

Battle of the Birds: Twitter Stops Singapore Tech Firm from Registering a Similar Bird Logo

Case Commentary: V V Technology Pte Ltd v Twitter, Inc [2022] SGHC 293

After a 5-year battle, the trade mark dispute between Twitter and the Singapore technology company V V Technology Pte Ltd (“VVT”) regarding their competing bird logos drew to a close. The Singapore High Court agreed with the tribunal below and held that VVT’s bird logo  conflicted with Twitter’s earlier rights in its own bird logo  and that VVT’s bird logo should, therefore, be refused registration.

The marks were visually & conceptually similar

In particular, the High Court found that the marks were visually similar. From a visual standpoint, the marks shared similarities in terms of their general shape and composition, especially when one adopted a higher level of abstraction recommended by English and European case law. Their general shapes and features were also found to be similar. The High Court also found that the marks were conceptually similar: they both depicted birds in flight.

There was a likelihood of indirect confusion

On the back of those two similarities, the High Court found that a significant proportion of the relevant public would likely be confused, at least indirectly, between the two marks. Indirect confusion refers to the wrongful perception of an economic link between two marks. For example, in this case, consumers would perceive VVT’s logo as a new iteration of the Twitter’s bird logo and/or as a modified mark that Twitter was using for closely-related digital services which were extensions of its current range of services.

These were the key reasons for why the High Court found that VVT’s bird logo was confusingly similar to Twitter’s and should not be allowed registration.

This case also raised 3 issues that would be of special interest to IP practitioners:



1. Acquired Distinctiveness should not be considered at the marks-similarity stage

Prior to this case, it was an open question in Singapore as to whether acquired technical distinctiveness, which would require the consideration of external matter, should be considered in the marks-similarity inquiry or whether it should only be considered at the likelihood of confusion stage.

This issue arose because technical distinctiveness had to be considered within the marks-similarity inquiry and it included both inherent technical distinctiveness (i.e., the meaning of the sign from the perspective of average consumers having regard to the goods or services in question) as well as acquired technical distinctiveness (proved through evidence of actual use and advertising).

However, a core prohibition under Singapore trade mark law, per the Court of Appeal in the seminal case of *Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide, Inc* [2014] 1 SLR 911, was that mark comparison is undertaken mark for mark without consideration of external matter.

The High Court held that acquired technical distinctiveness should not be considered at the marks-similarity inquiry. It gave three reasons for this:

- Precedent

Given the inconclusiveness of other apex court decisions on this subject, the High Court was bound by *Staywell* to hold that acquired technical distinctiveness should not be allowed within the marks-similarity inquiry. The tenor of the pronouncement in *Staywell* —“that the assessment of marks similarity is mark-for-mark without consideration of any external matter”—was clear and binding.

- Principle

The High Court also held that not considering acquired technical distinctiveness at the marks-similarity inquiry is also consistent with principle. Doing so better comported with the broader rationale behind the position taken in *Staywell* : to distinguish clearly between the issue of resemblance between the competing marks and the question of the effect of such resemblance.

Further, by considering acquired technical distinctiveness only at the likelihood of confusion stage (as opposed to the marks-similarity stage), there is also the benefit of avoiding the evaluation of the same kind of evidence twice over at different stages.

- Policy

The High Court held that not considering acquired technical distinctiveness at the marks-similarity inquiry would stop the adducing of much irrelevant evidence with the attendant cost consequences on all parties.

2. Guidelines for the assessment of animal marks

The parties also disagreed as to how best to carry out the comparison between the competing bird marks. Based on a review of a series of animal mark cases from around the world, Twitter had suggested a set of guidelines to aid the Court in the comparison process. It suggested that bird marks, or animal marks in general, could be compared with regard to four aspects: their general shape, movement, features, and composition. These guidelines were adopted by the tribunal below as “useful guidelines.”

VVT, however, argued that the application of these guidelines found little basis in law and that there should not be a special carve out for animal marks or to subject them to a special set of considerations.

The High Court rejected VVT’s arguments. It found that the Twitter’s guidelines provided helpful and objective basis to assess the competing marks. Further, the guidelines were by themselves result neutral and did not favour any particular type of mark. The adoption of these guidelines would also not lead to a slippery slope whereby carve-outs are had for different types of marks.

3. The correct weight attributable to conceptual similarity vs visual similarity

VVT had argued that where the competing marks were device marks, like they were in this case, visual similarity should be the most important factor. Consequently, it argued that the conceptual similarity in this case—that both marks represented a bird in flight—should have no or at best marginal relevance and that the assessment of conceptual similarity should lead to a neutral conclusion.

Twitter, on the other hand, argued that conceptual similarity is equally as important and is not subsidiary to visual similarity. And, where the marks in question represented highly recognizable and distinctive concepts, like a bird in flight as opposed to an abstract geometric shape, consumers are likely to remember such a concept more such that the shared concept would dominate the consumer’s overall impression of the marks.

The High Court agreed with Twitter that there could be no immutable rule that conceptual similarity should be considered as more or less important in relation to visual and aural similarities. All similarities had to be assessed separately and a holistic judgment made in the round at the end. To argue, as VVT did, that visual similarity was the most important factor when it came to device marks, and would thus relegate conceptual similarity to merely marginal relevance, is not helpful.

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