

D YOUNG & CO TRADE MARK NEWSLETTER *no.86*

May 2016

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*Gemma Kirkland and Robbie Berryman
join the D Young & Co partnership*

Trunki loses Supreme Court appeal PMS International Group Plc v Magmatic





We are delighted to welcome trade mark attorney Gemma Kirkland to the D Young & Co partnership. Gemma joined the firm in 2007 and specialises in trade mark law, particularly new filings, prosecution matters such as oppositions, cancellation actions and infringement opinions. We also welcome patent specialist Robbie Berryman to the partnership (read more on page 08 of this newsletter).

It is nearly time for us to travel out to INTA Orlando. Please do let us know if you would like to meet up during the conference.

Editors:

Helen Cawley & Anna Reid



Events



21-25 May 2016

INTA, Orlando US

D Young & Co partners Jeremy Pennant, Ian Starr, Tamsin Holman, Helen Cawley, Jackie Johnson, Gemma Kirkland and Senior Associate Richard Burton will be attending this year's conference.

26 May 2016

Patent searching webinar

D Young & Co's patent analyst Grayce Shomade joins Susan Bates of Shell International Ltd to present this Chartered Institute of Patent Attorneys (CIPA) webinar 'Patent Searching: understanding the patent document and how it can be searched'.

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Registered Community designs

Trunki loses Supreme Court appeal PMS International Group Plc v Magmatic

In a decision that will no doubt disappoint many design right holders, on 09 March 2016 Magmatic lost its appeal to the UK Supreme Court in its case against PMS, who sell the competing Kiddee Case.

This case concerned a Registered Community design (RCD) for the well-known Trunki ride-on childrens' suitcase.

The ultimate question in any design case under EU harmonised law is whether the overall impression of the design of (or incorporated in) the alleged infringement is the same as that of the RCD.

This first involves identifying what the overall impressions of the two designs are.

Trunki at the Court of Appeal

The Court of Appeal had overturned the first instance decision, where the judge had found infringement, holding that the overall impression of the RCD was of a "horned animal".

While the author has concerns about characterising what is ultimately a design for a suitcase by reference to something quite different and indeed general in description (similar concerns apply to describing an air freshener by reference to a snake's head – see P&G v Reckitt Benckiser), one can see what the Court of Appeal was trying to do with that description of what the RCD depicted in terms of the shape aspects of the design.

Importantly in this case therefore, the Court of Appeal came to that conclusion as regards the RCD based on the shape of the design depicted, and the fact there was no decoration shown in the RCD to alter that impression. For several reasons the Court of Appeal said that the Kiddee Cases in issue had different overall impressions, being of an insect and a non-horned

animal respectively. Again, comparing the shape and other features of the RCD with the equivalent elements in the Kiddee Cases, and ignoring surface decoration, one can understand that conclusion, even if reasonable people might differ.

Controversially however, the Court of Appeal appeared to base its decision in part on the influence of the surface decoration of the Kiddee Cases. This caused significant comment among observers since it seemed clearly to contradict earlier case law which says that where a protected design is for a shape (eg, when it has no surface decoration), surface decoration on an alleged infringement is to be ignored. While there was some doubt as to whether the RCD was a pure shape design (the RCD did have several aspects which showed tonal contrast, such as the wheels, clasp and strap, and these were not reproduced in the Kiddee Cases), the "impression" given to many readers of the Court of Appeal's decision was that the surface decoration on the Kiddee Case – depictions of whiskers, eyes, spots, body tone etc – had played a large part in its finding of different overall impressions.

The Court of Appeal seemed to describe the different overall impressions by reference to the applicable decoration on the Kiddee Cases. Again, as the RCD had no such decoration this seemed somewhat contrary to the established law.

Supreme Court decision

The Supreme Court today however upheld the Court of Appeal. It did so on the basis that the overall impression of the RCD was indeed of a horned animal, and that the Kiddee Cases had different overall impressions. While the judgment could be clearer on this point, it seems that its primary reason for upholding the Court of Appeal doing so was based on the overall impressions of the shapes.

> **Case details at a glance**
Jurisdiction: England and Wales
Decision level: Supreme Court
Parties: PMS International Group Plc v Magmatic Ltd
Citation: 2016] UKSC 12
Date: 09 March 2016
Full decision: <http://dycip.com/trunkisupremecourt>

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> **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>

PMS International Group Plc v Magmatic Ltd concerned ride-on children's suitcases



On the key issue of whether surface decoration was relevant to that consideration, the Supreme Court judgment appears to play down its importance, describing it as having “limited force” in this particular case.

Nevertheless, the judgment suggests that surface decoration could be taken into account in deciding whether a shape design is infringed but possibly only to the extent that it would reinforce the overall impression of the underlying shapes concerned.

It also hinted at there being more force in the point where surface decoration had been “positively distracting in nature”: then it may have an effect on overall impression. It made this comment by reference to an RCD rather than an alleged infringement, which makes it somewhat unclear as to how “distracting” surface decoration should be taken into account in an alleged infringement.

All of this may also be seen as somewhat controversial since it hints at a role for surface decoration in cases where there is none shown in an RCD.

Reference to the CJEU

A related point, which was run in argument, was whether the “absence” of surface decoration could be a positive feature of a design, as was suggested in *Apple v Samsung*. It was suggested that if this point was indeed relevant to the *Trunki* appeal, there should be a reference to the Court of Justice of the European Union (CJEU).

The Supreme Court refused to make a reference because the question wasn't in issue in the *Trunki* appeal (the court could decide without deciding the point, which in any event it considered was not raised by the Court of Appeal decision). Having said that, the Supreme Court did say *obiter* that absence of surface decoration could be a feature of an RCD.

Overall the Supreme Court decision in our view only provides limited clarity on the scope of protection of shape designs.

The court seems to have held that surface decoration in an alleged infringement can be taken into account in some circumstances, although the limits of that remain unclear. In the *Trunki* case itself, the court has played down the relevance of the Court of Appeal's consideration of surface decoration.

What does come out from the decision, yet again, is the importance of care in filing design registrations, so as not to limit scope of protection unnecessarily, especially for shape designs. Merely filing photographs or even CAD representations with unnecessary tonal contrasts depicted, could unintentionally do just that.

Therefore a note of caution to applicants: a hastily filed RCD has the potential to undermine the enforceability of your design rights.

Author:
Richard Willoughby



There is a broad definition of what is registrable as a design. Features that can be protected include:

- Lines, contours and the shape of the product
- Colours and patterns
- Texture and/or ornamentation
- Packaging, such as printed food cartons
- The get-up of the product
- Graphic symbols (such as an icon on a computer screen, or a cartoon character)
- Typographic typefaces

A detailed knowledge of design law in the UK, Europe and around the world is essential in order to get the best protection for your designs. If IP is something new for you and your business, professional advice is invariably worthwhile. We are able to file registered design applications in the UK and across Europe as a single application. We also file registered design applications elsewhere in the world through our network of foreign design attorney firms. Please do get in touch for further advice or see www.dyoung.com/designs.

The question of evocation

Viiniverla v Sosiaali

> Case details at a glance

Jurisdiction: European Union

Decision level: Court of Justice of the European Union

Parties: Viiniverla Oy (Viiniverla) v Sosiaali-ja terveystalan lupa-ja valvontavirasto, (Sosiaali)

Citation: C-75/15

Date: 21 January 2016

Full decision: <http://dycip.com/c-7515>

According to the Court of Justice of the European Union (CJEU), a 'geographical indication' (GI) for CALVADOS may prevent use of VERLADOS even though VERLADOS is produced in the Finnish village of Verla, is sold only in Finland and the names share only one syllable and four letters in common.

Background

Viiniverla produced a cider spirit drink under the name VERLADOS. Sosiaali, owner of a GI for CALVADOS, a Normandy apple brandy, complained to the European Commission (EC) about the use of VERLADOS suggesting it had previously been called VERLA and the "DOS" element was only added once sales of CALVADOS became popular in Finland. The Finnish authorities countered, stating VERLADOS was a local product produced in the village of Verla and sold only in Finland. The Finnish authorities also argued that CALVADOS and VERLADOS have only one syllable in common which, according to case law, is not sufficient to give rise to an evocation of the CALVADOS GI. The EC were unconvinced and warned the Finnish authorities that infringement proceedings against Finland would be issued if use of VERLADOS did not cease.

Viiniverla sought annulment of the EC decision from the Finnish Market Court (FMC) arguing that use of VERLADOS did not lead to any evocation or misuse of the CALVADOS GI and the FMC sought a preliminary ruling from the CJEU on the answers to three questions.

Judgment of the CJEU

FMC question 1: When assessing whether use of VERLADOS leads to evocation of the CALVADOS GI, should reference be made to the average consumer who is reasonably well informed, observant and circumspect?

CJEU response: The CJEU ruled that a GI identifies a product from a country, region or locality where a given quality, reputation or other characteristic is attributable to that geographical origin. GI's are effective across the EU and are protected from evocation even if the true origin of the product is indicated or the GI is accompanied by an expression such

C-75/15 concerns a Finnish apple cider spirit drink and a French apple brandy



as "like", "type", "style", "made", "flavour" or any other similar term. If a consumer sees a product and it triggers in their mind the product protected by a GI, evocation has occurred. Accordingly and in light of the pan-EU protection offered by a GI, the FMC must consider the reaction of the average consumer, across the EU and not just those residing in Finland.

FMC question 2: When considering evocation, what importance should be given to the facts that VERLA is part of Viiniverla's name; is likely to be recognised by Finnish consumers as the name of the Finnish village; sales of VERLADOS amount to only a few hundred litres on average per year, sold in the winery's own restaurant and in a limited amount to Finnish state officials; and VERLADOS and CALVADOS share just one syllable in common?

CJEU response: The CJEU ruled that these facts are irrelevant. Evocation arises where the products are similar in appearance and the names are identical (in that they consist of and end in the same two syllables). It was accepted that the products at issue were similar. Both names consist of eight letters, four of which are identical, share the same number of syllables and end in the syllable "dos". It is also relevant to take into account any evidence that suggests the adoption of VERLADOS was not fortuitous. If evocation arises, a GI protects against evocation throughout the EU. Therefore use in a single member state does not avoid evocation. Further, it is not necessary for confusion to arise for evocation to exist since it does not matter if the public associate the

products with each other and nor is it necessary for the trader to take unfair advantage of the reputation of the product protected by the GI.

FMC question 3: If evocation has occurred, may use of VERLADOS nevertheless be authorised on the basis that Finnish consumers are unlikely to imagine that VERLADOS is produced in France?

CJEU response: The CJEU ruled that even though there is no risk of confusion, use of VERLADOS may not be allowed, since on the basis of the above, it gives rise to evocation of the CALVADOS GI.

Author:
Gemma Kirkland



In short

This decision provides welcome guidance on the question of evocation of a protected GI. The pan-European nature of a GI is reinforced and serves as a reminder that confusion or deception are not necessary and even low level sales of a product in a single member state may be prohibited on the basis of a GI if evocation of a GI has occurred.

Do trade marks used in third party adverts infringe?

Daimler v Együd Garage

This case concerns use of trade marks in advertisements which have been picked up by third parties and whether this use (with or without consent) constitutes trade mark infringement.

Background to the case

Daimler is a motor vehicle manufacturer that owns the international figurative mark (below) protected in Hungary covering, amongst other things, motor vehicle parts.

„Mercedes-Benz”

Együd Garage Gépjárműjavító és Értékesítő Kft (Együd Garage), a Hungarian Company, sells motor vehicles and parts for repair and servicing. Daimler's subsidiary company and Együd Garage were parties to a contract for the supply of after sales services, which allowed Együd Garage to describe itself as an “authorised Mercedes-Benz dealer”. Együd Garage ordered the publication on a particular website, of an advertisement describing it as an authorised Mercedes-Benz dealer for the period covering 2011-2012 from an online advertising services company, Magyar Telefonkönyvkiadó Társaság (MTT).

Following the termination of the contract between Együd Garage and Daimler's subsidiary, Együd asked MTT to amend the advertisement to remove the reference to it being an “authorised Mercedes-Benz dealer”. In the meantime, several other websites had published online advertisements that referred to Együd being an authorised Mercedes-Benz dealer without its consent. Együd also wrote to the operators of these websites requesting removal of the advertisements.

The MTT advertisement was not removed and other online advertisements continued to appear and were presented when Google searches for “együd” and “garage” were carried out.

Budapest Municipal Court

Daimler brought an action in the Budapest Municipal Court for trade mark infringement seeking an order requiring Együd Garage to remove the advertisements at issue,

Is use of trade marks in adverts picked up by third parties trade mark infringement?



to refrain from further advertisements and to publish a correction.

CJEU decision

The Budapest Municipal Court referred a preliminary issue to the Court of Justice in the European Union (CJEU) which found that while the publication of an advertisement on a referencing website, referring to another person's trade mark, is attributable to the advertiser who ordered that advertisement, that advertiser cannot be held liable for the acts or omissions of such a provider who, intentionally or negligently, disregards the express instructions given by the advertiser to prevent use of the mark. In other words, since Együd Garage had expressly asked MTT to remove the advertisement, they could not be held liable for its continued use. Similarly, it was held that an advertiser cannot be liable for the independent actions of other economic operators who do not act by order and on behalf of the advertiser.

Együd Garage could not be held liable

for the third party advertisements.

The court expressly said that this finding did not affect the possibility for a trade mark proprietor to claim appropriate reimbursement from an advertiser who has gained a financial advantage.

Alternatively a trade mark proprietor could take action against the operators of websites that infringe their trade mark rights.

Author:

Emily Mallam



In short

This case demonstrates how increasing difficult it is becoming for trade mark owners to monitor and control use of their trade marks in online advertising.

What's the position on position marks?

Registration in the EU

Although position marks are not an officially recognised category of trade marks under UK or European Union (EU) law, such 'unconventional' trade marks are registrable, subject to fulfilling a trade mark's essential characteristics and overcoming absolute grounds. According to the European Union Intellectual Property Office (EUIPO) guidelines, position marks comprise a specific sign and its position on and in proportion to a product; this necessitates filing a description of the exact nature of the right concerned.

All signs are in theory subject to the same test for distinctiveness, however the courts have consistently held that consumers do not habitually identify the origin of products on the basis of signs (for example colours or shapes) which are indistinguishable from the appearance of the goods themselves.

The more a sign is banal or resembles that of a product, the less likely it will be inherently distinctive.

Indeed, relevant factors for assessing a shape mark's ability to fulfil its essential origin function apply equally to position marks. To be distinctive, the relevant consumer must be able to distinguish the sign from the normal appearance of the product such that it is likely to be understood as itself indicating origin, or the sign must depart significantly from the norms or customs of the sector.

Often, position marks will be considered to lack distinctive character on the basis that they are perceived as purely decorative or functional elements, indistinguishable from the product.

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

Early decisions

Orange toe of socks

Accompanying the trade mark application (European Union trade mark (EUTM) no. 5658117) was a description, stating that the trade mark was a positional mark,

characterised by a specific PANTONE shade of orange in the same place of the toe of a sock, in sharp colour contrast to the remainder of the sock.



The General Court (GC) concluded that the mark was devoid of distinctive character, with the average consumer perceiving the position mark as a decorative or functional element, indistinguishable from the form of the product.

In reaching its conclusion, the GC considered the form of the product to be the shape of the toe rather than the sock as a whole.

More from us on this GC decision here: www.dyoung.com/trademarknewsletter-sep10#anchorlink2

Red tips on shoelaces

Protection was denied for a sign for shoes with red shoelace tips (aglets) (EUTM no. 9130361) on the grounds of lack of distinctiveness.



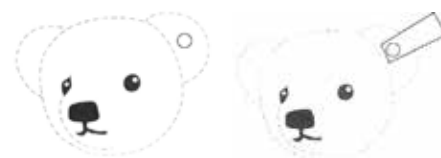
The GC considered that the red tips were not independent of the shape of the shoelaces, instead merging with the appearance of the shoe, such that the sign did not depart significantly from the norms or customs of the sector. The CJEU rejected the appeal and confirmed that the criteria for assessing the distinctive character of three-dimensional marks consisting of the appearance of the product applied to two-dimensional representations of that product.

Read our article on the GC decision at: www.dyoung.com/article-redalert1113

Steiff bear

The following position marks were granted protection in Germany but not at the EUIPO: EUTM no. 9439613 (above left) is for a glossy or matt, round metal button fixed to the middle of the ear of a soft toy and EUTM

no. 9439654 (shown below right) is for a rectangular, elongated fabric label attached by such button. The marks included descriptions stating that they are position marks and that the dotted lines do not form part of the protection sought, with the shape and size of the stuffed animal ear and head being variable.



The GC held the EUTMs to be devoid of distinctive character; consumers would perceive the button as decorative and the label as a decorative or functional element, rather than indicators of origin, as consumers were accustomed to a range of designs and configurations of buttons and labels on soft toys such that the signs did not differ from the norms or customs of the sector. Further, the signs were indistinguishable from the appearance of the soft toys, requiring fixation of the button and label at a precise point to exist.

Recent decisions

Shoe stripes

Registration was refused on the ground of lack of distinctive character for K-Swiss' EU designation of an international registration (no. 932758) for the following figurative sign:

The description associated with the mark was

"the trade mark consists of two sets of five parallel stripes, each set of five stripes extending downward from the central, frontal, portion of the shoe upper to the sole of the shoe". Assessing the

mark as part of the product and not as a 2D representation of the design, the GC noted that the sign extended to the full height of the product, such that the size of the stripes was determined by the shape of the product and was therefore indistinguishable from the product. Further, placing decoration on the sides of shoes was considered common in the sector such that the stripes would



➤ Case details at a glance

Jurisdiction: European Union
Decision level: General Court
Parties: X Technology Swiss GmbH v OHIM
Citation: T-547/08
Date: 15 June 2010
Full decision: <http://dycip.com/T-54708>

Jurisdiction: European Union
Decision level: General Court and Court of Justice of the European Union
Parties: Think Schuhwerk GmbH v OHIM
Citation: T-208/12 and C-521/13P
Date: 11 July 2013 and 11 September 2014
Full decisions: GC: <http://dycip.com/t-201812> (French and German language only)
CJEU: <http://dycip.com/c-5213p>

be simply viewed as an embellishment and not an indication of origin.

Stripes on clothing

Two recent decisions of the GC involved the applicant, Shoe Branding Europe BVBA filing applications for EUTMs for the below position marks, consisting of two parallel stripes of equal width positioned on the side of both sleeves of long sleeve shirts (EUTM no. 10926764, shown below left); and on the lower part of panel pants (EUTM no. 10984102, shown below right). In both cases, the dotted lines marked the position and not the form of the mark.



Both applications were considered to lack distinctive character by the Board of Appeal and the GC, with emphasis placed on the fact that the patterns concerned were simple and ordinary and that their positioning was not distinguishable from other purely decorative patterns which may be used on similar products. The GC noted that even where simple geometric shapes are indicative of origin, it is likely that distinctiveness is owed more to any intensive use than their position and simplicity, and manufacturers should be free to use such shapes unless and until there is evidence of acquired distinctiveness through use (no such evidence was adduced in this case).

Pending decision

More recently, clarification has been sought from the the Court of Justice of the European Union (CJEU) in the form of a request for a preliminary ruling by the Netherlands District Court in the case of Christian Louboutin. Specifically the court questioned whether a position mark which gives substantial value to the goods is caught by the additional exclusion grounds for shape marks (the exclusion grounds also include signs consisting exclusively of a shape resulting from the nature of the goods themselves or one necessary to obtain a technical function). If this is the case,

Jurisdiction: European Union
Decision level: General Court
Parties: Margarete Steiff GmbH v OHIM
Citation: T-433/12 and T-434/12
Date: 16 January 2014
Full decision: <http://dycip.com/t-43312> and <http://dycip.com/t-43412> (both decisions French and German language only)

Jurisdiction: European Union
Decision level: General Court
Parties: K-Swiss Inc v OHIM
Citation: T-3/15
Date: 4 December 2015
Full decision: <http://dycip.com/t-315>

then evidence of acquired distinctiveness would not assist, leaving proprietors lacking protection.

The future

Red sole of shoe

Christian Louboutin owns an opposed EU trade mark application (EUTM no. 8845539) for a specific PANTONE reference of the colour red applied to the sole of a shoe (with the dotted lines simply illustrating the position of the mark), as shown right.



This application was ultimately accepted by the Board of Appeal who considered the sign inherently distinctive on the basis that the mark was not a colour mark, but a specific PANTONE reference applied to the sole of a high-heeled shoe (rather than to shoes generally) and departed significantly from the norms and customs of the sector (ie, mainly beige, brown and black soles). This was corroborated by evidence of use and evidence that the proprietor pursued an active enforcement regime against counterfeiters.

Variations of the above mark form the basis of a number of national infringement proceedings, including in France, Belgium and the US. These infringement actions have highlighted the issue of whether to categorise the sign as the shape of a shoe sole; a mere colour; or a colour applied to a shoe sole in a figurative mark. As noted above, the categorisation of the sign is important as this would determine whether the mark is subject to the additional exclusion grounds applying to shape marks, eg, which prevent the registration of signs consisting exclusively of a shape which gives substantial value to the goods.

In March 2016, the District Court of the Hague in the Netherlands decided to refer a question to the CJEU for a preliminary ruling regarding the question of whether a “shape” under Article 3(1)(e)(iii) Trade Mark Directive (TMD) is limited to three-dimensional elements of the product or whether it covers two-dimensional characteristics such as colour. If the latter, proprietors may increasingly struggle to acquire protection for position marks, as evidence of acquired distinctiveness would not overcome an

Jurisdiction: European Union
Decision level: General Court
Parties: Shoe Branding Europe BVBA v OHIM
Citation: T-63/15 and T-64/15
Date: 15 December 2015
Full decision: <http://dycip.com/t-6315> and <http://dycip.com/t-6415>

Jurisdiction: The Netherlands
Decision level: Rechtbank Den Haag
Parties: Christian Louboutin v Van Haren Schoenen
Citation: HA ZA 13-999
Date: 09 March 2016
Full decision: <http://dycip.com/HAZA13999> (Dutch language only)

objection that the shape gives substantial value to the goods. It will be interesting to see how the CJEU handles this reference, although the fact that the wording of Article 7(1)(e) in the new EUTM Regulation now refers to “signs which consist exclusively of the shape, or another characteristic” suggests that the exclusions may apply to two-dimensional features.

Authors:

Anna Reid & Jennifer Heath



In short

Position marks face a number of hurdles to registration, a common issue being their perception by consumers as purely decoration or functional elements, indistinguishable from the associated product. Proprietors are more likely to be successful in registering position marks where they are clearly and precisely described and are limited in their application and/or where evidence of use is available.

Clarification is currently being sought from the CJEU on whether the additional exclusion grounds for shape marks, specifically shapes which give substantial value to the goods, also apply to position marks. If the exclusions do apply to two-dimensional features such as colour, then evidence of acquired distinctiveness would not assist proprietors in overcoming a refusal, and proprietors would be faced with a further obstacle to the registration of their position mark.

D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

D Young & Co news

New partners announced Gemma Kirkland and Robbie Berryman join the D Young & Co partnership

We are delighted to welcome two new partners to the D Young & Co partnership from April this year: trade mark specialist Gemma Kirkland and patent specialist Robbie Berryman.



Gemma Kirkland, Trade Mark Attorney

Gemma's main area of expertise is trade marks, focussing on all aspects of trade marks including clearance searches, new filings, and prosecution matters such as oppositions, cancellation actions, and infringement opinions. Gemma also handles assignments, changes of name and design matters. Prior to joining D Young & Co in 2007, Gemma had professional experience working in-house for BP plc's Group Trade Marks Department.

Gemma's client portfolio is varied as she acts for both multinational corporations as well as smaller, start-up businesses in many industry sectors, including beverages, consumer products, chefs, restaurants, automobile and financial services. Gemma travels regularly to the US, attending conferences and meeting with clients. She will be attending INTA in Orlando this coming May with colleagues Jeremy Pennant, Ian Starr, Tamsin Holman, Helen Cawley, Jackie Johnson and Richard Burton.

Robbie Berryman, Patent Attorney

Robbie's areas of expertise include physics, electronics, microprocessor technology and computing (including hardware and software). Robbie's work includes drafting and prosecution of UK, European and foreign patent applications for multinational microprocessor and electronics companies.

Other appointments: Senior Associate Trade Mark Attorney, Richard Burton

We are also pleased to announce the appointment of Richard Burton to the position of Senior Associate within the firm's trade mark and brands group.

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