

# D YOUNG & CO TRADE MARK NEWSLETTER *no.111*

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## Sky v SkyKick UK High Court decision



**Wir ziehen um!**  
We're moving to  
new permanent  
Munich offices  
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As we finalise this newsletter the UK Government has announced its new campaign to prepare the UK for the end of the Brexit transition period, which will end on 31 December 2020. We will keep readers informed of key actions to take and factors to be aware of over the coming months and invite you to visit our IP & Brexit website pages ([www.dyoung.com/brexit](http://www.dyoung.com/brexit)) for our latest updates. If you would like to receive our UK, EU and German trade mark presentation, tailored to your business, which will also address key Brexit issues, please do get in touch.

As always we wish our readers a safe and enjoyable summer period and we look forward to meeting with clients and colleagues in future months, whether that be in person or online. Details of our current work processes during the Covid-19 pandemic can be found at [www.dyoung.com/covid-19-service](http://www.dyoung.com/covid-19-service).

## Events



06-15 October 2020  
WTR Connect

Partner Richard Burton will be attending this online event that will bring together a series of digital sessions organised around major trade mark themes. [www.dyoung.com/news-events](http://www.dyoung.com/news-events)

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## Bad faith

# Sky v SkyKick UK High Court decision

Sky had sued SkyKick for trade mark infringement relying on a number of registrations with specifications covering goods as broad as “computer software” and services as broad as “telecommunications services”. SkyKick had claimed that those registrations were wholly or partially invalid on the basis that a) the goods/services lacked clarity and precision; and b) they had been filed in bad faith.

The Court of Justice of the European Union (CJEU) judgment in January 2020 confirmed that Sky’s registrations could not be held invalid on the basis that the goods/services lacked clarity or precision.

The CJEU judgment also held that if some degree of bad faith were found, that would not invalidate the registrations as a whole, but only those goods/services which were deemed to have been filed in bad faith.

Unsurprisingly, when the case returned to the High Court of England and Wales, the parties disagreed as to how this should be assessed.

### Back to the High Court of England & Wales – infringement

Lord Justice Arnold quickly dismissed SkyKick’s claim (a) regarding lack of clarity and precision, following the CJEU ruling. SkyKick’s claim (b) on bad faith attracted a longer commentary.

It followed from the CJEU that Sky’s marks could be held partly invalid. It is worth noting (Arnold LJ admitted that he himself may have overlooked it previously) that SkyKick did not allege that Sky’s registrations were invalid on the grounds of bad faith insofar as they covered “telecommunication services” and “electronic mail services”. This oversight on SkyKick’s part seems to have been as a result of their arguing that if any of the goods/services were deemed to have been filed in bad faith, that finding would taint the marks

as a whole (that is, all goods/services). However, the CJEU judgment confirmed that a registration can be partially held invalid on the grounds that certain goods/services were included in bad faith. SkyKick tried to amend their case to include those services in their bad faith attack. The judge refused permission for this, saying that he thought that would be an abuse of process (for various reasons), but that he felt it would not assist SkyKick’s case in any event (paragraphs 14 and 15 the UK decision).

Arnold LJ then assessed whether any of the goods/services covered by Sky’s registrations could be considered to have been filed in bad faith, applying the CJEU’s guidance. In particular, the CJEU had held that a bad faith finding applies where: “it is apparent from relevant and consistent indicia that the proprietor... has filed the application... not with the aim of engaging fairly in competition but with the intention of undermining, in a manner inconsistent with honest practices, the interests of third parties, or with the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark, in particular the essential function of indicating origin”.

If a trade mark owner includes in an application goods/services in relation to which it does not intend to use the mark, that may constitute bad faith “where there is no rationale for the application” in light of the aims referred to in relevant law (that is, the functions of a trade mark noted above, in particular the origin function). The CJEU had made it clear that bad faith cannot be presumed merely because, at the time of filing of the application the owner has no economic activity corresponding to the goods/services in question (paragraph 78 of the CJEU judgment).

The UK judge had already held, based on the evidence before him, that there were some goods/services in relation to which Sky had no reasonable commercial rationale for seeking registration. He was forced to conclude that Sky had included these goods/services with a view to seeking extremely

## Did Sky have a commercial rationale for seeking registration of the marks in question?



broad protection, regardless of whether it was commercially justified. Sky had no intention to use the mark in three different ways:

1. there were goods in relation to which Sky never had an intention to use (for example, “bleaching preparations”);
2. those that were so broad that Sky could never hope to make use across the whole spectrum (for example, “computer software”); and
3. the specifications were intended to cover all the goods/services in relevant classes.

Arnold LJ had held that Sky had applied for its registrations partly in bad faith in each of these three ways. Not merely was there no intent to use in relation to some goods/services, there was no “foreseeable prospect” that it would ever intend to use the marks in relation to such goods/services. Sky had thus applied for the marks, in relation to at least certain goods/services, with a view to obtaining an exclusive right for purposes other than those falling within the functions of a trade mark, namely “purely as a weapon against third parties”, whether in infringement

or opposition proceedings. The judge had also held that Sky had made a partly false declaration of an intention to use the mark as regards one UK registration (an applicant for a UK national mark – but take note, not an applicant for an EU trade mark – must sign a declaration that the mark is being used, or that the applicant has a genuine intention to use it, for the goods/services covered) – which also suggested an element of bad faith.

SkyKick had argued that the broad term “computer software” should be cut down to software enabling access to, or relating to the uploading, storing and sharing of, audio-visual content; software relating to the sending/receipt of emails, for set-top boxes, and so on. Sky resisted this, but did not put forward an alternative limitation to the term, which the judge found unhelpful. He found that bad faith had been proven insofar as Sky had applied for the term “computer software” as part of its commercial strategy without any commercial justification – but that SkyKick’s suggested limitation had been based solely on the actual use in relation to specific software that Sky had made of its marks. Arnold LJ held that that would be an unfair limitation, since Sky was entitled to file for a broader scope of protection than its

actual use on the marketplace reflected. In the absence of an alternative from Sky, the judge had to make a suggested limitation himself. He went with: “Computer software supplied as part of or in connection with any television, video recording or home entertainment apparatus or service; computer software supplied as part of or in connection with any telecommunications apparatus or service; electronic calendar software; application software for accessing audio, visual and/or audio-visual content via mobile telephones and tablet computers; games software”.

The judge’s thought processes here, and in relation to other good/services (paragraphs 30-33 of the UK decision) are quite useful in that they will likely inform similar assessments by the courts/tribunals going forwards in similar cases. Sky failed to supply its own suggested limitations, which likely did not assist its case.

Since Sky’s trade marks were deemed validly registered in relation to “telecommunications services” and “electronic mail services” in any event, infringement was found as a result.

On 02 July 2020, both parties were granted permission to appeal.

### Commentary

The High Court of England & Wales held that Sky had applied for at least certain goods/services with a view to obtaining an exclusive right for purposes other than those falling within the functions of a trade mark, namely “purely as a weapon against third parties”, whether in infringement or opposition proceedings.

Whether we will now see the UK Registry (and possibly other EU registries) objecting during the course of examination to broad terms such as “computer software” (unless an applicant specifies the intended uses for that software) remains to be seen. It is possible that current European practice could move towards the US model, where specifying the nature and intended purpose of terms such as “computer software” is necessary in order for an application to be accepted.

**Authors:**  
**Flora Cook & Matt Dick**



# PlanetArt v Photobox

## UK High Court has no APPetite for icons that fail to practice “social distancing”

➤ **Case details at a glance**  
Jurisdiction: England & Wales  
Decision level: High Court  
Parties: PlanetArt LLC & PlanetArt Limited v Photobox Limited & Photobox Free Prints Limited  
Date: 25 March 2020  
Citation: [2020] EWHC 713 (Ch)  
Link to decision: <https://dycip.com/planetart-photobox>

App icons allow mobile users to discriminate between different software. To attain maximum impact in a competitive space, descriptive words are frequently found under the logo. This interplay between trade marks and app icons was at the centre of PlanetArt LLC v Photobox Ltd, a recent trade mark and passing off dispute where the UK High Court considered issues such as descriptive signs and context of use when assessing consumer confusion.

### Background

In 2014, PlanetArt launched FreePrints, an app that provides a free photo-printing service for smartphone users. The service is highly successful in the UK, demonstrated by 11.5m downloads by the end of 2019. PlanetArt owns a UK trade mark in respect of its logo, a figurative butterfly on a turquoise background, together with the composite word “FreePrints”, shown below (figure 1):



Figure 1

Already an established business, Photobox launched its own free photo-printing service app in April 2019 called “Photobox Free Prints” in order to compete with PlanetArt. Like all apps, it too had app icons (figure 2), an app store icon (figure 3) and a stylised mark for other marketing purposes (figure 4).



Figure 2



Figure 3



Figure 4

PlanetArt issued proceedings for passing off shortly after Photobox’s launch. By the time of trial (and after one failed attempt to obtain an interim injunction), it included a trade mark infringement claim based on sections 10(2) and 10(3) of the Trade Marks Act 1994.

### The app icons

On the evidence, Daniel Alexander QC, sitting as Deputy Judge of the High Court, found that the FreePrints icon had acquired a secondary meaning through its use, despite the inherently descriptive content. He held there were significant aural and visual similarities between the marks, although aural similarity had lesser importance with regard to phone use. The judge found some limited conceptual similarities, although in context he considered the analysis to be “artificial” as the marks “carry no conceptual content”, particularly as they are not so significantly different to other apps. Of relevance was the common practice of placing the app name below the logo, to which the average consumer is likely to give origin-identifying significance. Taken together, Photobox’s similarities were sufficient to give rise to a likelihood of confusion.

Following the guidance in *Specsavers* ([2012] EWCA Civ 24), the judge gave cautious regard to the context of the use of the marks, but there was nothing about it to negate his finding on confusion.

The judge also noted that the court must make its own conclusions on likelihood of confusion in absence of evidence of actual confusion. He noted that this was a case of “post-sale confusion”, where consumers would not experience any operative confusion until after the icon is downloaded and therefore would not lead to a change in consumer behaviour.

### App store icon and stylised mark

With regard to Photobox’s other icons, the judge held there was no likelihood of confusion. Applying similar logic, the prominent positioning of the word PHOTOBOX would impact the average consumer’s perception of the marks, placing more significance on origin-denoting parts rather than descriptive elements (FREE PRINTS).

### No passing off

Despite finding that PlanetArt had goodwill in the FreePrints mark, the judge held there was no misrepresentation by Photobox. It was relevant that the term FREE PRINTS was never absent of the identifying word PHOTOBOX at the point of download. As discussed above, there was no chance of operative confusion in the icon after download.

It was also relevant that no evidence of actual confusion was uncovered, despite ample opportunity for it to come to light.

### Comment

In a reflection of the zeitgeist, the judge invited Photobox to look carefully at its branding and consider further changes to anything that might be best described as “anti-social non-distancing”.

He also warned PlanetArt to give broad latitude to traders using the genuinely descriptive phrase FREE PRINTS, giving the impression that the issues were finely balanced against a background where descriptive words are frequently used together with app logos.

There is a certain appeal in using the limited space under an icon to convey an instant message to users about what service to expect. Although this case was successful for the claimant and shows the power of a registered trade mark, it comes with a health warning that descriptive words are usually the bane of a trade mark and, if used, should be factored in carefully to any branding strategy.

### Authors:

Jake Hayes & Agnieszka Stephenson



# Sugar Bear Hair v Beauty Bear Reputation of the Kardashians' favourite hair vitamins

➤ **Case details at a glance**

Jurisdiction: European Union

Decision level: Board of Appeal

Parties: Besweet Creations (opponent) and Dansk Farmaceutisk Industri (applicant)

Road Zhengtong Trading Co Ltd

Date: 07 April 2020

Case reference: R 1437/2019-5

The Opposition Division and Board of Appeal at the EUIPO have highlighted the power of influencer promotion, referencing social media endorsements by the Kardashians, in a finding of reputation and enhanced distinctiveness.

The decisions suggest that, through successful social media campaigns, the reputation of celebrities and influencers can effectively be transferred to the brands and trade marks which they endorse.



## Background

BeSweet Creations LLC owns EU trade marks for “SUGARBEAR” and “SUGARBEARHAIR” and the figurative mark, shown on the bottle above, (the SUGARBEAR marks) for goods and services relating to vitamins in classes 5 and 35.

The brand has achieved online fame, especially within the young female demographic, by marketing their hair vitamins through celebrity influencers like the Kardashians. These vitamins are now widely referred to online as the “Kardashian hair vitamins” and have spawned various copies of the now “insta-famous” blue, bear-shaped, gummy vitamins.

BeSweet Creations opposed an application for BEAUTY BEAR by Dansk Farmaceutisk Industri A/S for classes 3 and 5, covering cosmetics, vitamins and dietary supplements. The applicant was using the mark BEAUTY BEAR for a very similar product, containing blue, bear-shaped hair vitamins (shown above).

## Opposition Division decision

The Opposition Division upheld the opposition entirely on the basis of Article 8(5) finding that the trade mark applied

for would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the SUGARBEAR marks.

The opponent had relied heavily on the endorsements of influencers like the Kardashians and resulting sales in the UK, to substantiate its reputation claim. At the relevant date, three of the Kardashian sisters had promoted the brand on their Instagram accounts.

The Opposition Division noted that Kim Kardashian was the fifth or sixth most followed person on Instagram in the world, with over 100 million followers; Kylie Jenner was the 8th most followed person, with more than 100 million followers; and Khloe Kardashian was the 18th most followed person, with around 75 million followers. The marketing and advertising potential of these social media due to their immediate and far-reaching power is a known fact.

The brand and the SUGARBEAR marks also enjoyed significant indirect advertising through articles published by Cosmopolitan, Telegraph, Elle, The New York Times and Yahoo, among others.

As the press interest was clearly driven by the endorsements, this demonstrated that, “at least part of the significant degree of recognition enjoyed by these celebrities has been successfully transferred to the opponent’s products and earlier marks.”

The Opposition Division admitted that the opponent’s submissions lacked some common categories of evidence, typically relied upon in reputation claims, such as advertising spend. However, the intensity of the promotion through social media endorsement and resulting sales in the UK, were considered sufficient to affirm the reputation claim.

## Board of Appeal decision

The decision was appealed and the Board of Appeal confirmed the decision based on the likelihood of confusion claim.

The Board of Appeal found that the goods were either identical or similar, whilst the

marks were considered to be similar to an average degree. The coincidental BEAR element was considered the most distinctive element of both signs. The Board of Appeal rejected claims that BEAR was descriptive for the goods, regardless of the shape of the vitamins, instead finding that the differentiating elements SUGAR and BEAUTY were descriptive and therefore had a reduced impact on the overall impression of the signs. The signs were considered visually and aurally similar to at least a low degree and conceptually similar to an average degree.

The opponent was successful in arguing enhanced distinctiveness for goods in class 5. The Board of Appeal again pointed to the vast efforts in promotion through popular social media channels which resulted in certain degree of success in terms of sales.

In evaluating the social media endorsements, the Board of Appeal concluded that the “promotional messages have reached thousands of followers in Instagram or YouTube and having regard to the very well-known character of the influencers and celebrities it may be inferred that a relevant part of the public, in particular in UK, were exposed to the earlier marks and have a certain knowledge thereof.”

## Author:

Abigail Macklin



## In short

This case serves as a reminder that marketing and advertising trends are always evolving. In a fluctuating social and new media landscape, the evidence submitted for reputation and enhanced distinctiveness should not necessarily be limited by traditional evidential expectations and requirements.

## IP & Brexit Transition period to end 31 December 2020



**A**lthough the UK left the EU at the end of January 2020, the Brexit transition period agreed between the UK and EU Governments means the UK remains governed by EU laws. The transition period will end on 31 December 2020.

**With offices in both the UK and Germany, D Young & Co's service will not be affected by Brexit and we will continue to advise on both EU and UK trade marks and designs.**

To help businesses prepare for Brexit, the UK Government has drafted legislation which is likely to come into force whether or not a trade deal between the EU and the UK can be agreed on 01 Jan 2021. This legislation will ensure that existing registered EU trade marks and registered Community designs will continue to be protected and to be enforceable in the UK by providing an equivalent right in the UK from 01 Jan 2021.

If you are thinking about applying for either an EU trade mark or registered Community design in the coming months, or if your pending EU trade marks and registered Community designs will not be registered on or before 31 December 2020 (for example, due to office actions, opposition or deferred publication), you will need to consider whether you require protection in the UK and if so, file a separate UK trade mark or design application.

**We have prepared an update on UK, EU and German trade marks which also covers Brexit. If you would like a personalised presentation for you and your business, please do let us know.**

Further information is also available in our online IP & Brexit guide: <https://dycip.com/post-brexit-ip>.

[www.dyoung.com/newsletters](http://www.dyoung.com/newsletters)

## Compensation claims Damages still available for infringement even where trade mark revoked

**T**he CJEU has ruled that compensation is still, in principle, available for infringement of a trade mark which has subsequently been revoked for non-use. The decision is the result of a preliminary reference from the Cour de Cassation in France in the context of infringement proceedings between AR and Cooper International Spirits LLC and others.

AR markets alcohol and spirits and in 2005 filed an application for a French national trade mark for the mark SAINT GERMAIN at the INPI. The mark was registered on 12 May 2006 for alcoholic beverages (except beers), wines and so on. On 08 June 2012 AR brought infringement proceedings against Cooper and others for distributing liqueur under the mark ST-GERMAIN. In parallel proceedings AR's SAINT GERMAIN mark was revoked with effect from 13 May 2011.

**The question which then arose and was referred to the CJEU was whether the owner of a trade mark who has never used it and which has since been revoked may argue that the essential function of the trade mark has been affected and seek compensation for infringing acts occurring during the period in which the mark was registered (in this case 12 May 2006 to 12 May 2011).**

The CJEU considered the question and concluded that EU member states had the option of allowing the owner of a trade mark to claim compensation for damage sustained before revocation took effect.

**In the UK, the fact that an owner had not used a trade mark during the period of infringement is likely to impact the damages which may be awarded.**

This decision is interesting because it reflects, to a degree, the UKIPO's practice of treating trade marks which have been revoked as "hanging rights" which can still be used to oppose third party applications in certain situations. This contrasts with the approach of the EUIPO which generally takes the view that earlier rights need to be valid throughout the proceedings.

**Author:**  
Anna Reid



*Case details at a glance*  
*Jurisdiction: European Union*  
*Decision level: CJEU (reference for a preliminary ruling)*  
*Parties: AR v Cooper International Spirits LLC, St Dalfour SAS, Établissement Gabriel Boudier SA*  
*Date: 26 March 2020*  
*Citation: C-622/18*  
*Link to decision: <https://dycip.com/ar-cooper>*

**Damages still available for infringement even where trade mark is revoked**



# Bad faith registration

## Bad faith grounds for invalidating Chinese characters

**B**ad faith is a ground that can only be used against an EUTM post registration and not beforehand during opposition proceedings. In this case, Inner Mongolia Yili Industrial Group Company Limited (the invalidity applicant) is a market leader in dairy production in China, where its trade mark 伊利 (yīlǐ) has attained the status of a well-known mark. It owns several EUTM's covering goods in classes 29, 30 and 32 with the word element "Yili" as well as its Chinese transcription:



In 2015, Mr Wen Li filed an EUTM application for similar goods in classes 29, 30 and 32 in the form containing both the word element "YILI" as well as the corresponding transcription into Chinese "伊利".

YILI  
伊利

After an unsuccessful opposition against this application based on its earlier (IPMA) EUTM, Inner Mongolia Yili filed for invalidity of the EUTM claiming bad faith under Article 59(1)(b) EUTMR.

In support of its invalidity action, Inner Mongolia Yili put forward the following arguments:

1. It claimed to be the primary milk and dairy products company in China and Asia. It submitted evidence to show that its marks (IPMA) and YILI were among the best known brands in China and had been issued Certificates of "well-known trade mark status" in China.
2. Mr Wen Li was of Chinese nationality at least in 2009, whereupon he became a resident and eventually a national of the UK, which created a presumption of his knowledge of leading Chinese brands.
3. An investigation had been conducted into the trading activities of Mr Wen Li, whereby it did not identify and past or present activity in the dairy business.
4. A conversation with a Chinese public

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Inner Mongolia Yili Industrial Group is China's market-leading dairy products producer



notary revealed that Mr Wen Li was fluent in Chinese and had dealings with members of the public in China.

It was argued that all the above factors created a strong presumption of a bad faith registration.

### Cancellation Division decision

The Cancellation Division noted that in order to find bad faith there must be a dishonest intention and an objective standard against which such a dishonest action can be measured. In order to assess whether this has taken place, the Cancellation Division referred to the non-exhaustive criteria laid down by the CJEU's judgment in the Lindt case.

Taking all of the aforementioned into consideration, the Cancellation Division found:

1. Inner Mongolia Yili had shown that its company, widely known under the short form of Yili, is the leading producer of dairy products in China and holds a position among the most valuable Chinese brands.
2. For many years before the filing date of the Contested EUTM, Inner Mongolia Yili was identified not only with the Chinese characters 伊利 but also with the Latin word YILI as a unitary brand.
3. There was no commercial logic other than a deliberate intention to create an association with the Chinese trade mark(s) of Inner Mongolia Yili in order to take advantage of these, and even to prevent them from

pursuing their business activities in the EU.

The Cancellation Division held that it was not a necessary condition for the finding of bad faith that the invalidity applicant actually possesses enforceable rights in the EU prior to the filing of the contested EUTM. What is important is the invalidity applicant's legitimate right to the sign. It therefore concluded that the EUTM should be declared invalid.

Author:

Richard Burton



### In short

Despite the huge number of EUTM filings from China, the EUIPO consistently considers EUTMs containing Chinese characters to be figurative marks (it conducts no aural and genuine visual and conceptual comparison in inter partes proceedings when assessing a likelihood of confusion). Therefore the scope of protection one has in a Chinese character EUTM is debatable. Whether the EUIPO's position is sustainable, only time will tell.

# D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

*D Young & Co news*

## Wir ziehen um! Our new Munich office

D Young & Co LLP - London, Munich, Southampton



In response to the year-on-year growth of our flourishing Munich-based IP team, we are delighted to give our regular newsletter readers advanced notice that this team will soon be moving (wir ziehen um) to more spacious and permanent office premises.

Still in the heart of Munich our new office is situated on Rosental, between Rindermarkt and Viktualienmarkt. Due to the proximity of Marienplatz and Sendlinger Tor we will enjoy excellent transport connections and will be within easy walking distance of

the European Patent Office as well as a variety of banks, hotels and restaurants.

We are currently in the final stages of fitting out the office space and expect to announce our official opening and share details of our new Munich office address, fax and telephone numbers in early Autumn.

We look forward to welcoming visiting clients and colleagues to our new office space and wish our Munich team every success in their new office.



We have prepared an update on UK, EU and German trade marks which will also cover Brexit. If you would like a personalised presentation for you and your business, please do let us know. Contact your usual trade mark adviser for further information or email us at [brexit@dyoung.com](mailto:brexit@dyoung.com).

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