

TRADE MARK NEWSLETTER



In our May 2008 Newsletter we reported on the UK Court of Appeal's decision in the case of *Boehringer Ingelheim KG & Anor v Swingward Limited*. While the Court of Appeal judges were minded to apply the principles set out by the European Court of Justice (ECJ) in case C-348/04 *Boehringer Ingelheim & Others* (judgement dated 26 April 2007) they were advised that a further reference to the ECJ had been made by the Austrian Courts in a new case involving parallel imports. They thus suspended their final decision.

The Austrian Court's reference was designed to clarify whether, when re-packaging of goods parallel imported from one EU Member State into another was necessary for effective access to the second Member State, any such re-packaging should only involve minimal intervention.

Obviously trade mark owners whose goods are being parallel imported and re-packaged are concerned about the impact this may have on their brand image. They have looked to the European Courts for a restrictive interpretation of the criteria set out in the *Boehringer* decision, in order to safeguard their trade mark rights in the longer term. The ECJ's Decision in *Boehringer* contained some ambiguities

on this point which triggered the referral in the Austrian case.

The facts of the Austrian case were that parallel importers were bringing ZOVIRAX trade marked goods into that country from other EU Member States (specifically Greece) and re-packaging the goods to comply with the local format. Of particular concern to the trade mark proprietor (Wellcome) was the fact that the re-packaged goods then bore the established trade mark of the parallel importer (Paranova) and the references to Paranova on the goods (required to comply with the notification guidelines) were larger than those referring to the name of the manufacturer (Wellcome).

Wellcome also complained that Paranova had not complied with the notice requirements in the *Boehringer* case by failure to specify the state of export and the precise reasons as to why re-packaging was necessary. The Austrian Court thus asked the ECJ for guidance on the issue of what points any notifications should cover, especially whether it was appropriate for the parallel importer to be required to give details of the EU country of export.

In their judgement on the issues referred (case C-276/05 dated 22

December 2008), the ECJ have clarified once and for all that where it is established that re-packaging of the pharmaceutical product is necessary for further marketing in the Member State of importation, the presentation of the packaging *only* needs to be assessed for compliance with the condition that it should not be such as to be liable to damage the reputation of the trade mark or that

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of its proprietor. In practical terms, proving that this is a likely consequence of the re-packaging imposes a severe evidential burden on the trade mark owner, and is unlikely to be successfully demonstrated in most cases.

In the UK, the Court of Appeal had already indicated in the *Swingward* case that complete removal of the trade mark owner's branding from the re-packaged product was not liable to damage the reputation of the trade mark or its proprietor, and also that co-branding was unlikely to do so. They considered neither act would damage the reputation of the TM owner or adversely affect its marks.

While this part of the latest ECJ judgement favours parallel importers, they may be less happy about the comments from the ECJ on the second question i.e. whether a parallel importer is obliged to supply information as to the Member State of export and

precise reasons for the re-packaging in order to enable the trade mark owner to determine whether the re-packaging is actually necessary.

While sounding a note of warning about the possibility that trade mark owners could abuse this requirement in order to detect weaknesses in their sales organisation (and presumably tighten up the supply chain to combat parallel trade) the ECJ nevertheless indicated that, in exceptional cases, it may be necessary for the parallel importer to disclose the Member State of export, where the absence of that information would prevent the proprietor from properly evaluating the need to re-package.

Accordingly the ECJ held that a parallel importer is obliged to furnish to the owner of the trade mark with the information which is necessary and sufficient to enable the latter to determine whether the re-packaging

of the product under that trade mark is necessary in order to market it in the Member State of importation. This may impose a significant bureaucratic burden on parallel importers.

For once this decision appears to be a clear statement of the relevant rules and, on the face of it, does not indicate that there is room for any more legal argument on the re-packaging principles. However, given the size of the potential market and the commercial advantage which parallel importers can obtain from selling re-packaged, parallel imported pharmaceuticals in other EU Members States, we are sure that there will be more cases in the pipeline. Whether the ECJ will be prepared to take more referrals on these issues remains to be seen; they have a residual power to simply refuse to hear such referrals where they consider that the issues have already been fully explained in previous case law, and they could choose to exercise this more rigorously in future.

ECONOMIC CHANGES ASSIST IP OWNERS

For many of our overseas clients, the cost of obtaining European and UK Trade Mark Rights and enforcing them has reduced considerably over the last year. As readers will be aware, there has been a significant reduction in the value of the Pound versus the Euro and also with respect to the US Dollar and the Yen over the last 6 months. As D Young & Co is based within the GB Pound area, the costs of services at D Young & Co have reduced significantly with respect to practices based in the Euro zone (to the tune of 20% over the last year).

This offers our Japanese, US and Eurozone clients all the advantages of prosecuting Community Trade Mark applications in English with the quality and service provided by D

Young & Co at substantially lower costs than a year ago. Japanese clients will find costs about 40% lower, US clients 30% lower and our European clients 20% lower. OHIM are also proposing a 40% fee reduction for their official fees, which is now entering the first phase of implementation.

These combined savings will continue to make the Community Trade Mark system excellent value for money and will, of course, benefit not only our own overseas clients but UK business too. If you have any questions in connection with these economic changes, please do not hesitate to contact your usual D Young & Co advisor.



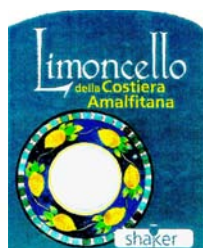
ECJ OFFERS LEMON-AID TO LIMONCELLO CONFUSION

On 12 November 2008 the CFI issued their decisions on two long running LIMONCELLO cases.

LIMONCELLO I

Following the Judgement of the ECJ in the long running case of Shaker di Laudato & C. Sas v Limiñana y Botella SL and OHIM (reported in our Newsletter of September 2007) the CFI revisited the global assessment test, and made a U-turn on its previous decision. This time it concluded that a likelihood of confusion existed between the marks, reversing its previous assessment.

The ECJ had stated that, contrary to the CFI's initial approach, assessment of similarity between two trade marks involved more than merely taking one component of a composite mark and comparing it with another mark.



To re-cap, Shaker had filed a CTM application for the mark shown left. The application was opposed by Limiñana y Botella SL on the basis of

their Spanish registration for the word mark LIMONCHELO for the identical goods.

The CFI had initially identified the device of a round plate with lemon motif as the dominant element of the application. They compared this with the earlier mark LIMONCHELO, and concluded that a likelihood of confusion did not exist.

In its second attempt, the CFI applied the ECJ's rationale and principles from the 2007 judgement to find that, although in some cases the overall impression conveyed to the public by a composite mark may be dominated by one or more of its components, it is only when the other components of the mark are negligible that the assessment of similarity can be carried out solely on the basis of the dominant element.

Having considered the composite mark here, the CFI on second review found that the dominant component was, in fact, the word LIMONCELLO and not the round plate with lemon motif. The remaining figurative elements in the mark, if not negligible, were at least secondary and not sufficiently significant to override the similarity created by the word LIMONCELLO. This, together with the phonetic and conceptual comparison, led them to conclude that there was "a certain similarity between the trade marks".

It then proceeded to carry out another re-assessment on likelihood of confusion. It commented that the distinctive character of the earlier mark must be taken into account when assessing likelihood of confusion but that this is only one of many factors involved in the assessment. Further, even in cases involving marks of weak distinctive character there may be a likelihood of confusion on account, in particular, of a similarity between the signs and between the goods and services in question.

On this basis, and taking into account the fact that the public retains only an imperfect picture of the marks at issue, it concluded that a likelihood of confusion did exist, insofar as the goods in class 33 were concerned.

It is encouraging that common sense finally prevailed, but disappointing that this case took years to finally decide.

LIMONCELLO II



In this case, Big Ben Establishment filed an application for a composite mark, as shown, left.

This was also opposed by Limiñana y Botella SL on the basis of their earlier Spanish registration for the word mark LIMONCHELO. The opposition was successful and Big Ben's appeal at OHIM was dismissed. The application was transferred to Nalocebar – Consultores e Serviços, Lda who filed an appeal to the CFI.

After the embarrassment of LIMONCELLO I, the CFI has learnt its lesson and immediately applied the corrected rationale stated above to the facts of this case.

As a consequence:

- The word LIMONCELLO was held to be the dominant element in the mark and the word kept in mind by the relevant public.
- The marks were found to be visually, phonetically and conceptually similar; and
- Applying the global assessment test on likelihood of confusion, such a likelihood of confusion was found to exist.

Commentators from most common law countries have found it difficult to understand how a mark such as LIMONCHELO which appears to have some generic characteristics has enjoyed such favourable treatment in these cases. They have drawn parallels with the decision involving DONUTS where again a largely generic term was given monopoly treatment; in both cases the prior rights were registered in Spain.

Of course, the existence of a registered Spanish national right is prima facie evidence of distinctiveness in that jurisdiction. OHIM and the courts have no option but to come to the conclusion they have reached, in comparing the respective marks.

Unless and until Limiñana's registration is invalidated it is unlikely that other manufacturers of "limoncello" drinks will be in a position to obtain a CTM registration containing the term in a presentation that is in any way "dominant" within the overall appearance of the mark.



NO USE? NO RESIDUAL GOODWILL!

THE RISE AND FALL OF THE HOUSE OF THE RISING SUN

In a recent case before the Trade Marks Registry in the UK a question arose as to whether goodwill in a name first used almost forty years ago can still exist, even where there has been no recent use of the trade mark by the alleged owner. Some readers may recall the 60s English pop group "The Animals" whose most famous hit record was "The House of the Rising Sun". In this case the dispute centred over residual rights in the name of the group, although in recent years it had largely faded from the public consciousness. As usual, the case history was complex.

FACTS/BACKGROUND

In 2004, a Mr John Steel, the former drummer of the original 60s band "The Animals" applied to register THE ANIMALS as a trade mark for CDs and musical recordings in Class 9 and musical live performances in Class 41.

The original lead singer of the band, Eric Burdon filed an opposition against the application on the grounds that Mr Steel did not own any rights to the name THE ANIMALS and had, therefore, filed the application in bad faith. In addition, Mr Burdon relied on two US trade marks for THE

ANIMALS applied for in his name, and claimed that the trade mark was a well-known trade mark in the UK under Section 56 of the Trade Marks Act 1994 (TMA); he also claimed that he had Passing Off rights in THE ANIMALS such that the application by Mr. Steel should be refused registration under Section 5(4)(a) of the TMA.

Mr Burdon filed evidence allegedly to show that the trade mark THE ANIMALS was synonymous with him. In support, he referred to the fact that he had been inducted into the Rock & Roll Hall of Fame in 1994, and that he currently performs under the trading names ERIC BURDON AND THE ANIMALS as well as THE ANIMALS.

Mr Steel filed evidence in reply stating that he has performed consistently under the name THE ANIMALS in the UK, beginning with the formation of the original band, and more continuously since 1993. He also claimed that when the original band parted company in 1966 the Opponent, Mr Burdon formed a new band, ERIC BURDON AND THE ANIMALS or ERIC BURDON AND THE NEW ANIMALS. Mr Steel also submitted evidence to show that it was the whole band

that was inducted into the Rock & Roll Hall of Fame rather than just Mr Burdon and stated that Mr Burdon was aware of his use of THE ANIMALS trade mark since 1993, having been invited to perform with Mr Steel's own band on numerous occasions.

THE LAW

The Hearing Officer rejected the opposition in its entirety. On the question of Passing Off, he confirmed it was necessary for an Opponent to show that he has goodwill or a reputation in the trade mark he is relying on; that there has been a misrepresentation by the Applicant and that he (the Opponent) has suffered damage as a result. Despite the assertions made by the Opponent, the Hearing Officer was not convinced that Mr Burdon was a rock legend with sufficient reputation in the name THE ANIMALS such as to prevent the registration of the mark by Mr Steel on "passing off" grounds. Finding that the original band was quite famous in the 60s, and in the absence of evidence to the contrary, the Hearing Officer held that all goodwill in the name THE ANIMALS was deemed to accrue to the group as a whole, rather than distinct individuals such as Mr Burdon. Although this goodwill



probably existed for some time after the band was dissolved in 1966 it was likely to have long dissipated by the date of the application in question, namely 11 February 2004. As there was no goodwill, the first hurdle of Passing Off had not been met and so the opposition under Section 5(4)(a) TMA was bound to fail.

Furthermore, the Hearing Officer held that the ground of opposition under Section 56 TMA must also fail. Section 56 provides for the protection of trade marks that are registered outside of but "well-known" in the UK. The provisions of Section 56 are generally considered to apply to truly famous marks such as KODAK or COCA-COLA and require convincing evidence of the owner's reputation in the trade mark in question. In the present case, Mr Burdon had provided almost no evidence of his use of the US trade marks he was relying upon and as such, the Hearing Officer was not persuaded that THE ANIMALS trade marks were in fact well-known.

This just left the ground of opposition under Section 3(6) TMA relating to bad faith. Although there is no statutory definition of bad faith, in referring to leading cases such as *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* and *Barlow Clowes International Ltd & Others v Eurotrust International Ltd & Others*, the Hearing

Officer stated that bad faith can be found even where there is no actual dishonesty present. However, he also found that Mr Steel's evidence had shown that Mr Steel was a founding member of the original band up until its disbandment in 1966; that he had played several reunion concerts and on reunion albums with other members of the band in the intervening years; and that at the date of application in February 2004, he had been using the trade mark THE ANIMALS for at least 11 years to the exclusion of all others.

The Hearing Officer considered that the trade mark in dispute had to all intents and purposes been lying dormant for 27 years before Mr Steel recommenced use of it in 1993 and Mr Burdon had not submitted any evidence to show that he has ever used the trade mark THE ANIMALS in the UK. Indeed, the Hearing Officer found that some of Mr Burdon's evidence in fact showed his aversion to being associated with THE ANIMALS. As such, there was no evidence that, at the date of application, Mr Steel had been acting in bad faith in applying to register THE ANIMALS and therefore, the opposition under this ground was also rejected.

CASE COMMENT

It is often thought that lead singers of music groups, as the "front men/ women" embody the group's goodwill. Indeed, there are some who would say

that in the present case, Mr Burdon is by far the most well-known member of the original band, THE ANIMALS, rather than the drummer, Mr Steel. However, it is clear from this decision that where the lead singer makes no use of the name of the band after the band has split up, and where he actually takes steps to distance himself from the original band, he cannot claim that he owns any residual goodwill in the name. Goodwill has to be nurtured and maintained and will not be considered to exist merely because the party objecting now might have owned some (possibly shared) goodwill in the name almost forty years previously.

So is there a moral to this story for all would-be musicians? Yes! Draw up a written agreement between the members of the group (akin to the pre-nuptial agreements made by A-List celebrities upon their impending marriages) stating who owns the goodwill and rights arising from use of the name right at the outset so that all parties know where they stand. Such an action is relatively inexpensive and fairly quick to execute and can avoid the need for bitter and costly legal disputes in the future when the group members have long since parted company and their chart success is perhaps, a thing of the past. If you have any queries with regards to this, please contact your usual D Young & Co attorney.

BECAUSE YOU'RE WORTH IT!

ADVOCATE GENERAL'S OPINION GIVES A BOOST TO L'OREAL IN THEIR FIGHT AGAINST BELLURE'S 'LOOK-A-LIKE' PACKAGING AND 'SMELL-A-LIKE' IMITATION PERFUMES

Following a reference from the UK Court of Appeal to the ECJ for a preliminary ruling concerning the assessment of trade mark infringement under Article 5 of the Trade Marks Directive and comparative advertising under the Comparison Advertising Directive ("CAD"), the Advocate General (AG) Mengozzi has now delivered his much-awaited Opinion.

SUMMARY

Several questions have been referred to the ECJ, but the key aspects under consideration in this case are whether Bellure's look-a-like perfume products, and their use of L'Oreal's own device marks in their comparative lists have taken 'unfair advantage' of the distinctive character or repute of L'Oreal's trade marks.

Concerning Bellure's use of the imitation packaging, the essential ingredient of 'unfair advantage' in these circumstances, according to the AG, is whether the use of packaging that creates a link with another registered mark would, **without due cause, result in a positive "boost"** to the second trader's business. It is for the national court to determine if due cause has been established and whether that use is unfair.

In essence, if the trader cannot establish that he had due cause to use the earlier mark and it has been determined that he has derived such a "boost" from the positive association with that well known mark, this will amount to infringement under Article 5(2) of the Trade Marks Directive.

As far as use of trade marks in comparison lists is concerned, the AG was of the opinion that under the Comparative Advertising Directive, **it is not unfair advantage where use of the registered mark is made by the trader for the sole purpose of comparing his goods in a price comparison list.** However, if there is an advantage by

virtue of the public associating the trader's sign with the well known mark, it must be for the national court to establish as to whether that use is unfair, based on all the circumstances and facts of the case. If it is unfair, it will infringe trade mark law.

Furthermore, whilst a trader can advertise his products as sharing the essential characteristics of competing goods, he must not make specific reference to copying or imitating the competitor's products, otherwise he will be in breach of the CAD.

BACKGROUND

L'Oreal SA are manufacturers of high quality perfumes and cosmetics. L'Oreal has registered the names and get-up of several of their perfumes as word and device marks. Bellure and the other co-defendants produced copycat 'smell-alike' and 'look-alike' perfumes and sold them at a much cheaper price in the UK. Although Bellure accepted that they intended their get-up to give 'a wink of an eye' to L'Oreal's products, their bottles and packaging were clearly not identical.

Proceedings for infringement were brought to the UK High Court by L'Oreal SA against Bellure [and others] concerning the latter's use of:

1. copycat packaging in respect of L'Oreal's Anaïs-Anaïs, Noa, Miracle and Trésor perfume boxes
2. use of L'Oreal's word marks in respect of their Anaïs-Anaïs, Noa, Miracle and Trésor brands in Bellure's comparative advertising lists.

The High Court allowed L'Oreal's action under section 10(1) of the Trade Marks Act (TMA) 1994 finding that the use of L'Oreal's Anaïs-Anaïs, Noa, Miracle and Trésor marks by Bellure in their comparative advertising lists amounted to use of identical marks in respect

of identical goods, and was thus an infringement of L'Oreal's registered rights.

L'Oreal also succeeded at first instance under section 10(3) TMA 94 (that use by Bellure of L'Oreal's device marks constituted use, without due cause, of identical marks which would take unfair advantage of the distinctive character or repute of L'Oreal's earlier marks) but only in respect of the devices protected by the Trésor perfume box trade mark and the Miracle perfume bottle trade mark.

Both parties appealed the High Court's Decision. L'Oreal's cross-appeal for a declaration that the Miracle and Trésor word marks, in addition to the Trésor perfume bottle and Miracle perfume box device marks had also been infringed under Section 10(3) was, however, dismissed by the Court of Appeal. The remainder of the Appeal is pending and five questions were referred to the ECJ for further interpretation:

These questions are (broadly speaking) as follows:

1. Where a trader uses a registered trade mark owned by a competitor in an advertisement for his own products (for the purpose of comparing the characteristics of his own goods (in this case, the smell) with those of his competitors) in such a way that there is **no confusion or detriment to the essential function of the registered trade mark** as an indication of origin, does his use fall within either (a) or (b) of Article 5(1) of Directive 89/104?
2. Where a trader uses in the course of a well-known registered trade mark (particularly in a price comparison list) for the purpose of indicating a characteristic of his own product (in this case, the smell) in such a way that:
 - a) there is **no confusion** of any sort;



- b) there is **no detriment** to sales of the products under the well-known registered mark;
- c) the **essential function of the registered trade mark** as a guarantee of origin has **not been affected**;
- d) that use **does not harm the reputation** of the well known mark, (either by way of tarnishment or dilution); and
- e) that use **plays a significant role in the promotion of the trader's product**,

does that use fall within Article 5(1)(a) of Directive 89/104?

3. What is the **meaning of "take unfair advantage of"** in the context of Art 3a(g) of the Directive [84/450] {CAD}, and in particular, **if a trader compares his product** with a product under a well-known trade mark **in a comparison list**, does this constitute 'unfair advantage' of the reputation of the well-known mark?
4. In the context of Article 3a(h) of the CAD, **what constitutes "presenting goods or services as imitations or replicas"** and in particular, does this expression cover the case where a party merely truthfully says that his product has a major characteristic (smell) akin to that of a well-known product which is protected by a trade mark without in any way causing confusion or deception?
5. If a trader uses a **sign which is similar** to a registered trade mark which has a reputation, and that sign is **not confusingly similar** to the trade mark, in such a way that:

- a) the **essential function** of the registered trade mark **is not impaired**;
- b) there is **no tarnishing or blurring** of the registered trade mark
- c) the trade mark owner's sales are not impaired; and

- d) the **trade mark owner is not deprived** of any of the reward for promotion, maintenance or enhancement of his trade mark;
- e) **but the trader gets a commercial advantage** from the use of his sign by reason of its similarity to the registered mark

does that use **amount to the taking of "an unfair advantage"** of the reputation of the registered mark within the meaning of Article 5(2) of Directive [89/104]?

AG'S FINDINGS

As far as the first two questions are concerned, the AG reiterated the findings of previous decisions of the ECJ and held that to constitute infringement under Art 5(1) of the Trade Marks Directive, the essential function of the marks must be affected.

With regard to the third question as to what constitutes taking 'unfair advantage' under the CAD, the AG considered that simply comparing product for product in a comparison list does not amount to unfair advantage. The advantage has to be derived from something more than just comparing like with like. If there is an additional advantage and the public associates the trader's products with the well known marks, the national court must determine whether that advantage is fair or not.

Under question 4, the AG did state that the CAD prohibits the explicit reference to the presentation of the defendant's goods or services as imitations or replicas. Therefore, whilst it is acceptable to note that a product shares similar characteristics, the trader is precluded from explicitly referring to his goods as copies or replicas of products under well known brand names.

Finally, on whether use of similar packaging by Bellure gives rise to an

'unfair advantage' under Article 5(2) of the Trade Marks Directive of L'Oreal's marks, the AG said that where there is a use of a sign similar to another person's mark and the trader derives advantage as a result of that *"consequential association of that sign with the positive qualities of that mark, such use may be prohibited if it is without due cause which cannot be the advantage itself, or, where due cause is shown if it is apparent, taking such due cause and all the relevant circumstances of the case into account, that that advantage is unfair"*

COMMENT

The AG's comments regarding infringement under Article 5(1) TM Directive do not come as any great surprise. If the essential function of the trade mark (to guarantee origin) is not affected, there is no infringement.

However, should the ECJ follow the AG's opinion, copy-cat manufacturers of perfumes must be careful not to specifically refer to copying brand owners' more expensive perfumes in their advertising and must note that their use of third parties' marks should not be in any way that will take unfair advantage by creating a positive boost to the sales of their own products, unless they can demonstrate that they had good cause to use the mark and that the advantage gained is a fair one.

How to interpret "without due cause" remains open to question as a consequence of this opinion. Defendants selling copycat goods using third party marks in comparison lists may argue that, to make an effective comparison, they need to use the well-known brands. The AG's opinion suggests some sympathy with this argument (in the interests of free competition). Brand owners will argue that such competitive acts are intrinsically unfair and cannot therefore be with due cause. It remains to be seen what the ECJ makes of these competing approaches.

OUT AND ABOUT

ITMA INTERNATIONAL MEETING

25-27 MARCH 2009

ITMA President Gillian Deas, accompanied by Vivienne Coleman and Mark Snowball, will be attending the ITMA International Meeting at the Waldorf Hotel, London, UK.

INTA ANNUAL MEETING

16-20 MAY 2009

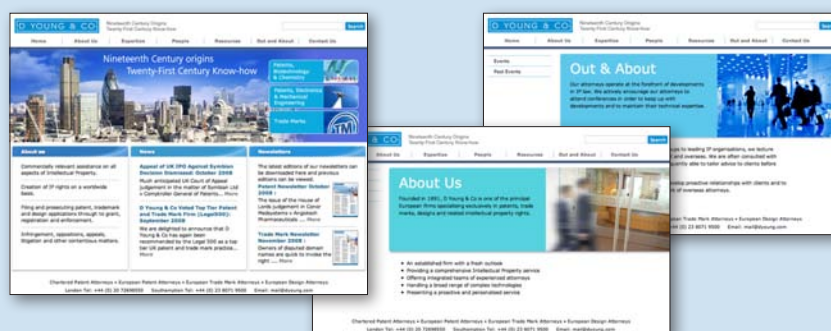
Members of the D Young & Co trade mark group will be attending the 131st INTA Annual Meeting in Seattle, USA.

ECTA ANNUAL MEETING

24-27 JUNE 2009

Jeremy Pennant will be attending the 28th ECTA Annual Conference in Vilnius, Lithuania.

For further details of these and other events please visit the D Young & Co website: www.dyoung.com/out_and_about/events.htm



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