

D YOUNG & CO TRADE MARK NEWSLETTER *no.102*

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The colour purple Cadbury fails to safeguard UK trade mark registration

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With this edition we send our best wishes for a prosperous 2019 and look forward to a busy year ahead. Do contact us if you would like to arrange a meeting at INTA Boston, as we know many of you, like us, will be registering and organising your INTA diaries this month. As we go to print we are aware of further uncertainty with regard to Brexit following the postponement (to January) of the UK Parliament's vote on the Brexit deal. Please do consult our website for our latest IP & Brexit advice: www.dyoung.com/knowledgebank/ip-brexit.

D Young & Co trade mark team, January 2019

Events



18-23 May 2019

INTA Conference, Boston US

Partners Jeremy Pennant, Tamsin Holman, Helen Cawley, Matthew Dick, Jackie Johnson, Gemma Kirkland, Richard Burton, Jana Bogatz and Anna Reid will be attending INTA in Boston this May. Do get in touch if you would like to arrange to meet during the conference.

www.dyoung.com/news-events

Brexit news



We welcome your Brexit questions (email our advisors at brexit@dyoung.com) and regularly publish news and advice regarding Brexit on our website: www.dyoung.com/knowledgebank/ip-brexit.

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Colour marks

The colour purple Cadbury fails to safeguard UK trade mark registration

This is a case in relation to which Cadbury tried, and unfortunately failed, to safeguard, to the extent possible, its UK trade mark registration for the colour purple.

Cadbury decided to take action to change the description of its 1995 UK trade mark registration no. 2020876a, for the colour purple, following the successful opposition by Nestlé against Cadbury's later filed application (dating from 2004) to register the colour purple under trade mark no 2376879. The 2004 trade mark application was refused on the basis that it was not considered to be a sign that is "graphically represented". The later application described the sign as "The colour purple (Pantone 2685C), as shown on the form of application, applied to the whole visible surface, or being the predominant colour applied to the whole visible surface, of the packaging of the goods".

The earlier trade mark registration bears an almost identical description: "The mark consists of the colour purple (Pantone 2685C) as shown on the form of application, applied to the whole visible surface, or being the predominant colour applied to the whole visible surface, of the packaging of the goods". In the case against the 2004 application, it had been decided that the wording referring to the colour purple "being the predominant colour applied to the whole visible surface, of the packaging of the goods" was lacking in clarity and precision as the description could cover numerous different combinations of colours. As the wording for the later mark is basically identical to the wording for the earlier mark, there is an argument that the earlier mark is indeed vulnerable to attack and, consequently, Cadbury applied to remove the part of the description of the mark referring to the "predominant colour". Cadbury argued that the case against the later mark had established that the description effectively covered two marks that should be considered to be a series.

Cadbury's application to remove the part of the description including reference to the "predominant colour" was refused by the registrar and the appeal to the High Court was unsuccessful. In this appeal from the High Court, reference was made to the practice concerning series marks and to

the fact that only very limited alterations can be made to a registered trade mark.

With regard to a series of marks, the judge pointed out that, even though, at the application stage, it may not have been made clear that an application covers a series of marks, it does not mean that a series of marks cannot be registered. However, in this case, the description attached to the 1995 application referred to a mark in the singular and there was no supporting evidence to indicate that the registration covered a series of marks. The judge commented that the description, albeit lacking in clarity, basically appears to be trying to cover any mark featuring purple as the predominant colour whether that mark might be combined with different colours and take the form of different patterns or feature no other colour (ie, consist of purple alone). The registration communicates to the consumer "a generalised but imprecise description of a single mark".

On the basis that the description of the mark effectively covers an infinite number of signs made up of the predominant colour purple potentially in combination with other colours and possibly taking the form of a number of different patterns, it could not constitute a series as the marks within a series must "resemble each other as to their material particulars and differ only as to matters of a non-distinctive character and not substantially affecting the identity of the trade mark".

The judge could not allow the appeal and Cadbury therefore remains the owner of a registration for the colour purple described in an imprecise manner, consequently leaving the registration open to attack, particularly by Nestlé.

Colour marks are very difficult to register but others can learn from Cadbury's efforts to safeguard its colour purple.

Author:
Jackie Johnson



Red Bull has its wings clipped T-150/17

➤ *Case details at a glance*
Jurisdiction: European Union
Decision level: General Court
Parties: Asolo Ltd v Red Bull GmbH
Date: 04 October 2018
Citation: T-150/17
Full decision (link): dycip.com/t15017

A recent CJEU decision confirms that “energy drinks” are not similar to “alcoholic drinks” despite the fact they are mixed, consumed and marketed together.

Background

Asolo Ltd is the owner of a EUTM for FLÜGEL (meaning wing) registered for “beers, mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for the preparation of drinks” in class 32 and “alcoholic drinks (except beers)” in class 33. The trade mark was registered on 01 February 1999.

On 05 December 2011 Red Bull GmbH sought to invalidate the registration based on its earlier trade marks in Austria. These trade marks were VERLEIHT FLÜGEL (meaning gives wings) covering “energy drinks” in class 32 and registered on 19 May 1998 and RED BULL VERLEIHT FLÜÜGEL covering “energy drinks” in class 32 and registered on 05 December 1995.

Red Bull relied on the following grounds:

- that the trade marks are similar and the goods are identical or similar as such there exists a likelihood of confusion on the part of the public which includes a likelihood of association with the earlier trade mark.
- the earlier trade mark registration has a reputation and use without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark.

Flying high

The cancellation division found in favour of Red Bull saying that due to the repute of the earlier trade mark VERLEIHT FLÜGEL a link could be made in the mind of the public.

Flying higher

Asolo appealed the decision to the Board of Appeal who confirmed the cancellation division’s decision. The Board of Appeal advised that for procedural reasons, the declaration for invalidity should be assessed on the grounds of likelihood of confusion only. It found that the

Red Bull sought to invalidate Asolo’s EUTM registration for FLÜGEL (meaning wing)



relevant public are made up of average Austrian customers while noting energy drinks are aimed at a young public. The Board of Appeal found that ‘other non-alcoholic drinks’ include “energy drinks” and, as such, are identical. The remaining goods in class 32 “beers etc.” are all drinks with the same purpose as energy drinks, namely ‘to quench thirst’ and are in competition with “energy drinks”; can be purchased at the same point of sale and are therefore similar.

Turning to the “alcoholic drinks” in class 33, the Board of Appeal considered a certain connection with ‘energy drinks’ noting the cancellation division was right to observe that alcoholic drinks were often mixed with energy drinks and/or consumed together. Overall given the similarities between the trade marks and the goods, this would lead to a likelihood of confusion.

Seeing red

Asolo appealed to the General Court on a number of points including the assessment made on the similarity of goods insofar as it relates to classes 32 and 33. The General Court observed that the evidence filed by Asolo showed Red Bull had always denied any connection between energy drinks and alcoholic drinks. In fact, their products contain a sentence which, when translated into English, reads “do not mix with alcohol”. Asolo claimed that Red Bull had always asserted its product makes consumers more energetic and alert – the opposite of alcohol, so that customers wishing to remain alert should not consider substituting it with alcohol. The General Court observed that a very large number of alcoholic and non-alcoholic drinks are generally mixed, consumed, or indeed marketed together, either

in the same establishments or as a pre-mixed alcoholic drink. However, to consider that these goods should be regarded as similar, when they are not intended to be consumed in either the same circumstances, or in the same state of mind, or as the case may be, by the same consumers, would put a large number of goods described as “drinks” into the same category. It cannot be said that “energy drinks” and “alcoholic drinks” are similar because they can be mixed, consumed or marketed together, given the nature, intended purpose and use of those goods differ. Companies which market alcoholic drinks pre-mixed with alcoholic content do not sell the ingredient separately or under the same trade mark. Many consumers in the EU are aware of this distinction and it is necessary for those who do not or cannot consume alcohol. The mere fact the products can be marketed together is not sufficient to challenge these findings.

The General Court annulled the decision insofar as there was a likelihood of confusion between the signs and ‘alcoholic drinks’ class 33 and “energy drinks” in class 32.

Author:
Helen Cawley



In short

This case confirms the differences between energy drinks and alcoholic drinks despite the trend to mix and consume them together.

Big squeeze on cheese Rights in HALLOUMI certification mark tested before General Court

➤ *Case details at a glance*
Jurisdiction: European Union
Decision level: General Court
Parties: Republic of Cyprus, M.J. Dairies
Date: 25 September 2018
Citation: T-384/17
Full decision (link): dycip.com/t38417

The Republic of Cyprus ('Cyprus') has failed to successfully contest a European Union trade mark (EUTM) on the basis of a certification mark for "HALLOUMI".

This is a General Court (GC) decision following an appeal brought by Cyprus against M.J. Dairies EOOD's EUTM application for the figurative mark (shown below) which covered a range of goods and services in Classes 29, 30 and 43, including cheese and related products:



Cyprus claimed a likelihood of confusion based initially on certification marks for HALLOUMI in the UK and Cyprus. The Opposition Division rejected the opposition and a subsequent appeal by Cyprus to the Board of Appeal, relying solely on the UK certification mark, was also dismissed.

The Board of Appeal concluded that the UK certification mark was weak in distinctive character and there was only limited similarity between the marks at issue. It set out that protection afforded to certification marks did not impose an additional requirement that the public must recognize it as a certification mark. Further, it held that the evidence submitted

by Cyprus showed that the term "halloumi" was, at most, perceived on the market as designating a specific type of cheese only.

Cyprus appealed the decision further to the GC. Cyprus relied on a single plea of infringement of Article 8(1)(b) in relation to the UK certification mark only and claimed the Board of Appeal had erred by:

- Finding the certification mark had weak distinctive character;
- Incorrectly assessing the similarity of the marks;
- Finding no likelihood of confusion as a result of an error in the analysis of the evidence filed.

In its decision, the GC set out that registration of a certification mark could be held to confer a certain level of distinctiveness. However, this did not mean a certification mark must be accorded an intrinsic distinctive character of such a level that would provide it with unconditional protection enabling opposition to any registration including that term.

The GC also confirmed that, unlike standard trade marks, the distinguishing function of a certification mark should be understood to enable the goods and services of the undertaking, which comply with the particular certification rules, to be distinguished from the goods and services of other undertakings which are not certified.

Certification marks do not serve to distinguish commercial origin as such, but rather a class of goods.

Considering the distinctive character of the earlier certification mark, the GC held the Board of Appeal had correctly assessed the earlier certification mark had a low degree of inherent distinctive character in view of its descriptive nature and perception by the public as referring to a particular type of cheese only.

The GC also upheld that the evidence submitted by Cyprus failed to prove the existence of an enhanced distinctive character.

Considering the assessment of the similarity between the marks, the GC confirmed the Board of Appeal was correct to find that the public's attention would be on the verbal element "BBQLOUMI" as well as the plate of food in the foreground of the image, therefore both these elements were co-dominant.

Although the GC found the Board of Appeal had erred by not finding a low degree of phonetic similarity in view of the common element "loumi" and certain conceptual similarity which would be made to halloumi cheese. However, despite this error the GC held it did not alter the position that the similarity between the signs remained limited and insufficient to offset the differences between the marks.

Considering the weak distinctive character of the earlier UK certification mark and dissimilarities between the marks in general, the GC held the Board of Appeal was correct to reach a finding that a likelihood of confusion did not exist and the appeal was dismissed.

Author:
Wendy Oliver-Grey



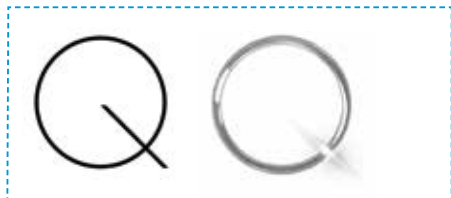
In short

Whilst the differences between the marks at issue in this case were a discerning factor, this case does highlight the difficulty to prove a certification mark can be seen by the general public as anything more than descriptive in relation to the goods it serves to certify.

Sky skewers Samsung Single letter marks

➤ *Case details at a glance*
Jurisdiction: UK
Decision level: UKIPO
Parties: SAMSUNG ELECTRONICS CO., LTD and SKY PLC
Date: 24 September 2018
Citation: O-585-18
Full decision (link): dycip.com/o58518

Samsung applied to register in the UK the mark below, left (together with another mark containing QLED TV) in respect of televisions.



The applications were opposed by Sky, owner of earlier registrations for the mark shown above right, also protected for televisions.

The main thrust of Samsung's argument was that:

1. single letter marks have a low level of distinctive character; and;
2. the Sky mark is not a letter Q.

The hearing officer, Oliver Morris, held that both marks comprise a circular element, with an intersecting straight component, crossing the circle in roughly the same place, with the straight components being roughly the same length.

Likelihood of confusion

Although a reputation and passing off were claimed the decision is limited to considering whether a likelihood of confusion would arise under Section 5(2)(b) of the UK Trade Mark Act. Sky filed evidence relating to their use of the mark but given that this was not specifically for televisions, it didn't really feature in the hearing officer's thinking.

Visually, taking into account the similarities and differences, the tribunal found that there is at least a medium level of visual similarity. Aurally, the marks were considered identical

The case concerning single letter marks in respect of televisions



if seen as a letter Q, pronounced QUEUE.

Conceptually, if perceived as a Q, the hearing officer felt the earlier mark would be identical to the applied for mark (to the extent that letters have a concept), whereas, if not perceived in that way, the marks would be conceptually different (one being a Q the other having no clear concept).

Counsel for Samsung argued that the average consumer would not see the earlier mark as a Q and that it would, instead, be seen as a metallic ring with a glinting effect added to it.

Sky countered saying that it would be clearly and unambiguously perceived as a Q. In addition the evidence filed (although not relied upon by the tribunal) showed that the sign was intended to be seen as Q, that it had been perceived in press articles as a Q, and if there had been any doubt as to the perception, consumers had been educated to see it as a Q.

The hearing officer confirmed that in his view the average consumer will see the letter Q when they encounter the earlier mark. Whilst they will notice its stylisation and that it is more than just a standard font, he agreed that the circle and the intersecting element matches the typical size and orientation of a Q so that the average consumer will see it as such.

Inherent distinctive character

Turning to the inherent distinctive character of the mark, whilst accepting that a single letter Q (for televisions) is unlikely to be regarded as highly distinctive, the hearing officer found no reason why he should accord only a very

weak or low level of inherent distinctiveness. Its distinctiveness may be slightly lower than the norm, but not by much, he held.

Direct and indirect confusion

The hearing officer then went on to consider whether there would be a likelihood of confusion distinguishing between direct and indirect confusion, the latter being where the consumer's mental analysis says "The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark". Slightly surprisingly, the hearing says "Notwithstanding the principle of imperfect recollection, I come to the view that the average consumer will not directly confuse the marks and will at least recall that one mark has some form of stylisation which is not shared by the other plainer mark(s)". He went on to conclude however that there would be a likelihood of indirect confusion and also for the mark containing QLED TV.

Comment

The decision is to be welcomed and was to be expected, notwithstanding the outcome in some recent UKIPO cases where a likelihood of confusion was not found – see, for example, our report on *MASTERCHEF v MISTER CHEF*: www.dyoung.com/knowledgebank/articles/masterchef-mister-chef.

The oppositions were upheld with costs of £2,200.

Author:
Jeremy Pennant

UK design infringement

The value of UK registered designs

As part of a wider initiative in relation to registered design rights, the UKIPO has recently commissioned research relating to design infringement in the UK. The report is a timely reminder to maximise the benefits obtainable from UK registered design protection.

UKIPO design infringement report

The UKIPO report measures the incidence of design rights infringement in the UK. It looks at attitudes to design rights, infringement among designers and design right owners. It provides a snapshot of the UK's design industry. This includes which rights designers value, the impact of infringement and what happens when designers go to court.

Read the UKIPO report in full online at:
dycip.com/ukipo-design-infringement

Whilst the report makes for interesting reading in relation to how design infringement in the UK is typically handled by right holders and infringers, at a more fundamental level the report highlights the principle that registered designs in the UK represent a nominally powerful and useful tool in protecting intellectual property, particularly when used alongside other registered rights such as patents and trade marks.

The upsides

At least from a cost perspective, one of the great advantages of UK registered designs is that they are comparatively cheap to obtain, particularly compared with the cost of obtaining a corresponding UK patent or UK trade mark.

In its simplest case, a single UK registered design can be obtained for as little as £50, whilst the official fee for obtaining up to ten UK registered designs (applied for at the same time) represents a modest outlay of just £70.

Cost issues aside, the scope and versatility of the UK registered design regime is also largely unparalleled with any other registered design regime in the world. In that respect, the perception amongst many is that a registered design is exclusively restricted to the shape or appearance of a physical product.

However, under the UK design regime, a design registration can be obtained in respect of a very broad range of things, including surface patterns; images; artwork; graphical user interfaces; computer game characters; computer icons; logos; and even typefaces.

Beware of the pitfalls

It is to be noted that registered designs, whilst being relatively easy and cheap to obtain, do need to be approached with care. Specifically, the protection afforded to a registered design is chiefly dependent on the drawings included in the design as originally applied for at the application stage. If the wrong, or unnecessarily detailed, drawings are included in the application, this can have a significant impact on the scope of any resultant registered design.

Registered designs, at least in the UK, can also end up becoming published and registered quite quickly - often in less than a week from when they are first applied for. Whilst this can be advantageous from the viewpoint of allowing the registered design to be enforced soon after it is applied for, the fact the design is published so quickly can cause problems particularly if other forms of registered rights, such as patents and/or trade marks, relate to the disclosure of the registered design.

Reaping the rewards

To maximise the benefits available under the UK registered design regime, whilst avoiding its pitfalls, it is invariably best to

seek guidance from a legal advisor that is experienced in handling registered design matters. For such guidance, or for additional information on registered design protection in the UK, do not hesitate to contact a member of the design team within D Young & Co; you may be surprised at the extent to which registered design protection is applicable!

Author:
William Burrell



We are delighted to welcome Senior Associate William Burrell.



William is a European Design Attorney and European Patent Attorney, with particular experience in registered design matters. William brings a wealth of knowledge and experience to our design team. He has considerable experience registering designs at both the UKIPO and EUIPO. He is well-versed in protecting products, games, user-interfaces and brands with registered design rights in territories all over the world. William has a wealth of experience in patent searching, drafting and prosecution and specialises in the fields of consumer devices, mechanical and automotive engineering.

Trade Mark Law Modernization Act Amended German trade mark law in force as of 14 January 2019

The Trade Mark Law Modernization Act (MaMoG) was executed and published in the Federal Law Gazette (Bundesgesetzblatt) on 11/14 December 2018 and will enter into force on 14 January 2019. The Act contains revisions whose aim is to mainly transfer the provisions of EU Trade Mark Directive 2015/2436 of 16 December 2015 into German law. Most changes will have an immediate effect.

Like in most other EU member states, the amendments will not fundamentally change the German trade mark law system. However, there are certain amendments which we deem relevant for trade mark owners:

Changes regarding term of protection and renewals

- The term of protection for trade marks registered on or after 14 January 2019 will end exactly ten years after the filing date and not, as before, ten years after the end of the month in which the trade mark was applied for.
- This does not apply to already registered trade marks.

Determinability of trade marks/ new types of trade marks

- A sign needs to be unambiguous and clearly identifiable, but there is no need to be capable of being represented graphically anymore.
- Application of sound marks, multimedia marks, holograms and other types of trade marks in suitable electronic formats is possible (but these marks may not serve as a basis for an international mark as WIPO still requires a 2D representation).

Certification mark

- Introduction of a national certification mark as a new category (besides trade marks and collective marks).
- Extension as an international mark is possible.

New absolute grounds for refusal

- Protected geographical indications and protected designations of origin (especially

for foodstuffs, wines and spirits protected under national or European legislation or agreements), protected traditional terms for wine, traditional specialities guaranteed with regard to foodstuffs and protected plant variety denominations.

Third party observations

- Introduction of this option (like with EUIPO).
- Observer does not become party of the proceedings.

Cancellation proceedings

- Renamed as revocation/invalidity proceedings.
- Fee changes.
- Administrative invalidity proceedings before the DPMA (German Patent and Trade Mark Office) will also deal with relative grounds for refusal (earlier rights) as of 01 May 2020 (ie, no separate court proceedings required, but still possible).
- Third party intervener possible.

Many changes in the opposition proceedings

- One opposition with various prior rights possible instead of multiple oppositions of which each is based on one right.
- More options for basis of opposition (now including protected geographical indications and protected designations of origin, etc).
- Change of fee (250 EUR per opposition based on one right plus additional 50 EUR for each additional right, instead of 120 EUR per opposition/right in the past).
- Introduction of a "cooling-off" period (two month, extendable by a joint request of the parties).
- Abolishment of the second objection of non-use with the "moving period".
- Full evidence required for genuine use instead of prima facie evidence, but affidavit (affirmation in lieu of an oath) is still considered suitable means of proof.

- Different time period relevant for genuine use in opposition proceedings: it will begin five

years before the filing date or the priority date of the challenged trade mark, instead of the five years before the date of publication of the registration of the challenged trade mark.

- Grace period for non-use will commence on the date when no further opposition can be filed against the registration of a trade mark (ie, either the day after expiry of the opposition period or the date on which the decision which concluded the opposition proceedings becomes final or the withdrawal of the (last) opposition). So far, the grace period for use began upon publication of the registration or – if an opposition was filed against the registration – at the date when the opposition proceedings were concluded. In future, the beginning and the end of the grace period for use will be recorded in the Trade Mark Register.

These changes will also apply to oppositions within the framework of the procedure for the extension of protection of international registrations of marks to the territory of Germany.

Licenses

- Registrability of licences possible, but not mandatory (subject to a fee).
- Register entry about willingness to license or sell/transfer possible.

Reclassification abolished

- If the division into classes of goods and services is altered after the filing date, the classification will not be adjusted upon renewal of the trade mark, neither at the request of the proprietor nor ex officio.

Goods in transit

- Identical goods in transit can now be stopped by customs.

This is a short overview of amendments which we believe to be most relevant for trade mark owners, but there are also numerous smaller changes which might be relevant in individual cases. For further information please contact your usual D Young & Co trade mark advisor.

Author:

Jana Bogatz



D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

IP & Brexit Draft trade mark legislation for a no deal Brexit

The UK government has published draft legislation, The Trade Marks (Amendment etc) (EU Exit) Regulations 2018 (see dycip.com/TM-amendment-eu-exit), which confirms the UK government guidance notes, published on 24 September 2018, on trade marks in the event of a no deal Brexit.

The draft legislation provides that an existing EU trade mark registration will be treated on and after exit day as if it had been filed and registered as a UK trade mark. The new registered trade mark will be referred to as a "comparable trade mark (EU)", and will be created automatically and at no cost to the registered owner.

There is a provision to opt out if the EU trade mark owner does not wish to own a comparable trade mark (EU), however it is not possible to opt out if the mark has been put to use in the UK on or after exit day by the registered owner or with their consent; if the mark is subject to an assignment, licence, security interest or other agreement or document; or if there are pending proceedings based on the comparable trade mark (EU).

In relation to EU trade mark applications which

are pending on exit day, applicants may file a new UK trade mark application within a period of nine months from exit day, maintaining the filing date, priority date or seniority date.

The draft Regulations do not make reference to International trade mark registrations or applications (trade marks protected or filed through the Madrid system), however the UK government stated in its guidance notes its intention to work with the World Intellectual Property Organisation (WIPO) to provide continued protection of existing International registrations and find "practical solutions" for pending applications.

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Our latest IP & Brexit advice, including our no deal Brexit guide, can be found on our website at: www.dyoung.com/knowledgebank/ip-brexit

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