

D YOUNG & CO TRADE MARK NEWSLETTER *no. 117*

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We are very aware that clients, friends and family are still facing obstacles and difficulties at this time, but hope that everyone is keeping well.

We have some exciting news to report as Tamsin Holman, one of our IP solicitors, has been listed as one of 22 UK women in the Managing IP 2021 "Top 250 Women in IP". Many congratulations to her!

We are fast approaching the end of the nine-month period (30 September 2021) in which any EUTM application that was pending on 01 January 2021 may be re-filed as a UK application, claiming the filing and priority date. We are ready to assist in ensuring that trade mark portfolios are maintained and secure. This date of course also applies to any Community designs that were pending on 01 January 2021. Please do contact us with any queries and you may wish to sign up for our Brexit webinar, mentioned below and detailed on the back page.

Jackie Johnson
Partner, Trade Mark Attorney

Events & webinars



06 July 2021

Brexit and trade marks webinar

Jana Bogatz and Matthew Dick present a brief discussion about lessons learned post-Brexit, what is likely to happen next, and what practical steps should now be taken. For more information and to register please visit www.dyoung.com/news-events.

On demand webinar

Insufficient evidence to support butcher's passing off claim against Lidl

Matthew Dick provides a short webinar overview of this passing off case, including a recap of the law, evidence of confusion, the challenges of a passing off claim and key take home messages. www.dyoung.com/webinars-videos.

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Passing off

Where's the beef? Insufficient evidence to support butcher's passing off claim against Lidl

The claimant (PWS), a high-end family butcher in Launceston, Cornwall had traded under the marks PHILIP WARREN and PHILIP WARREN & SON from around 1980, as well as the logo below:



PWS alleged passing off against Lidl based on use of the mark WARREN & SONS in relation to a range of meat products sold between 2015 and 2020.

PWS's business was significant in and around Launceston. It had a very limited online retail business and a significant wholesale business through which it mainly supplied leading restaurants/shops in London and elsewhere (for example, Claridge's and Harrods). Lidl used the WARREN & SONS mark nationwide, including in a Lidl store in Launceston close to PWS.

The evidence indicated that there was some knowledge of (and customers from) PWS outside the immediate local area but neither was very substantial. Attempts at a more precise evaluation of exactly where customers lived were, on the evidence, impossible, because records were not kept of where people who came into the shop were from. Ultimately this was not a critical issue for the case partly because even if there were more customers there was very limited evidence of an overlap between them and those who shopped in Lidl for meat.

The manager with overall responsibility for the Launceston Lidl store gave evidence that the first she heard of PWS was when Lidl's legal department told her about the case. This was considered to be of "some significance" in considering whether there was likely to be much overlap in customers. The judge felt that if even an individual such as this, local to the area and working in food retailing had not heard of PWS, it was unlikely that a significant number of ordinary Lidl customers further afield would. The differences in the product ranges

of PWS and Lidl under the WARREN & SONS brand were clear: PWS was very high end, selling unusual and specialist cuts such as rare breeds, with some less expensive products; Lidl was rather inexpensive with a few high-end products. That was reflected in the customer mix, which further supported a finding that outside of Launceston there would be very few Lidl shoppers who would have heard of PWS.

There was some evidence of actual consumer confusion: a consumer email sent to PWS noting its excellent gammon chops that the consumer had purchased in Lidl and asking if there was anywhere else nearby it could purchase the product, and other emails dated between 2016-2019. However, a lot of the evidence of alleged confusion, when examined, showed a good deal of "enquiries-whether" and very limited "assumptions-that", as the judge neatly put it.

Seventeen emails received, when hundreds of millions of Lidl products had been sold, was a very small proportion. Connections with PWS appeared to have been made from Internet searches by consumers trying to find contact details:

- PWS was unknown to them prior to their search.
- None of the email authors gave evidence, so it wasn't possible to ascertain the extent to which there was confusion, how it arose or how long-lasting it was.
- None of the email authors purchased Lidl products thinking they were PWS's.

These were sporadic and short-lived instances of customers making mistakes and did not indicate that there had been significant consequential damage to PWS's goodwill.

Three of the witnesses of alleged confusion gave oral evidence. The judge dealt with these in some detail because they illustrated the risks of taking evidence of confusion of this kind wholly at face value.

One witness did a Google search for WARREN & SONS and found PWS's website. On contacting them and being told they did not

> Related webinar



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

> Case details at a glance

Jurisdiction: England & Wales

Decision level: High Court

Parties: Philip Warren & Son Ltd v Lidl Great Britain Ltd & Ors

Date: 30 April 2021

Citation: [2021] EWHC 1097 (Ch)

Link to decision: <http://dycip.com/warren-lidl>

PWS alleged passing off against Lidl based on use of the mark WARREN & SONS



It is not sufficient that a purchaser may be misled or caused to wonder whether there is a connection with another trader initially, but that misunderstanding (or question mark) is dispelled before any material step is taken. It is also not necessarily enough if a defendant's actions cause limited and/or temporary confusion.

PWS alleged that Lidl's actions justified a financial award running into tens of millions of pounds (use had already ceased). A claim of that nature and magnitude must be based on comprehensive, solid and cogent evidence. While it cannot be too critical of passing off evidence, given the difficulties in obtaining such, there comes a point when it is so limited or equivocal that the court is reduced to speculation as to what might be in consumers' minds.

The court concluded overall that, while PWS had considerable goodwill in Launceston and the surrounding area, and in the high-end wholesale trade, and notwithstanding similarities in the respective marks, it had not been proved that Lidl's use of WARREN & SONS constituted passing off.

Put simply, there was insufficient evidence of a significant level of operative misrepresentation to any category of PWS's customers.

supply Lidl, he said: "This then made sense to me, as having looked at the claimant's website, they seemed to be above supplying a discount supermarket such as Lidl." The witness had apparently reached that view even before PWS confirmed they did not supply Lidl.

Often what appeared to be an assumption of a connection of WARREN & SONS branded products with PWS was much closer to a question whether there might be such a connection, rather than of any genuine deception. Not a single instance of confusion was given in evidence from the Launceston Lidl, less than a mile away from PWS's flagship store and where WARREN & SONS produce was available for years. Although not definitive, given the sheer magnitude of sales and the "optimum" conditions for confusion to arise in that context, the absence of such evidence was more important than it may be in other cases.

There is no reliable way of determining how much confusion there is in such cases. PWS contended that the fact that some consumers had sent emails spontaneously suggested that there may be much more confusion than was reflected in the evidence. Lidl noted that millions of packs of their products had been sold and the fact that there had been so little comment suggested there was very limited confusion. There had also been extensive

attempts to identify confusion and only the most limited amount had come to light. The court felt these points had real substance.

A passing off claimant must in general show that it has sufficient goodwill likely to suffer substantial damage as a result of the defendant's use of the mark in question. The alleged misrepresentation must have deceived or be likely to deceive; and the claimant must be likely to suffer damage by such deception. Mere confusion which does not lead to a sale is not sufficient, but it is sufficient that the defendant misrepresents its goods in such a way that it is a reasonably foreseeable consequence of the misrepresentation that the claimant's business or goodwill will be damaged.

There is a distinction which is often difficult to draw in practice between deception and "mere confusion". Previous case law (such as *Reed Executive plc v Reed Business Information Ltd*) suggests that the distinction lies in the difference between an assumption made by the relevant public and the public merely wondering whether there is a connection. The court agreed with this, both having significantly different consequences for a claimant's goodwill.

Importantly, any misrepresentation must be more than transitory and likely to be operative.

The take-home message for brand owners is clear: be sure to register your trade marks. In the absence of a registration, a UK trader is left to rely on the law of passing off. As this case confirms, such a claim can be very difficult to sustain, even when there has been some evidence of actual confusion.

Author:
Matthew Dick



Trouble in paradise (island)? No double territoriality requirement for EU trade mark use

➤ **Case details at a glance**
Jurisdiction: European Union
Decision level: Board of Appeal
Parties: Kerzner International Limited and Binter Cargo SL
Date: 14 May 2021
Citation: R 1264/2020-1

In a decision regarding the partial revocation of Kerzner International's ATLANTIS European Union Trade Mark, the EUIPO's First Board of Appeal found that the trade mark had been used within the EU in respect of various hotel-related services despite the fact that the proprietor's hotels were physically located in Dubai and the Bahamas.

Following Binter Cargo S.L.'s revocation request (submitted on grounds of non-use under article 58(1)(a) of the EU Trade Mark Regulation), the Cancellation Division partially revoked the ATLANTIS trade mark in respect of all goods and services in classes 16, 28, 36, 39, 41 and 44 as well as some class 43 services (including providing hotel accommodation; providing restaurant, bar and hotel services). The trade mark remained registered in relation to arranging accommodation in tourist centres; travel agency services for hotel reservations; accommodation reservations and restaurant bookings in class 43.

The Cancellation Division held that, by definition, it cannot be possible for EU customers to genuinely use services linked to restaurants and hotels if they can only benefit from using those services after physically leaving the territory of the European Union. The Cancellation Division considered that whilst the proprietor had indeed engaged in marketing activities in the EU with the explicit aim of concluding contracts with customers domiciled in the EU (and also operated a website specifically targeting EU-based customers which contained various European language and currency options), this was not sufficient to demonstrate genuine use of the trade mark in respect of the hotel-related services. The Cancellation Division did not, however, apply this reasoning to the travel agency booking services, explaining that, in order to book such services, it is necessary to do so far from the place where the services are in the broad sense produced, since users of these services are those wishing to travel outside the European Union.

The proprietor sought to annul the decision in its entirety. In relation to the revoked class 43 services, it argued that the Cancellation Division had erred in law by

Genuine trade mark use concerns the place where the trade mark is used for those services



effectively introducing a "double territoriality requirement" that could be found neither in legislation nor established case law.

The First Board of Appeal agreed. Pointing to Article 15(3) of the TRIPS agreement as well as the Hiwatt case (T-39/01), it held that no territorial requirement for the provision of the goods or services themselves is imposed in EU law. Genuine trade mark use does not primarily concern the place where services are supplied, but the place where the trade mark is used for those services, and such use should be ascertained by the proprietor's intention to create or maintain a market for the goods and services covered by the trade mark. The Board of Appeal also noted that if hotel services are advertised and sold to a sufficient extent to customers domiciled in the EU, it is not relevant where those services are in fact physically supplied. Since the class 43 services in question were sold via travel agents based in the EU to consumers domiciled in the EU, the relevant market in this case was deemed to be the EU market for accommodation provided outside of the EU.

The Board of Appeal also drew attention to the EUIPO's guidelines which state that advertising and marketing may be relevant acts of use where goods and services such as holiday accommodation are available abroad. The Board of Appeal pointed out that the distribution of goods and services via the Internet has created a new method for

their provision which cannot be neglected, and that the tourism sector is particularly active online, with the Internet being the main advertising channel for such services.

Ultimately, the Board of Appeal considered that the Cancellation Division had indeed erred in law in relation to the remaining class 43 services, and partially upheld the application for revocation.

The appeal in relation to the remaining goods and services was however dismissed since Kerzner had not submitted sufficient evidence to prove genuine use in relation to these. As the Cancellation Division correctly pointed out, the mere fact that these services were available in the proprietor's hotels did not mean they had been sold to customers in the EU.

This decision provides a useful explanation of the territoriality aspect of the genuine use requirement, which may be of particular interest to non-EU undertakings wishing to enforce their trade mark registrations in the European Union.

Author:
Agnieszka Stephenson



Machinery opposition a jump too far for Puma

Puma v Gemma Group

Case details at a glance

Jurisdiction: European Union

Decision level: General Court

Parties: Puma SE v EUIPO

(also Gemma Group Srl)

Date: 19 May 2021

Citation: T-510/19

Link to decision: <https://dycip.com/puma-gemma>

This General Court decision concerns an opposition by Puma SE (Puma) against an application for machine related goods in class 7 by Gemma Group (Gemma) as shown below:



Puma opposed Gemma's application, shown below, based on EU national rights in classes 18, 25 and 28, claiming Gemma's application took unfair advantage of or caused detriment to its reputation in its Puma device under A8(5) EUTMR.



The Opposition Division and the Board of Appeal rejected the opposition but the General Court annulled the Board of Appeal decision. The General Court held that Puma had relied on earlier EUIPO decisions which found a reputation in Puma's mark and the Board of Appeal's failure to take these into account may have had a decisive influence on the outcome of the opposition. The decision was sent back to the Board of Appeal to reconsider Puma's appeal in light of the EUIPO decisions confirming Puma's reputation.

The Board of Appeal again rejected Puma's appeal, noting Puma's mark had a reputation and the marks at issue were similar to a degree but that the link between the marks in the minds of the relevant public, which is required to establish an A8(5) claim, did not exist because the relevant publics were too different.

General Court decision

The General Court found Puma's public was the general public whereas Gemma's public was professional and specialist. There was no link between them. Puma claimed its business activities extended

into machines and therefore, the relevant publics were closer; however, this evidence was new to the General Court and therefore inadmissible. The General Court further held that marks must be examined as a whole and you cannot only compare the dominant elements. Acknowledging the Board of Appeal had noted various similarities between the marks, the General Court found the marks were only similar to a certain degree and therefore, the need for proving the link in the minds of the relevant public was paramount. As this was not proven, the appeal failed.

Puma had also appealed against the **degree** of reputation its marks had been found to possess because the Board of Appeal only took into account certain documents. Puma's evidence was criticised for not adequately supporting the reputation claim. For example:

- Puma had relied on a survey in Sweden but no Swedish national rights had been relied on in the opposition;
- documents were not translated into the language of the proceedings and were therefore inadmissible; and
- a survey in France was unclear in terms of the goods to which it related, the basis for its completion and was more than five years old at the date of the application in question so its relevance was questioned.

Therefore, the General Court held it could only consider the reputation evidence from the EUIPO, namely the prior decisions which had found a reputation. Whilst a reputation had been established, it was not proven to be "exceptional".

In a further blow to Puma, the General Court rejected arguments which Puma had brought before the General Court for the first time, holding it can only review prior decisions and is not there to re-evaluate facts based on evidence brought before the court for the first time.

Puma claimed it was deprived of submitting additional evidence but this was deemed unfounded given the Regulations provide opportunities to file evidence and the

examination of an A8(5) claim is limited to an examination of that evidence. The Board of Appeal has the discretion to ask for clarity but in the present case, the Board of Appeal had examined the earlier EUIPO decisions finding a reputation in Puma's marks and did not need to invite Puma to file additional evidence of reputation.

The General Court further held that actual harm is not required for a finding of detriment or unfair advantage – it is sufficient if the harm is foreseeable; however, one must prove there is a risk of serious harm or injury occurring in the future. Puma had failed to show the required link in the minds of the relevant public, so in this case, no harm was established.

In short

The decision is a useful reminder that simply owning a reputation is not enough to succeed under A8(5). You still have to prove that the relevant public will make a link between the trade marks. Therefore, an entirely different relevant public may impact the success of an A8(5) claim if a link cannot be proven, even though the law does not require similarity of goods or services.

If submitting evidence of reputation, it is necessary to ensure that all relevant evidence is submitted at the earliest stage possible to avoid it being deemed inadmissible. Evidence should be translated into the language of the proceedings, be clear and also both time and geographically relevant.

Author:

Gemma Kirkland



Anonymity is not a laughing matter

Banksy's trade marks declared invalid on the grounds of bad faith

➤ **Related article**

Read "Banksy's 'Flower Bomber' [thrower] EUTM declared invalid on grounds of bad faith", by D Young & Co partner Tamsin Holman, 18 November 2020: <http://dycip.com/flower-bomber-banksy>

In a series of recent developments at the EUIPO, Full Colour Black Limited (a graffiti card company) has been successful in five cancellation actions filed against EUTM registrations held in the name of Pest Control Office Limited (Banksy's deemed legal representatives).

The declarations of invalidity were brought by Full Colour Black against EUTM registrations for signs relating to famous artworks by Banksy, including: "Laugh now", "Love rat", "Girl with an umbrella", "Radar rat" and "Bomb hugger". Mirroring the outcome of the "Flower thrower" (sometimes referred to as "Flower bomber") case reported on last year, the Cancellation Division declared the EUTMs invalid on the grounds of bad faith.

Trade marks, copyright and bad faith

One of these cases involves the famous work "Laugh now, but one day we'll be in charge", which was created by Banksy in 2002 on the commission of a Brighton nightclub. The original work depicts ten monkeys with signs around their necks, some of which are blank and some of which feature the aforementioned wording, whilst the EUTM filed and declared invalid comprised a single monkey with a blank sign.

The "Laugh now" EUTM was filed in November 2018, in classes 9, 16, 25, 28 and 41 and the mark reached registration in June 2019. Absolute grounds are not available at the opposition stage in the EU (unlike in the UK), and an invalidation was filed in November 2019 against the EUTM on the grounds of bad faith as well as claiming that the mark lacked distinctive character and was descriptive. The EUIPO rendered its decision in "Laugh now" - and indeed on the other four cases - entirely on the grounds of bad faith.

In finding there had been bad faith in all of these decisions, the EUIPO considered it was clear that, at the time of filing the applications, Banksy did not have a genuine intention to use the signs as trade marks in relation to the goods/services covered.

All decisions recognised Banksy's predicament that copyright enforcement cannot follow without Banksy revealing his identity, which

This case highlights IP enforcement issues if an artist or designer remains anonymous



would undermine his persona. However, the EUIPO also reasoned that as Banksy is anonymous, he cannot be clearly identified as the unquestionable owner of the copyright. Thus, the Cancellation Division held that Banksy cannot use potentially unlimited trade mark protection to gain legal rights in a sign where he could not rely on copyright, noting that it is not a trade mark's function to uphold rights which may not exist for the person claiming to own them.

Other factors at play included:

- The original artistic works were graffiti in a public place (rather than on Banksy's own property or canvas);
- In his book "Wall and Piece", Banksy had stated that "copyright is for losers" and he had previously acknowledged his artwork was widely photographed (the EUIPO noted that Banksy's contempt of IP rights would not annul validly acquired rights);
- Banksy had allowed the public to download and use his artwork (as long as it was not for commercial purposes);
- Banksy had stated on his website that he was aware of third parties using his works and denied this was done with his permission, but took no legal action to prevent the same; and
- Banksy only started using the sign after a

declaration of invalidity had been filed against one of his trade marks – it was noted that Banksy's opening of an online shop was with the express purpose to undermine issues of non-use in a trade mark dispute.

The EUIPO did not substantively comment on Full Colour Black's claim that there had been a pattern of registering Banksy's artwork as trade marks in the EU and using the EUTM as a basis for trade mark registrations in the US.

Keep IP ownership on your radar

It remains to be seen whether Pest Control will file appeals against these decisions. The "Flower thrower" decision from 2020 was not appealed, but a new EUTM for the "Flower thrower" mark has reached registration and is now pending separate cancellation proceedings.

Whilst the EUIPO did not comment on the trade mark registrability of famous works of art, the Cancellation Division did note that copyright and trade marks in general are not mutually exclusive. Indeed, logos, for example, can fall under the remit of copyright, designs and trade marks. However, this case highlights the issues surrounding enforcement of IP where ownership and the chain of title is questioned and an artist/designer remains anonymous.

Author:
Jennifer Heath



Look sharp!

The importance of robust and objective evidence

A recent request to invalidate a registered community design failed due to the insufficiency of the evidence provided. The decision of the Third Board of Appeal in R 2019/2020-3 Cutelaria Cristema LDA v Francisco do Carmo Silva Mota serves as a helpful reminder of the importance of submitting sound and objective evidence in design invalidity proceedings in order to show prior disclosure of the design invoked.

Brief summary of the facts

Francisco do Carmo Silva Mota is the holder of registered Community design No 7 373 626-0001 filed on 10 December 2019 and represented by the images below in relation to “axes, hatchets, mincer tools and chopping knives”.



On 30 January 2020, Cutelarias Cristema, LDA filed an application for a declaration of invalidity of the registered Community design.

By way of reminder, in order to be valid a registered Community design must be novel and have individual character over the prior art.

- A registered Community design is deemed to lack novelty over a prior design if its features differ only in immaterial details.
- A registered Community design is deemed to lack individual character over a prior design if the two designs produce the same overall impression on the informed user. This invalidity action was based on a lack of novelty.

The documents submitted in support of the invalidity application were various invoices issued by the design holder referring to a “meat chopping hatchet” and several declarations made by people from several businesses testifying that the meat chopping hatchet as reproduced in the declarations was for sale on the Portuguese market by the design holder itself and other business entities well before the filing date of the contested registered Community design.

By a decision of 21 September 2020, the invalidity division rejected the application for a declaration of invalidity based on the lack of sound evidence – the evidence submitted was insufficient to prove the disclosure of the hatchets depicted in the declarations.

On 21 October 2020 the invalidity applicant filed an appeal accompanied by the statement of grounds requesting that the contested decision be set aside. In the statement of grounds, the invalidity applicant reiterated that the contested registered Community design lacks novelty and that the contested registered Community design is a well-known cutlery accessory used to chop meat and consists of a shape, lines and contours that were already known to the public before its filing date. In support of its claims, the invalidity applicant submitted photographs from books and catalogues showing hammers used in the 19th century and screenshots from Facebook in 2018 showing hatchets.

The Board of Appeal agreed with the invalidity division that the invoices and declarations evidence was insufficient to prove the disclosure of the prior design to the extent that the design lacked novelty. The invoices were issued for a “meat chopping hatchet” but there was no product image included in the invoice. The supporting declarations were insufficient to establish that the image depicted in the declarations was the same as the product referred to in the invoices. Further, the declarations were in the names of business entities linked to and having a business relationship with the invalidity applicant!

At the appeal stage, the Board of Appeal

was critical of the evidence submitted to support the argument that the contested registered Community design's lines, contours and shape were already known to the public before its filing date. Some of the evidence was undated whilst other evidence concerned new designs which did not form part of the invalidity division's assessment, and the invalidity applicant had no good reason as to why these prior designs were not relied on to begin with. The late submission of these prior designs was deemed to be due to negligence on the part of the invalidity applicant.

The Board of Appeal concluded that evidence submitted by the invalidity applicant was insufficient to demonstrate the disclosure of a prior design, the appeal was dismissed and the invalidity applicant was ordered to bear the other side's costs.

Comment

It is established case law that “the onus is on the invalidity applicant to prove the disclosure of the earlier designs”. Case law also tells us that “the disclosure of an earlier design cannot be proved by means of probabilities or suppositions, but must be based on solid and objective evidence that proves that the earlier design was made available to the public”.

This Board of Appeal decision is a useful reminder of the importance of obtaining robust evidence.

In respect of prior designs, sufficient pictorial evidence is needed together with proof that the design was indeed disclosed to the public before the priority date.

Evidence such as witness statements or affidavits should be dated, clearly signed by an identifiable individual and independently written.

Author:
Alice Berkeley



D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

Webinar invitation

Brexit and trade marks Where are we now, and what do we (not) know?

Webinar invitation: Brexit & trade marks, 9am, noon and 5pm, Tuesday 06 July 2021



This webinar will run three times on Tuesday 06 July (9am, noon and 5pm UK time) so you can register to attend at a time convenient to you.

Six months into a post-Brexit world, trade mark specialists Matthew Dick (solicitor) and Jana Bogatz (Rechtsanwältin) present a brief discussion about what we have learned as practitioners, what is likely to happen in the

coming months, and what practical advice/steps we should now consider taking.

This webinar will be of interest to individuals and businesses with trade mark interests in the EU and/or UK.

Registration

For more information and to register to attend please visit our website: www.dyoung.com/web-tm-jul21



Stop press! Congratulations to partner Tamsin Holman who is listed as one of only 22 UK women featured in Managing IP's 2021 "Top 250 Women in IP" global survey. Managing IP's Women in IP recognises the leading female IP practitioners in private practice who have performed exceptionally for their clients and firms in the past 12 months: <http://dycip.com/top-ipstars-women>

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