

D YOUNG & CO TRADE MARK NEWSLETTER *no.66*

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Editorial



Looking back, 2012 was an amazing year in the UK. Major celebrations included the Queen's Diamond Jubilee in the spring and the Olympic and Paralympic games over the summer – it really felt like one long party.

At D Young & Co, in addition to making time for sport and the Royal family, we were kept busy by increased filing, contentious and non-contentious work as well as numerous trips, at home and abroad, to visit clients and colleagues. We have seen a big increase in the amount of anti-counterfeiting work we do, as well as domain name disputes and trade mark oppositions.

We are grateful for the strong and enduring relationships we have with our clients and are looking forward to continuing to develop these in 2013. We expect another busy year ahead of us as we prepare to launch some exciting new services - currently in the pipeline!

So for now, the Trade Mark and Dispute Resolution and Legal teams want to thank you all for your commitment to D Young & Co and send our best wishes for a HAPPY NEW YEAR!

Editor:

Vivienne Coleman



Article 01

The War Against Counterfeiting D Young & Co Out in the Field

Counterfeiting activity within the European Union has increased considerably in recent years with consignments from the far-east sometimes leading to widely publicised commercial (and financial) difficulties for brand owners. Christmas, in particular, is always a very busy time of year.

Council Regulation (EC) No. 1383/2003 provides the legal framework for EU Customs authorities (and rights holders) to take action against importers of such goods on the basis of their suspicion that an item arriving into the European Union infringes certain intellectual property rights. These actions can be initiated *ex officio* (essentially of Customs' own volition) or upon a pan-European application being filed on behalf of the rights holder with HM Revenue and Customs (HMRC) here in the UK.

At D Young & Co, we work hard to combat the problem of counterfeit goods and are well placed to advise clients on formulating and implementing anti-counterfeiting strategies across Europe. We are not only tackling this issue from our desks but also out in the field, that is to say, by working directly alongside UK Customs officials in order to prevent the circulation of counterfeit goods within the UK.

To provide you with an insight into the work involved in these anti-counterfeiting 'missions' of ours, I provide you with a diary extract which illustrates the steps and processes involved in our efforts to combat the importation of infringing products into the UK. In this case we had filed a pan-European Customs application for our client, whose goods retail for over £100 each.

The diary of a D Young & Co legal assistant combatting counterfeits

9.00 Following up on an email received from the United Kingdom Border Agency (UKBA), I begin my day by making a phone call to UK Customs asking for confirmation of the number of units detained by UKBA. The officer tells me that a "significant number" of units have been identified as suspected counterfeit items (potentially infringing our client's intellectual property rights) and that he would like me to attend their offices to confirm authenticity of the

goods. I arrange a meeting with the Intellectual Property Rights Manager of UKBA, providing him with an ETA of 14.00 hours.

10.30 I liaise with colleagues and prepare materials for my onsite visit.

12.00 I collect my laptop, Dictaphone and confidential (read 'top secret') product authentication materials (although now I also have my own expertise as well) and depart for the train station.

13.00 I take the 13.00 hours train to the 'target location' (Heathrow Worldwide Distribution Centre in Langley, Berkshire) and make a further phone call to UKBA confirming that I am *en route* before reviewing my preparatory materials ahead of arrival.

14.00 I arrive at the Distribution Centre and, after being cleared by security, meet with the Intellectual Property Rights Manager. I quickly change into a fetching high-visibility vest/ steel toe-capped boots combo, before being escorted to an office where the suspect items are being stored.

14.30 I begin the task of sorting through packages of varying shapes and sizes (and smells!) and confirm the authenticity of each item. I then take down details of the importers for the purposes of follow-up action, namely our letters requesting the importers' consent to destroy the goods under the 'Simplified Procedure', which applies to goods detained under Regulation No. 1383/2003.

17.30 Hundreds of packages later (and with important importer details on my Dictaphone), I conclude my visit and depart the Centre, leaving behind me a trail of polystyrene, bubble wrap and brown wrapping paper. Upon returning to the office the next day, letters will be sent to each of the importers and, where destruction is not opposed, we will thereafter liaise with Customs to arrange for destruction of the goods.

Mission accomplished.

Author:

Scott Gardiner



Scrabble 3D Tile Held to be Invalid by High Court

JW Spear & Sons Ltd and Mattel Inc v Zynga

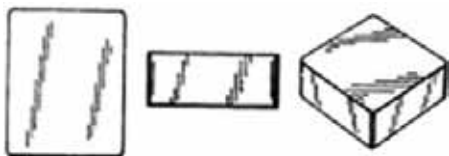
The High Court of England and Wales has found the Scrabble 3D trade mark to be invalid in a trade mark invalidation action. In *JW Spear & Sons Ltd and Mattel Inc v Zynga*, Mr Justice Arnold in the Chancery Division of the Court found that Mattel's Scrabble 'tile' did not comply with Article 2 of the Trade Mark Directive.

Background

The registration, which dated from 2000, was registered in respect of 'computer game adaptations of board games' in Class 9, 'board games' in Class 28 and 'organisation of competitions and exhibitions, all relating to board games' in Class 41. It was described as consisting of :

"a three dimensional ivory-coloured tile on the top surface of which is shown a letter of the Roman alphabet and a number in the range of 1 to 10".

Mattel claimed that Zynga had infringed four of its trade marks, one of which was the Scrabble 'tile' (below).



Counterclaim and summary judgment

Zynga counterclaimed for the invalidity of the Tile mark on the basis that it was not registrable under Article 2 of the Trade Mark Directive. Zynga applied for, and were granted, summary judgment in the counterclaim. Zynga claimed that the reason for making this application, rather than leaving the issue to trial, was to avoid costs being wasted, in particular on the survey that was to be carried out by Mattel (which had applied for permission to do so) to provide

evidence that the mark had acquired distinctive character through the use made of it.

Decision

Mr Justice Arnold held that the Scrabble tile mark was not a sign and was not capable of being represented graphically. Regarding the first condition of Article 2, he said:

"As Zynga rightly contends, the Tile Mark covers an infinite number of permutations of different sizes, positions and combinations of letter and number on a tile.

Furthermore, it does not specify the size of the tile. Nor is the colour precisely specified. In short, it covers a multitude of different appearances of tile.

It thus amounts to an attempt to claim a perpetual monopoly on all conceivable ivory-coloured tile shapes which bear any letter and number combination on the top surface.

In my view that is a mere property of the goods and not a sign. To uphold the registration would allow Mattel to obtain an unfair competitive advantage."

Further, regarding the second condition of Article 2 he commented that:

"Even if the Tile Mark complies with the first condition... the representation is not clear, precise, intelligible or objective.

The representation covers a multitude of different combinations. It does not permit the average consumer to perceive any specific sign. Nor does it enable either the competent authorities or competitors to determine the scope of protection afforded to the proprietor, other than that it is very broad."

Mr Justice Arnold therefore found that the tile trade mark did not satisfy the conditions imposed by Article 2 of the directive. He summed up by referring to the *Dyson* case, confirming his agreement that the acquisition of distinctive character by the mark was not a necessary consideration where the mark did not comply with Article 2. Accordingly, it would not assist Mattel to show that the tile mark had acquired a distinctive character, even if that were possible.

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To Stay or not to Stay: That is the Question Starbucks (HK) v Sky, EMI v Sky

On 13 September 2012, the UK Court of Appeal upheld a stay of infringement proceedings pending the outcome of an invalidity application at OHIM in respect of alleged trade mark infringement. What makes the case interesting is that, whilst upholding that stay, the Court of Appeal simultaneously upheld a decision not to stay infringement proceedings in respect of the same (allegedly) infringing service, NOW TV, where invalidity proceedings had also been commenced at OHIM.

Some legal background

Under Article 104(1) of the Community Trade Mark (CTM) Regulations, a Court hearing a CTM infringement action shall, *“unless there are special grounds for continuing the hearing”*, stay the proceedings where the validity of the CTM is already in issue before another court or where an application for revocation or declaration of invalidity has already been filed at OHIM. In short, there is a presumption of staying the infringement proceedings unless there are ‘special grounds’.

EMI v Sky (first instance)

Avid readers of this newsletter will recall (issue 64 “Now That’s What I Call a Balance of Convenience”) Sky’s success in seeking a stay of infringement proceedings pending conclusion of an invalidity action at OHIM. EMI, owner of a NOW CTM and promoter of albums sold under the NOW THAT’S WHAT I CALL MUSIC brand, sued Sky for trade mark infringement and passing off in relation of Sky’s proposed use of the ‘NOW TV’ name for an imminent television service. Sky sought a stay of the proceedings pending the outcome of an application to OHIM to have the NOW mark removed from the register on the basis of alleged non-use. The stay was granted.

Starbucks (HK) v Sky (first instance)

The EMI case was joined, at the Court of Appeal, with another: Starbucks (HK) v Sky. At first instance, Mr Justice Arnold had reached an entirely different conclusion based on a separate set of facts. Starbucks (HK) had commenced

its own action against Sky alleging trade mark infringement (relying on its CTM for a slightly stylised NOW) and passing off in respect of the same proposed launch, on the basis that NOW TV would infringe its CTM. The services of the CTM were essentially identical to Sky’s proposed use.

Starbucks had claimed that it had goodwill and reputation in the UK through use of the names NOW TV and NOW, such that Sky’s use of NOW TV would amount to passing off.

Starbucks (HK)’s parent company, PCCW, had significant commercial activity in Hong Kong, and accordingly substantial goodwill and reputation had been acquired within the Chinese population in the UK in the NOW TV name. Furthermore, between 2000 and 2002, PCCW had offered an internet television service in English to consumers across the globe through the domain name www.now.com, and although the use of the service had ceased, the goodwill had not disappeared. Moreover, another company in the PCCW group had been using the name NOW and the NOW mark under licence since 2004 in relation to the provision of broadband services, and those services were similar enough in nature for any accumulated goodwill to be relevant to a passing off action.

Before it was sued (but after receiving a warning letter), Sky had applied to OHIM to invalidate Starbucks’ NOW mark as being devoid of distinctive character and/or indicative in relation to the services for which it was registered.

Even if the CTM were found to be valid, Sky argued that the scope of protection of that mark would be so narrow that it would not be infringed by the signs which Sky planned to use, because there was no likelihood of confusion with NOW TV. Sky also denied passing off.

Mr Justice Arnold ordered an expedited trial, refusing Sky’s application for a stay pending the outcome of the OHIM invalidity proceedings. In his view:

- Starbucks had established special grounds, as required under Article 104(1) of the Community Trademark Regulation, to support its submission that a stay of infringement proceedings should not be granted, because of the urgency of the matter;
- if the stay were granted, it might take years to resolve the invalidity proceedings before OHIM; and
- it would not be right to stay the passing off claim - which was not affected by Article 104(1).
- It may well be that he had also felt that the UK Court was well suited to determine the issues speedily, which was in both parties’ interests.

Court of Appeal Decision

The Court of Appeal dismissed both appeals by EMI and Sky respectively.

When are there ‘special grounds’ within the meaning of Article 104(1)?

The Court emphasised that there was very little authority on the meaning of ‘special grounds’ in Article 104(1) and its conclusions were as follows:

The policy objective of Article 104(1) was to avoid inconsistent decisions. This policy was particularly important in the context of a CTM given its ‘unitary character’.

The presumption in favour of a stay under Article 104(1) is a strong one. This was because of the importance of the policy of avoiding inconsistent decisions in the particular context of CTMs (as mentioned above).

Consequently, it will be a ‘rare and exceptional case’ where there were special grounds within Article 104(1). ‘Special grounds’ relates to factual

circumstances specific to the given case. It was irrelevant whether there were systemic differences in terms of rules of evidence, procedure and powers of case management applicable to proceedings in the CTM courts of different member states and at OHIM. For those reasons, it was irrelevant that an application to OHIM would take a long time.

Sky's argument, that 'special grounds' must relate only or primarily to circumstances which would not give rise to irreconcilable decisions, was rejected. The CTM Regulation itself expressly contemplated that there could be circumstances in which there were inconsistent decisions concerning the same CTM. The issue to be addressed was whether, on the making of a counterclaim for invalidity or revocation, the infringement claim should be permitted to proceed notwithstanding the risk of inconsistent decisions.

The general need of a business to know 'where it stood' is not sufficient for 'special grounds'. The urgency must be such as to 'surmount the heavy presumption in favour of a stay', bearing in mind that protective and provisional measures might be available to protect the claimant in the event of any delay. It was not relevant that the application to OHIM had been made on a purely reactive basis to a threat of infringement proceedings.

How does this apply in Starbucks (HK) v Sky?

The Court of Appeal did not agree that the reactive nature of Sky's applications to OHIM was of any relevance to the determination of the stay application. Similarly, the fact that there was a passing off claim was irrelevant: it was commonplace that infringement claims were accompanied by passing off claims.

Nonetheless, the first instance judge, Mr Justice Arnold, was entitled to take the view that there were exceptional circumstances of urgency. Sky had had plans to launch its service imminently (it did in fact do so on 17 July 2012), and it was in its interests to be able to do so. PCCW was also looking at launching its own NOW television

Starbucks established special grounds to support its submission that a stay of infringement proceedings should not be granted, because of the urgency of the matter



service later in the year in the UK. It was not a case in which it would have been appropriate to delay Sky's launch by interim relief. As such, the Court considered the circumstances 'unusual' and Sky's appeal against the refusal to stay was dismissed.

How does this apply in EMI v Sky?

The Court of Appeal indicated that the first instance judge, John Baldwin QC, was both entitled and right to take a different view of the urgency from that taken by Arnold J. He had found that EMI had shown no urgency in launching a NOW-branded music TV channel and had no definite plans. Further, EMI had reached an agreement with Starbucks (HK) for the latter to be free to use the NOW mark in relation to a TV service in the near future. In contrast to the position in the Starbucks proceedings, the first instance Judge was entitled to conclude that EMI could be adequately compensated in damages for any loss. As such, EMI's appeal against the decision to stay was dismissed.

What does it all mean?

The Court of Appeal set out in this judgment some helpful guidance on the approach that a CTM court should take on an application for a stay of infringement proceedings under Article 104(1) of the CTM Regulation. It has made it clear that factors such as the existence of passing off claims, the length of time it might take for invalidity proceedings to come before OHIM, or the reactive nature of an application to OHIM, will not constitute special grounds.

The divergent outcomes highlight the fact-specific nature of applications

under Article 104(1). The key difference between the two actions was the view taken by the respective judges as to the urgency, and whether an interim injunction would have been appropriate.

What happened next?

The Starbucks speedy trial duly took place in October, with judgment on 2 November 2012. Mr Justice Arnold (again) held that the CTM of Starbucks (HK) was invalid as it was both indicative of a characteristic of a TV service (ie, its immediacy) and devoid of distinctive character (as 'now' was regularly used by others in the broadcasting industry). He was critical of the CTM having been granted at all by OHIM with a mere "*figurative fig-leaf of distinctiveness*" (ie, the 6 lines emanating from the 'O', as shown below):



He also held that, even if the CTM had been valid, it was not infringed as the scope of protection was very narrow and the use of NOW TV was not an infringement. On passing off, he held (on the facts) that there was insufficient UK goodwill to found a passing off action.

Author:

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Surveys and Witnesses to Show Confusion

How Difficult can it be?

Businesses use market research surveys to test a public's reaction to new products or to understand buying behaviour. They are important and valuable tools.

Although surveys to prove a reputation of a particular mark are accepted and valuable, surveys aimed at showing a likelihood of confusion have never been liked by English Courts – they are seen as too imprecise and are often flawed because of leading questions or inappropriate artificial surroundings.

Ever since the Imperial Tobacco case in the 1980s, trade mark lawyers have been trying to find ways around the detailed and onerous requirements set out in that case to allow the results of such surveys to be relied upon. In the early 1990s a new practice arose – the ‘witness collection programme’ – whereby a variety of experiments/surveys were undertaken not with the aim of relying on them for statistical significance but to find a suitable number of witnesses who can attest to a likelihood of confusion. Sometimes the surveys had some statistical validity, but often not. At trial only the ‘confused’ witnesses were called, even though the majority of those who responded to the survey were not confused.

Some judges did find such evidence helpful (if only to support their own views), but others did not (especially if their judicial view was different as to the likelihood of confusion). The ‘likelihood of confusion’ issue is a ‘jury-type’ question for the judge alone to decide and evidence from third parties is only of relevance to explain the factual background as to the market and purchasing behaviour.

In *Interflora v Marks & Spencer*, the Court of Appeal has just given a seminal decision on surveys and witness collection programmes in particular. Whilst such programmes were not deemed inadmissible, they will only be allowed in exceptional circumstances and where the Court (during its initial review of the case well before trial) feels the evidence would be helpful and cost-effective.

In the actual case (which relates to the use

of ‘Google Adwords’ by Marks & Spencer), the witness evidence that Interflora wished to rely upon was wanted by them to show that, as a result of Marks & Spencer’s purchase of the ‘Interflora’ adword, ‘a reasonably well-informed and observant internet user’ would not appreciate that Marks & Spencer and Interflora were independent by looking at the search results on Google which brought up Marks & Spencer. This was the test set out by the Court of Justice of the European Union (CJEU).

The Court of Appeal decided that this question was one that the Court was perfectly capable of deciding for itself and so such evidence from witnesses was not essential to Interflora’s case.

The Court of Appeal accepted that there may be cases where such evidence would be helpful – such as to show spontaneous reactions to a particular advertisement in issue or where the market was unusual or specialist. However, in most cases the evidence would not be helpful unless it was to supplement a statistically reliable survey or in support of a passing-off claim (where the legal issue is slightly different to a registered trade mark infringement claim as one has to show not that an ‘average consumer’ would be confused but that a substantial proportion of the public would). This latter test is more quantitative than qualitative, whilst the CJEU made plain in its initial decision in the *Interflora v Marks & Spencer* case that its test was intended to be a qualitative assessment and not a numbers game.

In passing-off cases, the fact that most consumers are not confused does not mean there is no passing-off if a substantial proportion (albeit a minority) are. The ‘average consumer’ or ‘reasonably well-observant and reasonably well-informed internet user’ are a legal construct, which a Court has to consider, once the relevant market and background facts have been evidenced.

So where are we now in trade mark cases?

- Pilot surveys can still be done (at one’s own risk as to cost);

Surveys to prove reputation are valuable



- full surveys can only be done with the Court’s permission (with the methodology and questions set out in detail to all parties and approved);
- relying on individual witnesses from pilot surveys or other ‘experiments’ alone will be difficult (absent unusual circumstances); and
- whilst the above theoretically does not apply to passing-off cases, one can expect much greater judicial scrutiny even in these cases. Merely tacking on a passing-off case to a trade mark infringement case will not be enough.

Whilst ‘witness collection programmes’ are not (quite) dead, they will need some creative thinking and planning to be acceptable. Proper surveys may still be allowed but they will continue to be expensive and fraught with difficulties. The carrying out of small-scale pilot surveys is likely to continue, not with the aim of finding potential witnesses but, rather, with the aim of seeing if the expense of a full survey is justified.

Author:
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Online Terms and Conditions

Time for a Health Check?

The UK Office of Fair Trading (OFT) issued a press release on the 12th October 2012 indicating that many of the top online retailers need to change certain terms and conditions on their websites in order to comply with the UK's Distance Selling Regulations and the E-Commerce Regulations. As part of an OFT investigation, 156 websites of the UK's top retailers were reviewed and it was found that many of the companies were not compliant.

There is a raft of inter-linking legislation governing trading with consumers, including legislation on unfair contract terms, rights of consumers online to receive certain information and rights to cancel an online purchase within a 'cooling off' period. In particular, the Distance Selling Regulations and the E-Commerce Regulations (which each derive from EU law so will have a similar impact in other Member States of the European Union) protect consumers when trading at a non-personable level, such as online.

The OFT has made clear that retailers who do not amend their terms and conditions in order to comply with consumer protection regulation will run the risk of enforcement action from the OFT or local Trading Standards Services.

Areas highlighted

Key areas highlighted in the OFT report include:

- restrictions on customers' rights to receive a refund after cancellation;
- restrictions on customers' rights to reasonably inspect and assess the product and then return it if defective;
- a lack of contact details on retailers' websites; and
- unexpected charges imposed at the point of checkout.

In particular, websites should provide clear details on the customers' cancellation rights, and this right to cancel should not be subject to unreasonable conditions. One of the most common conditions that the OFT came across was that the right to cancel was

subject to the product remaining in its "original packaging, original condition, resalable or it must have been unused". This was deemed by the OFT to be unreasonable, and therefore potentially unenforceable.

Contact details were also seen to be an issue on a number of the sites. The E-Commerce Regulations make it compulsory for companies to provide an email address for consumers to contact. However, 40% of the companies did not provide this and, in 2% of the cases looked at, neither an email address nor a web contact address were provided.

Further, offer price and compulsory additional charges were also brought to the attention of the OFT. 72% of the companies' websites surveyed included additional charges to the final check-out price. However, when the price was first quoted, consumers were not always told that there would be an additional charge (eg, delivery). The OFT considered that a number of companies were not providing consumers with the correct information when prices and charges are first displayed on screen. In 24% of cases, reviewers believed that there were even unexpected charges which were not indicated at the time of the first quote or at the final check out price.

Practical steps

It may be time for a terms and conditions 'health check' to ensure compliance with current legislation. There are three key questions:

Question 1: Are you providing consumers with information to which they are legally entitled?

All online service providers, including retailers, must make certain information available to their consumers, including:

- The name and geographic address of the service provider;
- The details of the service provider, including e-mail address;
- If a corporate entity, the company registration number of the company;

- Details of the relevant supervisory authority if the retailer is subject to an authorisation scheme; and
- (if applicable) the VAT registration number.

Question 2: Are you aware of consumers' rights to cancel and request a refund if the goods are defective? If so, do your terms and conditions make reference to those rights?

Online terms and conditions should cover, amongst other things:

- The 'cooling off' right: subject to certain exemptions, consumers have a right to a 'cooling off' period and a right to change their mind after the goods have been delivered.
- The consumers' refund rights: consumers also have a right to inspect goods and return them if defective.
- Details on how and when a refund will be made.
- Details of any surcharges or extra fees that may be incurred on top of the purchase price for the goods.

Question 3: Are your terms and conditions reasonable?

- Terms and conditions should be in plain English and avoid legal jargon. If contract terms imposed on a consumer are unreasonable, they may be unenforceable. A contract term that has not been individually negotiated is typically regarded as unfair if (in the absence of good faith) the term causes a significant imbalance in the parties' rights and obligations, to the detriment of the consumer. Over time, the OFT and the Courts have given guidance on what they consider to be 'unfair' in standard terms and conditions.

Author:

Dispute Resolution & Legal Group 

D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

"One of the Best and the Biggest" Chambers and Legal 500 Results

Legal 500 and Chambers have recently announced that D Young & Co has been ranked by their researchers as a top tier UK patent and trade mark firm. We are extremely grateful to our clients and colleagues who took time to respond to the researchers with such positive feedback.

Chambers 2013 says:

"D Young & Co offers clients a full IP law service, hosting solicitors as well as patent and trade mark attorneys, and it is the first firm to acquire legal disciplinary status (LDP). As one of the best and biggest such firms in Europe, D Young & Co performs enforcement and litigation as well as registration, prosecution and portfolio management services."



"Jeremy Pennant is a go-to lawyer for world-wide blue-chips in retail and leisure seeking market-leading advice and strategic direction"... "Ian Starr is an IP litigator of vast experience who handles disputes concerning all IP rights in the broadcasting, FMCG and pharmaceutical industries".
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Trade Mark and Dispute Resolution & Legal Groups

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We handle litigation, non-contentious and general advisory work relating to patents, trade marks, designs, copyright, trade secrets, malicious falsehood/unfair commercial practices as well as a full range of IP contractual matters. Much of what we do is non-contentious, advisory work such as drafting and reviewing IP agreements, that assist our clients on IP issues on a daily basis to protect and enforce their IP rights. Our expertise is as much about keeping clients out of court as it is actually litigating, although we are experienced in representing clients not only in litigation but also in alternative dispute mechanisms such as mediation and arbitration. Legal 500 writes that "D Young & Co 'surpasses expectations' on contentious IP work".

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