

# D YOUNG & CO TRADE MARK NEWSLETTER *no.88*

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## IP & Brexit

### How will the UK exit from the EU impact on UK and European trade mark and design law and practice?



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Welcome back to those who have been enjoying a well-deserved summer holiday. It certainly has been a very busy summer, especially if you enjoy sport. In this edition, we explore in more detail the implications of 'Brexit' and consider design law post 'Trunki'. We also review an important decision on blocking injunctions for brand owners and internet service providers. We also look at 'genuine use' and whether end users are really all important. We are looking forward to seeing friends and colleagues soon and will have representatives at MARQUES and the INTA leadership meeting. Finally, huge congratulations to Wendy Oliver and Jennifer Heath on their exam success – well done!

Editor:  
Helen Cawley



## Events



20-23 September 2016

### MARQUES conference, Alicante Spain

Trade mark group partners Jeremy Pennant and Matthew Dick and dispute resolution & legal group senior associate Anna Reid will be attending the 30th Annual MARQUES conference, themed: "TRADEMARKS v BRANDS".

15-18 November 2016

### INTA leadership meeting, Florida US

Trade mark group partners Jeremy Pennant and Helen Cawley will be participating in the INTA leadership meeting, which takes place in Hollywood, Florida.

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## IP & Brexit

# How will the UK exit from the EU impact on UK and European trade mark and design law and practice?

In this article we address some common questions about how the UK's exit from the EU (Brexit) will impact on intellectual property rights, particularly trade mark and design rights.

Though the full implications of Brexit remain unclear at present, we will continue to monitor developments closely and will provide timely updates as soon as the legislative position is addressed by the UK and EU authorities.

### Your Brexit questions

Please do get in touch if you have any questions or concerns, either by contacting your usual D Young & Co representative, or by emailing us at [brexit@dyoung.com](mailto:brexit@dyoung.com).

### What has changed?

It is important to know that currently there is no change to EU intellectual property rights or laws. In particular, the scope, effectiveness and enforceability of unitary EU-wide trade marks and designs remains the same, both within the UK and the other 27 member states. This will continue to be the case until such time as the UK actually leaves the EU, which will occur at the end of a period of negotiation likely to take at least two years.

### Will D Young & Co be able to continue representing clients for EU trade mark and design matters and before the EU Intellectual Property Office (EUIPO)?

Yes. Nothing will change with respect to rights of representation for at least the next two years and we have already taken steps to ensure that we will continue to be able to represent clients before the EUIPO (formerly OHIM) following the UK's exit from the EU in due course. These include both the recent opening of our Munich office and ensuring that our attorneys and solicitors are suitably qualified to act.

### What will happen to existing EU trade marks?

Once the UK's departure from the EU has been finalised, existing EU trade marks (EUTMs) will no longer provide coverage in the UK.

In the meantime, EUTMs will continue

to cover the UK. Although the position is unclear at present, we anticipate that appropriate legislation will be implemented to ensure that such rights continue to have effect in the UK, for example, by converting existing EUTM rights to UK national rights, enjoying the same priority or filing dates.

It is important to be aware, however, that where use of an EUTM takes place only, or predominantly, in the UK, such use is unlikely to support an EUTM against potential revocation in the longer term.

We would therefore encourage EUTM owners to review the territorial scope of their usage, with a view to making strategic supplemental national filings where appropriate.

### What will happen to existing seniority claims in EU trade marks?

Any existing seniority claims in a EUTM based on national rights in the UK will cease to have effect from the date the UK exits the EU. All other seniority claims will remain unaffected.

EUTM owners are advised to keep any UK national right used in support of a seniority claim in force to ensure the best protection for the trade mark in the UK. Where UK national rights may have already been allowed to lapse following a seniority claim at the EUIPO, we anticipate that legislation will be implemented to ensure that the current EU rules for restoring a national right following the lapsing of a seniority claim will be followed, thereby bringing the lapsed UK national right back into force.

### What will happen to international registrations based on an EU trade marks?

The validity of any existing international registration (IR) based on an EUTM will be unaffected by the UK's exit from the EU.

Once the UK does leave the EU, however,

# INFLUENCING THE FUTURE OF IP IN EUROPE

We are a strong voice within professional committees, driving and influencing IP decisions following the UK vote to leave the EU.

Share your questions or concerns with us at [brexit@dyoung.com](mailto:brexit@dyoung.com).



UK based companies looking to file new IRs based on an EUTM will be required to prove they have a real and effective commercial establishment in an EU member state in order to rely on the EUTM as a base mark for the IR.

If a UK company cannot fulfil this requirement, UK companies looking for protection in the EU via the IR system are advised to first file a UK application and use this as a basis for the IR, designating the EUTM.

## What will happen to international registrations designating a EU trade mark?

Any existing IR designating a EUTM will most likely need a separate UK designation following the UK's exit from the EU; however, it is likely that legislation will be implemented to address this point, allowing conversion of the EU designation of the IR into a UK national designation, without loss of priority or filing date. Any new IRs filed after the UK's exit from the EU will need to designate both the EUTM and the UK in the IR in order to obtain full protection in these countries.

## What will happen to existing Community design rights?

As with EUTMs, existing registered Community designs (RCDs) will no longer be effective in the UK after the UK's actual exit. Similarly, it is anticipated that transitional provisions will be introduced so as to provide for national UK registered designs to co-exist alongside residual RCDs.

After the UK's exit from the EU, Community unregistered design rights will cease to apply in the UK. Whilst there is already a separate UK national unregistered design right, this differs from the Community right in a number of respects. In particular, the UK right protects the shape and configuration of a product, whereas a Community unregistered design right covers the appearance of a product, including features such as colours, texture and ornamentation. The UK Government will therefore need to consider whether to legislate so that the national right is extended to include the additional features currently covered by the Community right, thereby closing the potential gap in protection.

Crucially, until the UK leaves the EU, existing EUTMs and RCDs will remain effective



## What action should be taken in relation to existing registrations and new applications?

Until the UK actually leaves the EU, existing EUTMs and RCDs will remain fully effective and enforceable.

In terms of filing new trade marks or designs during this transitional period, however, we recommend filing both a EUTM or RCD application along with a separate UK national application. Doing this will provide greater certainty in relation to long-term protection in the UK, and may also avoid the need to convert EUTMs in due course. In addition, we advise continuing to maintain any UK national registrations which may already exist.

## Will IP contracts such as EU-wide licences be affected?

We recommend conducting a review of any IP-related agreements, such as licensing arrangements, which involve EUTMs, RCDs or where the territory is specified as the EU. Unless the agreement expressly deals with the prospect of countries leaving the EU (which is unlikely), the issue of whether a particular agreement will still cover the UK post-Brexit will be open to interpretation. In general, unless there is anything in the contract to contradict it, it is likely that such agreements (where English law is the governing law of the contract) would be construed as still including the UK, on the basis that the parties intended to include the UK at the time of entering the

contract. It is important to note, however, that the position for any given contract will always depend on the circumstances of the particular agreement in question, hence the importance of reviewing such contracts, taking specific advice and potentially entering variation agreements if required.

## To what extent will the principle of 'exhaustion of rights' continue to apply to trade marks and designs?

At present, once goods have been put into circulation in the European Economic Area (EEA) by or with the consent of the rights holder, the relevant trade mark and design rights are said to be 'exhausted' and the rights holder cannot prevent further free movement of the goods within the single market (unless there are legitimate reasons such as a change in condition of the goods).

The extent to which exhaustion of rights will continue to apply to the UK will largely depend on whether or not the UK remains a member of the EEA (which currently includes all member states of the EU, as well as Iceland, Liechtenstein and Norway). However, if the UK leaves the EEA or if the UK Government takes a restrictive view on international exhaustion, it is possible that rights holders may be able to restrict imports coming into the UK from the EU, and vice versa.

## Authors:

D Young & Co trade mark & design groups



# Design after 'Trunki' UKIPO clarifies scope of protection for UK designs in DPN 1/16

**T**he UK Intellectual Property Office (UKIPO) has issued a rare 'Designs Practice Note' to provide guidance to applicants in the light of the judicial comments made in the recent Supreme Court decision in the 'Trunki' case.

## Scope of protection

As part of the Trunki decision, the Supreme Court justices commented that, in relation to a registered Community design (RCD), the scope of protection conferred by the registered design had to be construed from the drawings/photographs alone. This is because EU design law does not allow the meaning of the drawings/photographs (the 'representations' depicting the design) to be altered by any written statement (eg, written disclaimer or limitation) included on the representations or on the application form filed with the RCD application.

This is probably a pragmatic restriction imposed by the European Union Intellectual Property Office (EUIPO) in order to remove the need to have to translate any written statement into all of the official languages of the member states of the European Union.

**Without the assistance of a written statement, there can be ambiguity (as there was in the Trunki case) as to whether the design that is protected by an RCD comprises just the 3D features of shape and configuration, or the 3D features 'and more'.**

For example, the representations may show a 3D product which has 2D surface ornamentation in the form of a depicted tonal contrast between different parts of the product, and it can be unclear whether the 2D surface ornamentation is or is not to be construed as a claimed design feature, in combination with the 3D shape and configuration.

## Trunki demonstrated the importance of care in filing design registrations



If the representations show just a 3D shape with the product having a clear or empty surface which is free of ornamentation, it can be unclear whether the absence of ornamentation is being claimed as a design feature.

## Use of line drawings

The comment from the Supreme Court was that line drawings offer the best prospect for protecting the pure 3D shape of a product, but the justices did not find an answer (in the context of an RCD under EU design law) to whether line drawings, which inherently do not show any 2D surface ornamentation, do or do not mean that the absence of 2D surface ornamentation is a claimed feature of the registered design.

An answer may now be available nationally in the UK by the parallel option of applying for a national UK registered design under national UK design law and procedures.

## UK registered designs

The national UK route has always been available in addition to the EU route of an RCD application, but the national UK route has been less popular since the EU route first became available in 2003.

The national UK route may now be heading for a renaissance in the light of the new guidance provided by the UKIPO in its recent Designs Practice Note (DPN) 1/16, and also

## Useful links

*Trunki loses Supreme Court appeal:  
PMS International Group Plc v Magmatic  
Ltd [2016] UKSC (09 March 2016):  
<http://www.dyoung.com/article-trunkidecision>*

*Supreme Court Trunki decision  
09 March 2016 (pdf):  
<http://dycip.com/trunkidecision>*

*DPN 1/16: Guidance on use of  
representations when filing registered design  
applications: <http://dycip.com/dpn1-16>*

because applicants may wish to revert to securing registered design protection in the UK under national UK law instead of under EU law, in the light of the Brexit vote for the UK to leave the European Union in the next few years (see the article opposite for our thoughts regarding design rights and Brexit).

## UKIPO DPN 1/16

The advice from the UKIPO in the recent Designs Practice Note is brief and to the point, but it should be effective in ensuring that a UK registered design is interpreted as covering only 3D shape, and not some combination of 3D shape with the presence (or positive absence) of 2D surface ornamentation.

The advice is that the UK registered design application should be prepared and filed including a written statement that "protection is sought for the shape and contours alone".

This statement will appear on the Certificate of Registration and will be used when interpreting the scope of design protection conferred by the UK registered design.

For further information, or to discuss your design strategy with a member of our design team, please do get in touch or visit our website design services page: [www.dyoung.com/designs](http://www.dyoung.com/designs).

**Author:**  
**Paul Price**



# European design law

## D Young & Co publishes our collection of European design case summaries

**W**e are pleased to announce the publication of our European Design Law book. This handbook is an invaluable reference guide to key decisions in a fast moving area that has particular relevance to the fashion, food and beverage, technology and other sectors which thrive on design and innovation. It features a selection of design law case summaries including decisions of the Court of Justice and General Court, important European Union Intellectual Property Office (EUIPO) Board of Appeal decisions, as well as notable UK infringement decisions.

### Significant design decisions

Hot on the heels of the 2016 headline UK Supreme Court 'Trunki' case (PMS International Group v Magmatic Ltd), the book highlights significant cases that are relevant to businesses and their strategies for protecting and enhancing their design portfolios. Other notable cases included in this publication are the leading Court of Justice case Pepsico v Grupo Promer Mon Graphic (Metal Rappers) and UK infringement decisions P&G v Reckitt (Air Freshener), Dyson v Vax (Vacuum Cleaner) and Samsung v Apple (Tablet Computers).

With its easy digestible format, this book will be particularly useful to anyone with an interest in product development and commercialisation.

Cases are categorised into nine sections covering the key design subject areas:

protection and scope, technical function, the informed user, overall impression and individual character, complex products, conflict with other IP rights, and relevant prior art.

### Illustration by Adrian Johnson

D Young & Co was delighted to work with British graphic artist Adrian Johnson to design the book's cover illustration. Adrian is known for his economical, highly crafted graphic work. His reductionist approach, breaking down ideas and concepts into their purest form, goes hand in hand with D Young & Co's aim to produce a clear and concise guide to this complex area of the law.

The book is co-edited by Richard Willoughby and Matthew Dick, both partners at D Young & Co LLP. Richard Willoughby comments: "Following the high profile UK Supreme Court decision in Trunki earlier this year, interest has never been greater in design law and practice than it is now. We hope that our single-volume guide to important European cases in this developing area of IP law will prove to be a useful reference tool and of interest to our clients, in-house counsel, design attorneys and businesses generally."

### Client copies of this publication

Copies of the book will be posted out to our clients in September 2016.

### Author:

Rachel Daniels



D Young & Co announces the publication of our 'European Design Law' book



# UK design fees

## Effective 1st October 2016

### UK design fees 01 October 2016



**A** reduction in official fees charged by the UK Intellectual Property Office (UKIPO) for registered designs is likely to come into effect on 01 October 2016. This reduction was foreshadowed earlier this year in the UK Government's response to a public consultation on whether to change the regime of official fees for UK registered design applications and granted UK registered designs.

It is now known that, subject to the government implementing the necessary legislation, the reduction in official fees will come into effect on 01 October 2016.

Among other changes, the official renewal fees (payable every five years) will be reduced:

	Current official renewal fee	New official renewal fee (01 Oct +)
1st renewal (5th anniversary)	£130	£70
2nd renewal (10th anniversary)	£210	£90
3rd renewal (15th anniversary)	£310	£110
4th renewal (20th anniversary)	£450	£140

### Actions for design right owners

This presents a planning opportunity for proprietors of existing UK registered designs which are coming up for renewal later in 2016. Assuming that the renewal fee is due on or after 01 October 2016, you may wish to avoid paying the renewal fee early (at the existing, higher rate) and delay paying until after the renewal fee reduction has come into force.

### Author:

Paul Price



# Fake goods online

## Court of Appeal confirms blocking injunctions

### Case details at a glance

**Jurisdiction:** England and Wales

**Decision level:** Court of Appeal

**Parties:** Cartier International AG, Montblanc-Simplo GMBH, Richemont International SA and British Sky Broadcasting Limited, British Telecommunications plc, EE Limited, TalkTalk Telecom Limited, Virgin Media Limited and The Open Rights Group

**Citation:** [2016] EWCA Civ 658

**Date:** 06 July 2016

**Full decision:** <http://dycip.com/EWCA Civ658>

The Court of Appeal has upheld the High Court's decision to grant orders requiring five internet service providers (ISPs) to block access to certain websites selling counterfeit goods.

### Background

While it has long been common practice for copyright owners to utilise blocking injunctions to compel ISPs to block access to file sharing websites that infringe their copyright works, blocking injunctions are now being sought for infringement of trade marks.

In the High Court decision, the judge found that it had jurisdiction to make such an order in an action brought by a trade mark owner, and that it was appropriate to make the order in that instance. Furthermore, the judge held that the ISPs should bear the costs of implementing the blocking order. The ISPs appealed to the Court of Appeal claiming that, amongst other things, they should not be subject to such an order, as they were not alleged to be wrongdoers; that the court had no jurisdiction to make such an order; that the orders made were disproportionate; and that the judge fell into error in deciding the issue of costs.

### Jurisdiction

The ISPs contended that the court did not have jurisdiction to grant website blocking orders in cases involving infringement of registered trade marks. The Court of Appeal did not agree, finding (as the judge at first instance had) that the IP Enforcement Directive and section 37 of the Senior Courts Act 1981 provided the High Court with a basis on

which it could grant an injunction against an intermediary, who was not an infringer, but whose services had been used by a third party to infringe a registered trade mark.

### Principles to be applied

#### Effectiveness

The judge in the High Court identified several principles that must be applied when considering whether to make a website blocking order. One of these principles, the requirement for 'effectiveness', remained in dispute. The ISPs contended that a remedy should not be granted if it would not be effective, and that it was incumbent on the claimants to show that the order sought would achieve a significant reduction in the overall levels of access to infringing content. While the court did accept that blocking access to a website is less likely to be proportionate if there are a large number of alternative websites which are likely to be equally accessible and appealing to the interested user, it found that it would be "absurd" if rights holders seeking injunctive relief against counterfeiters were required to prove that the relief would be likely to reduce the overall level of infringement of their trade marks.

#### Proportionality

The ISPs argued that a website blocking order was not proportionate in this case because, for example, of the costs of implementing such an order, of the fact that there was no evidence blocking websites would achieve any material benefit and the fact that ISPs were not 'best placed' to bring the infringing activities to an end.

The court rejected these arguments, explaining that the law already provided sufficient safe

guards for ISPs in relation to potential trade mark infringement, and it was commonly accepted that ISPs are not required to monitor the activities taking place on target websites. Overall, the court held that it was proportionate to grant blocking injunctions in this instance and that, bearing in mind that the ISPs generated profits from the services provided, the ISPs should be liable for the cost of implementing the injunction (although one judge of the three dissented on this point).

### In short

The Enforcement Directive gives rights holders the right to apply for an injunction against an ISP whose services are being used by a third party to infringe **industrial property rights**, and commentators have recognised that this may lead to cases being brought for infringement of other IP rights, such as registered designs.

More generally, it will be interesting to see whether this decision leads to calls for other methods of disrupting online infringements in future, for example, 'de-ranking' search results (for example, where an internet user inputs "replica Cartier" and no search results are returned).

The Court of Appeal held that blocking injunctions should be granted in this instance



### Useful link

Fake goods online: Court agrees websites selling counterfeit goods should be blocked, Anna Reid, January 2015: [www.dyoung.com/article-fakegoods0115](http://www.dyoung.com/article-fakegoods0115)

### Author:

Claudia Rabbitts



# Genuine use

## Are sales to end consumers necessary?

**T**he General Court (GC) has confirmed that there is no 'end consumer' test for assessing genuine use, nor a need to have physically launched products in the marketplace.

Proving use of a registered trade mark can often be difficult and onerous; however, the recent GC decision in *Fruit of the Loom, Inc v EUIPO* provides helpful guidance in determining whether use is genuine if it has not been made to the end consumer.

### Background

Fruit of the Loom, Inc own a European Union Trade Mark (EUTM) for FRUIT in respect of 'clothing, footwear, headgear'. Takko Holding GmbH applied to cancel the registration on the grounds of non-use. Fruit of the Loom submitted evidence which included use of the word FRUIT as a stand alone element in preparatory works for the launch of a new clothing range, along with evidence that professionals within the retail sector had seen these preparatory works.

The Cancellation Division and Board of Appeal of the European Union Intellectual Property Office (EUIPO) both revoked the registration holding that the evidence submitted did not show genuine use of the FRUIT registration. In particular, it was held that use of FRUIT in preparatory works for the new clothing range only showed use of the registration in an ancillary way, and use of the word FRUIT on small labels stitched onto garments would not be noticed by consumers. It was further held that Fruit of the Loom had not actually offered the goods in question to end consumers because the new clothing range was never launched. Therefore, the use that had been made of the registration could not be considered genuine.

### GC judgment

The GC annulled the earlier decisions confirming that it is essential to consider whether the use that has occurred is warranted in the relevant sector as a means of creating or maintaining market share. However, there is no requirement that all use of the trade mark be directed towards end consumers.

There is no requirement that all use of a trade mark be directed towards end consumers



The relevant public includes not only end consumers but also specialists, industrial customers and other professional users. In the retail sector, it is common to direct commercial acts towards professionals in the retail sector and particularly at resellers. Therefore, use of a trade mark directed at professionals within the retail sector may be genuine.

The Court of Justice of the European Union has previously held that preparations to market a product can constitute genuine use; therefore, participation in trade fairs or other advertising of a trade mark are acts capable of showing that genuine use of a trade mark has been made.

In this case, the GC held that evidence showing Fruit of the Loom had attended a trade fair to market clothing items bearing the FRUIT trade mark registration could be deemed genuine.

The fact that the clothing range never launched was irrelevant to the question of whether the use that had occurred could be considered genuine. According to the GC "marketing activities invoked to establish genuine use of a mark are capable, at the time they are undertaken...of creating an outlet for the goods or services concerned, [and] subsequent circumstances may, in principle, not be taken into account when assessing whether there has been genuine use of that mark" (paragraph 58 refers). In conclusion, the GC ruled that a decision not to launch a product for strategic or economic

reasons is not in itself, a decisive factor in determining the question of genuine use.

The marketing of products to professionals within the relevant market sector may be taken into account in assessing whether genuine use of a trade mark has been made.

### In short

The question of genuine use must take into account all relevant factors for the market in question; Preparations to use a trade mark may show genuine use, if the use that occurs guarantees the identity of the origin of the goods, even if such use is not made to end consumers, and there is a decision which ultimately stops the products from being launched into the marketplace.

**Author:**  
Gemma Kirkland



# D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

## Exam success Wendy Oliver & Jennifer Heath

**W**e are delighted to report exam success for D Young & Co Trade Mark Group members Wendy Oliver and Jennifer Heath.

### Wendy Oliver: Trade Mark Attorney



Having joined the firm in 2000 as a trade mark paralegal, we are pleased to announce that Wendy Oliver has qualified as a

Registered Trade Mark Attorney and European Trade Mark Attorney. As a participant of our in-house training programme, Wendy trained for qualification entirely with D Young & Co, building on her wealth of experience as a paralegal working across a wide range of contentious and non-contentious matters.

Wendy has particular experience of conducting trade mark and design audits, ownership changes and evidence projects such as reputation and acquired distinctiveness.

Wendy also regularly provides trade mark and design advice and guidance at exhibitions and events for start ups from a variety of industry sectors.

### Jennifer Heath: Trade Mark Assistant



Trade Mark Assistant Jennifer Heath has passed the Queen Mary School of Law's Certificate in Trade Mark Law and Practice with

distinction. This postgraduate qualification demonstrates an understanding of national, European, and international trade mark law, and is designed for trade mark practitioners.

Jennifer has experience across a range of contentious and non-contentious commercial and IP matters, having assisted both D Young & Co's Dispute Resolution & Legal Group and Trade Mark Group.

A regular contributor to this newsletter, Jennifer specialises in trade marks, designs and domain names, and has a particular interest in how intellectual property strategies support innovation.

Congratulations to Wendy and Jennifer, and our best wishes to them both.

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Rachel Daniels



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