

D YOUNG & CO

TRADE MARK

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Editorial



We are delighted to announce two promotions within our trade mark team. Flora Cook has been appointed Senior Associate and Jennifer Heath has been promoted to Associate. Both Flora and Jennifer represent a diverse client base from start ups and SMEs to multinational companies. Our warm congratulations to Flora and Jennifer! Read more at dycip.com/promotions-apr19.

D Young & Co trade mark team, May 2019

Events



18-23 May 2019

INTA Conference, Boston US

Jeremy Pennant, Tamsin Holman, Helen Cawley, Matthew Dick, Jackie Johnson, Gemma Kirkland, Richard Burton, Jana Bogatz and Anna Reid look forward to meeting clients and colleagues at INTA.

26-29 June 2019

ECTA Conference, Edinburgh UK

Richard Burton and Flora Cook will be attending the 38th ECTA Conference in Edinburgh.

17-20 September 2019

MARQUES, Dublin Ireland

Matthew Dick, Anna Reid and Jana Bogatz will be attending the 33rd annual MARQUES conference in September.

www.dyoung.com/news-events

Brexit news



We welcome your Brexit questions (email our advisors at brexit@dyoung.com) and regularly publish news and advice regarding Brexit on our website: www.dyoung.com/knowledgebank/ip-brexit.

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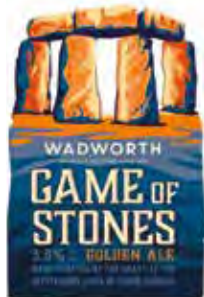
Oppositions

UK oppositions based on earlier rights for GAME OF THRONES HBO challenges GAME OF STONES & GAME OF VAPES

Home Box Office, Inc (HBO) owns various trade marks associated with its TV show Game of Thrones. The show has been enormously successful in the UK and the USA and is famous for its unexpected plot twists. It is perhaps no surprise, then, that the trade marks have recently been involved in a couple of noteworthy UKIPO opposition decisions.

GAMES OF STONES

Wadworth and Company Limited filed an application for the figurative mark WADWORTH GAME OF STONES (shown below) in connection with “beers; ales; porter; stout; flavoured beers”.



HBO opposed the application on the grounds of a likelihood of confusion, reputation (that the applicant would benefit from the recognition of the earlier marks) and passing off. HBO relied on two earlier EUTMs (a word mark for GAME OF THRONES, covering class 32 goods, including beers; and a Logo for GAME OF THRONES ASCENT in class 41, covering entertainment services related to video games).

The hearing officer considered HBO's best case to be in connection with its word mark for “beers”. The hearing officer found that the respective marks shared a low level of visual similarity, a high level of aural similarity and a reasonably low level of conceptual similarity.

Whilst HBO licensed its mark for use in connection with beer in the USA, no evidence was submitted showing similar use in the UK. The hearing officer therefore considered that the GAME OF THRONES mark had an average level of distinctive character, and did not benefit from an enhanced distinctive character in connection with beers.

The hearing officer went on to describe the purchasing act of the average consumer, and noted that aural and visual considerations play a part: in some instances, the purchase of beer would be done visually (selection by sight based on pump handles), and in others, it would be aurally requested. The average consumer would be the beer-drinking general public and they would pay a normal level of attention during the purchasing act. Consumers could refer to WADWORTH only (if only one type of WADWORTH-branded beer was available in a pub), but they might also refer to GAME OF STONES (if more than one type of WADWORTH beer was available). The high point of the opponent's case was considered to be where beer could be purchased aurally in a pub. However, ultimately, it was held that the consumer would not be confused: they would most likely see the pump handle, and the visual and conceptual differences (the stone circle reminiscent of Stonehenge) between the marks would be obvious.

When assessing the reputation claim, the hearing officer held that HBO had provided convincing evidence that it had a strong reputation in connection with its TV series. However, neither of the earlier marks relied upon covered “entertainment services” relating to the TV show. (The logo mark included “entertainment services in the nature of online, video and electronic games” and the evidence did not show reputation for those particular services). The Section 5(3) ground therefore failed.

When considering passing off, the hearing officer held that the applicant's mark may bring HBO's sign fleetingly to mind, but it would not lead to a misrepresentation. GAME OF STONES was considered to be “no more than an attempt at parody, namely, an imitation of the style of the opponent's sign for comic effect, rather than an intent to deceive”. Whilst the application was reminiscent of HBO's mark (and it was considered likely that inspiration was drawn from the GAME OF THRONES mark), the hearing officer considered the connection to be weak and unlikely to deceive the public into believing there to be a connection between the applicant's goods and the opponent's services.

> **Case details at a glance**
Jurisdiction: England & Wales
Decision level: UKIPO
Parties: Wadworth and Company Limited (applicant) and Home Box Office, Inc (opponent)
Date: 05 February 2019
BL Number: O/072/19
Full decision (PDF): dycip.com/gameofthrones

> **Case details at a glance**
Jurisdiction: England & Wales
Decision level: UKIPO
Parties: Maanmohan Singh (applicant) and Home Box Office, Inc (opponent)
Date: 21 February 2019
BL Number: O/103/19
Full decision (PDF): dycip.com/gameofvapes

HBO claimed likelihood of confusion, reputation and passing off



As such, there was no misrepresentation and therefore the passing off claim failed.

GAME OF VAPES

Maanmohan Singh (the applicant) filed for GAME OF VAPES figurative mark (shown below) in connection with class 34 “tobacco, smokers articles: matches.”



HBO opposed the application based on an earlier EUTM registration for the word mark GAME OF THRONES covering, *inter alia*, smoking products in class 34 and travel tour operation services in class 39. Again, HBO claimed a likelihood of confusion, reputation and passing off.

The hearing officer considered the evidence filed by HBO to be sufficient to show that it enjoys a significant reputation and goodwill in connection with its ongoing TV programme under the GAME OF THRONES mark. In the evidence, it was explained that HBO licenses its IP in connection with a wide variety of products.

The respective marks were held to be visually and aurally similar to a medium degree, but there was no overall conceptual

similarity, beyond both referring to a “game” of some sort. The earlier trade mark was held to have a higher than average degree of inherent distinctive character, given the mark is meaningless in connection with the goods and services for which it is registered. However, there was no evidence of enhanced distinctiveness beyond the core activity of TV shows.

The hearing officer held that the conceptual differences between the marks were significant and would counteract the visual and phonetic similarities. The average consumer would notice the differences between the marks such that there would be no likelihood of confusion, either direct or indirect. Further, it was noted that the mark applied for is not a natural brand extension of TV shows, and there was no “family of marks” argument raised by HBO. Whilst a consumer might associate the marks, it would not confuse them.

HBO claimed a reputation for goods and services in classes 34, 39 and 43. The hearing officer accepted that there had been use of GAME OF THRONES in connection with some merchandising (including lighters and smoking paraphernalia), but this did not amount to a reputation for those goods. Further, no evidence was put in regarding the relevant markets or market share. Hence the opposition fell down on this ground as the opponent had not shown the relevant reputation. In relation to passing off, the hearing

officer accepted that HBO had goodwill in connection with the TV show and the mark applied for may bring the GAMES OF THRONES mark fleetingly to mind, but was unconvinced that it extended beyond that. In the hearing officer’s view, the applicant’s mark would be seen as a “comedic play” on the GAME OF THRONES mark, and would not amount to a misrepresentation.

HBO submitted evidence that the applicant had previously applied for GAMES OF VAPES in a very similar get-up to the TV show’s marketing. However, the hearing officer stressed that the opposition needed to be assessed based on the current application and not on previous applications. That being said, such evidence might be relevant when looking at the misrepresentation element of a passing off claim.

Author:
Flora Cook



In short

HBO’s oppositions ultimately failed, despite the hearing officers acknowledging that the applications shared similarities with the earlier marks. Both applications were essentially considered to be parodying the GAME OF THRONES marks.

The decisions are a reminder that having a significant reputation may not, in itself, be enough to succeed. In particular, for reputation claims, the evidence should relate to the goods/services covered by the particular earlier marks being relied upon. Further, for passing off claims, there needs to be misrepresentation: simple imitation of, or a “nod” to, the earlier sign is unlikely to be sufficient.

Textilis and Ozgur Keskin v Svenskt Tenn

2D print affixed to goods such as fabrics does not “consist exclusively of the shape”

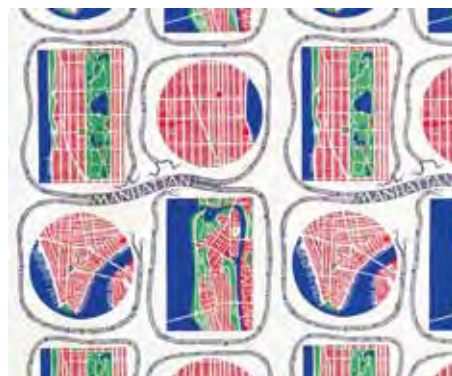
In a preliminary ruling of the Court of Justice of the European Union (CJEU), it has been confirmed that the amendment “or another characteristic” within Article 7(1)(e)(iii) EUTMR 2015/2424 does not have retroactive effect; and that a 2D print affixed to goods such as fabric or paper does not “consist exclusively of the shape” within the meaning of Article 7(1)(e)(iii) CTMR 207/2009.

Fabrics with decorative designs are therefore eligible for trade mark registration under CTMR 207/2009.

In this case, the CJEU was referred a number of questions by the District Court in Stockholm, Sweden, regarding the interpretation of Article 7(1)(e)(iii) EUTMR 2015/2424, that a sign “which consists exclusively of the shape, or another characteristic, which gives substantial value to the goods” shall not be registered. An amendment to the EUTMR came into force on 23 March 2016 – previously in the CTMR 207/2009, the provision did not include the words “or another characteristic”.

Background

The contested figurative EU trade mark (EUTM) (see below), owned by Svenskt Tenn, consists of a design incorporating parts of a map of Manhattan, alongside the word MANHATTAN (known as the MANHATTAN mark).



Svenskt Tenn also claimed ownership of

the copyright in the MANHATTAN mark.

The MANHATTAN mark covers various goods/services, including 2D goods such as textiles, bed and table covers, and wallpaper.

Svenskt Tenn markets and sells furniture, furnishing fabrics and other decorative accessories, and brought trade mark and copyright infringement proceedings in Sweden against Textilis (and its owner, Mr Keskin), which sells fabrics and goods bearing patterns similar to those of the MANHATTAN mark.

Textilis counterclaimed for invalidity of the EUTM, including on the grounds that the MANHATTAN mark should not have been registered as it consists exclusively of a shape which gives substantial value to the goods.

The Stockholm District Court dismissed the counterclaim and found trade mark and copyright infringement.

Textilis and Mr Keskin appealed, arguing that the third indent of Article 7(1)(e) applies to “other characteristics” of a sign and that a figurative sign on goods such as fabric cannot be registered as a trade mark without subverting the principle of the limitation in time of copyright protection.

Textilis argued that it is clear the shape prohibition applies to 3D and 2D marks representing 3D shapes and that the prohibition should also apply to 2D marks representing 2D goods such as fabrics.

Referral to the CJEU

The Swedish Court referred several questions to the CJEU, concerning the interpretation of the third indent of Article 7(1)(e).

The first question related to whether the amended wording of the EUTMR should

apply in this case. The MANHATTAN mark was registered prior to 23 March 2016; and the application for invalidity was also filed prior to the entry into force of this amendment.

For reasons of legal certainty and the need to protect legitimate expectations, the CJEU held that the additional words “or another characteristic” did not apply retroactively.

In its second question, the Swedish Court requested clarification on whether a sign consisting of a 2D decorative motif, which can be applied to a 2D product such as fabric, consists “exclusively of the shape”.

The CJEU noted the recent decision in the Louboutin red sole case, that the application of a colour to a location on a product does not mean that the sign consists exclusively of a shape.

Here, the MANHATTAN mark contains decorative motifs which can be affixed to 2D goods. Whilst there are various lines and contours, the sign also features the word MANHATTAN, and the decorative elements appear both inside and outside the outline of the stylised geographical maps.

The CJEU held that the form of the goods differs to that of the decorative motifs; and the sign is not indissociable from the shape of the goods, such that the sign did not consist exclusively of the shape within the meaning of the CTMR. The CJEU also considered that any copyright in the print did not impact whether the trade mark consists exclusively of a “shape”.

It would have been interesting to see how the CJEU would have treated this assessment had it been on the basis of the amended EUTMR 2015/2424.

Author:
Jennifer Heath



Tapir or (Peppa) Pig? General Court upholds application for invalidity

➤ **Case details at a glance**
Jurisdiction: European Union
Decision level: General Court
Parties: Xianhao Pan v EUIPO (Entertainment One UK Ltd, Astley Baker Davies Ltd)
Date: 21 March 2019
Citation: T-777/17
Full decision (link): dycip.com/tm-peppa-pig

The General Court found that the differences between the marks were not sufficient to dispel a likelihood of confusion, and as such upheld the application for a declaration of invalidity filed by Entertainment One UK Ltd, the owners of the earlier Peppa Pig figurative mark.



Contested mark



Earlier mark

Background

Xianhao Pan, the appellant, obtained an EU trade mark registration for the TOBBIA figurative mark in September 2013, covering “clothing, footwear, headgear” in class 25. In April 2015, Entertainment One UK sought to invalidate the registration on the ground of a likelihood of confusion with its earlier Peppa Pig figurative mark, which covers identical goods in class 25.

The EUIPO Cancellation Division rejected the application for a declaration of invalidity in its entirety, and Entertainment One UK appealed to the EUIPO Board of Appeal. The Board of Appeal upheld the appeal, finding that in view of the identity of the goods and the visual and conceptual similarities, the differences between the signs were not sufficient to dispel a likelihood of confusion.

The appellant subsequently appealed to the General Court, arguing that the Board of Appeal had erred in the comparison of the marks and in the global assessment of the likelihood of confusion.

Comparison of the marks

In relation to the visual similarities between the marks, the General Court upheld the Board of Appeal’s finding that the earlier mark and the contested mark are similar to the extent that they represent an illustration of a pig. It was found that the shape of the head and snout are almost identical in both marks, as are the



ears, eyes, cheeks, smiley mouth and nostrils. It was acknowledged that there are some visual differences between the marks, notably the colours used, the clothes and the word elements, however these differences were not considered capable of outweighing the similarities.

The appellant argued that the contested mark represents not a pig but a tapir. The General Court found, however, that even if the public were to identify the animal in the contested mark as a tapir, the earlier mark would also be associated with a tapir due to the visual similarities. Whether the public identifies the animals as two pigs or two tapirs does not therefore alter the assessment of the similarity of the marks.

With regard to the aural similarities, the General Court found that despite the differences between the word elements, there was a certain correlation between the element “peppa” and “tobbia” which was considered sufficient in order to establish a similarity between the marks.

Finally, in relation to the conceptual similarities, the appellant argued that the earlier mark refers to a female pig, whereas the contested mark refers to a male tapir. The General Court, however, agreed with the Board of Appeal’s finding that the average consumer would immediately associate the marks in question with a pig. It was unlikely that the public would associate the contested mark with a tapir since tapirs are not well known animals to the general public.

In view of the above, the General

Court found that the Board of Appeal did not err in finding that the contested mark and earlier mark are similar.

Likelihood of confusion & global assessment

The General Court dismissed the appellant’s claim that the Board of Appeal had erred when carrying out its assessment of the likelihood of confusion. In particular, the General Court noted that the specific nature of the clothing sector must be taken into account. The purchase of clothing generally involves a prior visual examination of the marks, and as such the visual similarity is of particular importance in the global assessment of the likelihood of confusion.

Consequently, the appeal was dismissed in its entirety.

Author:
Natasha O’Shea



In short

The General Court’s decision does not appear surprising given the similarities between the marks. However it serves as a reminder that otherwise obvious differences, such as between the word elements here, will be regarded as insufficient to overcome a likelihood of confusion where there is a high similarity between other elements.

The limitations of repackaging & re-sale of luxury goods

Trade mark exhaustion

The principal issue in this action was whether the purchaser of a product sold under a trade mark within the European Union was entitled to disassemble the product and sell component parts under the trade mark. In other words, would the trade mark proprietor's rights have been "exhausted" pursuant to section 12 of the Trade Marks Act 1994 (Act) or Article 7 of Directive 2008/95/EC (superseded since 14 January 2019 by Article 15 of Directive (EU) 2015/2436) (Directive).

Background

Nomination ran a successful business selling charm bracelets under the trade mark NOMINATION. One of Nomination's products was a "composable bracelet" which consisted of individual links which could be detached from each other and relinked in any order. The bracelets were comprised of "base links" (each of which bore the NOMINATION trade mark) to which "decorative links" made of precious stones could also be added. Nomination owned several European Union trade mark registrations for NOMINATION, all of which covered (amongst others) "jewellery" under class 14.

JSC, the defendant, sold custom jewellery online and began selling composable charm bracelets (not made by Nomination) under the trading name "Daisy Charm" and a logo that was registered as a UK trade mark for all goods in class 14.

The issues

Issues arose when JSC began purchasing single Nomination base links, as well as Nomination base bracelets (which it disassembled into individual links) from Nomination's German, Italian and UK retailers, and then selling single Nomination base links bundled together with single JSC links. These bundles either consisted of a) two blister packs, one for each of the Nomination and JSC links, or alternatively b) the JSC links were supplied in a blister pack and the Nomination base links were provided in a small plastic bag bearing a label "Manufactured by Nomination Italy Repackaged by JSC Jewellery UK".

Could the purchaser sell component parts of the product under the trade mark?



As stated above, the principal issue in this case concerned whether Nomination could object to JSC's use of the NOMINATION sign in relation to genuine, individual Nomination base links. Under section 12 of the Act and Article 7 of the Directive, Nomination could not prohibit JSC's use of the NOMINATION sign to sell individual Nomination base links if these had been sold within the European Union under the NOMINATION trade mark by Nomination, or with its consent, unless there were legitimate reasons for Nomination to oppose further dealings in the goods.

Consent

On the question of consent, Nomination claimed that it never consented to the sale of individual Nomination base links other than to customers who expressed the wish to enlarge their Nomination bracelet. However, on the evidence, there had been no contractual restrictions imposed on retailers supplied with Nomination's bracelets preventing the sale of individual base links taken from those bracelets. Moreover, Nomination conceded that even when such sales had been carried out, it had not approached the relevant retailers to complain.

The judge commented that, as a matter of general principle, it was not clear why Nomination should have a sound basis for objecting to the onward sale under the trade mark of links taken from their bracelets unless there are legitimate reasons for doing so. Nomination certainly could not object to their bracelets being disassembled by purchasers, and there would be nothing misleading, of itself, about a purchaser of a Nomination bracelet stating on eBay that a link taken from such a bracelet is a Nomination link. Therefore the judge decided the case not on the basis of consent, but whether there was a legitimate reason for Nomination to object to the further

commercialisation of the links by JSC.

Legitimate reason

Nomination argued, and the court agreed, that a legitimate reason did indeed exist. In particular, the court accepted that Nomination sold its products in high quality packaging, whereas JSC marketed the Nomination base links in low quality blister packs or plastic bags.

The court was satisfied that the elegant packaging of Nomination's bracelets conveyed an image of luxury to purchasers and that this increased the reputation of the trade mark. As a result, the receipt of Nomination's products in a small blister pack or polythene bag from JSC was likely to damage that reputation.

Authors:

Tamsin Holman & Alban Radivojevic



In short

This judgment serves as a useful reminder to businesses and trade mark proprietors alike of the issues involved in the repackaging and re-sale of goods and the limitations on the principle of trade mark exhaustion, particularly in the context of luxury goods.

The case also emphasises the importance for trade mark proprietors of policing the manner in which their trade mark(s) are used by official distributors.

Trump card prevails against prolific filer Gleissner

Trump International loses High Court trade mark appeal

The High Court has upheld a UK Intellectual Property Office (UKIPO) decision in relation to a trade mark for “TRUMP TV” filed in bad faith. Operations LLC v Comptroller General of Patents, Designs and Trade Marks [2019] EWHC 769 (Ch).

Background

Michael Gleissner is a name known to many in the trade mark profession. He is known for his companies' extensive trade mark applications, oppositions and cancellation actions, usually in relation to famous trade marks and high profile companies, which are widely seen to be causing disruption for commercial gain.

In 2016 Gleissner entities reportedly applied for over 800 UK trade marks. In November 2017 Gleissner entities were involved in 97 live contested trade mark cases before the UK IPO (5% of the total). Companies controlled by Mr Gleissner have not paid 49 costs orders, which amount to about one-third of the entirety of unpaid costs orders in the UK. He reportedly has over 1,000 UK company names, with those entities used as the applicants on over 4,000 trade mark applications in at least 38 jurisdictions.

The application

In October 2016, Gleissner filed an application for the mark “TRUMP TV” in classes 38 (telecommunication services) and 41 (production of radio and TV shows and more) in the name of “Trump International Limited”.

The mark was opposed by DTTM Operations LLC, who managed the IP rights for Donald Trump although it no longer has links to him.

The mark was filed just a day before Trump International Limited was incorporated and less than three months before the inauguration of Donald Trump as President of the USA.

The opposition

DTTM opposed the application based on unregistered rights and bad faith, filing extensive evidence of the past activities of Mr Gleissner's companies, DTTM's trade mark rights, and the lack of connection between DTTM and Trump International.

According to section 3(6) of the Trade Marks Act 1994 a trade mark “shall not be registered if or to the extent that the application is made in bad faith”. A trade mark application may be considered to have been filed in “bad faith” if the applicant had no intention of using the trade mark to distinguish its goods from those of others.

The IPO decision

The hearing officer refused the application on the ground of bad faith alone and did not proceed to rule on the other grounds of opposition. Trump International was ordered to pay costs of around £15,000. According to the hearing officer, the conduct of Michael Gleissner / Trump International in previous matters illustrated; “a flagrant degree of cynicism on the part of the applicant, where other related

companies have demonstrated a pattern of similar behaviour”. Therefore, “In considering whether off-scale costs are here warranted, I particularly bear in mind the well-evidenced pattern of abusive behaviour on the part of Mr Gleissner and his related companies.”

High Court Appeal

Trump International appealed to the High Court and argued that the hearing officer had erred by failing to make any findings in relation to the other grounds of opposition. It was also claimed that the hearing should have been stayed pending the CJEU's judgment in the Skykick case. A key question was whether the hearing officer was wrong to take into account evidence of Mr Gleissner's activities in unrelated actions in finding that Trump International Limited's application was made in bad faith.

The appeal was dismissed, with the Hon Mr Justice Henry Carr addressing the bad faith nature of the application; “Mr Gleissner's assertion of an intention to use the mark is, in my judgment, not credible...the evidence gives no details as to how the business would operate, how revenue would be generated, what markets and demographic would be addressed, nor in what geographical regions or on what platforms the service would operate. Nothing is said about when the planned business was or would be launched.”

Author:
Richard Burton



The High Court upheld the UKIPO decision in relation to TRUMP TV



In short

Clearly this is not the last we will see of Gleissner entities involvement in UK IPO proceedings but the High Court has made a stand, which could have precedential value.

In the meantime, as ever brand owners should remain alert to Gleissner's activities and the evidence demonstrating a pattern of bad faith.

D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

IP & Brexit

IP after Brexit Client guidance for post-Brexit UK & EU trade mark and design practice

Webinar guide: A practical guide to post-Brexit UK & EU trademark and design practice



The date that the UK will leave the EU is still under discussion. The EU granted an extension to the process in early April offering a hard deadline of 31 October 2019. There were other possible leaving dates allowed for as part of the extension. One of these (01 June 2019) has since been removed from the discussion as the UK has confirmed it will take part in the European Elections on 23 May 2019. Brexit could still happen ahead of the October date if the UK Parliament votes through the Withdrawal Agreement. This would mean that exit day could be brought forward to an, as yet, unknown date but in this instance there would be a deal in place that would include a transition period.

Our latest IP & Brexit advice

Our updates, including our guide to IP after Brexit, can be found at www.dyoung.com/knowledgebank/ip-brexit.

Webinar guide to IP after Brexit

We have also recently produced a client webinar guide providing insight and practical guidance on handling trade marks and designs in a post-Brexit IP landscape. The webinar walks viewers through the practices of the UKIPO and deals with trade mark applications and oppositions and design filings. We also highlight the differences in the practices of the UKIPO and the EUIPO. If you would like to view the recording please send us an email at registrations@dyoung.com.

As a European firm with an office in Munich, we are able to continue to represent you both in the UK and at the EUIPO regardless of the form Brexit takes and when it happens. There will be no change to the level of service that we provide following the UK's departure from the EU.

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