

# D YOUNG & CO TRADE MARK NEWSLETTER *no.96*

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## The London Taxi Corporation v Frazer-Nash Appeal dismissed

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Welcome to our January 2018 trade mark newsletter.

As we welcome in the New Year, we look forward to working with our clients and colleagues again in 2018 and wish all our readers a happy and prosperous New Year!

We hope that 2018 brings new opportunities for us all and we look forward to catching up with friends, clients and colleagues at the many trade mark and brand related events coming up during the year. We will be attending INTA in the Spring and would be delighted to hear from readers who would like to arrange a meeting.

We hope that you find this edition of interest and encourage you to subscribe to receive further copies directly by email or post as detailed below.

The D Young & Co trade mark team, January 2018

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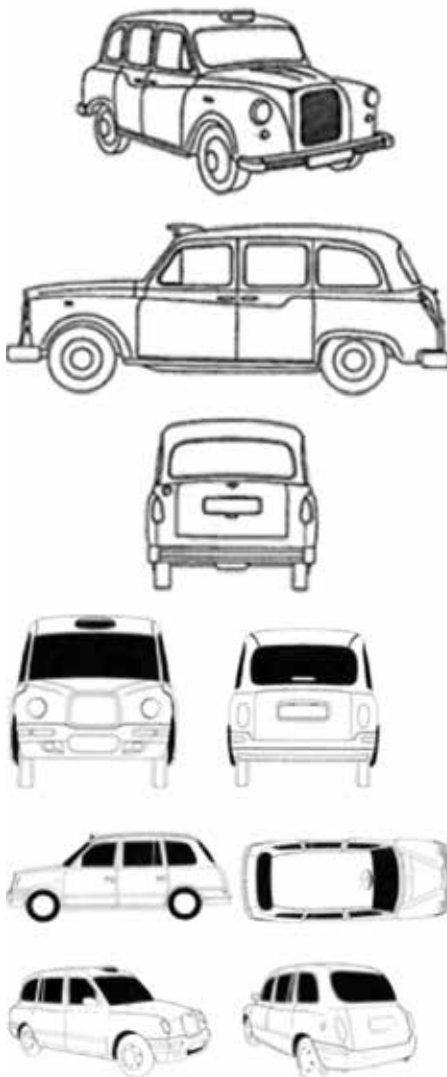


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3D trade marks / infringement

# The London Taxi Corporation v Frazer-Nash Appeal dismissed

In our March 2016 newsletter<sup>1</sup> we reported on the High Court decision in the UK between The London Taxi Corporation Limited (LTC) and its claim for trade mark infringement against Frazer-Nash Research Limited (FNR) and Ecotive Limited (Ecotive). LTC owned UK and EUTM registrations for three-dimensional trade marks as shown here:



The judge at first instance not only dismissed the claim for infringement (and the allegation of passing off) but also went on to hold that the registrations were invalid. LTC appealed (on no less than 26 grounds!) and the Court of Appeal has now issued its decision. In

a judgment which considers the validity of 3D shape marks amongst other issues, the original decision was upheld with the court confirming that the LTC trade marks were invalid for lack of distinctive character.

**Issue 1 - Inherent distinctive character**

Inherent distinctive character is a necessary condition for registration in the case of a mark consisting of the shape of a product. The shape, to be registrable, must be one that departs significantly from the norm or customs of the sector for products of that kind. Further, the mark must be perceived by the average consumer as identifying the origin of the goods. There was much discussion in this case about the average consumer. LTC sought to argue that this should include members of the public hiring taxis. The court disagreed. As LTC's registrations covered class 12 goods it held that the public are users of the service provided by the consumer of the goods; however, ultimately, little was to turn on this point.

The judge at first instance concluded that the marks would have been perceived by the average consumer of taxis as merely a variation of the typical shape of a taxi. The principles for applying this assessment were set out by the CJEU in Joined cases C-344/10 P and C-345/10 P Freixenet SA v OHIM and the subsequent General Court decision in case T-629/14 Jaguar Land Rover Ltd v OHIM. Here, the Court of Appeal held that as a first step it was necessary to determine what the sector is. Then it is necessary to identify common norms and customs, if any, of that sector. Thirdly it is necessary to decide whether the mark departs significantly from those norms and customs.

For some reason LTC did not suggest that the sector should be limited to London licensed taxi cabs. The court held that the sector could include all private hire taxis. This could be any model of saloon car within reason. Having established that, Lord Justice Floyd commented: "When the LTC features are compared with these basic design features of the car sector, each is, to my mind, no more than a variant on the standard design features of a car. A windscreen has a slope, a bonnet has a height and a grille has a

> Notes

1. March 2016 newsletter article "Taxi!" for 3D shape marks: London Taxi Company  
[www.dyoung.com/knowledgebank/articles/taxi](http://www.dyoung.com/knowledgebank/articles/taxi)

> Case details at a glance

Jurisdiction: England and Wales  
Decision level: Court of Appeal (Civil Division)  
Parties: The London Taxi Corporation Ltd (t/a the London Taxi Company) v Frazer-Nash Research Ltd & Anor  
Citation: [2017] EWCA Civ 1729  
Date: 01 November 2017  
Full decision: <http://dycip.com/EWCAciv1729>

The Fairway (left) and the new Metrocab (right)



distinctive character the purposes of their trade marks. The court concluded that the design of the new FNR / Ecotive Metrocab is strikingly different to that of LTC's taxis and accordingly would have reached the same conclusion as the judge at first instance.

Author:

Jeremy Pennant



shape. It is obvious that none of the LTC features is so different to anything which had gone before that it could be described as departing significantly from the norms and customs of the sector. Whether considered individually or as a whole the LTC features are simply minor variants on those norms and customs." On that basis the marks were held to lack inherent distinctive character. So the court went on to look at issue 2.

**Issue 2 - acquired distinctive character**

This was the major area of dispute between the parties. The judge at first instance had already commented on this in relation to 3D shape marks in his decision in *Société des Produits Nestlé SA v Cadbury UK Ltd* concerning the validity of marks depicting the shape only of a four-fingered bar of chocolate sold under the word mark Kit Kat. That case also went to appeal. The accepted test is now:

The applicant must prove that, as a result of the use they have made of the mark, a significant proportion of the relevant class of persons perceives the goods designated by that mark, as opposed to any other mark which might also be present, as originating from a particular undertaking. Put another way, the mark must have come to identify the relevant goods as originating from a particular undertaking and so to distinguish those goods from those of other undertakings.

Accordingly, it is not sufficient for the trade mark owner to show that a significant proportion of the relevant class of persons recognise and associate the mark with the trade mark owner's goods. They must go further and show that they perceive the goods designated by the mark originates with a particular undertaking and no other.

LTC took issue with the conclusion reached in the original decision where the judge accepted that LTC had educated the public that they were the manufacturers of their taxis, but concluded they did not take any steps to educate the public that the shape of their taxis denoted their trade origin. Although the court noted LTC's argument had some force (there was in cab advertising to that effect, it was not persuaded that it would be justified in interfering with the judge's conclusion at first instance. The court went on to say:

In the case of a shape mark, the public are not used to the shape of a product being used as an indication of origin. One must be careful therefore to distinguish this message admittedly conveyed to them by the shape, from that which is necessary to show that the mark has acquired trade mark significance.

The court therefore declined to find that the judge in the High Court came to an incorrect conclusion on this issue, or one with which the Appeal Court could properly interfere.

**Other issues**

Substantial value – The court did not feel that this was critical to the overall decision to dismiss the appeal. If it had then a referral to the CJEU would have occurred as the presiding judge did not regard as entirely clear cut the question of whether, in addressing substantial value, one should take into account or ignore the fact that consumers will recognise the shape as that of a London taxi.

Passing Off - LTC faced the same difficulties in establishing the necessary goodwill for the purposes of a passing off action as it did in relation to showing acquired

**In short**

This decision shows once again the high hurdle that a brand owner needs to reach in terms of seeking protection for three dimensional shapes as trade marks. Although courts often stop short of commenting on whether registered design protection is more appropriate, this is just the latest in a long line of cases which ultimately reach the same conclusion. Here, the LTC taxi shape would have long since passed the end of any design protection. In any event, as can be seen from the pictures here it is doubtful whether this would have been of any assistance to them.

A further point to note is that even if the brand owner can show sufficient distinctive character another significant obstacle may still remain and one where there has been little case law to date. Where the design does depart from the common norms there is a risk the shape will be seen as adding substantial value and thus once again is barred from protection.

# Facebook v Faceholiday

## Social media trends help score triumph for Facebook

➤ *Case details at a glance*  
*Jurisdiction: European Union*  
*Decision level: Opposition*  
*Parties: Facebook Inc, v Faceholiday s.r.o*  
*Citation: B 2 400 136*  
*Date: 27 October 2017*  
*Full decision: <http://dycip.com/002400136>*

A recent EUIPO decision considered the manner in which social media functions today to find FACEHOLIDAY objectionable, even for unrelated services. This case involved an opposition action brought by Facebook, Inc. against Faceholiday s.r.o's figurative EUTM application, as shown:

FACEHOLIDAY

Faceholiday's EUTM application covered a range of services in classes 35, 38, 39 and 42.

The opposition claimed a likelihood of confusion under Article 8(1)(b) and reputation under Article 8(5) and relied on Facebook's earlier EUTM registrations for the well known figurative FACEBOOK logo as well as a number of FACEBOOK word marks.

The opposition was assessed under Article 8(5) only. Facebook submitted a wealth of evidence in support. Whilst it was found Facebook did not succeed in establishing a reputation for all goods and services relied on, the Opposition Division found Facebook enjoyed a high degree of recognition with communication related services in classes 38, 41 and 42 and social introduction and networking services under class 45. The Opposition Division set out that it recognised Facebook's reputation had been confirmed by previous office decisions as well as other national authorities.

Of particular interest in this decision is the assessment of the unrelated services covered by Faceholiday's EUTM application under classes 35, 38, 39 and 42.

The Opposition Division recognised there was a growing trend for advertising on social networks which included forms that divert from the traditional text based or banner adverts, eg, sharing articles, videos and applications.

The influence of social media on the assessment of reputation was significant in this case



On this basis, it found Faceholiday's class 35 services, even those related to the promotion of travel agencies, were sufficiently close to the reputed social networking services such that consumers would make a connection with the earlier mark.

Whilst the Opposition Division recognised that a direct connection could not be readily established with travel and holidays related services in class 39, the high degree of Facebook's reputation and similarity of the signs were found to be key factors to indicate a link would be possible. Further, as the word "holiday" in Faceholiday's mark would strongly allude to the travel services, the remaining distinctive elements in the mark would leave consumers to think the services are offered through Facebook or an integrated platform. The Opposition Division compounded this finding by referring to third party applications being integrated into the Facebook platform which was contained in Facebook's evidence.

With regard to the class 38 and 42 services, these were found to be identical, closely related or at least connected to some extent to the earlier reputed services. With particular reference to the class 42 services, the Opposition Division found as the Facebook platform makes various applications, software and creation tools available to users it would be difficult to deny there was a link between the respective services.

It was concluded that consumers would likely associate the contested mark with Facebook's earlier marks and establish the required "link". Further, it was found the risk of unfair advantage was highly probable.

Whilst it was acknowledged that it was necessary to compare the marks as filed and not as used, the Opposition Division believed evidence filed by Facebook served to confirm that, in the circumstances, the likelihood of harm to Facebook's earlier marks was indeed high.

The opposition was therefore successful in its entirety and Faceholiday's EUTM application was rejected for all the contested services.

It will be interesting to see off the back of this decision the extent to which Facebook is able to successfully oppose other "Face"-related marks, especially those which cover broader goods or services than covered by its existing registrations.

Author:  
Wendy Oliver-Gray



### In short

This decision highlights the extent to which a reputation claim alone can serve to successfully oppose a third party trade mark, even where unrelated goods or services are concerned.

# Godfather beer

## An opposition they couldn't refuse?

Case details at a glance

Jurisdiction: UKIPO

Decision level: Opposition

Parties: Devans Modern Breweries Limited v Paramount Pictures Corporation

Citation: O-548-17

Date: 31 October 2017

Full decision: <http://dycip.com/O-548-17>

A recent UK trade mark opposition raises interesting questions about the extent to which a well-known word mark, in stylised script, can be relied upon to claim similarity (and thereby prevent registration) of a later mark.

Devans Modern Breweries Ltd applied for the mark below for "beer":



Paramount Pictures Corporation opposed the application relying on the marks below, both registered in class 43 and including "bar services"; the mark on the left also included "beer":



Paramount seemingly had a strong case: all its marks were within the five-year grace period for non-use; identical/extremely similar goods/services were covered; and the application featured, as arguably its most dominant element, an almost identical word.

However, Paramount only relied on Section 5(2)(b) of the Act, meaning that any reputation in THE GODFATHER marks should not be taken into account. In fact, neither party filed any evidence, and there was no hearing. Only written submissions were presented.

Unsurprisingly, the hearing officer held that the goods/services were identical or similar. Given their subject matter, he also held that the relevant average consumer was a member of the adult general public with an average level of attention; and that the selection process for the goods/services would be primarily visual (though aural considerations would also play their part).

When comparing the marks, he acknowledged that he should not artificially dissect the marks but consider their distinctive and dominant elements. He felt that the various additional elements in the application (the non-distinctive words SUPER STRONG and HIGH POWER BEER; the stars, oval, decorative banner, three roundel logos) made little if any contribution to its overall impression.

As regards the "bearded gentleman drinking a frothy beer" and the word GODFATHER, he held that rather than being "highly distinctive", an image of a person enjoying the goods at issue was fairly common in such labels. He found that the word GODFATHER, given its size and positioning in the context of the mark as a whole, would make by far the greatest contribution to the overall impression conveyed. The hearing officer found that the opponent's marks clearly comprised what the average consumer would perceive to be the word GODFATHER after the word THE, noting that the puppeteer device in the first mark would not affect that analysis.

Overall the application was deemed to have no more than a medium degree of visual similarity with the earlier marks; a very high degree of aural similarity; and a high degree of conceptual similarity.

The hearing officer noted that it would be unrealistic of him not to agree with the applicant that Paramount's marks would, for a not insignificant number of consumers, remind them of the well-known film trilogy of the same name. Nevertheless, he rejected the applicant's argument that that was sufficient for a finding of conceptual dissimilarity and found that there was a likelihood of both direct and indirect confusion. The opposition was successful.

### Comment

The Times ran an article on book covers

earlier in the year (2017), in which a font designer described how typefaces influence consumers and act as signposts:

“Once a logo has become familiar you no longer even need to read the words to know what they say, because you recognise it by its shape.”

We do this from a young age. The designer gave the example of a friend's daughter, a four year old who believes her family's car is made by the well-known UK pharmacy BOOTS on the basis of its logo. Bearing in mind the BOOTS logo (below left), once can see why the girl made a link with the well-known FORD logo (below right), despite the marks sharing no tenable similarities in their verbal elements.



Even a four year old recognises the similar fonts and colour schemes used in these marks, and makes assumptions and links accordingly. It seems likely that an adult consumer (admittedly one familiar with THE GODFATHER films, though the hearing officer noted that there were a not insignificant number of these) would be extremely familiar with the gothic-style font of Paramount's marks, and expect to see that font replicated in any beer or bar services offered under the marks. There is a reason why Paramount filed for the mark in the stylised format. It could have elected to file a plain word mark, but did not do so.

In such circumstances, although this decision is undoubtedly correct, one cannot help but feel a little sympathy for the applicant, particularly when a UK designation of an international trade mark for THE GODFATHER (in the name of an entity apparently unconnected to either party here) has registered for "beer" in class 32 for some years.

### Author:

Matthew Dick



# Look sharp! Thorny issues in Cactus decision

In 2009, Mrs Del Rio Rodríguez applied to register the mark shown below for horticultural goods and services in classes 31, 39 and 44, including: ‘Seeds, natural plants and flowers’; the distribution of such goods; and gardening services.

## CACTUS OF PEACE CACTUS DE LA PAZ

Cactus SA (Cactus) opposed, claiming a likelihood of confusion with its earlier EUTMs:

1. word mark CACTUS
2. composite mark



Cactus’ registrations included “natural plants and flowers, grains; fresh fruit and vegetables” in class 31, as well as the class heading of class 35.

### Opposition decision

The earlier marks were put to proof of use. The Opposition Division found Cactus had genuinely used the word mark for the class 31 goods and “retailing of natural plants and flowers, grains; fresh fruits and vegetables” services in class 35. It followed there existed a likelihood of confusion between the marks.

### Board of Appeal decision

Mrs Del Rio Rodríguez’s appeal to the Board of Appeal was upheld and the opposition was dismissed: the Opposition Division erred by finding genuine use of the registrations in respect of “retailing of natural plants and flowers, grains; fresh fruits and vegetables” services in class 35, primarily on the basis that those services were not covered by Cactus’ registrations (the class heading does not refer to “retailing”). The Board of Appeal found Cactus had failed to evidence genuine use of its marks for any goods/services of the registrations.

### General Court

Cactus appealed arguing that the Board of Appeal had erred by:

1. examining of its own motion whether “retailing of natural plants and flowers, grains; fresh fruits and vegetables” in class 35 were covered by Cactus’ registrations – it was not disputed by the parties. Cactus argued its registrations must be regarded as covering all class 35 services, including “retailing”.
2. considering that the above services in Class 35 were not covered by Cactus’ registrations. Cactus claimed that there had been genuine use for those services.

The GC annulled the Board of Appeal decision and held that “retailing of natural plants and flowers, grains; fresh fruits and vegetables” were covered by Cactus’ registrations, and allowed the opposition based on the class 31 goods.

### CJEU

The EUIPO appealed, arguing that General Court had misinterpreted the decisions in IP Translator (which essentially noted that general indications of a particular class heading could only cover goods/services in the alphabetical list of that class) and Praktiker Bau (that “retail services” must relate to specific goods/types of goods). The EUIPO argued that both decisions should apply retroactively, even though the earlier marks were registered before the delivery of those decisions.

The CJEU disagreed and referenced the *Brandconcern v EUIPO* judgment (C-577/14 P). The IP Translator judgment provided clarifications for new EUTM applications and did not concern marks registered before the decision was delivered. The General Court was therefore right to find that IP Translator did not apply. Further, whilst transitional provisions gave proprietors of EUTMs filed before 22 June 2012 and registered in connection with entire class headings the opportunity to declare whether their intention was to cover the literal meaning of the heading or all terms included in the alphabetical list (before September 2016), that provision was not applicable at the time the General Court took its decision.

➤ *Case details at a glance*  
*Jurisdiction: European Union*  
*Decision level: Court of Justice of European Union*  
*Parties: EUIPO v Cactus SA*  
*Citation: C-501/15P*  
*Date: 11 October 2017*  
*Full decision: <http://dycip.com/c-50115p>*

Further, the CJEU held that the Praktiker Bau judgment related to applications for registration and did not affect trade marks registered before the delivery of that judgment. As such, Cactus was not required to show use of the marks for the retail of particular goods/types of goods.

The EUIPO also argued that Cactus’ use of part of the composite mark (stylised cactus) altered the distinctive character of the mark as registered. The EUIPO argued that the General Court had erred by:

1. finding the figurative element to be “essentially equivalent” to the mark as registered;
2. failing to conduct an overall assessment of signs, including their visual and phonetic differences;
3. failing to consider that consumers would not perceive the figurative element as a stylised cactus without prior knowledge of the mark as registered; and
4. assessing the distinctive character of the composite mark from the perception of customers in Luxembourg.

The CJEU dismissed arguments (3) and (4) as an appeal to the court lies on points of law only - such arguments concerned factual assessments. On (1) and (2), the General Court had conducted an appropriate examination as it had made visual and conceptual comparisons (whilst finding the stylised cactus and word CACTUS conveyed the same semantic content).

Author:  
Flora Cook



### In short

The decisions of IP Translator and Praktiker Bau do not have retroactive effect for registered EUTMs predating those judgments.

# Three tales of jurisdiction Hummel Holding v Nike, Nintendo v BigBen Interactive and Parfummarken

A series of recent cases have considered the circumstances in which national courts have jurisdiction over entities not based within that member state. This article reviews some of the key decisions.

### Hummel Holding A/S v Nike, Inc: establishing an establishment

Article 125(1) of Council Regulation 2017/1001/EU (EUTMR) provides that a defendant should be sued in the member state in which it is domiciled or has an establishment. Pan EU relief is available in such circumstances (Article 126(1) EUTMR). The CJEU has provided clarification on the meaning of an “establishment” for the purposes of Article 125(1) (previously Article 97(1) of Council Regulation 207/2009).

#### Background

Hummel Holding (Hummel) sued Nike Inc (a US company) in Germany for trade mark infringement on the basis that Nike Deutschland GmbH (located in Frankfurt, but not a party to the proceedings) is an establishment of Nike Inc. The Nike parties argued that the German Court lacked jurisdiction over Nike Inc in the absence of clarity as to what constituted an “establishment” in the context of Article 97(1) (now Article 125(1)). The German Court referred the matter to the CJEU for a ruling.

#### CJEU ruling

The CJEU concluded that Article 97(1) (now Article 125(1)) “must be interpreted as meaning that a legally distinct second-tier subsidiary, with its seat in a Member State, of a parent body that has no seat in the European Union is an ‘establishment’... of that parent body if the subsidiary is a centre of operations which, in the Member State where it is located, has a certain real and stable presence from which commercial activity is pursued, and has the appearance of permanency to the outside world, such as an extension of the parent body.”

This decision increases the likelihood of pan-EU injunctions being granted against non-EU parent companies and opens the door to forum shopping for such purpose.

### Nintendo Co Ltd v BigBen Interactive GmbH, BigBen Interactive SA: defendant domiciled in a different member state

In this case the CJEU provided guidance on (1) when a national court will have jurisdiction to grant pan-EU relief against a defendant domiciled in a different member state, and (2) how the concept of ‘the country in which the act of infringement was referred to’ in Article 8(2) of Regulation No. 864/2007 (Rome II) should be interpreted.

#### Background

BigBen Interactive SA (BB France) was selling remote controls and accessories compatible with the Wii video game console via its website directly to consumers in France as well as to its subsidiary, BigBen Interactive GmbH (BB Germany). In turn, BB Germany sold the goods via its website to consumers in Germany and Austria. Nintendo owned various Community designs for the Wii console accessories and brought infringement proceedings against both BB France and BB Germany in Germany, in which it sought, amongst other things, supplementary orders for the provision of accounting documents, financial compensation, reimbursement of legal fees, publication of judgment and the destruction and recall of infringing goods.

#### CJEU ruling

The German Court asked whether it had jurisdiction over BB France and the ability to grant pan-EU relief in relation to the same, including the supplementary orders sought. The CJEU confirmed that it did.

The German Court also sought guidance on how to determine where the act of infringement was committed for the purpose of establishing the law applicable to the supplementary orders sought. The CJEU concluded that the Court should conduct an overall assessment of the defendant’s conduct to determine the place where the initial act of infringement was committed or threatened.

### Decision of the German Court in Parfummarken: an overall assessment

In this case the German Federal Court of Justice (BGH) conducted an overall assessment of the infringing activities of the

defendant in order to determine whether it had jurisdiction over the infringement claim brought by the claimant.

#### Background

The defendant is a perfume distributor based in Italy which used the claimant’s trade marks on its Italian .it website (which featured a German language version) and sold goods to a company based in Germany. The claimant sued the defendant for trade mark infringement in Germany.

#### Decision of the BGH

The BGH, influenced by the decision of the CJEU in Nintendo, conducted an overall assessment of the defendant’s conduct and concluded that the initial infringing act ie, the placing of the offer to purchase the infringing goods on the defendant’s website, took place in Italy. Consequently the German Court lacked jurisdiction over the claim.

This decision recalls that of the English Court in AMS Neve v Heritage Audio in which it was held that where infringing goods are sold on a website, the infringing act was the step of placing the infringing sign on the website. Such action is likely to occur in the member state where the defendant is domiciled or established.

These cases confirm that where infringing goods are bought online, Article 125(5) EUTMR may not provide much of an alternative in practice to the rule in Article 125(1) EUTMR (that a defendant should be sued in the member state of its domicile/ establishment). The cases also underline the importance of registering national trade marks in key jurisdictions.

#### Authors:

Anna Reid & Alban Radivojevic



#### In short

These recent cases on jurisdiction need to be kept in mind when determining litigation strategy.

# D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

## “Beautifully designed... Every page is fascinating” European Trade Mark Decisions - Third Edition

D Young & Co publishes European Trade Mark Decisions, third edition



**W**e are pleased to announce the publication of the third edition of our book “European Trade Mark Decisions”.

The book is a selection of the most important decisions from the Court of Justice of the European Union to date and recently featured in The Times (Law Diary, Edward Fennell) as being an “addition to the book recommendations for those with lively legal interests...It’s beautifully designed...Every page is fascinating”.

This edition includes over 100 trade mark case summaries extending into areas of the law that could not have been

contemplated a decade ago, and as Brexit negotiations progress, the divergence between decisions from the EUIPO and EU Courts and the UKIPO and UK Courts is particularly relevant to businesses pushing to expand the scope of their trade mark rights.

If you would like a copy of the book please send your details to [subscriptions@dyoung.com](mailto:subscriptions@dyoung.com).

More information is available online at <https://www.dyoung.com/news-events/news/trademarkdecisions-2017>.

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