

# D YOUNG & CO TRADE MARK NEWSLETTER<sup>no.62</sup>

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## Proof of Use and Genuine Use General Court Stubs Out Imperial Tobacco Appeal in Player v Playa





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5–9 May 2012

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Washington, DC, USA**

Meet Jeremy Pennant, Ian Starr,  
Jackie Johnson, Tamsin Holman and Helen  
Cawley at INTA's 134th Annual Meeting.

More information: [www.dyoung.com/events](http://www.dyoung.com/events)

## Editorial



We are looking forward to catching up with clients and friends at INTA this month and busy preparing for another packed conference. Diaries are always full for this meeting but look out for our team and contact us if you would like to get together.

In this issue we bring you the puzzling Board of Appeal decision in the **PLAYER v PLAYA** case. The thought that in the UK use of **PLAYER'S** was not sufficient to prove genuine use of **PLAYER** because both marks were separately registered, whereas in Ireland, where only a registration for **PLAYER** exists use of **PLAYER'S** might have been sufficient to prove genuine use (if more evidence had been filed), is baffling. I hope that the decision is appealed further and that this inconsistency is addressed.

As it stands, the decision could have implications for the many brand owners who have separate registrations for a mark alone and in combination with non-distinctive matter, but only use in the combination form. Should they wish to rely on their 'solus' mark against a later application or use, they may be unable to do so.

The obvious solution is to ensure that the 'solus' mark is also used and that evidence of this can be adduced. If this is not possible get in touch as alternative strategies may be available in some countries.

Editor:

**Vivienne Coleman**



## Article 01

# Proof of Use and Genuine Use General Court Stubs Out Imperial Tobacco Appeal in Player v Playa

The General Court's ruling in *Player v Playa* seems inconsistent on the issue of use



**G**rand River Enterprises (Grand River) applied to register the word mark **PLAYA** as a Community trade mark in November 2008. It covered goods in Class 34 that can largely be described as smoking articles and tobacco goods.

The application was opposed by Imperial Tobacco Limited (Imperial Tobacco) on the basis of various national registrations for **PLAYER**, **PLAYER'S**, **JOHN PLAYER** and **PLAYER'S PLAYER'S NAVY CUT**. These marks also covered various tobacco goods in Class 34.

Grand River requested that Imperial Tobacco prove genuine use of its national marks relied on in the opposition. Evidence was submitted and in October 2010, the Opposition Division dismissed the opposition on the grounds that the Austrian registration for **PLAYER** (which was the only mark considered by the Opposition Division) was not confusingly similar to **PLAYA**.

## Appeal to the Board of Appeal

Imperial Tobacco appealed and the Board gave serious consideration to the proof of use filed by Imperial Tobacco during the course of the opposition proceedings. The Opposition Division had not examined the proof of use evidence because they had not considered there to be a likelihood of confusion between the marks. The Board, however, believed it necessary to first determine whether the earlier marks relied on by Imperial Tobacco that were closest to the **PLAYA** mark applied for, namely the **PLAYER** and **PLAYER'S** marks, had been put to genuine use in the Community during the relevant five year period.

Much of the evidence submitted was not considered sufficient to show the extent of use, which is one of the requirements for proving genuine use of a Community trade mark, but the interesting point arising from this decision is the analysis of the Board in assessing whether use of a mark in a form other than registered was acceptable under the provisions of Article 15 (1)(a) CTMR.

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> **Missed anything?**  
In between issues of this newsletter we posted news about the CJEU's ruling in *Football Dataco v Yahoo!*. Visit our website for up to the minute IP related articles and news: [dycip.com/dyc-kb](http://dycip.com/dyc-kb)

The Board concluded that the Austrian mark **PLAYER** (which as noted above had been the sole basis for the Opposition Division's decision) had not been put to genuine use during the relevant period because the evidence submitted by Imperial Tobacco consisted of evidence showing the marks **PLAYER'S NO. 6**, **JPS** and **JOHN PLAYER SPECIAL** respectively. Crucially the Board held that the use shown by Imperial Tobacco depicted use of the **PLAYER** mark in a form which altered its distinctive character. Use of **JOHN** or **NO. 6** in addition to **PLAYER** was in the Board's view, sufficient to change the perception of the **PLAYER** mark in the minds of the consumer.

Further, the Board held that the wording of Article 15(1)(a) CTMR only provides for use in a form that is 'slightly' different from the registered mark. Where the use of the mark in trade differs from the registered mark only in 'negligible elements', the two signs can be considered 'broadly equivalent'. The Board also concluded that only trade marks that have been slightly changed for marketing and promotional requirements can be considered as differing only in 'negligible elements' and 'broadly equivalent'. The Board did not believe that the use of **JOHN PLAYER** for example was 'broadly equivalent' to the registered mark **PLAYER**. On this basis, use of the Austrian mark **PLAYER** was not found to have been proven.

Having found that the basis of the Opposition Division's decision had not been put to genuine use, the Board systematically analysed each of the other **PLAYER** and **PLAYER'S** marks relied on by Imperial Tobacco to determine whether these had been genuinely used, such that they could still form the basis of the opposition. In each case, use was not found. All of the evidence found use of combined marks **JOHN PLAYER** or **JPS** for example, but the Board remained firm in their view that additions such as the word **JOHN** to **PLAYER** was enough to alter the distinctive character of the **PLAYER** mark registered. **JOHN PLAYER** and **PLAYER** were considered to be two different trade marks.

More interestingly, the Board went further to hold that in the United Kingdom, use of **PLAYER'S** was not sufficient to prove genuine use of **PLAYER**. Despite holding initially that **PLAYER'S** does show use of **PLAYER**, the Board stated at paragraph 40 of the decision that, *"Even if there is a small difference, namely the presence of the final letter S, they constitute two different trade marks as is confirmed by the fact that the opponent (Imperial Tobacco) also registered trade mark No. 1300259 **PLAYER'S** (in the United Kingdom)"*. The fact that Imperial Tobacco had registered **PLAYER'S** as a separate trade mark to **PLAYER** was pivotal in the Board's finding.

The Board also referred to the ECJ decision in *BAINBRIDGE*, Case C-234/06, where the Court held "it is not possible to extend, by means of proof of use, the protection enjoyed by a registered mark to another registered mark, the use of which has not been established, on the ground that the latter is merely a slight variation of the former". On this basis, the Board held that genuine use of **PLAYER** had not been proven in the United Kingdom.

In Ireland, Imperial Tobacco had only registered **PLAYER** and not **PLAYER'S** but had used **PLAYER's** in the marketplace. In this circumstance, the Board believed that use of **PLAYER'S** *could* in fact count as a slight variation of **PLAYER** (though ultimately, the evidence of use was insufficient because it did not show the extent of use of the mark).

There were other marks relied on by Imperial Tobacco such as **JOHN PLAYER** and **PLAYER'S PLAYER'S NAVY CUT** but the Board held that although use of these marks had been proven, there was no likelihood of confusion arising between these and the **PLAYA** mark applied for.

As a consequence of the above findings, Imperial Tobacco's appeal was dismissed in its entirety.

#### Comment

It will be interesting to see whether Imperial Tobacco appeals further to the General Court. Whilst it is reasonable to assume that use of **PLAYER NO. 6** or even **JOHN PLAYER** may not be considered genuine use of **PLAYER**, the findings relating to **PLAYER** and **PLAYER'S** is surprising. Most practitioners and brand owners alike would consider that the plural or possessive form of a mark counts as use of the singular and, judging from the Board's finding in relation to Ireland, where the registered mark is singular but the use shows the possessive form, use of the registered mark may still be found.

In this case, however, the fact that Imperial Tobacco had registered both **PLAYER** and **PLAYER'S** as two separate marks was enough to persuade the Board that it was a different trade mark to **PLAYER** and thus use of **PLAYER'S** could not be found to support **PLAYER**. Brand owners may therefore wish to carefully consider whether they wish to register the plural or possessive form of a mark over the singular.

However, the best alternative remains to ensure that the mark is used as registered and registered as used in all its variations.

**Author:**  
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# Infringement of an Earlier Registered Design

## CJEU Ruling in Cegasa v Proin Road Sign Case Clears Traffic for RCD Enforcement

The CJEU's decision makes the notion of earlier registered designs clearer and could encourage greater use of the RCD system for obtaining IP rights in the EU



**T**he CJEU has issued a rare decision relating to registered designs, and it has answered the question whether obtaining your own registered design can prevent you from infringing an earlier registered design belonging to another party.

In the field of trade marks, it is well established that obtaining your own (later) right may not necessarily help you to avoid infringement of an earlier registration belonging to another party. However, registered design law is less developed and for many years there has been something of a gut feeling that somehow the act of obtaining your own (later) registered design might act as some kind of shield against accusations of infringement of an earlier registered design.

We now know that the CJEU considers that the later registered design does not provide a shield. Specifically, the CJEU in its capacity as the appellate court for the EU, has decreed that a later RCD does not provide a shield against being held to infringe an earlier RCD belonging to another party.

Up until this decision, it has sometimes been tempting for a party, worried about infringing (or accused of infringing) an existing RCD, to consider trying to frustrate enforcement of that RCD by applying for and obtaining their own (later) RCD for their product.

This strategy had been possible because, firstly, an RCD application is not substantively examined for novelty or individual character (in the sense of producing a different overall visual impression relative to existing designs) by the EU Designs Registry (OHIM) and an RCD can be granted in a matter of just a couple of weeks. Thus, an invalid RCD can be obtained very quickly, and at low cost.

OHIM considers that it falls to interested parties to apply to have the granted RCD declared invalid by commencing invalidity proceedings and to show that the RCD in question either lacks novelty or individual character. These invalidity proceedings typically last much longer than the short timescale for obtaining the RCD in the first place, and it can be months or years before an

invalid RCD is struck off the Register at OHIM.

Secondly, the EU Regulation laying down the law governing RCDs is not as well worded as it could have been, and has opened the door to a line of argument that a later RCD acts as a shield against infringement of an earlier RCD (at least until the later RCD is declared invalid). Specifically, Article 19(1) of Council Regulation (EC) No. 6/2002 states:

*"A registered Community design shall confer on its holder **the exclusive right to use it and to prevent any third party not having his consent from using it**".*

The wording "shall confer on its holder **the exclusive right ... to prevent any third party from using**" is the wording that one would typically expect for a monopoly right where the granted IP right is a 'right to stop others' and is not a right to use the IP oneself.

It is this line of argument that has now been struck down by the CJEU and may no longer be used by an importer of counterfeit goods who

# CTM Applications 'Object of Property' on Death of Applicant

stalls and delays action against the counterfeit goods by obtaining their own (later) RCD.

The case decided by the CJEU does not relate to branded goods or counterfeits, but has general applicability even though it relates to the functional and less glamorous world of traffic bollards.

In this case, Cegasa obtained its RCD (the 'earlier' RCD) in 2005 as RCD No. 000421649-0001 and the visual appearance of their 'road sign' (or traffic bollard) is shown right as Fig. 1.

Proin started marketing its competing bollard in 2007, and Cegasa served a cease-and-desist demand upon Proin in January 2008.

In April 2008, Proin filed its own RCD application and it was granted a month later as RCD No. 000915426-0001 (the 'later' RCD): its appearance is shown above, right, as Fig. 2.

In the infringement proceedings before a Spanish court, Cegasa argued that the Proin bollard was an infringement of its RCD because the Proin bollard does not produce a different overall impression on the informed user compared with its design.

Proin replied with the 'shield' argument that the later RCD gives Proin the exclusive right to use the Proin design and thus the Proin bollard is not an infringement of the earlier RCD, at least until the Proin RCD is cancelled by means of invalidity proceedings. Interestingly, Cegasa did not attempt to invalidate the later RCD. Instead, the merits of the shield defence were referred by the Spanish court up to the CJEU for a preliminary ruling.

The Polish government intervened in favour of the shield defence, and the European Commission intervened to argue that the shield defence does not apply. Perhaps the European Commission was keen to intervene in order to try to make amends for the original poor drafting of the wording of Article 19 in the Regulation.

The CJEU essentially decided that the earlier RCD trumps the later RCD on "the priority principle, under which the earlier registered

Fig 1

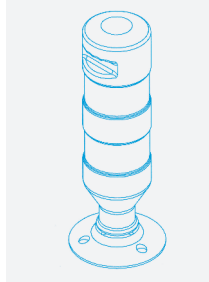


Fig 2



Community design takes precedence over later registered Community designs".

In other words, the shield defence is not valid, and the right of the proprietor of the earlier RCD to "the exclusive right . . . to prevent any third party" applies even when that third party is the proprietor of a later RCD and irrespective of the conduct of that third party, such as the fact that the third party applied for their RCD after becoming aware of the earlier RCD.

This is good news for RCD owners who now know that attempting to enforce their RCD against a competitor will not be frustrated and delayed by any later RCD obtained by the competitor. Specifically, it will no longer be necessary to remove from the Register the later RCD in order to have a clear run at enforcing the earlier RCD.

Overall, the ruling from the CJEU may make the RCD system more attractive as it has always offered a cheap and quick route to obtaining an IP right in the EU and it will no longer be blighted by the worry that a competitor will try to escape liability for infringement by indulging in the delaying tactic of obtaining their own later RCD for essentially the same design or a variant that does not produce a different overall visual impression.

**Author:**  
Paul Price



**Useful links:**  
Decision C-488/10 Cegasa v Proin:

[dycip.com/c48810dec](http://dycip.com/c48810dec)

In a decision published on 8 March 2012, the General Court of the European Union (the Court) confirmed that when an applicant for a Community Trade Mark (CTM) dies during the course of opposition proceedings, the CTM application is transferred to another person in accordance with the law of succession of the relevant Member State of the European Union (Article 16(1) of Council Regulation 207/2009).

*The Court also confirmed that, whilst the new proprietor of the CTM application must register the transfer at OHIM, the new proprietor is deemed to have acquired the CTM application at the moment when the initial applicant died.*

In the present case, IBF was the beneficiary of the CTM application under the provisions of the will of the initial applicant, who had died prior to the decision of the Board of Appeal in opposition proceedings. Applying the analysis set out above, the Court concluded that IBF was therefore actually the other party in the proceedings before the Board of Appeal and was consequently entitled to participate as Intervener in proceedings before the Court. More generally, the Court confirmed that, whilst it was entitled to examine the *locus standi* of any of the parties before it, this examination could not lead the Court to question the decision made by OHIM to register the transfer of the mark.

**Author:**  
Anna Reid



**Useful links:**  
Decision T-298/10 Arrieta D Gross v OHIM - Toro Araneda (BIODANZA):

[dycip.com/t29810dec](http://dycip.com/t29810dec)



# Community Trade Mark Owners Get Your Documents in Order!

**A** number of recent cases highlight the need for users of the Community trade mark system to ensure that documents are in order and are filed appropriately at the office in connection with opposition proceedings.

First we review a case which addresses proof of use. We then touch on two cases that highlight the need for attention when there is a transfer of the rights upon which an opposition is based.

In *New Yorker SHK Jeans GmbH & Co KG v OHIM* (intervenor Vallis K – Vallis A. & Co. OE; T-415/09; General Court; 29 September 2011), the applicant requested that the opponent prove use of the mark relied upon and the Court therefore had to consider whether the evidence filed by the opponent demonstrated genuine use. The court reconfirmed certain criteria that should be taken into account:

- 1. The evidence must address the place, time, extent and nature of the use;**
- 2. The evidence should show use in accordance with the essential function of the trade mark, so that the trade mark signifies origin;**
- 3. The use may not be only token;**
- 4. An overall assessment should be undertaken, bearing in mind all relevant factors; it may be that genuine use is shown through various pieces of evidence considered together which, individually, would not demonstrate genuine use.**

**Failure to prepare and file all the relevant documentation could result in lengthy delays and unnecessary costs**



In relation to the last point, in this case, materials were submitted each of which would not ordinarily be considered to show genuine use but had value when assessed with the other materials filed, namely an Affidavit that did not include any detail as to the affiant, and photographs either undated or that showed the mark used on advertising material rather than the actual product.

Where invoices bore the relevant trade mark at the head of the invoices, this alone was not considered to show genuine use of that trade mark on the goods, although these invoices could be taken into account to supplement other materials as they still showed the nature of use. This is worth noting when considering using copy invoices to show use of a trade mark, although invoices are laid out in a variety of ways and their value is likely to vary.

For example, in the case *La Mer Technology, Inc v OHIM* (intervenor Laboratoires Goemar; Court of First Instance T-418/03; 27 September 2007), invoices did not show the

relevant trade mark which was a house brand. However, products were clearly identified on the invoices and the associated packaging was provided which bore the house mark. It was therefore relevant to consider the packaging together with the invoices. Consequently, in some cases, it will be worth including certain pieces of evidence that may not appear to have significant value, but could be considered relevant when all the factors are assessed.

One last point reconfirmed by the court is that use does not necessarily have to be quantitatively significant; in this case, there was not a high volume of goods sold, but the invoices showed addresses of a number of different locations and this was considered to “represent an effective and genuine commercial effort”.

In the Fourth Board of Appeal decision (R2351/2010-4 of 14 February 2012) *PT Comunicacoes, SA v Bouygues Telecom, SA*, the Board reconfirmed how important it is to file

the correct documents to show that the earlier mark is valid and that the opponent is indeed entitled to file the opposition. In this case, the opponent had not filed a copy of the most recent renewal certificate so that it was unclear as to whether the earlier registration was in force at the relevant date. Furthermore, the earlier registration had changed hands, but the only document submitted in this regard was a copy of the application to record the assignment; no copy of the actual transfer document was filed nor any proof the assignment recordal had taken place. The office is not required to tell the opponent what documents are missing; the onus is on the opponent to ensure the necessary evidence is filed to support its case within the set time period.

The CJEU also recently ruled on a case (*OHIM v Nike International Ltd; Aurelio Munoz Molina* C-53/11 of 19 January 2012) in which a transfer of an earlier right took place during the opposition proceedings but insufficient proof of the transfer was submitted so that the opponent was unable to show it had locus standi (essentially, the right to bring the action). In this particular case, the Court also helpfully confirmed that the Boards of Appeal do not have to follow the Community Trade Marks Office's guidelines, but only the Council Regulation. The General Court had been wrong to suggest that, with reference to the guidelines, the opponent should have been given more time to show proof of ownership; this was not allowed under the Regulation.

Trade mark owners should endeavour to record assignments and changes of address promptly to ensure they are not caught out or delayed should they need to enforce their rights. Prompt attention to such administrative matters is usually more cost effective in the long run, particularly when a large number of marks are involved.

These cases serve to remind all parties involved in proceedings at the Community Trade Marks Office to take care in the preparation and filing of relevant documents so as to avoid featuring in a similar cautionary tale.

#### Author:

Jackie Johnson



#### Useful links:

Decision T-415/09 New Yorker SHK Jeans GmbH & Co KG v OHIM:

[dycip.com/t41509dec](http://dycip.com/t41509dec)

Decision T-418/03 La Mer Technology, Inc v OHIM:

[dycip.com/t41803dec](http://dycip.com/t41803dec)

Decision C-53/11 OHIM v Nike International Ltd; Aurelio Munoz Molina:

[dycip.com/c5311dec](http://dycip.com/c5311dec)

## Article 05

# Stop Press! UK Opt-In Service to Cease from 1 October 2012

Trade mark owners are advised to subscribe to a trade mark watch service



**T**he UK IPO has announced that it will stop operating the optional notification service for owners of Community Trade Mark (CTM) registrations from 1 October 2012.

Since October 2007, it has been possible for owners of CTM registrations to 'opt-in' to receive notifications of potentially conflicting, later filed, UK applications when they proceeded to publication for opposition purposes. The 'opt-in' subscription cost £50 and lasted for a period of three years.

In view of the change of practice we recommend that owners of CTM registrations consider subscribing to a suitable trade mark watch service.

D Young & Co can arrange for a cost effective trade mark watch to be set up for our clients on a worldwide, regional or national basis. Watch notices can be sent direct to the client or can be screened by us so that only those for the most pertinent marks are forwarded to you. If you are interested in this service please contact your usual D Young & Co trade mark adviser.

The automatic notification service operated by the UK IPO for owners of UK or IR(UK) registered marks is unaffected by this change.

#### Author

Vivienne Coleman



#### Useful links:

UK IPO notice of change to rules affecting opt-in notification:

[dycip.com/ipooptin1012](http://dycip.com/ipooptin1012)

*From 1 October, it will no longer be possible to 'opt-in' and notifications will no longer be sent to those trade mark owners who have previously opted in to the service, regardless of whether their subscription term is yet to expire.*



# D YOUNG & CO INTELLECTUAL PROPERTY

## And finally...

### D Young & Co UK Trade Mark Prosecution Firm of the Year 2012

D Young & Co has been named UK Trade Mark Prosecution Firm of the Year at MIP's 2012 Global Awards.

The MIP Global Awards recognises the firms behind the most innovative and challenging IP work of the past year. Trade mark partners Gill Deas and Helen Cawley were joined by assistant Richard Burton to accept the award at a ceremony held at The Dorchester in London, in March.

The group is delighted to receive this prestigious award and trade mark partner Jeremy Pennant comments: "I am very proud that D Young & Co has won UK Firm of the Year for trade mark prosecution for

2012. This award says a huge amount about the hard work and dedication of everyone in the team and so I thank them all for their contribution and effort in helping us achieve this success. I am also grateful to our clients, colleagues and friends around the world who contributed their positive comments and feedback to the MIP research team."

For more details visit:  
[www.dyoung.com/news](http://www.dyoung.com/news)



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