

# D YOUNG & CO TRADE MARK NEWSLETTER *no.85*

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## “Taxi!” For 3D shape marks

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Thank you to our readers who kindly contributed to the Managing IP 'IP Stars' survey. We are delighted to report that we are once again top tier for trade mark prosecution work and favourably featured for our trade mark contentious services. This means that we are still top tier for trade marks in all the UK legal directories (Legal 500, IP Stars, Chambers and WTR 1000).

We also welcome new trade mark associate Flora Cook and dispute resolution & legal group associate Emily Mallam to our team of newsletter contributors. You'll find an overview of the entire team on page 08.

## Editors:

Helen Cawley &amp; Anna Reid



## Events



15-16 March 2016

**Wearable Technology Show, London UK**

D Young & Co sponsors this key event for the wearables, augmented reality and IOT community.

21-25 May 2016

**INTA, Orlando US**

Jeremy Pennant, Ian Starr, Tamsin Holman, Helen Cawley, Jackie Johnson, Gemma Kirkland and Richard Burton will be attending this year's conference. Do get in touch if you would like to meet with us during the conference.

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## 3D shape marks

# "Taxi!" For 3D shape marks

The High Court has recently handed down a decision in a case that deals with a wide spectrum of intellectual property issues, including average consumer assessment, validity of 3D shape marks, trade mark infringement and passing off. What is particularly interesting about this decision is that it highlights the difficulty of enforcing trade mark registrations in respect of 3D shape marks.

**Background**

The claimant, the London Taxi Company (LTC), was proprietor of trade mark registrations (UK and CTM) for the shape of the exterior of three of its models of taxi: the Fairway, and the TX1/TX2 taxis. LTC also claimed goodwill in the shape of its TX1, TX2, TX4 taxis, and the Fairway.

LTC claimed that the defendants threatened to infringe their trade marks and commit passing off by marketing a new model of London taxi referred to as "Metrocab" which, LTC complained, had been "substantially copied from the shape of the TX4". Unsurprisingly, the defendants denied trade mark infringement and passing off, and counter-claimed that the trade marks should not have been registered because they are devoid of distinctive character and consisted exclusively of the shape which give substantial value to the goods.

**Average consumer**

Before assessing the merits of the case, the judge assessed who should be regarded as the 'average consumer' in this case. LTC submitted that there were two average consumers: 1) taxi drivers; and 2) members of the public who hire taxis. LTC's case appeared to focus primarily on the second of these two options.

Unfortunately, the judge's view was that members of the public who hire taxis are consumers of taxi services, and not of taxis. Therefore, they were not the end users of the goods in question.

**Validity: inherent distinctiveness**

Before assessing trade mark infringement,

the judge examined whether the trade marks had been validly registered.

While making his assessment, the judge was mindful that the average consumer is not in a habit of making assumptions about the origin of products on the basis of their shape or the shape of their packaging, in the absence of any graphic or word element.

In the judge's view, the trade marks would be observed by the average consumer of taxis as simply a variation of the typical shape of a taxi. Further, even if the shape was regarded as departing significantly from the norms and customs of the sector, it would not have been perceived as identifying the origin of the goods. His conclusion therefore was that the trade marks were devoid of distinctive character. He also commented that his assessment would not differ if the relevant 'average consumer' consists of or includes a consumer of taxi services.

**Validity: substantial value**

Importantly for shape marks, the law says that marks should not be registered if they consist exclusively of a shape which gives substantial value to the goods.

In examining this cause of action, the judge stated that it was key that trade marks are not used to indefinitely extend the time-limited protection of other IP rights. For example, trade marks being used to protect shapes that really should be protected by a registered design. Taking all factors into consideration, including that it was implicit to LTC's case that the trade marks would be recognised as the 'iconic' London taxi, the judge found that the shape of the trade marks did add substantial value to the goods.

**Validity: acquired distinctive character**

This aspect of the case focused on the proposition that the trade marks had become distinctive to a significant proportion of consumers of taxi services in the UK. However, the judge had already concluded that the relevant average consumer is a taxi driver, not a consumer of taxi services. However, in light of this argument, the judge felt it prudent to consider both.

> **Case details at a glance**

**Jurisdiction:** England and Wales  
(European Union in relation to the Community trade mark)

**Decision level:** High Court of Justice

**Parties:** The London Taxi Corporation Limited t/a The London Taxi Company v (1) Frazer-Nash Research Limited and (2) Ecotive Limited

**Citation:** HC-2014-002085

**Date:** 20 January 2016

> **Knowledge Bank**

Scan the QR code below using your internet enabled smart phone to access our IP knowledge site



> **Missed anything?**

We regularly publish IP case updates and articles between newsletters. For up to the minute IP related articles and news visit <http://dycip.com/iparticles>

**A shape mark must have distinctive character (to identify the origin of the goods)**



- In relation to the average taxi driver, the judge felt that nothing had been done to educate consumers that the shapes of these taxis denoted the source of the taxis, and therefore they could not be said to indicate origin.
- In respect of consumers of taxi services, LTC argued it should be seen as having become distinctive of the source of taxis because: 1) it had a *de facto* monopoly of taxis having a similar appearance in London for decades; 2) the absence of anything other than shape which could indicate trade origin; 3) it had a policy to preserve the distinctive appearance of their taxis through successive models; and 4) the steps it had taken to educate the public.

In the judge's view, none of these factors, whether individually or in combination, justified the inference that consumers of taxi services identified the source of LTC's taxis from the shape of its taxis. Plus, there is no reason why consumers of taxi services should care about the origin of the taxis driven by taxi drivers. Provided it is a licensed London taxi, and it conforms to preconceptions, the identity of the manufacturer is surely a matter of indifference.

**Trade mark infringement**

LTC did not suggest that there was a

likelihood of confusion between taxi drivers, but contended that there was a likelihood of confusion on the part of members of the public who hire taxis. As noted, the judge had already concluded that the average consumer was a taxi driver. Therefore, the judge's view was that LTC's pleaded case amounted to a concession that there would be no likelihood of confusion on the part of the taxi drivers between the trade marks and the Metrocab. However, in case he was wrong, he also examined the position from the perspective of consumers of taxi services. He found that there was a low degree of similarity between the trade marks and the Metrocab. Because of this, and the low distinctive character of the marks, there was no likelihood of confusion.

**Reputation**

LTC also argued that Metrocab infringed their trade marks on the basis that the trade marks had a reputation, and that the Metrocab was 'taking unfair advantage of or was detrimental to the distinctive character or the repute of the trade marks'. The judge noted that the Metrocab was sufficiently similar to the trade marks to remind the average consumer of the trade marks, whilst also appreciating that it differed from them. He found that there was no detriment to the mark's distinctive character, and the nature of association which the average consumer would make

would be simply that all three shapes were a species of the London taxi. Unfair advantage was not established as there was no evidence the defendant intended to exploit the reputation of LTC's marks.

**Defence**

The judge also commented that the defendants would (although it was not necessary) be able to rely on a defence which prevents a trade mark owner from prohibiting a third party from using indications concerning the kind, quality, or other characteristics of goods or services in accordance with honest commercial practices.

**Passing off**

The passing off claim also failed because the judge did not agree with LTC that they had acquired sufficient goodwill to establish that the shape of the taxis denoted the source of the taxis. He also found that there was no misrepresentation as there was no evidence that the shape of the Metrocab was likely to lead consumers of taxi services to believe that it came from the same source as LTC as opposed to just being a licensed London taxi.

**Author:**

**Claudia Rabbits**



**In short**

This is clearly a crushing outcome for LTC and one that has sparked many interesting discussions amongst IP practitioners. To have its shape trade marks found to be invalid because they are not seen as a 'badge of origin' and because they will be viewed merely as the variation on the shape of a taxi will be disappointing for LTC. It will be interesting to see if it takes steps to appeal some, or all, of this decision.



# Brand owner beats cybersquatter...again!

## Cybersquatting update

**T**he High Court has confirmed that the mere registration of a domain name may amount to passing off. The court also clarified that it did not have jurisdiction to hear appeals of Uniform Domain Name Dispute Resolution Policy (UDRP) or Dispute Resolution Service (DRS) decisions.

In this recent case the High Court has reinforced the seminal case of *One in a Million* and confirmed that a registrant may be liable for passing off by merely registering a domain name including a third party trade mark, regardless of the registrant's future plans for use of the domain name.

### Background

This case involved Royal Bank of Scotland Group (RBS) and a business, Yoyo.email, which has registered approximately 4,000 domain names rooted at the .email domain. The domain names involved in the dispute included:

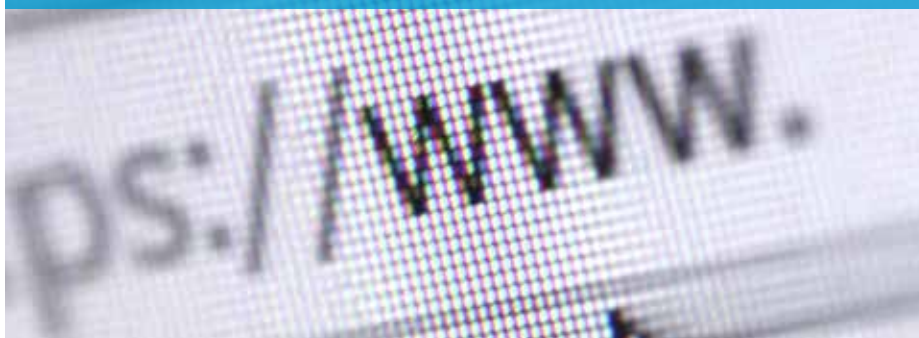
- rbsbank.email
- rbs.email
- natwest.email
- courtts.email

In August 2014, the World Intellectual Property Organisation (WIPO) held that the domain names Yoyo.email registered were identical or confusingly similar to trade marks owned by RBS, and that Yoyo.email's intended use of the domain names was not genuine, legitimate or fair and that the company had registered them in bad faith. Consequently, it was decided that the domain names should be transferred to RBS.

### High Court proceedings

Disappointed with WIPO's decision, Yoyo.email applied to the court for a declaration that it had been "guilty of no wrongdoing" and was entitled to relief. In a cross application, RBS requested that the court strike out Yoyo.email's claim and counterclaimed for passing off. In turn, Yoyo.email sought to bring a further counterclaim for revocation of RBS' trade marks on grounds of non-use

The act of passing off occurred at the time of Yoyo.email's domain name registration



in respect of electronic mail services.

### Decision

In relation to Yoyo.email's request for declaratory relief, the court held that the UDRP did not "afford any jurisdiction" to the High Court to "act as an appeal or review body" from the domain name dispute resolution panel's decision in August 2014. The judge held that clause 4k of the UDRP (which states that the parties are not barred from taking the matter to court after its conclusion) did not give rise to a separate cause of action in favour of the Yoyo.email, nor did it give the court any jurisdiction to act as an appeal or review body in relation to the UDRP decision.

This is in line with the previous case of *Toth* which held that the court did not have jurisdiction to hear appeals of DRS policy decisions. (By way of reminder, Nominet's DRS policy is applicable in relation to ".co.uk" domain names whilst WIPO's UDRP is relevant to various other gTLDs, such as ".email" in this case.)

The judge then turned to consider RBS' counterclaim for passing off, which involved an analysis of the leading case in this area *BT v One in a Million* from 1999. Readers will recall that in the *One in a Million* case, the defendants had registered a large number of domain names which included the names or trade marks of various well-known brands without their consent, and none of the domain names were linked to active sites. One of the issues under consideration was whether the mere registration and ownership of a domain

### Case details at a glance

**Jurisdiction:** England and Wales

**Decision level:** High Court of Justice

**Parties:** Michael Toth and Emirates & Nominet

**Citation:** [2012] EWHC 517 (Ch)

**Date:** 07 March 2012

**Full decision:** <http://dycip.com/tothvemirates>

**Jurisdiction:** England and Wales

**Decision level:** High Court of Justice

**Parties:** Yoyo.email Ltd and Royal Bank of Scotland Group Plc and Others

**Citation:** [2015] EWHC 3509 (Ch)

**Date:** 02/12/2015

**Full decision:** <http://dycip.com/yoyovrbs>

**Parties:** British Telecommunications Plc and One in a Million Limited

**Citation:** [1999] 1 WLR 903

name may constitute passing off. It was held that this was actionable. This decision has been followed here with the judge ruling that Yoyo.email was liable for passing off.

The judge went on to say that he did not need to consider Yoyo.email's business plan as to what they proposed to do with the domain names, as the act of passing off had occurred at the time of registration. By appearing on the publicly available WHOIS register, there was a misrepresentation that a registrant was associated with the goodwill in the name.

**Author:**  
Verity Ellis



### In short

With the continued growth in available gTLDs, this area of law remains a hot topic and an area which must be closely monitored by brand owners.

This decision will be welcomed by brand owners in the continued fight against cybersquatting. Whilst the world of the Internet has grown exponentially in the last decade or so since the 1998 decision, it is comforting that the leading case of *One in a Million* remains good law.

# Top secret

## Trade Secrets Directive expected to come into force during 2016

The Trade Secrets Directive was initially proposed by the European Commission in November 2013. It followed two studies published in November 2011 and April 2013 that found a divergence in national laws, some of which inadequately protect businesses and act as a deterrent to cross-border innovation activities.

The agreed text of the Directive was published in December 2015 and a provisional date of 08 March 2016 has been set for the European Parliament to vote on it. Assuming the Council and European Parliament approve, the Directive will be published in the EU Official Journal and come into force 20 days later. Member states will then have two years to implement it.

The object of the Directive is to:

harmonise the existing diverging national laws on the protection against the misappropriation of trade secrets so that companies can exploit and share their trade secrets with privileged business partners across the Internal Market, turning their innovative ideas into growth and jobs.

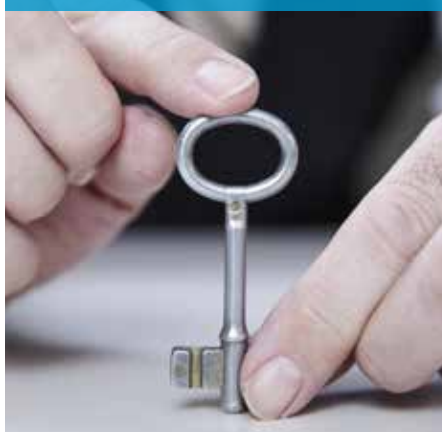
The Directive seeks to achieve this by setting minimum standards for protection of trade secrets across Europe.

### What is a trade secret?

A trade secret is defined in Article 2 of the Directive as information that:

- is secret, ie, not generally known among, or readily accessible to, persons in circles that normally deal with the kind of information in question;
- has commercial value because it is secret; and
- has been subject to reasonable steps under

### The Trade Secrets Directive



the circumstances, by the person lawfully in control of the information, to keep it secret.

### Infringing acts

Article 3 of the Directive gives details of infringing acts including unlawful acquisition, use or disclosure and production, offering or placing on the market of infringing goods.

### Remedies available

Article 11 includes common remedies for IP infringements such as:

- injunctive relief preventing the use, production or sale of the trade secret;
- destruction or delivery up of infringing articles; and
- corrective measures including recall of the infringing goods from the market and depriving infringing goods of their infringing quality.

### Current UK position

There is currently no concept of a trade secret in the UK. The equivalent is the common law concept of 'confidential information'.

The leading case of *Coco v AN Clark (Engineers)* established that information is confidential if:

- it has the "necessary quality of confidence";
- it was imparted in circumstances importing an obligation of confidence; and
- there has been unauthorised use

of the information to the detriment of the communicating party.

Confidential information therefore appears to be a wider concept than a trade secret under the Directive, especially as there is no requirement for confidential information to have commercial value. The existence of commercial value was considered in *Douglas v Hello!* in which the majority of the House of Lords concluded that the commercial value of the photographs in question was a contributing factor in establishing the necessary quality of confidence, though not essential.

### Next steps

There will be a number of implications of the new law, particularly for the drafting of non-disclosure agreements and for employment law, particularly in the context of the balance between brand know-how and experience gained on the job via 'honest commercial practices'; the latter is meant to fall outside of the definition of a trade secret whilst know-how may be protected.

Some other definitions of the Directive are unclear; such as who 'controls' a trade secret; could this include a key employee and/or exclusive licensee, as well as the ultimate 'owner' of the information? Whilst it is hoped that these issues, and others, can be clarified before the Directive comes into force, it may be that we will have to wait until the Directive is tested before the courts before these matters are resolved.

### Comment

Whilst the Directive aims for harmonisation, there will still be a patchwork of national laws across Europe, with differing scopes and levels of enforceability. It has been commented that the current UK position already covers some provisions of the Directive, and so it will be interesting to monitor if and how the UK will implement the Directive in the coming months.

Authors:  
Verity Ellis & Emily Mallam



### Useful link

European Commission trade secrets webpage: <http://dycip.com/ectradesecrets>

# Lost in translation?

## Are trade marks in different languages confusingly similar?

**R**ecent decisions of the Court of Justice of the European Union (CJ) in *El Corte Inglés v OHIM* and the General Court (GC) in *Rotkäppchen-Mumm v OHIM* have considered the issue of whether a trade mark and its foreign language equivalents are confusingly similar or likely to give rise to a link in the mind of the relevant public.

This article provides an overview of some of the EU case law on this topic.

### Early decisions

#### **CINCO OCEANOS/5 OCEANS (device)**

In an Office for Harmonization in the Internal Market (OHIM) Opposition Division (OD) decision dating from 1999 the OD confirmed that the opponent's earlier Spanish registration for the mark CINCO OCEANOS was conceptually similar to the CTM application for the following mark:



The OD noted that the marks were written in different languages but concluded that the English word OCEANS would be translated by Spanish consumers into the Spanish word OCEANOS. The marks were therefore conceptually similar and a likelihood of confusion existed.

#### **BARON ROJO (figurative)/RED BARON**

The OD in this case considered that a Spanish consumer would associate the words RED BARON with the words BARON ROJO as "red" is a common English word which Spanish consumers would be familiar with. Accordingly the marks were conceptually identical and there was a likelihood of confusion.

#### **SHARK (figurative)/HAI**

In 2005 the Court of First Instance of the European Union (CFI) (now known as the General Court) considered an application to register a Community trade mark (CTM) for the word mark HAI, which means "shark" in German and

Finnish. The application was opposed by Osotspa Co. Ltd based on their mark:



The CFI considered the fact that the word "shark" is translated as "hai" in German and Finnish, as "haai" in Dutch and as "haj" in Danish and Swedish. The court concluded that it was therefore possible for people who speak those languages to understand both of the marks SHARK and HAI as meaning "shark". As a result the marks in question were found to have conceptual similarity, albeit that this depended on some prior translation. The CFI ultimately found that since the relevant goods were generally subject to widespread distribution and were bought "on sight" by the public, the significant visual and phonetic differences between the marks cancelled out the conceptual similarity, resulting in no likelihood of confusion between the marks.

#### **DAS GOLDENE BLATT/GOLDEN PAGES**

In contrast the OD in this case found no conceptual similarity between the earlier German registration for DAS GOLDENE BLATT and the CTM application GOLDEN PAGES, essentially because the word "pages" was not a direct translation of the word "blatt". As a result there was no likelihood of confusion between the marks.

### Recent decisions

#### **BALLON D'OR/GOLDEN BALLS**

In this case the General Court (GC) found that the marks BALLON D'OR and GOLDEN BALLS had only a weak degree of conceptual similarity for the relevant public, which required some prior translation. This finding was based on a number of considerations, including the fact that the mark GOLDEN BALLS is in the plural and the different positions of the words GOLDEN and D'OR within the marks. This weak degree of conceptual similarity, along with the lack of visual and phonetic similarities, ruled out a likelihood of confusion between the marks, although not necessarily a 'link' for

the purpose of Article 8(5) (this latter point was referred back to OHIM to reconsider).

#### **HALLOUMI/HELLIM**

The GC in this case confirmed that the marks HALLOUMI and HELLIM were not visually or phonetically similar. The GC then pointed out that the average consumer in Cyprus, where both Greek and Turkish are official languages, will understand that the marks refer to the same specialty cheese from Cyprus. There was, therefore, some conceptual similarity between the marks, however, in view of the fact that the earlier mark HALLOUMI was descriptive and of weak distinctiveness, the conceptual similarity was not sufficient to give rise to a likelihood of confusion.

#### **EI CORTE INGLÉS/THE ENGLISH CUT**

The applicant applied to register the word mark THE ENGLISH CUT as a CTM and this was opposed by El Corte Inglés (ECI) on the basis of its earlier Spanish word mark for EL CORTE INGLÉS and the following CTMs:



The GC agreed with the Board of Appeal's finding that the marks were not visually or phonetically similar. In relation to conceptual similarity, the GC took the view that Spanish consumers would be able to perceive the meaning of the signs as being identical only after translating the mark THE ENGLISH CUT into Spanish. There was therefore a low degree of conceptual similarity between the marks, however, the marks were different overall and there was no likelihood of confusion between them. The GC went on to consider that, since the signs were not similar for the purposes of Article 8(1)(b) CTMR, the conditions laid down in Article 8(5) CTMR were not satisfied.



> Case details at a glance

**Jurisdiction:** European Union  
**Decision level:** Court of Justice of the European Union  
**Parties:** El Corte Inglés v OHIM  
**Citation:** C-603/14 P  
**Date:** 10 December 2015  
**Full decision:** <http://dycip.com/elcorte15>

**Jurisdiction:** European Union  
**Decision level:** General Court  
**Parties:** Rotkäppchen-Mumm Sektkellereien GmbH v OHIM  
**Citation:** T-128/15  
**Date:** 16 December 2016  
**Full decision:** <http://dycip.com/rotkap16>

**Jurisdiction:** European Union  
**Decision level:** OHIM, Opposition Division  
**Parties:** Jesus Perez Urzay v Cana Foods Inc. (CINCO OCEANOS/5 OCEANS)  
**Citation:** 131/1999  
**Date:** 25 March 1999

**Jurisdiction:** European Union  
**Decision level:** OHIM, Opposition Division  
**Parties:** Servicios y Distribuciones Discograficos S.A. (Serdiscos) v Mr. Freiherr Wolf-Manfred Von Richtofen and ors (BARON ROJO (figurative)/ RED BARON)  
**Citation:** 3111/2000  
**Date:** 21 December 2000

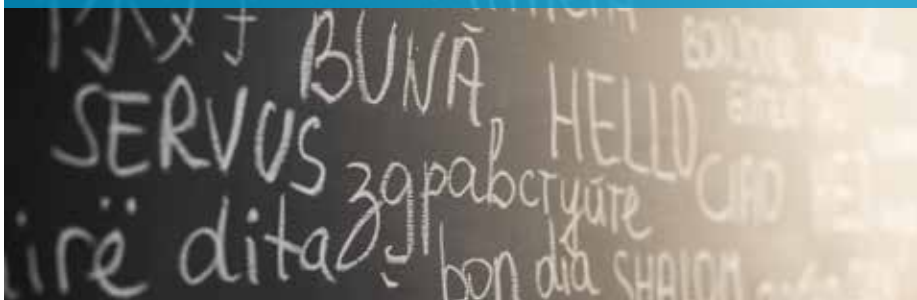
**Jurisdiction:** European Union  
**Decision level:** General Court  
**Parties:** Osotspa Co. Ltd v OHIM  
**Citation:** T-33/03  
**Date:** 09 March 2005  
**Full decision:** <http://dycip.com/osotspa05>

**Jurisdiction:** European Union  
**Decision level:** OHIM, Opposition Division  
**Parties:** Bastei Verlag Gustav H. Lubbe GmbH & Co v Promedia GCV (DASGOLDENE BLATT/GOLDEN PAGES)  
**Citation:** 1121/1999  
**Date:** 12 November 1999

**Jurisdiction:** European Union  
**Decision level:** General Court  
**Parties:** Golden Balls Ltd v OHIM  
**Citation:** T-437/11 and T-448/11  
**Date:** 16 September 2013  
**Full decisions:** <http://dycip.com/goldenballs437> and <http://dycip.com/goldenballs448>

**Jurisdiction:** European Union  
**Decision level:** General Court  
**Parties:** Organismos Kyriakis Glakatokomikis Viomichanias v OHIM  
**Citation:** T-534/10  
**Date:** 13 June 2012  
**Full decisions:** <http://dycip.com/organismos12>

Is a trade mark and its foreign language equivalents confusingly similar?



ECI appealed to the CJ who held that the GC should not have characterised the signs as being essentially dissimilar, when the GC had earlier found a degree (albeit low) of conceptual similarity between the marks. The CJ reiterated that Article 8(5) CTMR requires only a degree of similarity which would lead the relevant public to make a link between the marks (rather than confusing similarity, which is required for Article 8(1)(b) CTMR). As the GC had not applied the test in relation to Article 8(5) correctly the CJ referred the case back to the GC to reconsider this issue.

**ROTKÄPPCHEN/RED RIDING HOOD**

The ECI case can be contrasted with the decision from the GC regarding the application to register a CTM for the mark RED RIDING HOOD. The mark was opposed by Rotkäppchen-Mumm Sektkellereien GmbH based on their earlier German mark for ROTKÄPPCHEN which translates to the title of the fairy tale “Little Red Riding Hood”.

The OD rejected the opposition and the Board of Appeal dismissed the appeal concluding that the signs were visually and phonetically different and that no conceptual comparison was possible because German-speaking and English-speaking consumers of the EU would not perceive that the signs both referred to the fairy tale “Little Red Riding Hood”.

The GC found that it had not been established that the meaning of the mark applied for, consisting of the words “Red”, “Riding” and “Hood”, would immediately be understood by the general public of the EU. Furthermore, the lack of root common to the German word “kappchen” and the English word “hood” did

not allow the relevant public to immediately perceive that they have the same meaning. The considerable differences between the marks meant that the relevant public were not able to make a conceptual comparison.

**Author:**  
**Anna Reid**



**In short**

In cases concerning everyday words and their foreign language equivalents there will usually be a degree of conceptual similarity between the marks, although this may not be sufficient to support a finding of a likelihood of confusion, particularly if the marks are not visually and phonetically similar.

It is possible that the existence of even a low degree of conceptual similarity between a CTM application and a mark with a reputation may lead the relevant public to make a link between the marks for the purposes of Article 8(5) CTMR and it will be interesting to see what the GC says on this point in the ECI case.

# D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

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