



PRESS RELEASE No 97/22

Luxembourg, 8 June 2022

Judgment of the General Court in Joined Cases T-26/21, T-27/21 and T-28/21 | *Apple v EUIPO – Swatch (THINK DIFFERENT)*

Apple and Swatch 'THINK DIFFERENT'

The General Court dismisses the actions brought by Apple Inc. against the decisions of EUIPO revoking the word sign THINK DIFFERENT

In 1997 (T-26/21), 1998 (T-27/21) and 2005 (T-28/21), the applicant, Apple Inc., obtained registration of the word sign THINK DIFFERENT as an EU trade mark. The goods in respect of which the registration was sought include IT products such as computers, computer terminals, keyboards, computer hardware, software and multimedia products.

In 2016, the intervener, Swatch AG, filed with EUIPO three applications for revocation of the contested marks. The company claimed that the contested marks had not been put to genuine use for the goods concerned for an uninterrupted period of five years.

On 24 August 2018, the Cancellation Division of the European Union Intellectual Property Office (EUIPO) revoked the contested marks in respect of all the goods concerned, with effect from 14 October 2016. The appeals brought by Apple against the decisions of the Cancellation Division were dismissed by the Fourth Board of Appeal. In January 2021, Apple Inc. brought three actions before the General Court of the European Union.

By its judgment delivered today in those three cases, the General Court dismisses the actions.

According to the Court, the onus was on Apple Inc. to prove to EUIPO that those marks had been put to genuine use for the goods concerned during the five years preceding 14 October 2016 (the date on which the applications for revocation were filed), namely from 14 October 2011 to 13 October 2016.

By its actions, Apple Inc. complained inter alia that the Board of Appeal did not take into account the high level of attention of the relevant public when assessing whether the contested marks had been put to genuine use. In particular, it disputed the Board of Appeal's conclusion that the relevant public would carelessly overlook the labels affixed to the packaging of an iMac computer which bore the contested marks. According to the Court, Apple **has not demonstrated** that taking into consideration a high level of attention would have led the Board of Appeal to

find that the consumer would examine the packaging in any detail and that he or she would pay particular attention to the contested marks. In addition, the Court rejects Apple complaint that the Board of Appeal wrongly failed to take into account the sales figures of iMac computers throughout the European Union, put forward in the witness statement of 23 March 2017. The annual reports for the years 2009, 2010, 2013 and 2015, attached to that statement, contain only information on the net worldwide sales of iMac computers and do not provide any details as to the sales figures for iMac computers in the European Union.

Furthermore, Apple criticised the Board of Appeal for having concluded that the contested marks were devoid of any distinctive character. The Court holds that that argument is based on a **misreading** of the contested decisions and points out that the Board of Appeal did not deny the words 'THINK DIFFERENT' any distinctive character, but attributed to them a rather weak distinctive character.

The Court notes that, contrary to what Apple claims, the Board of Appeal's conclusion as to the distinctiveness of the contested marks is **not contradicted by a body of evidence** aimed at proving that they have been put to genuine use. While it is true that the items of evidence of genuine use filed with EUIPO include numerous press articles noting the success of the advertising campaign entitled 'THINK DIFFERENT' at the time of its launch in 1997, those press articles **predate the relevant period by over 10 years**.

The Court holds that **no infringement of the right to be heard** can be found in this case. Furthermore, in its view, the Board of Appeal **stated to the requisite legal standard**, in the contested decisions, **the reasons** as to the question whether Apple had adduced proof of genuine use of the contested marks.

NOTE: EU trade marks and Community designs are valid for the entire territory of the EU and coexist with national trade marks and designs. Applications for registration of a EU trade mark or Community design are addressed to EUIPO. Actions against its decisions may be brought before the General Court.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision. The appeal will not proceed unless the Court first decides that it should be allowed to do so. Accordingly, it must be accompanied by a request that the appeal be allowed to proceed, setting out the issue(s) raised by the appeal that is/are significant with respect to the unity, consistency or development of EU law.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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