

D YOUNG & CO TRADE MARK NEWSLETTER *no. 114*

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Now in its fifth year, our Munich office has been warmly received by clients both nationally and internationally. As part of our commitment to continued growth we are delighted to announce the appointment of Associate Rechtsanwalt Gabriel Wittmann. Gabriel advises a wide range of clients both in Germany and internationally in relation to trade marks, designs, copyright and unfair competition law. His practice extends to both non-contentious and contentious issues. Having recently moved to more spacious offices in central Munich this is an exciting start to 2021 for the team and the wider firm.

With this newsletter we send our best wishes to all our readers and our hopes that you remain safe and well. As the Covid-19 pandemic continues, measures remain in place to ensure that our staff are safe and to maintain our high levels of client service. For our latest updates, including information about changes in practice at IP offices in Europe, please visit our website: www.dyoung.com/covid-19-service.

2021 also brings to an end the practical departure of the UK from the EU. Notwithstanding this, we continue to provide advice to and act for clients before the EUIPO as we have done since the office in Alicante opened 25 years ago. We are honoured to represent a range of amazing clients, proud of the service we have provided and look forward, with enthusiasm, to our partnership with you all over the next 25 years and beyond.

Jeremy Pennant January 2021.

Events



03-04 March 2021

CITMA Biennial Design Seminar

Partner Richard Burton will be attending CITMA's biennial design seminar, a two-day event focusing on design litigation in the IPEC and international designs.

www.dyoung.com/news-events

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Likelihood of confusion / passing off

A fitting conclusion as defence falls apart at the seams IPEC considers post-sale confusion and passing off

The UK's Intellectual Property Enterprise Court in *Freddy SpA v Hugz Clothing Ltd & ors* [2020] EWHC 3032 (IPEC) has given a decisive victory to the claimant in a case that considers the importance of the role that passing off, patents and unregistered designs can play when combatting copycats in the fashion industry.

Background

Freddy SpA is an Italian fashion company that designs and produces a popular line of shapewear jeans sold under the WR.UP brand (see below left), as it has done since 2012. According to Freddy, its body-enhancing jeans "smooth, shape and sculpt" the hips of the wearer and provide lift and definition of the buttocks. Freddy enjoys a good market position and its jeans are sold worldwide in over 40 countries, the UK making up 11% of its annual global sales.



The defendants (Hugz) also sell shapewear jeans (see above, right) and clothing. Freddy complained that Hugz's first iteration of its jeans were a copy of its WR.UP jeans, which Hugz admitted to and the dispute was resolved by settlement agreement. Hugz then attempted to design around the WR.UP jeans with a second version. Freddy started proceedings in the IPEC, stating that Hugz breached the settlement agreement, infringed its patent and various unregistered design rights, and were passing off.

The defendants filed and served a defence but did not submit witness or expert evidence, nor did they participate in the trial. Under the court's procedural rules, the defence could have been struck out, but as the claimant wanted a reasoned judgment from the court, they proceeded anyway, treating the defence as evidence in chief of the defendant.

Passing off - goodwill

The claimant asserted that it owns goodwill in the get-up of the jeans, in particular the combination of several elements including: the badge and where it is positioned on the pocket; the shape and seams of the pockets, each having several curved seams and a straight one; and the central rear belt loop, sewn at an angle. In other words, all the elements making up the 'posterior' area of the jeans.

The defendants rejected that goodwill could subsist in the get-up. They asserted that goodwill, if any, could only attach to the brand(s), as the jeans are sold by reference to FREDDY or WR.UP.

Upon consideration of the evidence, deputy judge David Stone found that the claimant was purposeful in marketing the elements of the get-up, so much so that customers had been sufficiently educated and therefore associated those elements with the claimant. He held that the claimant owned goodwill in the get-up.

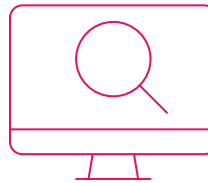
Misrepresentation / damage

The deputy judge had no hesitation finding that there was conventional passing off, stating that the Hugz jeans are an obvious rip-off through the adoption of similar branding elements/get-up, and in the manner in which they were sold.

The deputy judge went on to consider whether there could be post-sale confusion, rarely considered in the context of passing off, but generally established under EU trade mark law and followed in the UK.

The logic behind post-sale confusion in this case is that a consumer, who is not confused at the time of purchase, buys the jeans wanting others to believe that the knock-off, when worn/used, is associated with (or is) the original. In that sense, the customer continues to "sell" the product as it is worn, confusing other potential consumers.

Such a premise has no equivalent in UK case law, but the claimant relied on New Zealand High Court case *Levi Strauss* and



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For regular case law updates, IP FAQ, news and guidance visit www.dyoung.com/knowledgebank

In other news: Madrid Protocol - Gibraltar & Guernsey

The UK's ratification of the Madrid Protocol has been extended to Gibraltar and Guernsey as of 01 January 2021.

It is now possible to designate Guernsey as a designation of a new or an existing International trade mark. It is also possible to apply to register a mark in Gibraltar on the basis of a UK designation of an international trade mark as long as the UK designation is dated 01 January 2021, or later.

This Intellectual Property Enterprise Court case concerned IP rights for shapewear jeans



Co and Anor v Kimbyr Investments Limited [1994] FLR 335 in which the judge found that some people, upon seeing knock-off jeans in the real world, would think it to be very attractive to buy a cheaper pair of jeans with a red tab that could be passed off as the real thing. The New Zealand court held that the owner of goodwill is entitled to protection throughout the lifetime of the product, not just at point of sale.

Deputy judge Stone found the New Zealand case highly persuasive and held that the misrepresentation made by the Hugz jeans would be ongoing every time the jeans are worn by the consumer, despite the consumer not being confused at the time of purchase.

Unregistered designs

The claimant claimed that Hugz had infringed its unregistered designs, for which the defendants raised two primary objections:

1. "definitional" objections; and
2. whether the designs were excluded from protection.

In relation to the former, the defendants objected to the claimant's claim that the shape of the jeans when worn could produce a protectable design, which the deputy judge agreed with, finding that it is the shape of the wearer that will ultimately determine the resultant shape of the jeans when worn. The defendants also objected to a claimed design for shape and configuration of the jeans, including the moveable elasticity of the fabric. The deputy judge could find no reason in law as to why configuration could not allow for any consideration as to the movement of material, referring to case law for other moveable products (A Fulton, Magmatic etc), and held that the design was protectable.

Turning to the latter objection, the defendants ran all the main statutory exclusions to design protection, all of which failed. Of interest is the judge's finding on the must match exclusion, which the judge considered despite having already found the when worn design invalid. The principle is that a design cannot subsist where it is dependent on another article, to form an integral part. A previous case (Ocular Sciences) had considered the possibility that the human body could be an "article" in respect of contact lenses, but the deputy judge was not prepared to apply this in respect of jeans, particularly because there is no integration with the human body to form an integral part.

Patent infringement

The Freddy patent teaches a multi-element knitted fabric adapted to cover various parts of the buttocks, with one of the elements (the upper central element) secured together along the seams at the centre.

The deputy judge found that the patent was novel and not obvious over the prior art, which consisted of underwear constructed as one piece and a patent for trousers that did not teach resilience of fabric, unlike Freddy's patent.

On infringement, as the defendant had admitted the first iteration of the Hugz jeans were a copy, the only issue for the judge to consider was whether the design-around of the second version, being a single piece of fabric covering lateral portions of the buttocks rather than multiple pieces, fell within the scope of the claim.

The deputy judge held that there was no teaching in the patent that required the product to have separate pieces of fabric, and found that the design-around infringed.

Comment

This decision will almost certainly pique the interest of the fashion industry, particularly those who have questioned the usefulness of passing off or patents in the past.

There remains a question as to whether there would have been a different result had there been opposing evidence, but there are interesting propositions of law raised in relation to get-up and post-sale confusion which will almost certainly be tested by the courts in the future, particularly where confusion is twice-removed from the defendant, such as it was here.

However, industry will welcome the common sense logic of the judgment, the flexibility of passing off as a potential claim and the suggestion that designers are entitled to longevity of protection in any goodwill that they own in their designs.

Author:
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Snakes and ladders at the General Court

Allergan Holdings France v EUIPO; and Dermavita Co Ltd v EUIPO

The General Court has issued two decisions in a tussle between Allergan and Dermavita concerning a revocation against the mark JUVEDERM ULTRA.

The interesting questions arising from the proceedings were whether (i) it is possible for use evidence to support goods in two different Nice classes, and (ii) EU Directives / Regulations can have any bearing on classification of a trade mark specification.

Background

In 2007, Allergan Inc. (predecessor in law to Allergan Holdings France), filed an application for JUVEDERM ULTRA for:

- class 5: “Pharmaceutical products administered by injection for use in moisturising skin and reducing wrinkles”; and
- class 10: “Dermic implants, including visco-supplementation substances for medical use, intended for wrinkle filling or volume increasing”.

The mark was registered in 2008 and Dermavita Co Ltd Parseghian & Partners (predecessor in law to Dermavita Co Ltd) filed a non-use cancellation action in 2016. The Cancellation Division partially upheld the revocation, maintaining the registration for injectable pharmaceuticals in class 5 but revoking the goods in class 10.

On to the Board of Appeal

The Board of Appeal dismissed Allergan’s appeal, finding that evidence of use for class 5 goods was generally precluded from supporting the class 10 goods (in principle a product cannot belong to two classes). Further, the evidence provided did not show use in connection with “dermic implants” in class 10.

Dermavita’s appeal, directed at the class 5 goods, argued that EU Directives concerning medical devices and opinions of medical professionals supported a finding that Allergan’s goods were not in fact “pharmaceuticals” so its use of the mark did not support the registration. The Board of Appeal dismissed this argument

Allergan Holdings France v EUIPO; and Dermavita Co Ltd v EUIPO



- the class 5 goods were “pharmaceutical products”, not in the sense of medicinal products but rather “other preparations for medical use”, and were correctly classified.

The General Court appeals

Allergan’s appeal claimed that its goods have a dual function as pharmaceutical products in class 5 as well as dermal fillers, a subcategory of artificial implants, in class 10. It claimed the pharmaceutical component of the goods in question is immediately absorbed after injection, whereas hyaluronic acid gel expands and settles under the skin, forming a subcutaneous implant which deteriorates over time. The hyaluronic acid gel, once injected, would function as an artificial implant.

The General Court disposed of this argument rather quickly. It noted the EUIPO’s argument that dual classification of the same product is not normally possible in the light of the wording of the relevant regulation. Allergan had not argued that its goods were “composite goods” with a dual function. Further, as the Cancellation Division and the Board of Appeal

had both observed, it was not established that Allergan’s dermal fillers were used as artificial implants within the meaning of class 10. Rather, they were used as dermal fillers within the meaning of class 5. The General Court took the view that Allergan was seeking to protect the same product under two different headings of the Nice Classification.

The General Court concluded that the only function of the goods in question was filling wrinkles of the skin. Allergan had not established that a dermal filler constituted an “implant” in class 10. The General Court favoured the Board of Appeal and Cancellation Divisions interpretation of class 10 “surgical implants” – namely implants composed of artificial materials. It also noted the EUIPO’s argument that an implant is generally associated with surgery, whereas the goods in question are “injectable dermal fillers” and cannot constitute an implant at the same time.

Dermavita’s appeal was based on a claim that injectable dermal fillers were not “pharmaceuticals” such that Allergan had not used the mark for goods in class 5.

> Case details at a glance

Jurisdiction: European Union

Decision level: General Court

Parties: Allergan Holdings France

v EUIPO; and Dermavita Co Ltd v EUIPO

Date: 18 November 2020

Citations: T-664/19 and T-643/19

Dermavita contested the classification of the goods as “pharmaceuticals” rather than their classification in class 5. The question was whether the goods for which the mark was used aligned with the goods as registered. By reference to other EU laws, Dermavita argued that the goods had no medical purpose intended to “treat or prevent disease”, but were intended to be used for beauty purposes.

However, the General Court found it was irrelevant that the goods may not be “pharmaceuticals” within the meaning of other EU Directives, and the Board of Appeal did not err when it found that goods should be classified in accordance with the Nice Classification system. The Board of Appeal did not make any error when finding the goods had to be in class 5 as “pharmaceutical products”. Further, it was noted that the goods have several medical applications and are often administered by injection by medical practitioners and clinics.

Thus, the General Court decision confirmed the Board of Appeal and Cancellation Division were correct to maintain the registration for class 5 goods.

Summary

Goods / services are classified under the Nice Classification by reference to their function or purpose. Generally speaking, separate evidence will need to be shown to support goods falling in different classes. For example, “gloves” can fall within class 9 (for example, protective gloves) or class 25 (clothing): evidence for the latter would not support the former.

The decision in the Dermavita appeal is a reminder that the Nice Classification is the ultimate yard-stick for determining the correct classification of goods/services.

Author:
Flora Cook



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EU Customs applications

EORI number Now mandatory for customs applications in the EU

If customs applications are part of your counterfeiting enforcement strategy, be sure to have your EORI number ready. EORI stands for “economic operators registration and identification number”. It is valid throughout the European Union (EU) and, in Germany, now replaces the German customs numbers. The single identification number across the EU is supposed to streamline processes throughout the EU for economic operators and customs authorities.

When do I need an EORI number?

Businesses and traders must now use the EORI number as an identification number in all customs procedures when exchanging information with customs administrations, in particular when lodging customs declarations or entry and exit summary declarations.

Hence, the EORI number is usually associated with export businesses. Given the nature of the EORI number, the party responsible for the import or export of goods may be in possession of this number and not the IP rights holder or their representative.

However, as of 15 September 2020, due to new Regulation (EU) 2020/1209 of 13 August 2020 amending Implementing Regulation (EU) No 1352/2013 it is now mandatory for **right holders and their legal representatives** to have an EORI number in order to file:

- **A union application for action**, meaning a request made to the competent customs department for customs authorities in one member state of the EU to take

action with respect to goods suspected of infringing an EU intellectual property right in said member state as well as one or more other member states to take action in their respective member states;

- **a national application for action**, meaning an application requesting the customs authorities of a member state to take action in that member state;
- **a request for extension** of the above-referenced applications for action;
- **any amendments to an existing application**, for example, the simple act of informing customs authorities that an intellectual property right has been renewed.

Why do you now need an EORI number?

It is planned that all customs applications for action in the EU will need to be filed electronically and this is one of the preparatory steps.

What to do now?

There is no reason to panic. As EORI numbers have already been in existence for quite some time, it is very likely that the right holders or legal representatives already have an EORI number. Therefore, it is worth checking internally first if there is a need to apply for one. If you do not have an existing EORI number, apply for one and to have available when it comes to file, update, renew your customs application. That way, you can avoid any negative impact on your enforcement strategy.

Author:
Yvonne Stone



It is advisable to check now if you already have an EORI number



A not so EASY task after all UKIPO finds EASY mark devoid of distinctive character

In this case, easyGroup failed to register “EASY” in relation to various retail, transport, food and drinks, booking, hotel and temporary accommodation services as the mark is found to be descriptive and devoid of any distinctive character by the UKIPO pursuant to sections 3(1)(b) and (c) of the Trade Marks Act 1994 (TMA).

In an attempt to strengthen its rights in the “easy” family of marks, easyGroup sought to register the mark “EASY” in relation to various services under classes 35, 39 and 43. The application was however opposed by Alnair Limited (Alnair), proprietor of several earlier registrations for the mark “BIG EASY” (a chain of restaurants first established in 1991 and operating within London). The opposition was based on sections 5(2)(b) (likelihood of confusion), 5(3) (mark with a reputation), 5(4) (a) (passing off), 3(1)(b) (descriptive mark) and 3(1)(c) (non-distinctive mark) of the TMA.

Likelihood of confusion

easyGroup argued that the marks were conceptually dissimilar, claiming that BIG EASY was the nickname for the city of New Orleans whilst EASY would be associated with its business. easyGroup however failed to show that the public would indeed associate the word “EASY” alone with its business or the range of goods and services relied upon (although the UKIPO acknowledged that EasyGroup had an established business in the UK providing air travel to holiday makers).

The UKIPO therefore concluded that the term EASY would be given its ordinary meaning (and was, at best, “at the low end of the spectrum of distinctiveness”). As for the former point, the UKIPO found that many consumers may not be aware that BIG EASY is the nickname for the city of New Orleans but, nevertheless, concluded that the term would be familiar to the average consumer in the UK and likely be recognised as an American expression and/or as a term for an American city (even if consumers were unsure of which one).

It further found that its construction did not follow norms of the English language as the word “big” (usually used as an adjective) appeared before another adjective (that is, “easy”), creating an expression whose memorable impact resides in the combination of the two words (concluding that both words shared equal dominance and distinctive character within the mark).

The UKIPO therefore found that the respective marks had no conceptual similarity and shared a medium to medium-high level of visual and aural similarity.

The UKIPO ultimately found that use of EASY would not bring to mind the earlier BIG EASY trade mark and that there was consequently no likelihood of confusion between the respective marks. The UKIPO therefore rejected the opposition insofar as it was based on section 5(2)(b) TMA.

Passing off

Proceeding on the assumption that BIG EASY had the requisite goodwill, whilst recognising that the test for misrepresentation is different to that for likelihood of confusion the UKIPO stated that it doubted whether the difference between the legal tests would produce different outcomes. It did not think this to be the case in this instance as it rejected the opposition insofar as it was based on section 5(4)(a) TMA.

Mark with a reputation

Again, assuming that BIG EASY enjoyed a reputation in the UK for restaurant services, the UKIPO went on to consider whether the public would make the required mental link between the respective marks.

Although the UKIPO acknowledged the level of similarity required for the public to make the necessary mental link is less than the level of similarity required to create a likelihood of confusion, it found that the lack of any conceptual similarity combined with the low level of distinctive character of the EASY mark was such that one mark was not likely to bring the other to mind. The UKIPO therefore rejected the opposition on this ground.

Descriptiveness and lack of distinctive character

Having previously concluded that the term EASY would be given its ordinary meaning by consumers, the UKIPO found that the average consumer would understand the mark EASY to mean that the services offered do not require much effort to access, are easy to use, purchase, book, order, to pay for or in some other way do not require much effort.

The UKIPO therefore rejected the application on the basis that EASY is a descriptive term contrary to section 3(1)(c) that should remain free to use by other traders.

As a result the UKIPO also concluded that the EASY mark was devoid of any distinctive character pursuant to section 3(1)(b).



Eugène Perma France v EUIPO

Weak distinctive character comes NATURA-ly

➤ *Case details at a glance*

Jurisdiction: European Union

Decision level: General Court

Parties: Eugène Perma France v EUIPO

Date: 05 October 2020

Citation: T-602/19

Decision: <http://dycjp.com/t-602-19>

This case demonstrates the limitations associated with enforcing a trade mark containing descriptive components.

Eugène Perma France sought to register an EU trade mark for NATURANOVE. The application was opposed by SPI Investments Group on the basis of its prior rights in the mark NATURALIUM (including an international registration designating the EU and a Spanish national trade mark).

Both NATURANOVE and NATURALIUM cover identical goods in class 3, including cosmetics and hair products.

First instance and Board of Appeal

The opposition was successful at first instance, on the grounds of a likelihood of confusion under Article 8(1)(b) EUTMR. The Board of Appeal then dismissed the applicant's appeal. In particular, when assessing the case, the Board of Appeal held that:

- The level of attention of the relevant public at large in the EU was generally average, and could even sometimes be higher for goods applied to the skin;
- The signs are visually and phonetically similar to an average degree and, as a whole, conceptually have no meaning (although each share the notion behind "natura");
- Overall, the earlier mark NATURALIUM has a normal degree of distinctiveness;
- The common element "NATURA-" evokes an association with the word "nature" and has a weak distinctive character relative to the goods;
- The goods are identical; and
- Overall there was a likelihood of confusion. That the component "natura" was allusive did not change this finding, even for the attentive public.

Appeal to General Court

Eugene Perma France appealed against to

NATURANOVE and NATURALIUM cover identical goods in class 3



the General Court, claiming that the Board of Appeal had erred in its assessment of the similarity of marks; the distinctive character of NATURALIUM; and the overall analysis of the likelihood of confusion.

In its appeal, the applicant claimed that the marks were not similar. In particular, the applicant submitted that regardless of the placement of the common element "NATURA" as the prefix of both marks, the component was limited or non-existent in its distinctiveness, whilst the elements "-NOVE" and "-LIUM" were completely different.

In contrast, the EUIPO claimed that the element "NATURA" was not directly descriptive and that its placement at the beginning of both trade marks compensated for the low distinctive character within the overall framework of a likelihood of confusion.

In its decision, the General Court held that the similarities between the signs were visually and phonetically limited to the first component, "NATURA", and that this common prefix was weakly distinctive, whilst the endings "-LIUM" and "-NOVE" were completely different. These differences played an important role and the trade marks NATURANOVE and NATURALIUM were considered by the General Court to be visually and phonetically similar to only a low degree, rather than an average degree as the Board of Appeal had previously held. In addition, taking into account the weak distinctive character of the common component "NATURA", the General Court found the conceptual similarity between the signs to be low.

In terms of the inherent distinctive character of the earlier mark, NATURALIUM, the General Court noted that the mark comprises only two elements, of which one element "NATURA" would be perceived as alluding to the natural origin of the Class 3 goods and was weakly distinctive, whilst "LIUM" is shorter and would not strengthen the overall distinctiveness of the earlier mark. The General Court therefore agreed with the applicant that the earlier mark had a weak distinctive character, rather than a normal level of distinctive character as had been held by the Board of Appeal.

Therefore, the General Court concluded that the different suffixes of the marks compensated for the common prefix "NATURA" and, notwithstanding the identity of goods, there would be no likelihood of confusion. The Board of Appeal's decision was therefore annulled.

During its overall assessment of a likelihood of confusion, the General Court remarked that:
"a company that chooses a trade mark with a low degree of distinctiveness must accept that competitors are equally entitled to use trade marks with similar or identical descriptive components."

Author:

Jennifer Heath



D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

IP & Brexit

UK address for service Applications from 01 Jan 2021

UK address for service requirements



From 01 January 2021, it will be necessary to have an address for service in the UK, Gibraltar or the Channel Islands for any new applications, for defending new oppositions and other challenges, and for filing new oppositions, revocations and invalidity actions.

It will not be necessary to have an address for service in the UK, Gibraltar or the Channel Islands for post registration actions such

as renewals. It will also not be necessary to have such an address for the newly created comparable trade marks and contentious matters relating to the same, for a period of three years from 01 January 2021. In view of the requirement to have an address for service in the UK, Gibraltar or the Channel Islands for new matters, it will make sense, from an administrative point at least, to use one address for service in the UK, Gibraltar or the Channel Islands across the trade mark portfolio of one registrant.

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