

# D YOUNG & CO TRADE MARK NEWSLETTER *no. 120*

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We are delighted to kick off the new year with plans to attend the INTA conference in Washington DC this coming April. We very much look forward to finally catching up in person with many clients and contacts that we have been unable to see over the past two years - do get in touch with us if you are attending and would like to meet during the conference. We are also pleased to announce that we will be supplementing our regular "bite-sized" case law webinars with a longer-form live webinar in early April. We'll be discussing trade mark and design strategies post Brexit with a particular focus on creative approaches to protection and enforcement that practitioners may not have traditionally considered. More details will be shared in our next newsletter so watch this space! With this newsletter we send our best wishes for a happy, healthy and successful 2022.

Richard Burton  
Partner, Trade Mark Attorney

## Webinars



### Save the date! Trade marks & designs Webinar, 05 April 2022

D Young & Co presents a practical view of creative and effective trade mark and design strategies for the protection of your assets. More information will be published in our next newsletter, including registration details.

### Validity of UK rights post-Brexit

Now available on demand

Natasha O'Shea and Tanja Hofer discuss the validity of UK rights in appeal cases after Brexit.  
[www.dyoung.com/webinars](http://www.dyoung.com/webinars)

## Events



### INTA Conference

Washington DC, US, 30 April - 04 May 2022

Jeremy Pennant, Tamsin Holman, Matthew Dick, Helen Cawley, Jana Bogatz, Gemma Kirkland, Richard Burton and Anna Reid will be attending the INTA conference in Washington DC. We look forward to joining colleagues at this important event in the global trade mark calendar.  
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# EUIPO appeal cases Validity of UK rights post Brexit

Following Brexit and the end of the transition period on 31 December 2020, European Union trade marks (EUTMs) can no longer be rejected, opposed or invalidated on the basis of rights which exist in the UK only. An opposition or invalidity action that was pending on 01 January 2021 in the EU and based solely on UK rights will be dismissed. A number of recent decisions have examined the extent to which UK rights are now considered valid in appeal cases.

### Indo European Foods Ltd v EUIPO

In 2017, Hamid Ahmad Chakari applied to register the figurative mark shown below as an EUTM for various goods including rice flour. The mark incorporates the wording "Abresham Super Basmati Sela Grade One World's Best Rice".



The EUTM application was opposed by Indo European Foods Ltd, on the basis of the earlier unregistered word mark in the UK, BASMATI, used to refer to rice. Indo European Foods argued that it was entitled to prevent use of the mark applied for under the "extended" form of passing off in the UK.

In 2019, the Opposition Division rejected the opposition in its entirety. It found that the evidence submitted by Indo European Foods was insufficient to prove that the earlier mark BASMATI had been used in the course of trade of more than mere local significance before the relevant date and in the relevant territory.

Indo European Foods subsequently appealed to the Board of Appeal, which issued a decision in April 2020 dismissing

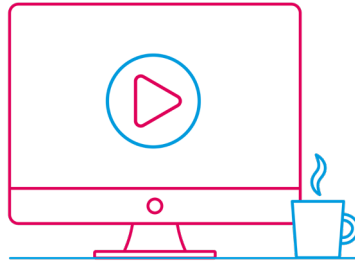
the appeal as unfounded. Although it accepted that Indo European Foods had built up goodwill in the mark BASMATI, the Board of Appeal found that they had failed to demonstrate that use of the mark applied for could result in a misrepresentation of the mark BASMATI. The Board of Appeal also found that use of the mark applied for could not cause a direct loss of sales for Indo European Foods, since the contested goods were goods other than rice, whereas Indo European Foods sold only rice. Likewise, there was no argument to explain how use of the mark applied for could affect the distinctiveness of the name "basmati", taking into account that "super basmati" was a recognised variety of basmati rice.

Indo European Foods further appealed to the General Court. The EUIPO contended that the General Court should dismiss the appeal. The EUIPO firstly claimed that given the opposition was based on an earlier unregistered trade mark in the United Kingdom, and in view of the withdrawal of the UK from the European Union and the expiry of the transition period, the opposition procedure and present appeal were deprived of their purpose.

However, the General Court noted that the contested EUTM application was applied for in 2017, when the UK was a member of the European Union, and the contested decision of the Board of Appeal was taken in April 2020, during the transition period. It held that since the purpose of appeals to the General Court is to review the legality of decisions of the EUIPO Boards of Appeal, the General Court must take into account the date of the contested decision when assessing that legality. Accordingly it held that the earlier unregistered word mark in the United Kingdom relied on by Indo European Foods in support of the opposition and its appeal is capable of forming the basis of the opposition.

Turning to the substantive issues, the General Court found that the Board of Appeal had erred in its findings and held that misrepresentation was established and damage is liable to

#### > Related webinar



We've published a short "bite-sized" webinar about this decision that you can access on demand at: <http://dycip.com/tm-brexite-validity>.

#### > Case details at a glance

*Jurisdiction: European Union*  
*Decision Level: General Court*  
*Parties: Frida Indo European Foods Ltd v EUIPO*  
*Date: 06 October 2021*  
*Citation: T-342/20*  
*Link to decision: <http://dycip.com/indo-euipo>*

*Jurisdiction: European Union*  
*Decision Level: EUIPO Board of Appeal*  
*Parties: Teatox GmbH v Burnfatea LLP*  
*Date: 28 September 2021*  
*Citation: R 1310/2020-1*  
*Link to decision (direct PDF download): <http://dycip.com/R13102020-1>*

#### To what extent are UK rights are considered valid in EUIPO appeal cases after Brexit?



In May 2020, the Cancellation Division partially revoked "Teatox" for goods and services related to medicinal tea, medicinal infusion, asthmatic tea, tea based beverages and the wholesale and retail of these goods.

In June 2020, Teatox GmbH filed an appeal requesting that the decision be set aside. In response, Burnfatea LLP requested for the appeal to be dismissed. Whilst the appeal was filed within the transition period, it was not until May 2021 that the Board of Appeal informed Burnfatea LLP of a deficiency regarding the mandatory representation in accordance with Article 119(2) EUTMR. As Burnfatea LLP was not based within the EEA, it was necessary for them to appoint an authorised professional representative to stand before the EUIPO. Failure to do so would lead to any procedural steps and documents submitted to be deemed inadmissible.

In addition, it was noted that the majority of the evidence submitted to prove that "Teatox" had become a common name for the goods and services in question was UK related and therefore could no longer be taken into account given that the UK is not part of the European Union. Consequently, the Board of Appeal invited the parties to submit their observations and complete the evidence.

Burnfatea LLP's argued that "no additional representation could be made" and that the procedural steps and documents submitted when the deficiency did not yet exist must be considered admissible. However, this was rejected by the Board of Appeal which proceeded to grant the appeal and annul the contested decision in its entirety.

The key distinguishing point here is that the contested decision had to be re-examined by the Board of Appeal after the end of the transition period, taking into account whether or not a new decision with the same operative part as the decision under appeal may be lawfully adopted at the time of the appeal ruling.

#### Authors:

**Tanja Hofer & Natasha O'Shea**



arise. The Board of Appeal's decision was subsequently annulled.

#### **Teatox GmbH v Burnfatea LLP**

This EUIPO Board of Appeal decision highlights the importance of appointing the appropriate representation following the end of the transition period in ongoing EU cases.

In May 2014, the German company Teatox GmbH registered their "Teatox" EU trade mark for goods and services related to teas, medicinal teas and infusions, asthmatic teas, tea pots and tableware, candy, cookies, coffee, cocoa and flavoured beverages. In December 2018, Burnfatea LLP, based in the UK, sought to strike "Teatox" off

the register, stating that "Teatox" has become a common name in trade, namely a generic descriptive term for "Tea Detox" in the United Kingdom. It was argued that "Teatox" was widely used by UK companies and understood by its customers, to mean Tea Detox. Evidence, such as printouts from Google, articles from Virgin Media television, the BBC and the Huffington Post were submitted in support of this claim. Additionally, it was argued that Teatox GmbH failed to take appropriate measures to defend their mark from being used as a generic term on the market, in the media and by end users, which resulted in "Teatox" being interchangeably used with Tea Detox and Detox Tea by many in the tea industry.

# T-592/20

## Bad faith – timing is everything

➤ **Case details at a glance**  
*Jurisdiction: European Union*  
*Decision level: General Court*  
*Parties: Univers Agro EOOD v Shandong Hengfeng Rubber & Plastic Co Ltd*  
*Date: 29 September 2021*  
*Citation: T-592/20*  
*Link to decision: <http://dycip.com/univers-agro>*

In March 2017, Univers Agro Ltd filed a European Union trade mark (EUTM) application for the word AGATE in class 12, which proceeded to registration in June 2017. In July 2017 the registration was used to bring infringement proceedings against Shandong Hengfeng Rubber & Plastic Co. Ltd, (Shandong) and its distributor's use of the figurative mark (shown below) for goods in class 12 in Bulgaria. Shandong subsequently applied to invalidate Univers Agro's mark on bad faith (amongst other grounds).



Both the EUIPO Cancellation Division and Board of Appeal invalidated the registration, holding the evidence showed Univers Agro had filed the application with the intention of taking advantage of Shandong's market share given that Shandong's mark was not registered in Bulgaria; the chronology of events showed Univers must have known that Shandong was using its mark through its distributor in Bulgaria; and Univers Agro had no honest intention to use its own mark.

Univers Agro appealed, denying it had knowledge of the AGATE mark, Shandong or its distributor before March 2017. It further claimed that the volume of use of the Shandong mark was extremely low and that it was too high a burden for it to know of all conflicting use by competitors. Therefore, it denied that there should be a presumption it was aware of the Shandong use at the time it filed its EUTM application. In support, Univers Agro stated it had undertaken a clearance search prior to filing the EUTM application and no risks had been identified. Finally, it claimed Shandong had falsified documents to support its own position.

### General Court decision

Bad faith exists where there is evidence of dishonest practices, for example, where there is no intention to trade

fairly and honestly, but an intention to undermine another's interest. Knowledge of another's use of a sign may arise from knowledge of the sector involved and if the sign in question has been used for a long period of time, from an inference that in light of the duration of use, the other party must have known about the prior sign. Whilst there is a presumption of good faith *prima facie*, once this has been called into question, the proprietor of the mark being invalidated needs to prove its actions were in good faith.

There was no evidence that Shandong had tampered with any evidence and so, the Board of Appeal was right not to question its authenticity. It was acknowledged that the search report relied on by Univers Agro contained no information concerning the Chinese trade mark Agate but it was lacking in information relating to the geographical scope and extent of the search and does not **categorically** rule out that there could be problematic marks or other risks. Therefore, the report could not conclusively be relied on.

It was noted by the Board of Appeal that there was a very short period of time between Univers Agro's mark being registered in June 2017 and Univers bringing infringement proceedings Shandong in July 2017. The short time frame supports an argument that Univers Agro must have known about the Shandong mark earlier than claimed.

Further, whilst acknowledging that a trade mark owner does not have to have used its mark in order avoid a bad faith finding, the question remains that you do need to consider whether the trade mark owner had any intention to use the mark at all at the time of filing. In the present case, indications were that Univers Agro did not have any such intention because there was a complete lack of evidence showing any commercial plans to use the mark.

The Board of Appeal was therefore entitled to hold that in view of the short period of time between filing and registering its mark

and then bringing proceedings against Shandong, Univers Agro must have already known about Shandong's use, and seized an opportunity to take advantage of the fact Shandong had not protected its mark.

In addition, evidence submitted by Shandong and accepted by the court, showed that Univers agro had "hindered others" by contacting representatives of Shandong and canvassing their views. The Board of Appeal found this amounted to dishonest practices.

In light of the above, Univers was deemed to have acted in bad faith and its appeal was dismissed.

### Comment

Bad faith claims are notoriously difficult to sustain; however, what this case demonstrates is that in circumstances where the evidence, in its totality, indicates a presumption of knowledge, and shows behaviour that can be described as dishonest, the courts will be likely to find bad faith.

Each case will be assessed on its own merits but here, given that a legal action was brought within one month of the mark being registered, and only four months after the mark was filed, coupled with the activities of Univers Agro in its dealings with the other side, the courts felt the facts clearly lent themselves to a finding of bad faith.

**Author:**  
Gemma Kirkland



# Stealth mode

## Acquiring an earlier registration cannot substitute infringement with genuine use

In UK High Court proceedings concerning the use of the STEALTH and STEALTH VR trade marks in relation to video game headsets by ABP Technology Ltd and Voyetra Turtle Beach, Mr Justice Miles rejected the claimant's summary judgment application and partially allowed the defendants' proposed amendments to their defence and counterclaim. As a result, the defendants could rely on an earlier trade mark acquired from a third party in the course of the proceedings. However, they could not claim that their use of the STEALTH sign pre-acquisition constituted use of the newly-acquired mark which is likely to have implications for their attack on the validity of the claimant's later STEALTH registration.

### Background

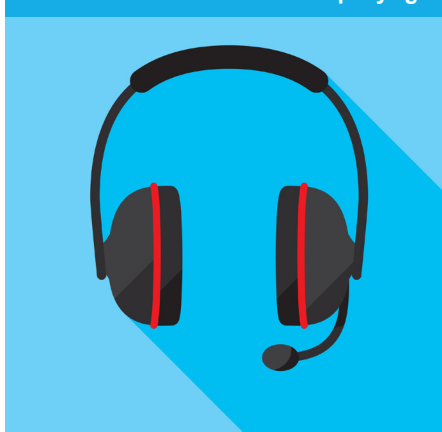
The claimant used the STEALTH mark from mid-2014 and registered UK trade marks nos. 3211021 STEALTH and 3476958 STEALTH VR in relation to audio headsets for playing video games in February 2017 and March 2020 respectively. The defendants started using the STEALTH sign in relation to video game headsets a few months later. This formed the basis of the claimant's trade mark infringement action brought under sections 10(1) and 10(2) of the Trade Marks Act 1994 (TMA) in November 2020, and the defendants' honest concurrent use argument relied on in their defence (filed in February 2021).

In July 2021, the defendants proposed to amend their defence to reflect their acquisition of UK Trade Mark no. 2014250 STEALTH (mark-250), registered in 1996 in relation to hi-fi apparatus, instruments and loudspeakers. Mark-250 was assigned to Name Creations Limited in January 2021, licensed in March and then assigned to the defendants in June. The defendants sought to deploy mark-250 as a sword and shield: to contend the claimant's marks are invalid, and to provide a defence to trade mark infringement.

### Summary judgment

Rejecting the application for summary judgment, Mr Justice Miles was not satisfied

### This case concerned earlier third-party rights



that the defendant lacked a real prospect of successfully defending the claim on the basis of honest concurrent use. In denying the application, Mr Justice Miles noted that the defence does not simply turn on a minimum period of use but also other factors such as consumers' understanding of the use of the marks by different businesses.

### Permission to amend

Whilst mark-250 had not been used in the five years prior to January 2021 (prior to its acquisition), the claimant was unable to revoke the mark for non-use. This is because under section 46(3) of the TMA any use of a mark which has not been used for over five years and which falls within the three months prior to the filing of a revocation action cannot be relied on to prove genuine use if the proprietor was aware that an application for revocation was likely to be made. However, if the use resumed before the three-month period, it can be relied on.

In this instance, the defendants recorded the transfer of mark-250 at the UKIPO in June (whereas the licence term commenced in January 2021) and proposed to amend their defence to rely on this mark in July 2021. The defendants could therefore claim that they started using mark-250 in January (which took them outside the three-month period mentioned in the TMA). The claimant argued the amendment should not be permitted as the defendants deliberately structured the sequence of events so that

their use of mark-250 took place outside of the three-month period. The claimant sought to invoke the court's discretionary powers, stating that the proposed amendments, based on a plan to covertly acquire mark-250 in the infringement proceedings, would lead to irremediable damage to the claimant who would not be able to launch a revocation action.

The defendants submitted they were not under any obligation to bring forward the amendments until they became the proprietors of mark-250 in June 2021.

The court agreed it was reasonable to amend once legal title had been acquired and that the non-disclosure of the acquisition at the time did not contravene any procedural requirements or constitute abuse of process.

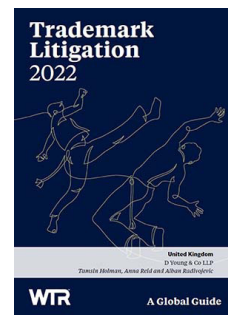
The proposed amendments also included an invalidity challenge against the claimant's registrations, which stated that the defendants' use of the STEALTH sign constituted use of mark-250 from 2014 onwards. Siding with the claimant, the court considered that this arrangement constituted a "fiction". The change of mark-250's ownership cannot expunge the events from 2014 onwards, which should be assessed in their proper historical context. This counterclaim was not permitted. However, the counterclaim that the claimant's trade marks infringe mark-250 was permitted.

### In short

The decision is a cautionary tale for defendants who seek to rely on the acquisition of earlier third-party rights (which have not been used) to mount an invalidity challenge against later registrations.

### Authors:

Alice Berkeley & Agnieszka Stephenson



Members of our dispute resolution & litigation team have written the UK chapter of World Trademark Review's Trademark Litigation 2022 guide. The guide can be viewed online at [www.dyoung.com/guide-tm-litigation](http://www.dyoung.com/guide-tm-litigation)

# Brand enforcement in the meta-verse

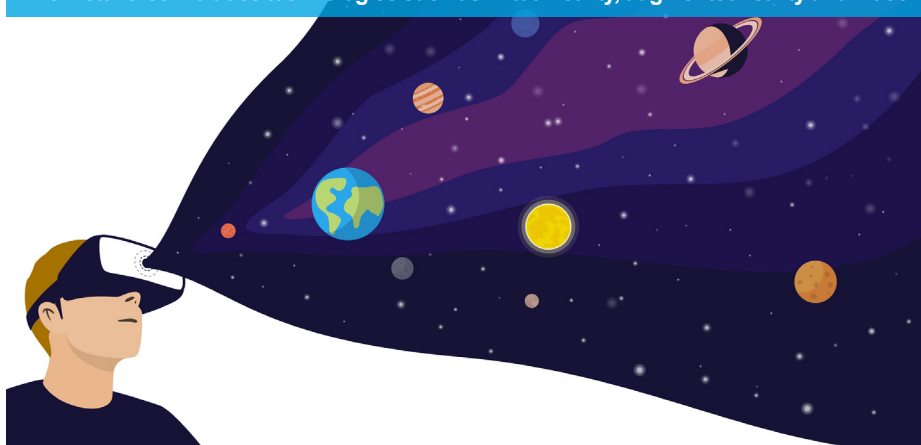
## Time for a re-think?

The growth of the metaverse (simulation environments pertaining to aspects of real life) has provided a fantastic opportunity for many companies seeking to develop their brand image. Frequently these days, it is common to see companies advertising their brand and products in these virtual environments, such as FORTNITE or ROBLOX, and the Facebook rebrand to Meta has brought the metaverse into focus for many more that have yet to explore it.

The transition from the physical realm to the metaverse does raise some interesting and thought-provoking considerations as to how a brand can be enforced in these virtual settings however, noting the rules and regulations of many intellectual property registries were not primarily drafted with these virtual applications in mind. The lack of local currencies could also make it very difficult to determine which territory and jurisdiction is applicable, for example.

Indeed, not least from a UK and EU (including German) trade mark perspective, many well-established companies although having a number of trade marks relating to real-life goods are unlikely (yet) to have trade marks relating explicitly to meta-based goods/services. Is this a problem? Would a trade mark for a real-life goods/services cover a meta-based version of the same goods and services or would these at least be considered similar? If a distinction is made it will nevertheless be necessary to rely on a likelihood of confusion instead, which may not be as straightforward as it sounds. One company that is taking no chances and at the same time testing the water is Nike, which has filed trade mark applications in the US and EU for “virtual goods namely computer programs featuring clothing, headgear, eyewear, bags ... for use online and in online virtual worlds”, as well as “retail store services featuring virtual goods namely footwear, clothing, headgear, headwear... online retail stores services featuring virtual merchandise”. It will be intriguing to see how these progress and whether others follow suit.

The metaverse includes technologies such as virtual reality, augmented reality and video



Additionally, design registrations may well have potential application to activities based in the metaverse. Unlike trade marks, a notable benefit of design registrations relating to the UK and many other parts of the EU, such as Germany, is that they are **not** limited to particular goods and services: so even if a design registration is initially classified under a particular product indication, for example, a real-life piece of clothing, the design registration can nonetheless be notionally enforced against any product resembling the appearance of the design registration. This being the case, and noting at least many design registration regimes in Europe do expressly allow for design registrations to relate to graphical user interfaces and other types of virtual designs, there may be arguments that a design registration initially directed to a physical product might, and should, in fact also cover virtual depictions of the same product.

A further benefit of design registrations in many European territories, such as the UK and Germany, is that as well as covering physical products, design registrations may also be used to cover graphical symbols – which also includes logos. So for any new logos being contemplated moving forward, for those brand owners not doing so already, consideration may well be given whether a corresponding design registration should be made **alongside** any trade mark application for the logo, to potentially help

with applications of the logo in an online/virtual setting. For completeness however, note that the design registration regimes in many of these territories are only validly applicable to designs which have not been publically disclosed for a significant period of time (in many territories, no more than 12 months after the design is first publically disclosed). So for those designs which have been on the market for some time, it may not be possible to retrospectively cover these designs with a design registration.

Undoubtedly we are still only witnessing the start of the metaverse and brand owners will take time to adapt to the emergence of it and decide what they need to do. Brand owners contemplating application of their brand to virtual environments should actively consider whether this might necessitate changes or additions to their intellectual property strategy. In particular, should more virtual-based goods and services be covered by future trade mark applications, and should brand owners consider filing for a wider scope of protection sooner rather than later, to ensure coverage for the virtual domain? Design registrations may equally provide further opportunities for brand enforcement, which could be used to supplement any protection otherwise obtained from trade marks, if this approach is not being implemented already.

Authors:

William Burrell & Richard Burton



# Hague design system Changes to the rules effective 01 January 2022

**F**ollowing a recent announcement from WIPO, a number of welcome amendments have been made to the rules of procedure relating to the Hague design registration system. These amendments came into force on 01 January 2022.

## Modification to the publication term for a standard Hague design registration

The first, and most important, amendment concerns a change to when a “standard” Hague registered design application is published, that is, an application which is not subjected to either immediate or deferred publication. Accordingly, for any such standard application filed on or after 01 January 2022, the new rules mean that these applications will now be published by WIPO shortly after twelve months (as opposed to six months) from the date when the Hague registered design application is first submitted.

For many, this change to the standard publication term for Hague designs will be seen as particularly welcome news, noting publication of the Hague design after just six months from filing was often felt as being too short a time period. This then practically meant, for those wishing to extend the deferment term, a need instead to submit the Hague design application under the deferred publication route to otherwise extend the deferred publication period. This, however, was sometimes not possible noting a number of territories of the Hague design registration system do not allow for the use of the deferred publication route, such as Mexico; Russia; and the Ukraine. So for a Hague design including any of these particular territories, the Hague design could only practically be deferred from publication for up to six months from filing – which was often felt too short a time period.

## Introduction of a “force majeure” exemption for late completed acts

A further welcome rule change concerns the introduction of a provision for allowing late submissions to certain WIPO deadlines, relating to a Hague design application, to be excused in the case of force majeure circumstances. Such circumstances, for example, might include those caused by

the still ongoing COVID-19 pandemic.

## Signatory modifications for change in ownership requests

Finally, the rule changes also facilitate new owners of a Hague design registration seeking to record themselves as such before WIPO.

It is currently necessary for the new owner of a Hague design registration, when making a recordal request to WIPO to have themselves recorded as the new owner, to have the recordal request additionally signed by the former owner of the Hague design registration, or be accompanied by an attestation from the competent authority of the holder's contracting party that the new owner appears to be the successor in title of the holder. This thus practically poses a significant burden on new owners in instances where the signature of the former holder cannot be obtained as part of the recordal request.

From 01 January 2022 however, it is possible for a new owner of a Hague design registration to have themselves recorded as such before WIPO without the need for such a signature from the former holder as part of the recordal request, so long as the recordal request is nonetheless evidenced by an assignment document or some other document which is sufficient to provide evidence for the recording of the change.

Thus from 01 January 2022, the process for recording the change of ownership of a Hague design registration is much more aligned with many other design registries around the world – where the assignment of a design registration can notionally be recorded without an official assignment form signed by the former owner of the design registration.

## Conclusion

If you are interested in obtaining design right protection via the Hague system, or are curious to know how the Hague system might benefit you, please do not hesitate to contact one of the members of our design team who would be pleased to advise.

## Authors:

William Burrell & Stefanie Koroll



# UK Government consultation on possible reform to UK design law Have your say!

**I**n what is very timely news, the UK Government has released a consultation on whether changes are required to the existing UK design law framework.

The consultation  
is in the form of a  
survey, and is open  
for responses until  
07 February 2022.

The questions of the survey are fairly wide-ranging, and notably include questions on whether substantive examination should be introduced as part of the UK design registration process.

Other topics of consultation concern the existing criminal sanctions relating to UK design right enforcement; dynamic type (animated), and graphical user interface (GUI), design registrations; as well as questions which allude to the existing unregistered design right provisions in the UK.

Noting its wide-reaching nature, the issuance of this consultation now provides a fantastic opportunity for those already making use of registered and unregistered design rights in the UK to have their say on whether these rights are currently fit for purpose, and if not then how they could be improved to work more effectively.

Equally, for those entities that are not yet making substantial use of design rights in the UK, the consultation at least now provides a welcome opportunity for these entities to provide input on how these rights might be modified to better cover their design related activities.

The survey is open for responses until 07 February 2022 and can be accessed via the UK Government website: <http://dycip.com/uk-gov-design-survey>.

## Author:

William Burrell



# D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

## Representation

### Application “starts a hare running” Little Hare Gin v Harrogate Distillery (Whittaker’s Gin)

This is a somewhat cautionary tale/reminder in relation to UK trade mark opposition proceedings. The case concerned an application by LITTLE HARE GIN COMPANY LIMITED for a series of the six marks shown below, LITTLE HARE GIN with an image of a hare.



The application covered a number of classes but was opposed by HARROGATE DISTILLERY specifically against gin goods in class 33 under sections 5(3) and 5(4), on the basis of a reputation in and use of the hare logo (shown below) on gin. It is relevant that the opponent was unrepresented.



As a result of how the parties handled this case, the reminders to all are:

- If an applicant considers it to be worthwhile to refer to other closely similar marks of unrelated parties being in existence for the relevant goods and/or services, it is necessary not just to point to those on the register, but to show how they are used in the marketplace.
- The evidence should support the grounds of opposition filed so that a consistent case is put forward; if grounds refer to specific goods, it may not be helpful to include evidence relating to other goods.
- Wherever possible, if a witness statement refers to use, the statement should include exhibits to illustrate the nature of the use; for instance, if the mark has been shown on a television programme or an advertisement, a bare statement to this effect is insufficient and exhibits could consist of screen shots and details such as dates and viewing figures. The trade mark should always be clearly visible.
- Submissions will not be taken as evidence which should be set out within the witness statement or another format which includes a statement of truth.

The hearing officer in this case was not about to forgive a party for not following procedures, even one unrepresented. The opposition failed.

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