

## TRADE MARK NEWSLETTER

## NO HOLES IN DONUT MONOPOLY

In a surprising decision rendered by OHIM's Cancellation Division on 7 May 2008, the figurative CTM registration no. 719500 for "arnold's DONUTS", owned by Distribution & Marketing GmbH, was declared invalid in respect of all goods and services in Classes 16, 25, 30 and 42. The mark is shown below:



The challenger, Panrico S.A, filed their invalidity action relying on Art. 8(1)(b) and Art. 8(5) of Council Regulation No. 40/94, invoking their earlier Spanish registrations for DONUT in Classes 16, 25, 30, 32 and 42.

Panrico claimed that the CTM registration for "arnold's DONUTS" should be cancelled on the basis that there was a likelihood of confusion with their earlier Spanish DONUT registrations, due to the similarity between the signs and identity and similarity of the goods/services, under Article 8(1)(b) CTMR.

Panrico also requested cancellation of "arnold's DONUTS" on the grounds that use of that mark would, without due cause, take unfair advantage of, or be detrimental to, the distinctiveness and high repute of Panrico's earlier DONUT registrations in Spain, under Article 8(5) CTMR.

Reversing an earlier decision issued by OHIM's Opposition Division (which had rejected Panrico's opposition against the "arnold's DONUTS" mark, finding that the word DONUT was essentially descriptive of pastry goods), the Cancellation Division found that the English word DONUT is a fanciful term and has no descriptive connotation to the Spanish consumer.

Given also 'arnold's' had no conceptual meaning in Spain, they concluded that Panrico's earlier rights were valid and there were sufficient visual and phonetic similarities between the marks in issue to find a likelihood of confusion.

OHIM considered that there was identity/overlap with respect to all goods/services in Classes 16, 25, 30 and 42 except for: "*rice, tapioca, sago, flour and preparations made from cereals, bread, salt,*

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*vinegar and mustard*" in Class 30, so the claim based on Article 8(1)(b) CTMR succeeded for these goods.

With regard to the remaining goods in Class 30, OHIM considered that these were 'dissimilar' goods to the goods/services covered by Panrico's earlier DONUT registrations.

However, Panrico had submitted overwhelming evidence of their reputation in Spain (which consisted of market surveys and statements from Chambers of Commerce in Spain). The Cancellation Division concluded that, taking account of the high consumer recognition of Panrico's DONUT marks in Spain, the CTM registration of "arnold's DONUTS" would benefit from the selling power of the earlier DONUT registrations, therefore, the application for invalidity under Article 5 also succeeded.

### CONCLUSION

It appears that the "second bite" approach by Panrico paid off in this case; judging from this Decision and in line with the reasoning given by the ECJ in *Matratzen* (C-421/04), whilst DONUT would be regarded as non-distinctive and/or descriptive of pastry/confectionery goods in the UK, the word DONUT is sufficiently fanciful in Spain for these goods and can enjoy monopoly rights as a trade mark.



however, it transpired that the owner was in fact using the site to promote a rival drink. Consequently, he was ordered to transfer the domain name to Red Bull.

While the trend in domain name disputes still favours owners of earlier trade mark rights, there are some exceptions. Two recent and contrasting cases neatly illustrate this:

### "REDBULLSUCKS.COM" SUCCESSFULLY TRANSFERRED TO RED BULL

In a decision by WIPO, the owner of the domain name "redbullsucks.com" has been ordered by WIPO to transfer the domain name to Red Bull, the energy drinks company and owner of the trade mark RED BULL. There have been several previous cases where the owner of a "sucks" domain name has successfully resisted a request for transfer by showing that the website is a genuine protest site and is not being used for commercial gain. In this case,

WIPO's rules on domain name disputes protect trade mark owners against third parties who use or register, in bad faith, domain names which are either identical or confusingly similar to their trade mark. Since the "protest site" defence had failed, the case turned on whether the term "redbullsucks" is confusingly similar to the trade mark RED BULL. Red Bull had argued that the word "sucks" is a generic word which would be given little attention by the consumer (in the same way as the added generic elements in "drink-redbull.com" and "redbull-online.com" would). WIPO rejected this argument, finding that the word "sucks" is widely known as an insult and that the consumer would not be confused into thinking that the site was operated by Red Bull.

At this stage, things were not looking good for Red Bull. But WIPO then managed to side-step this issue by holding that a domain name is identical or confusingly similar to a trade mark when the domain name

# WIPO DECISION GIVES RED BULL WINGS; MAESTRO HITS A WRONG NOTE WITH NOMINET

includes the whole of the trade mark, or a confusingly similar variation, regardless of the other terms in the domain name. Thus, Red Bull did not have to show that consumers would be confused as to the origin of the website. Under this generous test, WIPO found that the name "redbullsucks" was confusingly similar to the mark RED BULL.

Perhaps concerned about genuine protest sites falling foul of this test, WIPO also stated that true protest sites ought to escape attacks from trade mark owners because such sites have a legitimate interest, are not being used, and would not have been registered, in bad faith. In the present case, it was unsurprising that the owner of redbullsucks.com failed to keep the domain name since his site was not used for legitimate criticism but instead was promoting a rival energy drink for commercial gain.

## MAESTRO DEBIT CARD BUSINESS FAILS TO HAVE MAESTRO.CO.UK TRANSFERRED

By contrast, Mastercard, whose MAESTRO mark is used for a leading brand of debit cards in the UK, has failed to have the domain name maestro.co.uk transferred to it from a third party. The message from Nominet (the arbitration body in charge of .co.uk domain names) is that it does not matter how well known your trade mark might be, you still need evidence that the domain name registration is "abusive" if you are to have the domain name transferred to you.

The events which preceded the dispute did not paint the domain name owner in a very good light. He had registered various domain names which included arguably well known brands, for example, popidol.co.uk and bigbrothertv.co.uk. Mastercard argued that the registrant had a history of obtaining abusive registrations and

that the registration of maestro.co.uk also fell into this bracket. However, the defendant's evidence showed that the domain name maestro.co.uk had been used by its owner to sell music downloads and to provide education and tuition services. The owner claimed that he had registered the domain name with the musical meaning of MAESTRO in mind and told Mastercard that he would only be willing to sell the domain name for an exceptional offer, as he had invested significant effort into developing the site for his own legitimate purposes. After negotiations failed, Mastercard filed a complaint with Nominet, but was unsuccessful.

Nominet found that, whilst Mastercard had gained a degree of distinctiveness and goodwill in the mark MAESTRO in the UK in respect of debit card services, it was not the only user of the word. Given the ordinary musical definition, the term was likely to be of interest to and used as a brand name by several other businesses. Mastercard thus did not have a case for monopoly across all goods and services. The offending domain name was being used for legitimate purposes and Mastercard were unable to prove that it was "abusive" or was taking commercial advantage of Mastercard's trade mark. Surprisingly, Nominet found that there was no

evidence supporting the arguments that the registrant was a serial abuser (no complaints concerning the other domain names had been filed) and, in any event, the registration of maestro.co.uk did not form part of the pattern of other alleged abusive registrations since it was applied for nearly a year later.

Nominet's finding that the registrant had not devoted any significant effort to the development of his website was also surprising in context.

The fact that the word "maestro" is an ordinary English word and Mastercard filed no evidence to show that it had become a well-known trade mark appears to have saved the domain name owner in this case. The message from Nominet is that if your trade mark is an ordinary English word, which has not acquired a strong secondary meaning through extensive use, you will need very persuasive evidence that the domain name registration is abusive to succeed in having a domain name transferred, even if the registrant's motives are less than honourable.



# TRICKY TRADERS BEWARE!

On 26 May 2008, two new important pieces of UK legislation came into force – The Consumer Protection from Unfair Trading Regulations 2008 and The Business Protection from Unfair Marketing Regulations 2008. Many older laws have been superseded with the introduction of these Regulations, such as The Control of Misleading Advertisements Regulations 1988, parts of the Trade Descriptions Act 1968 and parts of the Consumer Protection Act 1987.

The purpose of these Regulations is to protect both consumers and businesses alike from traders who employ unfair commercial practices towards consumers or who use advertising which is misleading towards other businesses. If a trader's activities are purely business-to-business, the Business Protection from Unfair Marketing Regulations apply, but if there is any element of consumer business, then the Consumer Protection from Unfair Trading Regulations will take precedence. The test for establishing which Regulation should be enforced is whether the activities of the trader "are directly connected with the promotion, sale or supply of a product to or from consumers". Interestingly, the Regulations apply regardless of whether the company or trader in question is based in the UK. If UK consumers are being targeted and the trader is found to be engaging in activities contrary to the Regulations, he liable to fall foul of the Regulations.

## THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS ("CPUT" REGS)

These are much stricter than those covering business-to-business activities and judge all commercial practices from the view point of the "average consumer," who is defined as being reasonably well informed, observant and circumspect; a member of a particular group of consumers; or a clearly identifiable group of consumers which are vulnerable due to mental or physical infirmity or age or credulity.

The Regulation is administered by the local enforcement authorities such as Trading Standards, who have a duty to enforce the Regulations where necessary and have the powers to enter premises, make test purchases of the products in question, require

production and seizure of goods and documents and if necessary, break open containers or vending machines.

Under the Regulation, there are five types of prohibited activity, namely a General Prohibition, Misleading Actions, Misleading Omissions, Aggressive Practices and a list of 31 prohibited activities detailed in Schedule 1 of the Regulations. In summary, these cover:

1. **The General Prohibition:** a commercial practice is unfair to consumers if it "contravenes the requirements of professional diligence" and "materially distorts the economic behaviour of the average consumer."
2. **Misleading Actions:** actions which contain false information (such as information relating to the existence, characteristics or price of the product) or which deceive or are likely to deceive the average consumer (even if the information is factually correct) and which cause the average consumer to make an economic decision he would not otherwise have taken. Most notably, a trader will be guilty of committing a misleading action if his activities "concern the marketing of a product (including comparative advertising) which creates confusion with any product, trade mark, trade names or other distinguishing marks of a competitor".
3. **Misleading Omissions:** those which omit or hide material information, provide information in an unclear, unintelligible, ambiguous or untimely manner or fail to identify its commercial intent, and which, as a result, cause the average consumer to make a transactional decision he would not otherwise have taken. "Material information" is deemed to include all information "the average consumer requires to make an informed transactional decision".
4. **Aggressive Commercial Practices:** those which "significantly impair or are likely to impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence" and which cause the average consumer to make an economic decision he would not otherwise have taken. Factors to be taken into consideration are things such as whether the trader uses any threatening or abusive language or behaviour, and whether there has been any exploitation by the trader of circumstances surrounding the consumer which are likely to impair its judgement.
5. **Engaging in one of the 31 listed prohibited activities:** Schedule 1 of the Regulations lists 31 commercial activities which are considered unfair.





their Directors, Managers and Company Secretary may be prosecuted.

There are, however, two defences available to traders accused of committing an unfair commercial practice under the Regulation:

1. **"Due Diligence" Defence:** the trader will not be found guilty if he can show that the commission of the offence was a mistake, caused by reliance on information supplied to him by another person, the act or default of another person, an accident or another cause beyond his control and that he took all reasonable precautions and exercised all due diligence to avoid the commission of an offence himself.
2. **"Innocent Publication of Advertisement" Defence:** the trader will have a defence if he can prove that he is in the business of publishing or arranging the publication of advertisements, that he received the misleading advertisement in the ordinary course of business and that he had no reason to suspect that its publication amounted to an offence under the Regulation.

#### THE BUSINESS PROTECTION FROM MISLEADING MARKETING REGULATIONS 2008 ("BPMM" REGS)

As mentioned above, these Regulations are less strict than those protecting consumers. The main offence is a prohibition against any misleading advertisement which deceives or is likely to deceive the traders to whom it is addressed and by virtue of its deception is likely to affect their economic behaviour or injure a competitor. Factors to be taken into consideration in determining whether an advertisement is misleading are things such as the characteristics of the product, the price and manner in which the price is calculated, the conditions on which the product is supplied or provided and the nature and rights of the advertiser.

Specific mention is made of comparative advertising, which under trade mark law is permissible provided that the comparison complies with honest commercial practices, does not denigrate or discredit the trade mark and is in accordance with the provisions of the Comparative

Advertising Directive. Under the Business Protection from Misleading Marketing Regulation, comparative advertising is only acceptable when the following conditions are met:

1. It is not misleading under this Regulation or the Consumer Protection Regulation
2. It compares products meeting the same needs or intended for the same purpose
3. It objectively compares one or more material, relevant, verifiable and representative features of the products,
4. It does not cause confusion with or discredit or denigrate another's trade mark, trade name or other distinguishing marks, products, activities or circumstances of a competitor
5. It does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing mark of a competitor or of the designation of origin of competing products
6. It does not present products as imitations or replicas of products bearing a protected trade mark or trade name.

The penalties for committing an offence under the Regulation and the defences available are the same as under the Consumer Protection from Unfair Trading Practices Regulation, as are the powers of the enforcement authorities. Differences are, however, that under the Business Regulation, the enforcement authorities can apply to the Courts for an injunction to prevent the further activities of the accused.

#### CONCLUSIONS

At first glance, the CPUT Regulations appear to provide an additional layer of protection for brand owners and may help to prevent third parties promoting products similar to their own, such as look-alikes. However, these Regulations are likely to be of limited use as enforcement can only be made via local enforcement authorities and no actions can be brought by trade mark owners themselves. Traders will still have to rely on the established provisions of trade mark law, passing off and the Comparative Advertising Directive to take action against infringing third party use of their trade marks, in particular where misleading statements give rise to consumer confusion.

The most pertinent ones from a trade mark perspective are displaying a trust or quality mark without having obtained the necessary authorisation and promoting a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that the product is made by that same manufacturer when it is not.

The penalties under the Regulation are potentially criminal, resulting in an unlimited fine and/or up to two years imprisonment. Civil injunctions are also available to enforcement authorities. However, in order for a trader to be found guilty of an offence under the "General Prohibition", it must be shown that in undertaking the activity he did so knowingly or recklessly. All of the other offences are strict liability offences. Companies should note, however, that if they are found guilty of an offence under the Regulation,

# SONIA GIVES CUADRADO THE SLIP

The ECFI has again considered (in case T-131/06 dated 30 April 2008) the application of the “proof of use” requirements under Article 43(2) and (3) CTMR. This case concerned an opposition by Cuadrado, owners of a Spanish national registration for SONIA in class 25, against an application by the French fashion designer, Sonia Rykiel, for a composite mark as shown below:



This application covered class 25 clothing as well as goods in class 18.

Since the opponent’s mark was more than 5 years old at the time of publication for the applicant’s mark, proof of use was requested. The case got off to a bad start because this request was not properly transmitted to the Opponents by OHIM. Instead, the Opposition Division found that there was a likelihood of confusion between the marks in respect of the class 25 goods, without considering whether proof of genuine use of the Opponent’s marks had been demonstrated.

This triggered an appeal on the procedural omission by the Applicant and the case was then remitted by the Second Board of Appeal at OHIM to the Opposition Division for further consideration. This time round, materials showing use were filed by the Opponent, of which the following materials were considered admissible:

- a) 9 invoices dated for the period 10 January 1997 – 10 March 1998, bearing reference numbers which were used to identify women’s petticoats and women’s slips. The dates of the invoices were concentrated between the months of January – March 1997 and February/ March 1998.
- b) A declaration from the

Opponent demonstrating that actual sales volumes were 31 units (petticoats) and 54 units (slips) with a total sales value of EUR432.

There was no attempt by the Opponent to put these materials into a wider context or to explain what appeared to be a relatively low volume of sales, taking account of the everyday nature of the goods in issue.

Notwithstanding, the Opposition Division and OHIM’s Board of Appeal both felt that the materials filed were sufficient to satisfy the user requirement in respect of women’s slips and petticoats.

The Opposition Division also decided that the respective marks were not likely to be confused, a finding that was then overturned by the Board of Appeal.

In the subsequent appeal to the ECFI, Sonia Rykiel argued that not only was the Opponent’s proof of use not sufficient but that the finding of likelihood of confusion was incorrect. In the event, this latter point was not decided by the ECFI because they concluded that the Opponent’s proof of use was inadequate.

In their reasoning, the ECFI referred to the rationale for the genuine use requirement in the CTMR, namely that conflicts between trade marks should be restricted to those where there was a sound economic reason resulting from an actual function of the mark on the market.

However, the ECFI stated that it will not be necessary to assess the commercial success of an undertaking, monitor its economic strategy or interpret the genuine use provision in a manner designed to reserve the protection of trade marks for large scale commercial uses of them.



In fact the interpretation of “genuine use” in previous EU case law has tended to be more generous than previous UK decisions. The Sunrider (VITAFRUIT) case and the “La Mer” decision might be seen as the extreme end of the spectrum when it comes to accepting that low commercial volumes and infrequent sales are still evidence of a genuine trade in the goods.

In the present case, the ECFI adopted a more nuanced approach, asserting that the assessment of whether there is genuine use in a particular case involves a “degree of interdependence” between these factors, thus low commercial sales volumes may be offset by the fact that the use of the mark was geographically extensive or very regular, or vice versa.

Applying these considerations to the present case, the following factors counted against Cuadrado:

- 1) The goods in issue were intended for everyday consumption and sold for a reasonably low price. The prospective market must therefore be presumed to be quite large, but there was an extremely limited volume of actual sales.
- 2) No evidence was filed to place the minimal turnover/small quantity of goods sold over a relatively long period (13 months) in context.



# INCREASED PROTECTION FOR BRAND OWNERS - A NEW COMPANIES ACT

October 2008 will see the new Companies Act 2006 come into effect in England & Wales. The key change in this Act for brand owners will be their new powers to object to a company name which conflicts with their trade mark.

The current English law gives very little opportunity for brand owners to object to third party registration of conflicting company names. However, the new Act will allow not just the Secretary of State to direct a company to change its name; trade mark owners will also be given the opportunity to object.

In summary, Section 69 of the Companies Act 2006 entitles any person to object to an independent adjudicator if a corporate name is: i) the same as a name in which the applicant has goodwill; or ii) sufficiently similar to such a name that its use within the UK would be likely to mislead by suggesting a connection between the two.

There is no requirement for the person making the objection to own a registered trade mark or to have registered a conflicting company name. Moreover, there is no requirement for the objector to show use of their earlier trade mark.

Once an objection has been filed, the onus will shift to the company which has applied for a company name incorporating a term that conflicts with claimed earlier goodwill or trade mark rights to show that the company name was adopted legitimately.

The statute lists the following reasons as legitimate reasons for adoption:

- a) *that the name was registered before the commencement of the activities on which the applicant relies to show goodwill; or*
- b) *that the company is operating under the name, or is proposing to do so, and has incurred substantial start-up costs in preparation, or was formerly operating under the name and is now dormant; or*
- c) *that the name was registered in the ordinary course of a company formation*

*business and is available for sale to the applicant on the standard terms of business; or*

d) *that the name was adopted in good faith; or*

e) *that the interests of the applicant are not adversely affected to any significant extent.*

The objector can only respond to defences a, b and c if they can show that the main purpose of registering the new company name was to obtain money or prevent the earlier trade mark owner from registering the name.

If a successful objection is made, the adjudicator has the power to direct the company to change their company name to one which does not conflict with the rights asserted by the brand owner. Failure to comply with the order will be an offence.

The adjudicator for such disputes under the new Companies Act will be a person who has experience in the IP field.

## COMMENT

The new Act extends the rights of the brand owner into new territory. It seems that the threshold set by the new Act for enforcing rights in a trade mark is very low, shifting the onus onto the company adopting the new name to defend their actions from the outset.

Trade Mark owners should take full advantage of this new power and subscription to company name watching services is recommended. Further, prior to incorporating a new company at Companies House, we would recommend trade mark searches to identify any conflict and avoid a later challenge.



- 3) The actual sales were sporadic, and did not spread evenly over the relevant 13 month period (contrast "La Mer").

The ECFI thus concluded that its initial doubts as to the genuine use of the Opponent's mark, arising from the extremely limited commercial volume of its exploitation had not been dispelled by Cuadrado's explanations or the fact that they actually traded in a huge range of articles of which the goods in issue were only one part.

It is of note, however, that the Court did not expressly state that the evidence of use supplied was merely token and made for the sole purpose of preserving the rights conferred by the mark. Instead, it seems the Opponents simply failed to provide sufficiently convincing evidence to the contrary.

Overall the CFI's conclusions in this case are not a great surprise; nevertheless, their analysis still suggests a tendency to give the benefit of the doubt to the Opponent in such cases. From a tactical perspective, this can pose problems where initial commercial enquiries do not pick up such low user levels and applicants rely on incorrect assumptions that an earlier mark may not survive a "proof of use" challenge.

However, if acting for the registered proprietor in such cases, it is of some comfort to know that very limited evidence of use may save the day and that the threshold for success is still low.

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## ITMA AUTUMN CONFERENCE, 25-26 SEPTEMBER 2008 ALICANTE, SPAIN

Gillian Deas, as President of ITMA, will be chairing, and Penny Nicholls will be speaking at the Conference on the subject of unregistered rights as a basis for opposition.

## PTMG AUTUMN CONFERENCE, 1-4 OCTOBER 2008 ISTANBUL, TURKEY

Gillian Deas will be attending the 77th Conference, which has the program, "New Lamps for Old, Letting the Genie Out of the Bottle".

## ECTA COUNCIL & COMMITTEE MEETINGS, 16-18 OCTOBER 2008 MUNICH, GERMANY

Jeremy Pennant will be attending the 56th ECTA Council & Committee Meetings.

## INTA LEADERSHIP MEETING, 12-15 NOVEMBER 2008 BOCA RATON, FLORIDA, USA

Jeremy Pennant will be attending the INTA Leadership Meeting at the Boca Raton Resort & Country Club.



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