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Infringement of EUTMs Issues of jurisdiction and the geographical scope of injunctions



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Welcome to our January trade mark newsletter. We would like to wish all of our readers success and happiness in 2017. Our trade mark team are pleased to see in their first year as 'Chartered Trade Mark Attorneys', following ITMA (the Institute of Trade Mark Attorneys) becoming CITMA (the Chartered Institute of Trade Mark Attorneys) in late November 2016.

In this edition of the newsletter we take a look at issues such as the jurisdiction of national courts over infringements of EUTMs and the geographical scope of injunctions granted, passing off based on the get-up of products, a decision relating to an application for the CAFFE NERO logo, as well as a decision relating to the sale of grey market goods.

Editor:

Anna Reid



Events



14 February 2017

UP & UPC webinar

Catch up with the latest unitary patent and Unified Patent Court news from our UP & UPC specialists, following Brexit and the UK Government's recent announcement that it will ratify the UPC.

20-24 May 2017

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Members of our Trade Mark and Dispute Resolution & Legal groups will be attending INTA in May 2017. If you would like to meet with us during the meeting do get in touch.

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Trade mark infringement

Infringement of EUTMs Issues of jurisdiction and the geographical scope of injunctions

In this article we review two recent decisions which consider the jurisdiction of national courts over infringement of European Union Trade Marks (EUTM(s)) and the geographical scope of injunctions to be granted in cases of infringement of an EUTM.

AMS Neve v Heritage Audio: English court determines it has no jurisdiction over infringement of an EUTM where there was no infringing act in the UK

An English court has held that it did not have jurisdiction to decide a claim relating to acts of infringement of an EUTM under Article 97(5) of the EUTM Regulation, in circumstances where the potentially infringing acts committed by the defendant (in this instance taking steps to put a sign on a website) took place in Spain where the defendant was domiciled. The court did, however, have jurisdiction under the Brussels Regulation (Regulation (EU) No.1215/2012) in relation to infringement of various UK national marks.

This decision underlines the importance to brand holders in ensuring that they hold national trade mark registrations in key European Union (EU) markets, as these national rights are likely to confer jurisdiction on the relevant national courts over a wide range of acts that infringe trade mark rights such as advertising/offering goods for sale on websites which are directed at consumers within that jurisdiction.

AMS Neve Ltd and Heritage Audio SL

The defendants, Heritage Audio and its sole director, were based in Spain and sold audio equipment. The claimants were UK manufacturers of audio equipment/amplifiers and owned two UK registered trade marks and an EUTM which they claimed were infringed by the offer for sale and sale by the

defendants of their own audio equipment and amplifiers in the UK under a conflicting mark. The defendants applied for a declaration that the English courts did not have jurisdiction to try the claim. The key issue in the case was whether the defendant had carried out any act in the UK which was subject to the jurisdiction of the English court.

Analysis of AMS Neve v Heritage Audio

HHJ Hacon held that the English court had jurisdiction by virtue of the Brussels Regulation in relation to the potential infringement of the UK registered trade marks as a result of the offer for sale of goods in the UK under the signs complained of.

Conversely, whilst Article 97(5) of the EUTM Regulation confers jurisdiction on national courts over infringing acts committed within that particular member state, the judge construed 'infringing acts' narrowly and determined that they require active conduct by the defendant within the jurisdiction.

In relation to the sale of infringing goods on a website, the judge considered that the infringing act is not likely to be the display of the sign on the website, but rather the step of putting the infringing sign on the website and is therefore likely to occur in the member state where the defendant is domiciled or established. As in most instances the defendant's active conduct is likely to take place in the member state where they are domiciled, it seems that Article 97(5) does not provide much of an exception to Article 97(1) (which states that a defendant should be sued where they are domiciled).

This approach to the issue of where an infringing act takes place can be contrasted with the decision of the CJEU in Case C-98/13 Martin Blomqvist v Rolex SA. In this case it was essentially held (in the context of a customs detention) that the sale to a customer in the EU of a counterfeit watch constituted an infringing act which entitled the goods to be seized and destroyed, despite the fact that the website from which the counterfeit watch was bought operated out of China and was not offering the goods for sale to and/or advertising

Case details at a glance

Jurisdiction: United Kingdom
Decision level: Intellectual Property Enterprise Court (IPEC)
Parties: AMS Neve Ltd, Barnett Waddingham Trustees Limited and Mark Crabtree (claimants) and Heritage Audio SL and Pedro Rodriguez Arribas (defendants).
Dates: 27 July 2016 & 11 October 2016
Citation: [2016] EWHC 2563 (IPEC)
Full decision: <http://dycip.com/ewhc2563ipec>

Jurisdiction: European Union
Decision level: Court of Justice of the European Union
Parties: combit Software GmbH v Commit Business Solutions Ltd
Dates: 22 September 2016
Citation: C-223/15
Full decision: <http://dycip.com/c-22315>

the goods to customers in the EU.

In short

This decision highlights the importance of registering trade marks at national level.

Following this decision it seems that Article 97(5) EUTM Regulation may be interpreted narrowly and may not confer jurisdiction on national courts (other than those of the state where the defendant is domiciled) to hear claims of infringing acts as often as might have once been thought, particularly in relation to the offer for sale of infringing goods via websites directed at consumers in certain member states (which ultimately seems somewhat surprising).

Combit Software v Commit Business

Solutions: geographical scope of injunctions
The CJEU has confirmed that national courts are entitled to hold that an EUTM has been infringed, even where the likelihood of confusion exists only in part of the EU. However, where the role of an EUTM in indicating origin is only adversely affected in part of the EU, the scope of any injunction granted should be limited to that part.

Background to combit v Commit

This case involved a reference from the Regional Court of Dusseldorf in Germany. The claimant, combit, was a software company based in Germany and the owner of German national marks and EUTMs for COMBIT in relation to goods and services in the computer industry. The defendant, Commit, was an Israeli company selling software in a number of countries (including Germany) via its website.

Combit sued Commit in Germany for trade

It is important to consider the registration of trade marks at a national level



mark infringement and sought an EU-wide injunction against Commit, based on its EUTM rights. In the alternative, combit sought an injunction in Germany based on an infringement of its German trade mark. At first instance, only the alternative claim succeeded and Combit was granted an injunction in relation to Germany only. The appeal court in Germany decided that use of COMMIT was liable to cause a likelihood of confusion on the part of the average German speaking consumer, but not on the part of the average English speaking consumer, as the latter would draw sufficient conceptual distinctions between COMMIT (to commit to something) and COMBIT (a contraction of the words 'computer' and 'binary digit').

The reference to the CJEU

Given the unitary character of EUTM rights, the appeal court referred to the CJEU the question of whether, where there is only a likelihood of confusion in some member states, the EUTM is infringed only in those member states or whether the EUTM is infringed across the whole of the EU.

In its response, the CJEU confirmed that the German court was entitled to find infringement of the EUTM where a likelihood of confusion existed only in part of the EU.

However, following on from the decision in Case C-235/09 DHL Express France SAS v Chronopost, where an EUTM's function of indicating origin was only adversely affected in part of the EU, the scope of the prohibition should be limited to that part.

In short

The CJEU confirmed that the German court should limit the geographical scope of the injunction granted, provided the court was sufficiently clear about what was meant by the term the 'English speaking' parts of the EU and could clearly exclude these parts from the order made. It will be interesting to see how the German court defines the 'English speaking' part of the EU and whether areas such as Scandinavia will be included in this definition.

Authors:

Matthew Dick & Anna Reid

IPEC considers passing off based on get-up A cupful of disappointment for TALA cups

Case details at a glance

Jurisdiction: England & Wales

Decision level: Intellectual Property Enterprise Court (IPEC)

Parties: George East Housewares Limited (claimant) and (1) Fackelmann GmbH & Co KG and (2) Probus Creative Housewares Limited (defendants)

Citation: [2016] EWHC 2476 (IPEC)

Date: 21 July 2015

Full decision: <http://dycip.com/ewhc2476ipe>

This case provides a very useful overview of the tricky area of passing off based on get-up; an issue which has always sat rather uncomfortably with public perception.

The claimant was the company that manufactures and distributes TALA kitchenware in the UK, George East Housewares Ltd. The first defendant, Fackelmann GmbH, was a German company that manufactures household items and the second defendant, Probus, a related company which imports and distributes Fackelmann's kitchenware products, together with products from other companies. Whilst this article will refer to the defendants collectively, it is important to note that no judgment was provided on the issue of tortfeasorship.

It was alleged that the claimant's TALA measuring cups enjoyed goodwill, and the defendants had passed off their own measuring cup as the claimant's product.

In this case, Miss Recorder Amanda Michaels was sitting as deputy judge in the Intellectual Property Enterprise Court (IPEC). Crucially for a case concerning passing off, the deputy judge first considered the definition of 'get-up' in the claimant's measuring cups and held that it could be classified as follows:

- Shape of the cup;
- The TALA name as used on the cups;
- Interior design of the cup;
- Exterior design of the cup; and
- The brand name ("TALA").

Interestingly, the 'retro feel' of the cup was not a pleaded feature of the get-up.

The deputy judge carefully considered how the design of the TALA measuring cups had evolved over time, and noted that certain models did not feature the get-up as pleaded (although they did have other significant elements which had been omitted from the definition of get-up).

Get-up and passing off

The judgment contained a succinct overview

The Intellectual Property Enterprise Court considered the get-up of measuring cups



of the law on get-up in the context of passing off, including the seminal "Jif Lemon" case of Reckitt & Colman v Borden, which set out the three limbs of passing off: goodwill/reputation, misrepresentation and damage. In particular, the judgment focussed on the difficulty in establishing misrepresentation where a defendant's product copies elements of the claimant's get-up but does not bear a mark similar to the claimant's brand name, and the importance in such cases of demonstrating the get-up alone can identify trade origin.

In this instance it was held that there was no goodwill in the shape of the cup alone, nor in the get-up as a whole. As regards the shape, this claim appeared to fail on the basis that the claimant had not demonstrated that the relevant public relied on the shape of the product to identify trade origin. The deputy judge herself noted that proving that a single feature of get-up (here, the shape) was capable of acting as an indicator of origin was an "uphill task", in light of the case-law in this area. In relation to the get-up as a whole, part of the downfall was the lack of pleaded evidence such as relevant sale figures and impact of the evolving designs and advertising expenditure.

Misrepresentation and damage

The deputy judge did still consider the issues of misrepresentation and damage,

similarly finding that neither of these factors were established. Whilst it was held that the products of the claimant and defendants were similar in some respects, and it appeared that the interior design of the claimant's measuring cups had "without doubt" been copied by the defendant, the differences between the designs of the products of the claimant and defendant, together with a lack of evidence of confusion, resulted in it being unlikely that a purchaser would be misled or believe there to be a link between the two products.

In short

The case is a cautionary reminder to be very careful when particularising claims regarding get-up and to ensure that full evidence is provided in support of a case.

Useful link

Full decision of Reckitt and Colman Products Limited v Borden Inc [1990] RPC 341, [1990] 1 WLR 491, [1990] WLR 491, [1990] UKHL 12, [1990] 1 All ER 873; <http://dycip.com/ukhl199012>

Author:
Verity Ellis



No go for Nero logo GC rejects Caffè Nero appeal

Case details at a glance

Jurisdiction: European Union

Decision level: General Court

Parties: Caffè Nero Group Ltd (applicant) v EUIPO (defendant)

Citations: T-29/16 & T-37/16

Date: 27 October 2016

Full decisions: <http://dycip.com/t-2916> & <http://dycip.com/t-3716>

In two related decisions, the EU General Court (GC) has rejected two applications by Caffè Nero Group Ltd to register the name Caffè Nero and its company logo, as shown below.



Rejecting appeals against two decisions from the European

Union Intellectual Property Office (EUIPO) Board of Appeal to maintain the objections from the EUIPO in the first instance, the GC agreed that the marks were both descriptive of the majority of the class 30 and 35 goods and services relating to coffee. The court found that the relevant Italian speaking public would understand the expression "Caffè Nero" as meaning black coffee ie, a coffee sold without cream, milk or sugar. Further, the GC found the marks to be misleading in relation to other goods applied for, such as tea.

Descriptive in a language of the EU

Caffè Nero had argued that coffee is, in fact, usually referred to by using a specific name rather than by reference to its colour; however, the GC said the two elements

"Caffè" and "Nero" were commonly used in Italian, one of the languages of the EU. As a whole, the combination of those two terms will thus be perceived by a proportion of public concerned as meaning "black coffee". The GC said: "It is a matter of common knowledge that in many member states the literal translation into their own language of the expression "Caffè Nero" will be understood by the general public as referring to coffee served as a beverage without any additions". It was deemed irrelevant that there were other terms that might be used more frequently than "Caffè Nero" to refer to coffee-based beverages.

The GC therefore refused to register the marks on the basis of Article 7(1)(b) and (c) EUTMR for the majority of the goods and services that were perceived to either contain black coffee or for which it was possible that they could taste like black coffee. This included not just coffee but also biscuits, cookies, chocolate bars, muffins, pies and other goods in class 30, as well as retail store services in class 35 relating to coffee and other coffee related goods.

A misleading mark

In addition, for some of the goods at

issue (namely those corresponding to the following description: "tea, cocoa, coffee substitutes; herb tea; tea beverages; cocoa and cocoa-based preparations; cocoa beverages; preparations and mixes for making the aforesaid goods; powdered chocolate"), the GC held that consumers were likely to believe that those goods were, or contained, black coffee, even if, in actual fact, this was not the case.

The Board of Appeal had earlier considered that these goods were sold in packaging that is quite similar to that used for coffee and consumers "may often have to buy those goods rather hastily, without necessarily taking the time to analyse the wording of the packaging". The GC agreed and concluded that once it is established that there is actual deceit or a sufficiently serious risk that consumers will be deceived, it becomes irrelevant that the mark applied for might also be perceived in a way that is not misleading. Accordingly, the appeal was refused and the marks were also rejected for these goods on the basis of Article 7(1)(g) EUTMR as they could mislead the public.

In short

This case highlights the fact that if a mark is descriptive in any one of the languages of the EU, it is likely to be objected to on the basis that it is not a registrable mark for at least a proportion of the relevant public in the EU. It is also a reminder that, if a mark is applied to goods which are different to those described, it is possible that the mark could be perceived as deceptive or misleading to consumers and it could also be refused on that basis.

The court said that the combination of "Caffè" and "Nero" would be descriptive



Problem child CJEU dismisses BAMBINO LÜK appeal

Case details at a glance

Jurisdiction: European Union

Decision level: Court of Justice of the European Union

Parties: Westermann Lernspielverlage GmbH v EUIPO

Citation: C-482/15 P

Date: 26 October 2016

Full decision: <http://dycip.com/c48215p>

The Court of Justice of the European Union (CJEU) has rejected an appeal against the General Court's (GC) decision refusing to register the applicant's figurative mark BAMBINO LÜK as an EU trade mark (EUTM) for various goods due to likelihood of confusion with an earlier BAMBINO figurative mark, despite the fact that the earlier mark had been revoked by the date of the action before the GC.

Background

Westermann (the applicant) applied to register the figurative mark BAMBINO LÜK in May 2010 (depicted below):



Diset (the opponent) filed an opposition against the application on the basis of a number of earlier marks, including the earlier EU figurative mark BAMBINO (depicted below), alleging a likelihood of confusion. The Opposition Division found a partial likelihood of confusion, refusing to register the mark for the majority of the goods applied for. The applicant appealed to the Board of Appeal, who upheld the appeal in part, allowing the registration of the trade mark applied for in respect of certain goods, but dismissing the appeal in respect of the remaining goods.



The applicant then appealed to the GC, arguing that the word element "bambino" was descriptive and lacked distinctive character and that the additional elements, the stylised child in the earlier mark and the word "lük" in the mark applied for, served to prevent any likelihood of confusion. It was submitted that the "bambino" element of the earlier mark had a weak distinctive character because "bambino" means 'baby' or 'young child' in some European languages and the earlier mark covered goods and services for children. The GC dismissed the appeal, finding that the fact that the earlier mark had been registered meant that it had the necessary minimum of

This decision highlights the importance of filing a revocation action as early as possible



inherent distinctiveness for registration, and a dispute as to the earlier mark's minimum distinctive character could not form the subject matter of opposition proceedings.

On appeal to the CJEU, the applicant submitted that the GC had erred in law and distorted the facts by taking into account the earlier EU figurative mark BAMBINO in its review of the Board of Appeal's assessment of the likelihood of confusion when the mark had been revoked and no longer had any effect at the time the applicant brought its action before the GC. The applicant had informed the GC of the decision revoking the earlier mark, however it had refused to admit the letter (this formed the basis of a separate ground of appeal to the CJEU, which was dismissed). It was argued that the case should have been remitted to the Board of Appeal in order to have the opposition assessed on the basis of the opponent's marks other than the earlier BAMBINO mark at issue.

Following a revocation action brought by the applicant, the earlier EU figurative mark was revoked from June 2013. The date of revocation was, however, subsequent to the Board of Appeal's decision dated April 2013. The CJEU held that in light of this and in line with established case law, the GC was not required to take into account the EUIPO decision revoking the earlier mark. The GC could only annul or alter a decision of the Board of Appeal if, at the date on which the Board of Appeal decision was adopted, one of the grounds for annulment or alteration set out in Article 65(2) of the EUTM Regulation applied.

The applicant further argued that the GC had been wrong to find the word element "bambino" was the dominant element in the marks at issue and therefore led to a similarity between the signs and a likelihood of

confusion. This argument was also dismissed by the CJEU, which noted that an appeal is limited to points of law, and as there was no distortion of the facts or evidence in the present case, the argument was inadmissible.

In short

This decision highlights the importance of filing a revocation action as early as possible. In this case, had the revocation action been filed earlier, a decision revoking the earlier mark could well have been received before the Board of Appeal decision was issued, in which case the earlier mark may not have been taken into account. In such circumstances a request that the appeal proceedings be suspended pending the outcome of the revocation action should always be considered. It is unclear why Westermann requested revocation of the earlier mark rather than invalidation – the latter would have had the effect of striking the mark off the register, as if it had never been filed. In such circumstances, it is difficult to see how the mark could remain a bar to the application.

Author:
Natasha O'Shea



No longer a grey area UK court considers third party liability for unauthorised sale of goods

Case details at a glance
Jurisdiction: England & Wales
Decision level: Court of Appeal (Criminal Division)
Parties: R (respondent) and C and Others (appellants)
Citation: [2016] EWCA Crim 1617
Date: 01 November 2016
Full decision: <http://dycip.com/ewcacrim1617>

The Court of Appeal has confirmed that third parties (including companies) can be liable for prosecution if they sell, offer for sale, distribute or possess with a view to distribute, 'grey market goods', that is goods bearing a trade mark, where a trade mark proprietor has given consent to have the mark applied to the goods (or applied it themselves), but has not given consent to the sale, distribution or possession of these goods.

Background

The defendants were alleged to have been involved in unlawfully selling in the UK various branded goods that were manufactured outside the EU. While some of the goods were unauthorised, and therefore were counterfeits, some were manufactured with the trade mark proprietor's authority, but were later disposed of without authority. It was in relation to the dealing in the unauthorised goods, and the potential for criminal liability, that the court was asked to adjudicate.

The law

Section 92(1)(b) and (c) of the Trade Marks Act 1994 (TMA) states

"A person commits an offence who with a view gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor... (b) sells or lets for hire, offers or exposes for sale or hire or distributes goods which bear, or the packaging of which bears, such a sign, or (c) has in his possession, custody or control in the course of a business any such goods with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b)".



Findings of the Court of Appeal

The appellants argued that a proper interpretation of section 92(1)(b) TMA meant that this section can only apply to goods which bear a sign, identical or likely to be mistaken for a registered trade mark, which has been applied to the goods without the consent of the proprietor. Since a number of the alleged instances related to goods where the relevant sign was applied with the consent of the proprietor, the appellants argued that it followed that such instances could not constitute a criminal offence under this section; and the appropriate remedy should be confined to civil infringement proceedings. They also argued that the language of section 92 TMA was ambiguous, and that there was sufficient uncertainty as to justify references to Parliamentary debates to help ascertain Parliament's intention.

The court did not agree with the appellants' arguments. In its view, their arguments would lead to an "untenable position", as the wording of section 92 TMA was perfectly clear, and should be understood as having a broad application, extending not only to counterfeit goods, but also to "grey goods". This view, they found, was supported by

case law and leading legal texts. The court also gave the arguments that there should be references to Parliamentary debates short shrift, finding this was an "impossible argument", as there was not sufficient ambiguity in the language of the section to justify such a reference.

Ultimately, the appeal was dismissed.

In short

This decision will please trade mark proprietors, as it provides another weapon in their arsenal with which to tackle the unauthorised sale of goods, even when the goods in question are not counterfeit, and the mark has been applied to the goods with consent.

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And finally...

Domain names No roving on Jaguar's cyber land

WIPO orders transfer of 174 domain names to Jaguar Land Rover Limited



Famous worldwide as a manufacturer of premium vehicles, Jaguar Land Rover Limited (the complainant) owns numerous trade marks, including Australian national trade marks, for JAGUAR, LAND ROVER and RANGE ROVER.

Registration of 175 ".au" domain names, held by the Trustee for the Trivett Family Trust (the respondent), was disputed by the complainant as the domain names incorporated the complainant's marks alongside geographical or descriptive words (eg, "adelaidejaguar.com.au" and "maintainmylandrover.com.au") or "Trivett".

Satisfied the formal requirements of the ".au" Dispute Resolution Policy (a uniform domain-name dispute-resolution policy (UDRP) variation) and rules were met, the WIPO panel held:

1. The domain names wholly incorporated the complainant's highly distinctive and well-known marks with no other distinguishing term, such that the domain names were identical or confusingly similar to the marks.
2. The respondent gave no evidence of a legitimate non-commercial interest and had cornered the market (contrary to an Oki Data criterion), thus depriving the complainant from seeking to register the domain names.
3. The domain names had been registered in bad faith for commercial gain to drive traffic to the respondent's website by creating a likelihood of confusion with the marks.

The panel ordered the transfer of 174 domain names and the cancellation of one incorporating the Trivett name.

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