). Therefore, a likelihood of confusion for only part of the relevant public of the European Union is sufficient to reject the contested application.

The applicant argues that the earlier mark's sole verbal element, 'TikTok', will be perceived as a misspelling of the onomatopoeia 'tick-tock', used to denote a repeated ticking sound. The Opposition Division agrees with the applicant that some consumers in the European Union will perceive this meaning in the earlier mark. However, another part of the consumers will perceive this sign as meaningless, such as a significant part of the German-speaking part of the public. Consequently, the Opposition Division finds it appropriate to focus the comparison of the signs on the German-speaking part of the public, who will perceive the verbal element 'TikTok' of the earlier mark as meaningless and, therefore, distinctive. This affects the perception of the signs by that public and influences the assessment of likelihood of confusion.

The contested sign's verbal element, 'fikfok', has no meaning for the relevant public and is, therefore, distinctive.

Both signs are word marks. In principle, the protection offered by the registration of a word mark applies to the word stated in the application for registration and not to the individual graphic or stylistic characteristics that the mark might possess (22/05/2008, T-254/06, RadioCom, EU:T:2008:165, § 43). In addition, word marks do not have elements that could be considered clearly more dominant than others.

Consumers generally pay greater attention to the beginning of a mark than to its ending (17/03/2004, T-183/02 & T-184/02, Mundicor / MUNDICOLOR, EU:T:2004:79, § 81; 16/03/2005, T-112/03, Flexi Air / FLEX, EU:T:2005:102, § 64-65). However, this general rule cannot call into question the fact that the assessment of the signs must take account of the overall impression they produce. This is because the average consumer normally perceives a mark as a whole and does not examine its individual details (10/10/2006, T-172/05, Armafoam, EU:T:2006:300, § 65; 27/06/2012, T-344/09, Cosmobelleza, EU:T:2012:324, § 52). The aforementioned general rule is not applicable in all cases, and depends on the specific characteristics of the signs (07/03/2013, T-247/11, Fairwild, EU:T:2013:112, § 33-34).

Visually and **aurally**, the signs coincide in the sequence of letters '*IK*OK' (and its sound). They differ in their initial and fourth letters, namely two letters 'T' in the earlier mark versus two letters 'f' in the contested sign (and their pronunciation).

Both signs consist of six letters and coincide in the number of their syllables (two) and their vowel sequence (I-O), as well as their rhythm and intonation. Due to the signs' coinciding letters, and even taking into account their different beginnings, the differences between the signs are not sufficient to outweigh the similarities caused by the identical letters '*IK*OK', which are, moreover, placed in the same position in both signs.

Therefore, the signs are visually and aurally similar to an average degree.

Conceptually, neither of the signs has a meaning for the public in the relevant territory. Since a conceptual comparison is not possible, the conceptual aspect does not influence the assessment of the similarity of the signs.

As the signs have been found similar in at least one aspect of the comparison, the examination of likelihood of confusion will proceed.

d) Distinctiveness of the earlier mark

The distinctiveness of the earlier mark is one of the factors to be taken into account in the global assessment of likelihood of confusion.

According to the opponent, the earlier mark has been extensively used and enjoys an enhanced scope of protection. However, for reasons of procedural economy, the evidence filed by the opponent to prove this claim does not have to be assessed in the present case (see below in 'Global assessment').

Consequently, the assessment of the distinctiveness of the earlier mark will rest on its distinctiveness per se. In the present case, the earlier trade mark as a whole has no meaning for any of the goods in question from the perspective of the public under examination in the relevant territory. Therefore, the distinctiveness of the earlier mark must be seen as normal.

e) Global assessment, other arguments and conclusion

Likelihood of confusion must be appreciated globally, considering all the factors relevant to the circumstances of the case. This appreciation depends on numerous elements and, in particular, on the degree of recognition of the trade marks on the market, the association that the public might make between the marks, and the degree of similarity between the signs and between the goods (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 22).

Account is taken of the fact that average consumers rarely have the chance to make a direct comparison between different marks but must trust in their imperfect recollection of them (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26). Even consumers who pay a high degree of attention need to rely on their imperfect recollection of trade marks (21/11/2013, T-443/12, ancotel, EU:T:2013:605, § 54).

The goods are partly identical and partly similar. They target the public at large and the professional public, whose degree of attentiveness varies from average to high. The degree of inherent distinctiveness of the earlier mark is normal.

The signs are visually and aurally similar to an average degree, while the conceptual aspect does not influence the assessment of the similarity of the signs. Considering the similarities and differences between the signs described in detail in section c), their overall impressions on the relevant public will be similar. The differences between the marks will be insufficient to counteract the commonalities between them. Therefore, the relevant public, who must rely on their imperfect recollection of the signs, may easily confuse them or believe that the goods found to be identical or similar originate from the

same or economically linked undertakings. This also applies to consumers who display a high degree of attention.

Considering all the above, there is a likelihood of confusion on the part of the German-speaking part of the public. As stated above in section c) of this decision, a likelihood of confusion for only part of the relevant public of the European Union is sufficient to reject the contested application.

Therefore, the opposition is well founded on the basis of the opponent's EUTM registration No 18 184 341. It follows that the contested trade mark must be rejected for all the contested goods.

Since the opposition is successful on the basis of the inherent distinctiveness of the earlier mark, there is no need to assess the enhanced degree of distinctiveness of the opposing mark due to its extensive use and/or reputation as claimed by the opponent. The result would be the same even if the earlier mark enjoyed an enhanced degree of distinctiveness.

As the earlier EUTM registration No 18 184 341 leads to the success of the opposition and to the rejection of the contested trade mark for all the goods against which the opposition was directed, there is no need to examine the other earlier right invoked by the opponent (16/09/2004, T-342/02, Moser Grupo Media, S.L., EU:T:2004:268).

Since the opposition is fully successful on the basis of the ground of Article 8(1)(b) EUTMR, there is no need to further examine the other ground of the opposition, namely Article 8(5) EUTMR.

COSTS

According to Article 109(1) EUTMR, the losing party in opposition proceedings must bear the fees and costs incurred by the other party.

Since the applicant is the losing party, it must bear the opposition fee as well as the costs incurred by the opponent in the course of these proceedings.

According to Article 109(1) and (7) EUTMR and Article 18(1)(c)(i) EUTMR, the costs to be paid to the opponent are the opposition fee and the costs of representation, which are to be fixed on the basis of the maximum rate set therein.



The Opposition Division

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Anna PEKAŁA

Alexandra KAYHAN

According to Article 67 EUTMR, any party adversely affected by this decision has a right to appeal against this decision. According to Article 68 EUTMR, notice of appeal must

be filed in writing at the Office within two months of the date of notification of this decision. It must be filed in the language of the proceedings in which the decision subject to appeal was taken. Furthermore, a written statement of the grounds for appeal must be filed within four months of the same date. The notice of appeal will be deemed to have been filed only when the appeal fee of EUR 720 has been paid.