

D YOUNG & CO TRADE MARK NEWSLETTER^{no.64}

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Events



6-10 November 2012

INTA Leadership Meeting, Orlando, Florida, USA

Jeremy Pennant, Ian Starr, Tamsin Holman and Helen Cawley will be in Orlando for the 2012 INTA Leadership Meeting.

More information: www.dyoung.com/events

Editorial



The most recent edition of this newsletter was issued in early July, just before the Olympics commenced. We hope that everyone enjoyed the games, whether you were ticket holders or watched from the comfort of your homes.

There was certainly a positive effect on morale here in the UK and now we eagerly await the Paralympics, preparations for which are underway as this edition of our newsletter goes to print.

Apparently, a record number of tickets have been sold for the Paralympics so we expect another fortnight of excitement and admiration for the athletes. Enjoy!

In the meantime, I hope you enjoy this collection of articles. You will see that some cases result in uncertainty and raise new questions. Within the offices of D Young & Co this keeps our teams committed to following developments in the law and observing inconsistencies at the Community Trade Marks Office.

Editor:

Jackie Johnson



Article 01

The FRUIT Case Goes Pear-Shaped Fruit of the Loom Inc v OHIM (T-514/10)

This case concerned whether use of the composite mark, FRUIT OF THE LOOM was sufficient to save a registration for FRUIT alone from a challenge on the ground of non-use. This is an interesting question and notwithstanding the supposed harmonised laws within the EU, views differ from country to country even with guidance from a number of cases decided before the Court of Justice of the European Union (CJEU).

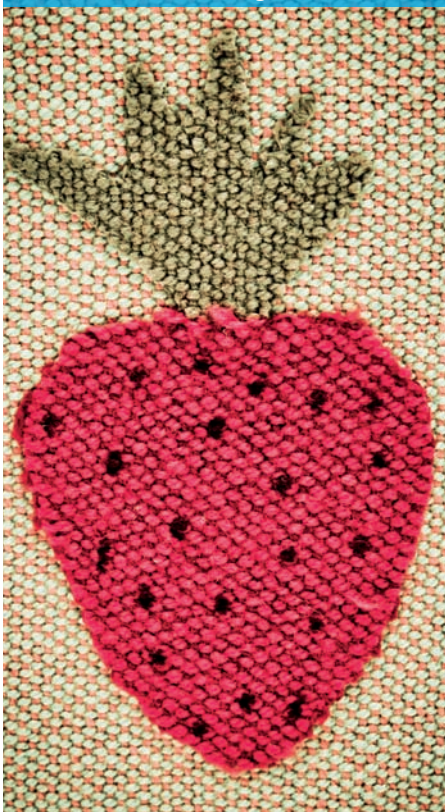
After a challenge by a third party, the registration for FRUIT was cancelled by the Office for Harmonisation in the Internal Market (OHIM) on the grounds of non-use for goods in classes 18 and 25 in 2008. The proprietor showed substantial use of the mark FRUIT OF THE LOOM in various forms and, additionally, provided some use of FRUIT alone including extracts from its website at www.fruit.com which had been active since late 1995.

Notwithstanding the evidence filed by Fruit of the Loom, Inc, the Cancellation Division concluded that there had been no genuine use of the mark FRUIT alone and that the registration should be revoked. This decision was upheld by the Board of Appeal and, on the 21 June 2012, by the General Court (GC) of the CJEU.

The owner's appeal was dismissed on the basis that use of FRUIT OF THE LOOM (both word only and in logo form) did not constitute use of FRUIT or a variation thereof. The Board of Appeal had stated that the phrase FRUIT OF THE LOOM was indivisible and the phrase could not be reduced to the single element FRUIT. They also pointed out that the word FRUIT by itself has a different meaning.

The owner argued that FRUIT is the dominant element of the composite mark and is reinforced by the figurative elements – this was not accepted by the GC who held that the word LOOM was equally important. Further the Court said that the words OF THE LOOM are not in an ancillary position and their addition alters the distinctive character of the word FRUIT. The GC considered whether the use of FRUIT alone was genuine and concluded it was informal, internal use and thus dismissed the appeal.

The phrase FRUIT OF THE LOOM could not be reduced to the single element FRUIT



As readers will be aware it is not uncommon for well known brands to be used primarily, and sometimes always, in conjunction with a house mark.

Could this decision infer that such well known marks might be vulnerable if they are never used alone as separate trade marks in their own right?

In our view, such a conclusion is very unlikely. In the CRISTAL case of Castellblanch v OHIM, case T-29/04 the General Court confirmed that there is nothing in the Community Trade Mark system that obliges use of a trade mark to be on its own, independent of any other. It is acceptable for two or more trade marks to be used simultaneously without altering the distinctive character of the marks.

> Useful links

Full text of the judgment of the General Court:
<http://dycip.com/fruit0612>

- > D Young & Co September 2005 trade mark newsletter no.21, article 'Congratulations ECJ - Have a Kit Kat!' about the proceedings between Mars and Nestlé regarding the trade mark, HAVE A BREAK:
<http://dycip.com/tmnl0905>

Article 02

ONEL v OMEL Genuine Use of a CTM in the Community

> Useful links

D Young & Co article 'The Max Planck Institute Study - Overall Functioning of the European Trade Mark System', author Richard Burton (25 May 2012):
<http://dycip.com/max0512>

"Fruit of the Loom was founded in 1851 by two brothers in Rhode Island, USA... Five years later the Fruit of the Loom brand name was born, inspired by paintings of fruit created by the daughter of one of the company's customers.

In 1871 Fruit of the Loom became official and was registered as trademark number 418. This makes the company one of the world's oldest trademarks and also means it is older than Coca-Cola, the light bulb and even the humble paper bag."

Source: <http://www.fruitoftheloom.eu/imprint2012/en/worldoffruit/history>

The HAVE A BREAK decision related to the distinctiveness of HAVE A BREAK when used as part of the phrase HAVE A BREAK HAVE A KIT-KAT. The analogy, however, is the same. Merely because HAVE A BREAK is always used as part of the longer slogan and in conjunction with the words HAVE A KIT-KAT does not mean that it cannot acquire its own independent distinctive character or be regarded as use of the mark alone in terms of maintaining a registration against a challenge for non-use.

There is a clear case for differentiating the outcome in the FRUIT OF THE LOOM decision; however, we anticipate there will be more challenges along the lines discussed in this article and we will report on developments as they occur.

Author:
Jeremy Pennant



www.dyoung.com/newsletters

This opinion is based on questions put to the Court of Justice (requesting a preliminary ruling) by a Dutch court on the meaning of the term "put to genuine use in the Community" under Article 15(1) of the Community Trade Mark Regulation (CTMR):

1. Must Article 15(1) of the CTM Regulation be interpreted as meaning that use of a CTM within the borders of a single Member State is sufficient to constitute genuine use of that trade mark, given that, had it been a national trade mark, such use would have been regarded as genuine use in that Member State?
2. If the answer to question 1 is no, can the use of a CTM within a single Member State as described above never be regarded as genuine use in the Community?
3. If the use of a CTM within a single Member State can never be regarded as genuine use in the Community, what requirements apply, in addition to the other factors, in respect of the territorial scope of the use of a CTM when assessing genuine use in the Community?
4. Or else, as an alternative to the above, must Article 15 CTMR be interpreted as meaning that the assessment of genuine use in the Community should be carried out wholly in the abstract, without reference to the borders of the territory of the individual Member States (and that, for example, market share (product markets/geographic markets) should be taken as the point of reference)?

The Advocate General recommended that the Court of Justice respond as follows:

- a. Use of a CTM within the borders of a single Member State is not, of itself, necessarily sufficient to constitute genuine use of that trade mark, but it is possible that, when account is taken of all relevant facts, use of a CTM within an area corresponding with the territory of a single Member State will constitute genuine use in the Community.
- b. Genuine use in the Community within the meaning of Article 15(1) CTMR is use that, when account is taken of the particular

characteristics of the relevant market, is sufficient to maintain or create market share in that market for the goods and services covered by the CTM.

The Advocate General is therefore of the opinion that use within a single member state is not necessarily sufficient to constitute genuine use within the meaning of Article 15(1) CTMR but that it is possible that it might be found to constitute genuine use taking into account all other relevant factors. The Advocate General pointed out that, even if a national court were to find that use in a Member State was not enough to constitute genuine use in the Community, that would not prevent it from finding that the use was genuine under national law.

The Advocate General seems to have adopted a compromise between two possible alternative outcomes that does not appear to provide brand owners with a definitive answer regarding the geographical extent of use in the European Union (EU), but rather sits on the fence.

Should the Court of Justice follow the Advocate General's opinion (which it is not bound by but usually follows), the geographical extent of use of a trade mark will remain just one of various factors that national courts should take into account when assessing whether that use is genuine. Opponents may not be able to rely on proof of use in just one Member State of the EU.

Earlier this year, a comprehensive study by the Max Planck Institute suggested that there should be no requirement that a CTM must be used in more than one Member State. The study suggested that genuine use should be assessed on a case by case basis. That position appears to have been adopted by the Advocate General and it remains to be seen whether the Court of Justice agrees.

Author:
Richard Burton



SEVEN SUMMITS

'Seven' not so Lucky for Sport Eybl & Sports Experts GmbH

> Useful links and CTM figurative marks
Full text of the judgment of the General Court
case T-179/11: <http://dycip.com/judgment0512>

> **SEVEN SUMMITS**
Figure 1 - Sport Eybl & Sports Experts GmbH
SEVEN SUMMITS mark

> 
Figure 2 - Seven SpA SEVEN mark

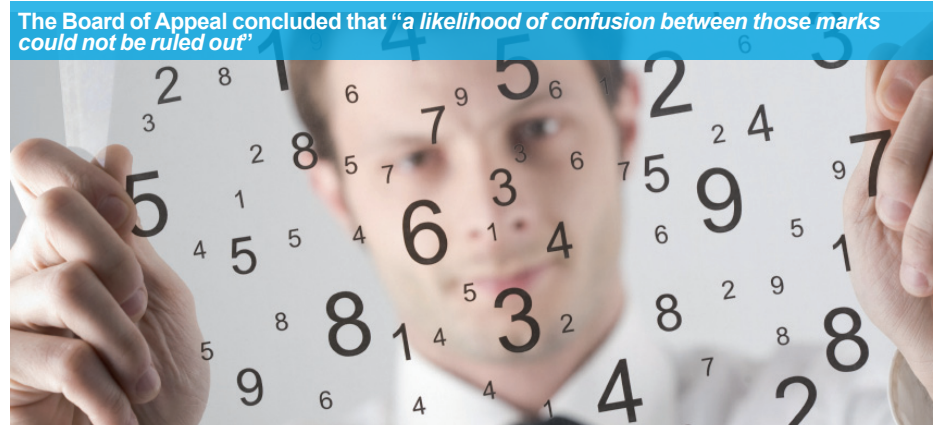
This case is an appeal to the General Court from Sport Eybl & Sports Experts GmbH ('Sports') following the refusal of their trade mark application for SEVEN SUMMITS (Device) for goods in Class 18 based on an earlier trade mark owned by Seven SpA for the trade mark SEVEN (stylised) for goods also covering Class 18.

The Opposition Division had upheld the opposition and refused registration of SEVEN SUMMITS (Device) under Article 8(1)(b) of Regulation 207/2009. Sports appealed this decision but this was also upheld by the Board of Appeal who found that there was "a very low degree of visual similarity, a medium degree of aural similarity and some conceptual similarity between the two marks". It concluded that "Even if the figurative elements of the marks at issue differed, a likelihood of confusion between those marks could not be ruled out because, given the prominent display of the word element 'seven' as well as the fact that the goods covered by the marks at issue are in part identical and in part similar, the targeted public might perceive the goods as belonging to two distinct product ranges but as coming, nonetheless, from the same manufacturer."

Sports further appealed the decision to the General Court by claiming that OHIM had erred in their comparison of the trade marks, contending that "given the overall impression made by the marks at issue, those marks are not visually, aurally or conceptually similar, and there is no likelihood of confusion for the purposes of Article 8(1)(b) owing, in particular, to the very low distinctive character of the element 'seven'".

Sports agreed with OHIM that the goods in question were in part identical and in part similar, and that the relevant public is reasonably well-informed and reasonably observant and circumspect.

Sports did, however, take issue with the Board of Appeal decision, claiming that it had not taken account of the very low inherent distinctive character of the element 'seven'. Sports made references to previous decisions of the Opposition Division and Board of Appeal which had found that numbers generally have



a very low distinctive character, even where the number is present entirely in letters.

Sports argued that numbers are generally used to indicate quantity, weight and serial numbers, but the public is not used to seeing them as trade marks.

Sports claimed that if this decision is upheld, it could have a knock-on effect for later trade marks containing the same number if combined with other elements. Sports also took issue with the Board of Appeal finding that 'seven' was prominently displayed in both trade marks. Finally, Sports claimed that the Board of Appeal had erred in their assessment that consumers might assume that the products are from two different product ranges from the same manufacturer.

In its decision, the General Court held that "even if the Board of Appeal had made no explicit statement as to the inherent distinctive character of the earlier mark, it is nevertheless clear from the proceedings" that it agreed with the Opposition Division who found that the earlier mark had "normal distinctive character".

In connection with the assessment of the element 'seven', the General Court found that the trade mark met the criteria for registration and the comparison of trade marks was correctly made on the basis that the word 'seven' had normal inherent distinctive

character. Sports had not furnished any evidence to advance their argument that the trade mark SEVEN was low in distinctive character.

In dismissing Sports' argument that the Board of Appeal had erred in their global assessment of the likelihood of confusion, the Court clarified that the Board of Appeal did not find that the element 'seven' was dominant in the mark applied for or that the element 'SUMMITS' was insignificant. The Court confirmed that the Board of Appeal approach is consistent with case law such that the "existence of a similarity between two marks does not presuppose that their common component forms the dominant element within the overall impression created by the mark applied for; rather, it is sufficient in that connection that the common component not be negligible".

Finally, the General Court distinguished this case from previous decisions made by the Opposition Division and Board of Appeal claiming that every decision is determined on a case-by-case basis and the cases put forward by Sports could not act as a precedent.

This case demonstrates the current practice by OHIM of a very strict comparison and the fall-back that every case is individual and assessed on its merits; hence OHIM's decisions can often be seen as inconsistent.

Author:
Helen Cawley



EMI v Sky

Now That's What I Call a Balance of Convenience

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> **Missed anything?**
We regularly publish news and updates in between issues of our patent and trade mark newsletters. For up to the minute IP related articles and news please visit www.dyoung.com/knowledgebank

On 25 June 2012, Mr John Baldwin QC (sitting as Deputy Judge of the Chancery Division) handed down his judgment following a hearing between the EMI (IP) Ltd and others v British Sky Broadcasting Group plc and another [2012] EWHC 1644 (Ch).

The action was brought by EMI against Sky following the latter's announcement on 21 March 2012 that it intended to launch an online TV service under the name NOW TV. The proceedings related to both trade mark infringement and passing off (although at the hearing for injunctive relief the passing off claim was not relied upon).

As some readers may be aware (although perhaps less willing to admit), amongst other things, EMI promote and sell serial 'pop' compilation albums under the stylised sign NOW THAT'S WHAT I CALL MUSIC (each new edition of the album being given a consecutive number – 1, 2, 3 etc). In arguing trade mark infringement, EMI relied on their Community Trade Mark for the word mark NOW (CTM Registration No. 7153505) as well as their contention that, over time, they had built up significant goodwill in the NOW name.

EMI sought the following from the Court:

1. An interim injunction preventing Sky from using the name NOW TV (and the corresponding logo) in relation to internet TV services; and
2. An expedited trial.

Sky resisted both requests and sought from the Court a stay of proceedings until such a time as the Office for Harmonisation in the Internal Market (OHIM) had decided upon Sky's application to invalidate EMI's NOW registered trade mark on the basis of alleged non-use.

1. EMI's request for an interim injunction

In relation to the request for injunctive relief, Baldwin QC determined that whilst he believed there was a serious issue to be tried, he was not satisfied that the "*balance of convenience*" (a question considered by the Court when determining whether or not an injunction should be granted) had been made out in EMI's favour. He concluded that there was a certainty of "*real and substantial damage*" to Sky if the injunction were to be granted, compared to the merely speculative loss/damage which may be sustained to the NOW brand if the injunction were to be refused. EMI's argument that irreparable damage would be sustained to the NOW brand was significantly undermined by it having already reached an agreement with Starbucks (HK) Ltd which allows Starbucks to use the name NOW in relation to a TV service. It is interesting to learn that subsequent to the action between EMI and Sky, Starbucks (HK) Ltd has commenced its own action against Sky for trade mark infringement (relying on its CTM for the sign NOW) and passing off.

EMI's further argument that Sky had done little to "*clear the way*" for the launch of its new online TV service under the name NOW TV was similarly dismissed as it was said to be unreasonable to expect a commercial entity to give advance notice to its competitors of an intention to use a particular name. An interim injunction was therefore refused.

2. Expedited trial

Revisiting the principles set out in Daltel Europe Ltd & Ors v Hassan Ali Makki, Baldwin QC commented that expedition should only be granted "*on the basis of real, objectively viewed, urgency*" with various factors being important to consider.

On the facts of the case, it was Baldwin QC's opinion that EMI had not demonstrated any "*pressing need*" for the case to be heard sooner rather than later. This conclusion was reached not least as a consequence of the earlier refusal of an interim injunction, which made redundant EMI's argument that expedition would allow the case to be heard with minimal disruption to the defendant's

proposed launch, which would go ahead before any likely trial date. An expedited trial was refused.

Stay of proceedings

Having already commenced an invalidation action before OHIM against EMI's NOW mark, Sky requested a stay of proceedings on the basis of Article 104(1) of the Community Trade Mark Regulation (207/2009/EC) (the CTMR).

The Court considered Articles 27-30 of the Brussels Regulation, Article 28 providing that "*where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings*". Article 104 provides for specific rules on related actions to the effect that proceedings shall be stayed unless there are 'special grounds' for them being continued. It was therefore for EMI to prove that there were such 'special grounds' in the case, so as to justify the continuation of proceedings.

Baldwin QC was unconvinced that any 'special grounds' existed and held that none of the factors relied upon by EMI (such as their argument that Sky took no steps to "*clear the way*") were such as to "*take the case outside the norm*". Commenting upon EMI's argument that there was a need for commercial certainty, the Judge determined that such an argument was no more persuasive in this case as it may be in many others.

Conclusion of the case

Concluding the judgment, the Judge granted a stay of proceedings.

It is interesting to see how in this case the Court held that the "*balance of convenience*" was in favour of the defendant. In coming to such a conclusion, the Court has reminded trade mark owners of the importance of making use of a mark (or at least showing firm plans for any intended future use) in relation to certain goods or services. As this case has shown, a failure to do so may prove fatal when seeking to obtain injunctive relief on the basis of alleged trade mark infringement.

Author:
Scott Gardiner



IP Translator Decision CIPA Seeks Clarity on use of Class Headings

On 19 June 2012, the Court of Justice gave its keenly awaited decision in the IP Translator case (the Chartered Institute of Patent Attorneys (Trade marks) [2012] EUECJ C-307/10). This was a test case, the purpose of which was to try to establish whether or not it is acceptable to use the class heading for a trade mark application and, if so, whether the class heading equates to all goods and services within that class.

In 2003, OHIM had issued a Communication (No 4/03) confirming that applicants could use class headings when filing trade mark applications and that

“the use of all the general indications listed in the class heading of a particular class constitutes a claim to all the goods or services falling within this particular class.”

It was acknowledged that this was not a practice that is accepted by all national offices.

This case began with The Chartered Institute of Patent Attorneys (CIPA) filing a UK trade mark application to register IP TRANSLATOR in class 41, using the class heading, *“education; providing of training; entertainment; sporting and cultural activities”*.

The UK Office refused the application on the basis that the mark was non-distinctive for translation services; translation services were considered to have been covered by the application because the class heading had been used. CIPA appealed to the Appointed Person who referred three questions to the Court of Justice.

Question 1: *“Is it necessary for the various goods or services covered by a trade mark application to be identified with any, and if so what particular, degree of clarity and precision?”*

“Directive 2008/95 must be interpreted as meaning that it requires the goods and services for which the protection of the trade mark is sought to be identified by the applicant with sufficient clarity and precision to enable the competent authorities and economic operators, on that basis alone, to determine the extent of the protection conferred by the trade mark.”

Question 2: *“Is it permissible to use the general words of the class headings of the [Nice Classification] for the purpose of identifying the various goods or services covered by a trade mark application?”*

“Directive 2008/95 must be interpreted as meaning that it does not preclude the use of the general indications of the class headings of the Nice Classification to identify the goods and services for which the protection of the trade mark is sought, provided that such identification is sufficiently clear and precise.”

Question 3: *“Is it necessary or permissible for such use of the general words of the Class Headings of [the Nice Classification] to be interpreted in accordance with Communication No 4/03 ...?”*

“An applicant for a national trade mark who uses all the general indications of a particular class heading of the Nice Classification to identify the goods or services for which the protection of the trade mark is sought must specify whether its application for registration is intended to cover all the goods or services included in the alphabetical list of that class or only some of those goods or services. If the application concerns only some of those goods or services, the applicant is required to specify which of the goods or services in that class are intended to be covered.”

With regard to these questions and the responses given by the Court of Justice,

It is welcomed that the Court has confirmed that a specification of goods and services should be sufficiently clear and precise.

It is also helpful to know that the general indications of class headings can be used in some circumstances, although the position remains unclear as to which general indications will be considered sufficiently clear and precise. By way of example, *“headgear”* (class 25) would appear to have a clearer meaning than *“cultural activities”* (class 41).

The answer to the third question is less than helpful and the Court, by referring to the alphabetical list, has confused matters.

The Court has said that an applicant using a class heading must confirm whether they wish to cover all of the goods and services *“in the alphabetical list of that class”*.

The problem here is that each *“alphabetical list”* (of the Nice classification) is not exhaustive and indeed some are broader than the class headings and others are narrower.

Consequently, covering all the goods and services in that list is not necessarily equal to covering all the goods and services that could be classified in that class.

The position is not satisfactory. The UK Trade Marks Registry has not yet confirmed a new practice following the decision. OHIM has introduced a practice for any new application that uses the class heading, informing applicants that they have to make a declaration if they want to ensure that the application extends to all of the goods and services in the alphabetical list; otherwise, the literal meaning of any general indication will

> **Useful links**

D Young & Co article 'IP Translator - Court of Justice Judgment', author Ian Starr, with link to the full judgment (20 June 2012):
<http://dycip.com/iptranslatorjun12>

> D Young & Co article 'IP Translator - Advocate General's Opinion', author Ian Starr, with links to the full text of the Advocate General's Opinion C-307/10 (29 November 2011):
<http://dycip.com/iptranslator1111>

> Partner Jeremy Pennant gives his opinion on the case in 'Intellectual Property Magazine' (30 November 2011):
<http://dycip.com/IPMagazineJBP>

Court of Justice notes that goods or services covered by a trade mark application should be identified with "sufficient clarity and precision" to allow the relevant authorities to "determine the extent of the protection conferred by the trade mark"



be applied. Going forward, it will be possible to tick a box to confirm this rather than making a declaration, but the effect is the same.

With respect to existing Community trade mark registrations and applications, OHIM has indicated in its Communication No 2/12 (of 20 June 2012) that it will consider that the intention of the applicant was to cover all the goods or services in the alphabetical list (although whether that is legally permissible is probably for a further reference).

Bearing in mind that the alphabetical list is not exhaustive, OHIM's approach does not appear to be ideal. Certain general indications of class headings are sufficiently unclear that, from a literal meaning, they could be considered to extend to goods or services that rightly fall within a particular class, but that are not itemised within the alphabetical list. This could mean that protection is narrowed as a result of a mark being considered to cover only all the goods and services within the alphabetical list. Conversely the alphabetical list may include

goods or services not within the class headings at all and so there is no clarity or precision (and quite possibly impermissible broadening).

Hopefully, the position will not remain quite so lacking in clarity and precision for too long.

OHIM's Convergence Programme Working Group has been developing the introduction of "Class Scopes" which will be "sufficiently specific" and help resolve the conflict between OHIM and national offices on the use of class headings.

This project is to be concluded by the end of the year.

The Appointed Person has also to review this case in light of the Court's decision and a

re-referral to the Court is not unheard of. In the meantime, we encourage any applicants to be careful in the drafting of specifications of goods and services.

It will sometimes be worthwhile to use the class heading but also to add reference to any specific goods and services of importance to the business.

Please contact your usual D Young & Co advisor in this regard.

Author:
Jackie Johnson



Useful links:

Nice classification of goods and services:

<http://dycip.com/niceclassifications>

D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

Strengthening our Team Trade Mark Group Associate Appointed August 2012

Congratulations to Richard Burton, who was officially entered onto the ITMA Register of Trade Mark Attorneys on 11 July 2012 and was appointed an Associate within our Trade Mark Group.

Richard's career started within D Young & Co in 2006 as a trainee trade mark attorney, having completed his LLM Masters Degree in Intellectual Property at the University of Southampton.

Richard's appointment further strengthens a team highly acclaimed for the provision of top tier trade mark services and we wish him every success in his career with us at D Young & Co.

Trade Mark Group Exam Success 2012



Trade Mark and Dispute Resolution & Legal Groups

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