

D YOUNG & CO TRADE MARK NEWSLETTER^{no.71}

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In this edition, as well as some interesting case reviews, covering a variety of topics, we are pleased to include two articles from our Dubai team. As sponsors of INTA's forthcoming conference on hot trade mark issues in the Middle East, our colleagues from D Young & Co International (Dubai) will be delighted to meet those of you who may be attending the conference in Dubai this December.

In other news, I am proud to report that we have again achieved a top-tier ranking in the Legal 500. I am also delighted to announce the imminent publication of the second edition of our hugely popular 'Trade Mark Decisions' book, providing at-a-glance summaries of key trade mark decisions of the Court of Justice of the European Union. We will be sending out copies soon.

Enclosed with this newsletter, you will find details of our recently introduced range of search packages, which, in response to our clients' increasing requirements for cost-effective EU-wide trade mark searches, incorporate local opinions and are reported in a standardised format with a single summary overview.

Finally, I look forward to seeing some of you at the INTA Leadership Meeting in Miami in November and, as we approach the end of the year, I wish everybody a very happy festive season and a prosperous 2014.

Editor:
Tamsin Holman



Events



12-16 November 2013

INTA Leadership Meeting, Miami, US

Jeremy Pennant, Ian Starr and Tamsin Holman will be attending the INTA Leadership Meeting.

09-10 December 2013

INTA, Dubai, UAE

D Young & Co sponsors this conference on hot trade mark issues in the Middle East, Africa, South Asia and beyond. Mark Bone-Knell presents 'Major Sporting Events in the Middle East'. Kate Symons will also be attending.

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Article 01

Assos v ASOS Cycle Clothing Conflict

The English High Court has held that the online fashion designer and retailer ASOS is not liable for infringing the registered trade mark of Assos of Switzerland, the specialist cycling clothing company.

The claimant is a top-end designer and manufacturer of cycling kit and related specialist clothing, sold under various trade marks incorporating the ASSOS brand name. The company also manufactures some casual clothing wear, although the primary focus of its business is on the specialist cycling clothing market. It markets its products primarily in specialist cycling publications, with only a very limited focus on Internet sales (the company preferring its distributors to sell through physical retail stores).

The defendant, ASOS plc, is an online-only fashion and beauty retail company, launched in 1999 under the name "As Seen On Screen", but has used the acronym ASOS for over a decade. From around 2004/2005, the company started to design and sell its own-brand range of clothing for men and women under the ASOS mark.

The claimant owned the word ASSOS as a registered Community Trade Mark (CTM) in classes 3, 12 and 25, each covering a very broad, generic list of goods (eg, "vehicles"; "clothing, footwear and headgear"). It also used a number of logo marks incorporating the name ASSOS in a rounded, stylised font. The company sued ASOS for passing off and for trade mark infringement under Articles 9(1)(b) and (c) of the Community Trade Mark Regulation, alleging that the marks ASSOS and ASOS were confusingly similar and used in relation to identical/confusingly similar goods; and that use of the ASOS mark was detrimental to the distinctive character/repute of the ASSOS mark.

ASOS counterclaimed for partial revocation of the ASSOS mark on the basis of non-use: there were many types of clothing for which the claimant had not used its mark, such as shoes and dresses. (ASOS also counterclaimed for invalidation of the ASSOS registration based on its use of the ASOS mark before the priority date of the mark –

however, this claim was rejected on the basis that ASOS could not show relevant goodwill in its own-brand clothing range at that time).

As regards the revocation claim, the court held that when considering the scope of use that had been made of a trade mark, the consumer will consider not only the goods in question, but also other factors such as sales channels/intended use.

ASSOS had used its mark on specialist cycling wear, but also had some sales of more general casual wear. What would the average consumer consider to be fair description of all these goods together?

It was considered that restricting the specification to "clothes to be worn during or after cycling" would make no sense to ordinary consumers.

The court held that the average consumer would take into account that ASSOS had chosen **not** to go down the same route as brands such as NIKE in developing an extensive collection of non-specialist casual sports clothing, but instead had retained a focused approach, limiting the types of clothing to which the ASSOS mark was applied. It was important that ASSOS does not market its goods on the High Street or through general clothing stores. Ordinary consumers would not regard the company as selling 'clothing' as such, but rather a distinct subset of clothing, namely "specialist clothing for racing cyclists and casual wear including tracksuits, T-shirts, polo shirts, caps and jackets". The class 25 specification was limited accordingly. The class 3 specification was also limited to reflect the intended purpose of the products for which use of the mark had actually been shown (ie, "preparations for the treatment/prevention of ailments associated with cycling; cleaning products for specialist cycling clothes"). The broad term "vehicles" in class 12 was limited to "bicycles and parts/fittings therefor".

Unsurprisingly, the marks ASOS and ASSOS were held to be visually and orally similar. To the extent that the partially revoked mark covered

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casual clothing, the ASOS mark was being used in relation to identical products. However, the court held that the reputation of the ASSOS mark was in relation to cycling gear; there was no separate reputation as regards casual clothing (despite limited use of the ASSOS mark in relation to such products). Taking into account that reputation, the goods sold by ASOS that were not identical to ASSOS' goods were not very similar at all. Some goods (eg, shorts/T-shirts) were identical – but beyond that there was limited similarity, since ASSOS' reputation was so closely linked with specialist cycling clothing.

When assessing confusion, the identity of the average consumer of ASSOS goods (as covered by the partially revoked mark), was relevant. Their attention is high because ASSOS products are expensive (with no suggestion that the company intended to expand the brand beyond the premium clothing sector).

Evidence of people contacting ASSOS thinking they were ASOS to complain of products was held not to be sufficient evidence of confusion – merely that consumers had contacted the wrong entity, **not** that they had bought ASOS goods thinking they were ASSOS goods. No other evidence relied on by ASSOS established that the relevant average consumer was likely to be confused into thinking that ASOS was linked with the ASSOS mark. The Article 9(1)(b) claim therefore failed.

As regards the Article 9(1)(c) claim, there was no evidence that the ASOS mark had diluted the ASSOS mark, or its cachet. The fact that ASSOS had limited its web/general media presence (where the ASOS mark was primarily used) was important; and also the fact that there was no evidence to suggest a dramatic future change in ASSOS' approach to its marketing techniques.

The passing off claim also failed. The court held that ASOS had not done anything that could damage the goodwill of ASSOS as a maker of cycling apparel.

In relation to the trade mark infringement claim, ASOS had tried to rely on the 'own name'

ASSOS is a top-end designer and manufacturer of cycling kit and specialist clothing



defence. The court held that the focus of enquiry here must be whether the defendant has acted fairly in relation to the trade mark owner. The adoption of the ASOS mark was as an honest acronym of the company's original trading name, "As Seen On Screen". However, no trade mark searches had been undertaken at the time of that adoption.

Importantly, the court held that when a defendant, using its own name as a trade mark, learns of a claimant's objection to such use, it is not automatically barred from relying on the own name defence. Here, ASSOS' objections were based on the assumption that the goods covered by its mark were much broader than was actually merited; confusion was likely to be limited in practice (as confirmed by the evidence); and ASOS had also taken steps to minimise confusion (eg, it had stopped selling ASOS branded shorts or other products related to cycling; it had also made changes to its website so that anyone searching for certain 'cycling' terms was redirected to the ASOS homepage, meaning they would have to search through every product to find the item they were looking for (eg, a motorcycle jacket)).

The purchase by ASOS of 'ASSOS' as a keyword was explained as being because it was a common misspelling of ASOS; there was no suggestion of its being an attempt to misdirect ASSOS customers. However, the judge was concerned by this: given the much stronger web presence of the ASOS brand, such conduct could easily lead to a

kind of 'swamping' of the ASSOS brand from which the latter was entitled to protection.

There had also been a slight change to the stylisation of the ASOS logo after it had become aware of the ASSOS mark, depicting the lower case letters in a more rounded font (which was closer to the rounded stylisation of the ASSOS brand as used by the claimant). The court held that this was unfortunate, since it brought the ASOS mark closer to the ASSOS typeface. Although it was not suggested that this was deliberately to make the brand look more like ASSOS, it was relevant to the question of honest practices. There was no need to adjudicate the question of the own name defence because there had been no infringement. However, the judge was keen to note the aspects of ASOS' conduct which could be open to criticism if further assessment were required on appeal.

The judgment confirms the increasing tendency of UK courts to take account of commercial reality when assessing trade mark infringement claims – although on the face of it the marks ASSOS and ASOS were clearly similar, and being used at least to some extent in relation to identical goods, the respective marketing practices and reputations of the parties meant that confusion as to trade origin, and damage to the earlier mark's reputation, was unlikely. The decision seems likely to be appealed, and we await further developments with interest.

Author:
Matthew Dick



Fast Track UK Trade Mark Opposition Procedure What You Need to Know

Useful links

UKIPO Tribunal Practice Notice
(2/2013) Fast Track Oppositions:
<http://dycip.com/ukipofasttracktms>

UKIPO Fast Track User Guidance:
<http://dycip.com/ukipofasttrackguide>

UKIPO Fast Track Opposition Procedure
FAQ: <http://dycip.com/ukipofasttrackfaq>

On 01 October 2013, the UK Intellectual Property Office (UKIPO) launched a new fast track trade mark opposition procedure. The new streamlined procedure, which will run alongside the standard opposition route, has been introduced with a view to making UK oppositions more appealing to prospective opponents, enabling them to be more proactive in enforcing their rights, more quickly and at a reduced cost.

Fast track opposition – key facts

- The official filing fee has been reduced to £100.
- The scope of a fast track opposition is limited to claims of **identity** between the trade marks and the goods/services (Section 5(1) Trade Marks Act '94 (TMA)), and likelihood of confusion (Section 5(2) TMA) only. This means that if you want to rely on claims of unfair advantage or detriment (under Section 5(3) TMA) or passing off (under Section 5(4) TMA), for example, you will be unable to use the fast track opposition procedure.
- It is only possible to rely on a maximum of three **registered or protected** earlier rights only. If a party wishes to rely on more than three earlier rights, or on a pending application, they will need to follow the standard opposition procedure.
- Proof of use evidence required for any earlier mark relied on that is more than five years old at the time of publication of the opposed application must be provided at the time the fast track opposition is filed (as compared to during the evidence stages of a standard opposition).
- There are no formal evidence rounds in a fast track opposition. The parties may request leave to file additional evidence during the course of the proceedings, but leave will only be granted in exceptional circumstances.
- Whilst oral hearings will still be possible, there is a preference within the UKIPO that decisions in fast track oppositions should be

The UKIPO launched the fast track trade mark opposition procedure on 01 October



decided from the written submissions filed by the parties, with oral hearings only being granted if really necessary. If a request for an oral hearing is granted, the hearing will most likely take the form of a teleconference without the need for skeleton arguments.

- A decision on the matter is anticipated to be received within six months, compared to the average 12 months for a standard opposition.

Standard oppositions

These will continue to be used for any opposition on grounds other than those under Sections 5(1) or 5(2) TMA, or where the opponent wishes to rely on pending applications or more than three registered trade marks. In addition, the official filing fee for filing a standard opposition that relies solely on Sections 5(1) or 5(2) TMA, will also be reduced to £100 so that parties wishing to rely on these grounds but who want to use the standard opposition procedure, are not subject to a cost disadvantage. Where grounds other than Section 5(1) or 5(2) are involved however, the usual official filing fee of £200 will still apply.

Other changes

For the first time, an official fee for filing an appeal to the Appointed Person in *inter-partes* disputes of £250 will be introduced. This is with a view to ensuring that any appeals that are filed are well founded and have at least a reasonable chance of success.

Comment

The new simplified fast track opposition procedure is likely to be welcomed by both brand holders and attorneys alike.

A growing number of oppositions are decided purely on the basis of the similarity of the trade marks and the goods and services in question, and only a small handful of cases really require extensive evidence. However, over time, practice has evolved with the result that parties generally file lots of unnecessary evidence in support of their positions which, in turn, increases the costs for trade mark owners and results in a delay in proceedings being concluded.

The new procedure provides parties with the opportunity to really assess the strength of their case and, if appropriate, to choose the fast track procedure to have the merits of the case decided within a relatively quick period of time, at a fraction of the costs for standard oppositions.

It will be interesting to see how popular the new fast track procedure becomes with trade mark holders, and the extent to which the new simplified procedure is used by businesses and individuals to enforce and protect their rights.

Author:
Gemma Kirkland



BEST

New Methods Tagged Onto Definition of 'Advertising'

Following a reference from the Belgian Cour de Cassation, in *Belgian Electronic Sorting Technology NV v Bert Peelaers and anor.* C-657/11, the Court of Justice of the European Union (CJ) has ruled on the definition of 'advertising', within the meaning of the Comparative Advertising Directive 2006/114/EC (CAD). In particular,

the CJ has confirmed that 'advertising' can be interpreted as including use of metatags and the use of a domain name (as opposed to the mere registration of a domain name).

Metatags are invisible words hidden within a website (in its metadata or programing code, for example) so that when the relevant word is searched for (eg, via Google) the website has the potential to appear nearer the top of the list of search results.

The defendant had registered and used 'bestlasersorter.com' ('BEST' was an acronym of the claimant's company name) and the defendant also used the claimant's name and products as metatags within their website. Both parties were producers of sorting machines and sorting systems incorporating laser technology.

'Advertising' is defined in the CAD as: *"the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations"*. The CAD provides that in order to be non-abusive advertising, a number of conditions must be fulfilled. Examples of these requirements include:

- not being 'misleading' (ie, the advert deceives or is likely to deceive, resulting in a change of economic behaviour of a consumer or injury to a competitor)
- comparing goods/services meeting

the same needs or intended for the same purpose

- not taking unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor.

If an act which is deemed to fall within the definition of 'advertising' fails to meet these criteria, then such act would be deemed to be unlawful. By way of background, under the provisions of the CAD, individual member states may allow brand owners to launch proceedings direct or to designate an administrative body to deal with breaches of the CAD. (In the UK, the government has appointed Trading Standards authorities to initiate proceedings on behalf of traders and consumers.)

In relation to domain name issues, the CJ clarified that the mere registration of a domain name, being a purely formal act, did not fall within the definition of advertising.

The CJ stated that registration of a domain name did *"not necessarily imply that potential customers can become aware of the domain name"*. On the other hand, the use of a domain name was held to amount to 'advertising' within the meaning of the CAD.

The CJ also held that the use of metatags would fall under the CAD.

The CJ said that it was not important that metatags are invisible to the user of a website, highlighting that the CAD covered both direct and indirect advertising. As metatags have the potential to elevate a website within a consumer's search engine results, a consumer may have thought that the defendant's website was linked to the claimant. Therefore, this demonstrated that the use of metatags is capable of affecting the economic behaviour of a consumer.

Commentators have observed that it will

CJ confirms that 'advertising' includes the use of metatags and domain names



be difficult for metatag use to ever comply with the CAD criteria, such as to objectively compare *"one or more material, relevant, verifiable and representative features of a product"*. Further, it appears that if a company wants to cite a competitor brand in a domain name (which it will then actively use), such domain name may itself need to fulfil the requirements of the CAD. These issues will be important for all individuals and companies considering using the name of a competitor or their products within their own brand advertising strategy.

This is an interesting decision that shows the continued struggle to interpret legislation in light of evolving technology. Being a CJ decision, we will follow with interest how this judgment is applied by national courts and also how regulators such as the Advertising Standards Authority in the UK deal with these issues going forward.

Author:
Verity Ellis



Red Alert Decision Tips on Lack of Distinctive Character

Obtaining registration for 'unconventional trade marks', such as colours, shapes, sounds or smells, is notoriously difficult; a common reason for refusal being that such marks lack distinctive character. To be distinctive and fulfil its essential origin function, a mark must depart significantly from the norms and customs of the relevant sector (C-456/01 P and C457/01 P Henkel v OHIM [2004] E.C.R. I-5089). Filing evidence of acquired distinctiveness through use is helpful in overcoming this hurdle.

A useful reminder of the prevalence of this issue can be seen in a decision of the General Court (GC) dated 11 July 2013, T-208/12 Think Schuhwerk GmbH v OHIM [2013] unpublished. The applicant, an Austrian shoe company by the name of Think Schuhwerk GmbH, applied for a CTM for shoes with laces with red tips (aglets) on the ends of shoelaces in class 25 (figure 1, above right).

The examiner refused registration on the basis that the mark was devoid of distinctive character within the meaning of Article 7(1)(b) of the Community Trade Mark (CTMR); this was upheld by the Board of Appeal (BoA), who considered that use of red tips

on the ends of shoelaces did not produce a significantly different impression from the normal design of lace-up shoes and that consumers would perceive the mark as a variant in shoe design, not as an indicator of origin. In an appeal to the GC, the applicant put forward four pleas, arguing violations of Articles 75 and 76 CTMR; misapplication of Article 7(1)(b); and also violation of the principle of equal treatment.

The GC rejected the plea under Article 75, that the applicant had not had an opportunity to comment on the BoA's reasoning in relation to Article 7(1)(a), because it was irrelevant given that the decision had turned on Article 7(1)(b) (see below).

While the applicant acknowledged that shoes and shoelaces exist in various forms and colours in the market, their argument that the BoA had not stated the reasons for its decision was rejected by the GC, who deemed such argument to be more in relation to the substantive issue of whether the sign had distinctive character, not a lack of reasoning.

Further, the GC also rejected the applicant's argument based on Article 76, finding that when examining distinctiveness, the BoA may base its analysis on facts

➤ Think Schuhwerk's CTM application



Figure 1: Think Schuhwerk GmbH application for a CTM for shoes with laces with red tips (aglets) on the ends of shoelaces in class 25.

arising from practical experience generally acquired from the marketing of the product concerned to ascertain that the average consumer would not consider the sign as an indicator of origin, and the BoA does not need to cite specific examples of such practical experience. Notably, the applicant did not provide evidence to prove that the relevant public would consider the red tips as an indicator of origin. The GC also highlighted that originality and novelty were not decisive factors when assessing a mark's distinctive character.

In response to the applicant's plea that the BoA had misapplied Article 7(1)(b), the GC reasoned that the case law in relation to this issue and applicable to 3D and figurative marks, that average consumers are not in the habit of making assumptions as to the origin of goods based on the appearance of products unless the sign departs significantly from the norms or customs of the sector (see our September 2010 newsletter at www.dyoung.com/trademarknewsletter-sep10 for our comment on T-547/08 X Technology Swiss v OHIM), applies in this case for the key reason that the red tips are not independent of the shape of the shoelaces as they 'merge' with the appearance of the designated product. The GC rejected the applicant's assertions that red tips on shoelaces are rare and considered that consumers had an average level of attention in relation to this product. Moreover, the GC rejected the applicant's argument that there was no public interest in preventing a monopoly over the colour red for shoelaces, an argument deemed more relevant to the interpretation of Article 7(1)(c).

Finally, the GC found there was no violation of the principle of equal treatment.

This decision provides a useful reminder to applicants for non-traditional trade marks, of the importance of filing sufficient evidence of acquired distinctiveness through use, to support the argument that the sign serves as an indication of trade origin to consumers.

The GC rejected the applicant's assertions that red tips on shoelaces were rare



Fighting the Fakes in the United Arab Emirates Challenging Counterfeiting On and Offline



To receive your copy of our recently published 'Trade Marks in the GCC States - A Reference Guide', please send your details to Rachel Daniels, Marketing Communications Manager, rjd@dyoung.com.

Dubai's Customs Authority and the Department of Economic Development (DED) are working hand in hand to fight against the importation into the United Arab Emirates (UAE) of fake products in a bid to support brand owners in the UAE and to achieve a business friendly environment.

In the fight to combat counterfeiting, the DED is making regular site inspections to identify illegitimate goods, creating awareness campaigns to educate the public on counterfeit goods and providing workshop training for the authorities to enable them to better identify and distinguish between counterfeit and original goods.

Dubai customs

By having one of the busiest ports in the region (Jebel Ali), the UAE faces an uphill struggle to control the importation and re-exportation of counterfeit products.

Most of the counterfeit products do, in fact, originate from other countries and are imported into the UAE only to be re-exported to their final destination. This activity puts the UAE second place in the world for being responsible for exporting counterfeit goods to the EU.

Notwithstanding the above, it is encouraging for brand owners to note that the UAE Government is ploughing a lot of effort into clamping down on counterfeit activity in this region.

Counterfeit Toyota spare parts seized

In recent months Dubai Customs identified potentially counterfeit Toyota spare parts trying to be imported into the United Arab Emirates (UAE). Toyota determined the goods were counterfeit and filed an official complaint with Dubai Customs claiming infringement of its TOYOTA trade mark. The complaint was upheld and Dubai Customs issued a decision ordering the confiscation and destruction of hundreds of units of counterfeit spare parts.

The UAE Government is clamping down on counterfeit import and export activity



It is pleasing to note that this case was resolved within only a couple of months from the time of filing the complaint to the destruction of the counterfeit spare parts. This should encourage brand owners to enforce their rights and file complaints at Dubai Customs. Customs complaints are a timely, effective, and cost-effective method for the enforcement of IP rights in the UAE.

By providing brand owners with a platform to record their registered trade marks at the Intellectual Property Rights (IPR) Division within Dubai Customs, brand owners can expect Dubai Customs officials to notify them of any suspected counterfeit consignments that go through Dubai's various sea ports and airports.

Online challenges

While the DED is making a concerted effort to remove counterfeit products from the streets, fraudulent activity is now finding its way into social media. Online social media platforms are seemingly being targeted for black market trade and as a result of this, the UAE Government has implemented new measures

to combat online counterfeiting trade.

Government officials are making undercover online inspections, creating teams to specifically monitor online black market trade and setting up hotlines and social media platforms (eg, Twitter) to enable members of the public to report suspected counterfeit activity.

Comment

We do question the severity of the penalties that are currently imposed against infringers in the UAE. Senior officials with the DED are calling for tougher action against counterfeiters who sell potentially dangerous fakes such as car parts and medicines. Perhaps if the government were to implement harsher fines, would-be infringers might think twice.

Authors:

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D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

Dubai for World Expo 2020 Implications for Brand Owners

Word on the sand dunes is that Dubai is in pole position to host the 2020 World Expo. Organised by the Paris-based Bureau International des Expositions (BIE), the World Expo provides a global platform for hosts and participants to share innovation, as well as promote technological advances and cultural diversity. Expo is considered a global economic, cultural and social melting pot. For the host in particular, it can generate an important legacy and serve as a real boost to the country's public image.

The announcement of who is to host Expo 2020 is expected on 27th November 2013. Dubai is in competition with Sao Paulo in Brazil, Yekaterinburg in Russia and Izmir in Turkey to host the event.

There is no shortage of reasons why Dubai is the leading Expo 2020 candidate. The UAE out-ranks all of the other contenders on the World Economic Forum's (WEF) Global Competitiveness Index. The high price of oil has also allowed Dubai to reduce its debt. This has enabled the Emirate to diversify its economy and there is now in place sound infrastructure, an open market and a stable economic climate. It is also a convenient hub for international trade (Jebel Ali port is the third busiest port in the world).

By securing Expo 2020, Dubai's brand



value would be anticipated to increase by US \$8 billion. It is expected that Dubai would receive 25 million visitors during the six month long event and would generate over 270,000 new jobs.

It is fair to say that Dubai is not an Emirate that likes to stand still. If it is successful in its bid to host Expo 2020, it will be the first city in the Middle East to host such a large scale event.

So what does this mean for brand owners and budding inventors? In short, Dubai is already firmly on the map as a region that is fast attracting overseas trade and commerce. Expo 2020 will certainly accelerate new foreign investment and expertise. Brand owners operating already in the region or those businesses looking to enter the Gulf should give serious thought to securing trade mark protection at the earliest opportunity, particularly in a region like the UAE where it can be extremely difficult to enforce an unregistered trade mark right.

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