

D YOUNG & CO TRADE MARK NEWSLETTER *no.103*

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Editorial



Welcome to our March trade mark newsletter. As we go to print we expect further Brexit discussions in the UK Parliament with a series of Brexit-related votes from the 12 March onwards. We are regularly updating our website as IP-related Brexit news unfolds: www.dyoung.com/knowledgebank/ip-brexit. We welcome your Brexit questions at any time. Non UK/EU-based readers may also find our 19 March “IP after Brexit” webinar of interest (event details below).
D Young & Co trade mark team, March 2019

Events



9am & 5pm GMT, 19 March 2019

Webinar: IP after Brexit - A practical guide to UK & EU trade mark and design practice
Partners Jana Bogatz, Richard Burton and Helen Cawley present a practical guide to changes to trade mark and design practice after Brexit. See page 08 for registration details.

18-23 May 2019

INTA Conference, Boston US

Partners Jeremy Pennant, Tamsin Holman, Helen Cawley, Matthew Dick, Jackie Johnson, Gemma Kirkland, Richard Burton, Jana Bogatz and Anna Reid will be attending INTA in Boston this May. Do get in touch if you would like to arrange to meet during the conference.

www.dyoung.com/news-events

Brexit news



We welcome your Brexit questions (email our advisors at brexit@dyoung.com) and regularly publish news and advice regarding Brexit on our website: www.dyoung.com/knowledgebank/ip-brexit.

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Genuine use

Out of office UK High Court revokes Easygroup's EASYOFFICE marks for non-use

This was an appeal to the UK High Court from revocation proceedings at the UKIPO. The hearing officer had revoked two of Easygroup's UK marks for EASYOFFICE for non-use. The marks were registered in class 35 for “Provision of office facilities, rental of office equipment”.

Nice classifications

The hearing officer firstly interpreted the scope of services according to their natural and ordinary meaning, but then adopted a narrower interpretation by reference to the list of goods/services in the Nice classification – this approach was in accordance with guidance published by both the UKIPO and EUIPO, and also the *Altecnic* case [2001] EWCA Civ 1928. Easygroup contended that that approach was wrong, relying on the judgments in *Omega Engineering* [2010] EWHC 1211 (Ch) (“Omega 1”) and [2012] EWHC 3440 (Ch) (“Omega 2”) and the *Fidelis* case [2018] EWHC 1097 (Pat), the latter of which were handed down after the hearing officer's decision.

Although “rental of office equipment” may seem like a straightforward service offering (the hearing officer had interpreted it as “the rental of any equipment that may be used in an office”), in the Nice classification the term “Rental (Office machines and equipment-)*” contained an asterisk which indicated that the rental of machines/equipment that may be used in an office could also be found in other classes (eg “rental of photocopiers” in class 35; “rental of fax machines” was in class 39; “rental of computers” was in class 42; etc.). He concluded that the specifications for the EASYOFFICE marks could not cover these terms.

Considering *Altecnic* and *Omega 1*

During the appeal process, the court considered the *Altecnic* and *Omega 1* judgments. In *Altecnic*, in the context of opposition proceedings, the hearing officer held that the UKIPO had been wrong during the prosecution process to allow the applicant to request a transfer of goods from class 7 to class 11 after filing, despite it being common ground that class 11 was more appropriate. It was held that if a

class number is relied on, together with a description of goods/services which may be ambiguous, that class number must be considered part of the descriptor attached to the goods/services. If those are at odds with the class number claimed, the examiner must be able to correct it, but an applicant cannot apply to amend the class itself.

The goods in question (valves) clearly fell in class 7, which was not at odds with the listed goods, so there was no inconsistency and no obvious mistake which could be permissibly amended.

On appeal, the judge held that since the specification did not refer to goods in class 7, and since the class was for administrative convenience only, it did not affect the scope of the specification and therefore the amendment was possible – it was not necessary to show that an obvious error had been made. The Court of Appeal disagreed – it felt that class 7 was a part of the application in the context of the goods covered. Since valves fell within class 7, this was not an obvious mistake.

The *Omega 1* case concerned construction of a trade mark co-existence agreement, in the context of which the judge had considered *Altecnic*. He confirmed that a statement in an application form as to the class of goods covered formed part of the application and was to be taken into account in interpreting the scope of the application at least during the prosecution process – it did not decide whether *Altecnic* applied in the context of infringement, which remained an open question.

Since he considered it unnecessary to reach a concluded view on the question of whether the scope of a specification should be limited by reference to the Nice class, the judge in *EASYOFFICE* declined to do so. However, he concluded that he should express a provisional view.

The judge noted that it is appropriate to use class number as an aid to interpretation of the specification where the words used in the specification lack clarity and precision. In his provisional view, the judge held that this applies to registrations as well as to

➤ **Case details at a glance**
Jurisdiction: England and Wales
Decision level: High Court of Justice (Appeals)
Parties: Pathway IP Sarl (formerly Regus No.2 Sarl) and Easygroup Ltd (formerly Easygroup IP Licensing Limited)
Date: 26 November 2018
Citation: [2018] EWHC 3608 (Ch)
Full decision (link): dycip.com/easyoffice

Easygroup's UK marks for EASYOFFICE had been revoked by the UKIPO for non use



phrase and its natural and ordinary meaning to class 35, which worked in Easygroup's favour. Even then, he felt that the natural and ordinary meaning of the term "provision of office facilities" was clear and precise – and that it did not include rental of office space.

The appeal failed, and the marks were deemed to have been correctly revoked. Even if the judge had been prepared to accept that the term "provision of office facilities" did include the rental of office space, the evidence submitted did not constitute genuine use in relation to those services.

Author:
Matthew Dick



applications, and therefore applies in the context of infringement and revocation claims. The judge noted that in many cases it will be unnecessary to use the class number in this way, as the words in the specification will be sufficiently clear and precise, and he felt that the words "provision of office facilities" fell into that category. Its ordinary and natural meaning could be ascertained without reference to class number.

The judge made it clear that for the EASYOFFICE case it was not necessary for him to express an opinion on circumstances where the class number would be relevant where the natural and ordinary meaning of the words used in the specification is clear and precise – that is a question for another day.

In the context of revocation actions based on whether or not a mark has been used for the goods/services covered, where a specification otherwise lacks clarity or precision it may be of considerable importance to be able to refer to the class in which the mark has been registered as an aid to interpretation.

The starting point for assessing the meaning of words in a specification should be how the product in question is, as a practical matter, regarded for the purposes of trade. Specifications of services are inherently less precise than those of goods – when assessing them they should be interpreted in a manner which confines them to the core of the ordinary and natural meaning rather than more broadly; terms should not be interpreted so liberally

that they become unclear and imprecise.

For the purposes of EASYOFFICE, the judge noted that "provision of office facilities" could in theory extend to cover things such as "provision of in-house catering staff, a fleet of cars, IT support staff etc". The hearing officer was correct to consider the core of the ordinary and natural meaning of the terms used and to consider that the natural and ordinary meaning of the term "rental of office equipment" is the rental of any equipment that may be used in an office. The natural and ordinary meaning of the term "provision of office facilities" is the provision of anything that facilitates the functioning of an office, which could be a physical item such as furniture, or a human endeavour such as typing services, data processing, photocopying, etc. The judge did not think the term could include the rental of the office itself, as the inclusion of such a service would interpret the phrase so liberally that it would be unclear and imprecise.

The judge seems to have been swayed by the fact that the appellant did not argue that "provision of office facilities" included rental of office space. The skeleton argument filed in the first instance proceedings did not address the ordinary meaning of the term, whereas the respondent's skeleton had done so (arguing that it did not include rental of office space). The appellant did not appear to reject that interpretation.

In reaching his decision, the judge noted that he was not limiting his interpretation of the

In short

The case confirms how complex seemingly simple aspects of trade mark law actually are.

Specifications need to be considered carefully at the point of filing to ensure that all possible goods/services of interest are included. Regular audits and reviews should be conducted to ensure that a brand owner's constantly changing and evolving business model remains sufficiently covered in terms of trade mark protection.

The case also highlights the inevitable and unavoidable risk that a trade mark owner's interpretation of the natural and ordinary meaning of particular goods/services may not align with a judge's. Erring on the side of caution is advisable, and thinking laterally when filing applications.

Not a FUNTIME for Trespass at the IPEC Luen Fat Metal and Plastic Manufactory v Jacobs & Turner t/a Trespass

The Intellectual Property Enterprise Court (IPEC) in *Luen Fat Metal and Plastic Manufactory Limited v Jacobs & Turner Limited t/a Trespass* has held that the claimant's UK and EU trade marks for FUNTIME were valid and infringed by Trespass's use of a similar sign on several child-focussed products in its range, despite having its own trade mark clearly displayed on the packaging.

This judgment serves as a reminder that the proximity of a well-known brand will not necessarily remedy a sign that may serve to confuse consumers.

The claimant was a Chinese manufacturer specialising in children's toys and games. It owned a UK series mark for FUNTIME (also FUN TIME and FUN-TIME) for products in class 28 including games, toys and electronic games. It also owned an EU mark for the word FUNTIME. The parties agreed that nothing in the judgment turned on the minor differences found in the UK series mark and, with exception of one minor point, the UK and EU marks were treated equally for the purposes of infringement and validity.

The background to the claim is reasonably simple: the defendant was the well-known outdoor goods company Trespass, which began using the words FUN TIME in stylised form on the packaging of several products aimed at children, including a kite and water guns. The Trespass logo was also clearly displayed on the packaging, which it said was relevant to whether the average consumer would understand that the product was from Trespass, and not another entity.

The claimant brought infringement proceedings in the IPEC in the basis of sections 10(1), 10(2) and 10(3) of the Trade Marks Act 1994 (and the equivalent provisions under EU law), but by the time it came to trial, the judge was asked only to consider infringement on the basis of 10(2)(b) and 10(3).

Trespass counterclaimed for invalidity of the trade mark on the alleged grounds that FUNTIME was devoid of distinctive character (s. 3(1)(b) of the 1994 Act) and/or that

FUNTIME consisted of a sign which serves in trade to designate the kind, quality, intended purposes or other characteristics of the goods for which the claimant's trade marks are registered (s. 3(1)(c) of the 1994 Act). By the time of trial, the defendant accepted that s. 3(1)(b) added nothing to its argument, and ran only arguments under s 3(1)(c) at trial.

As is typical in UK judgments, validity was considered first. The judge, Mr Recorder Douglas Campbell QC, considered a reasonably recent decision, *Devin AD v EUIPO* (T-122/17), which succinctly summarises how a sign would be caught by the prohibition in section 3(1)(c): "...there must be a sufficiently direct and specific link between the sign and the goods and services in question to enable the relevant public **immediately to perceive, without further thought, a description of the goods or services in question or one of their characteristics**" (emphasis added).

Not surprisingly, the judge determined that, although the goods were aimed at young children, it is the adults buying the goods that are the "average consumer". The judge thought that the average consumer would give the mark/sign a low level of attention. The judge's view was that FUNTIME did not cause the average consumer to immediately perceive a description of the goods, and it would not be sufficient even if each of the constituent elements (FUN and TIME) were themselves descriptive. The judge said on several occasions: "The average consumer would not immediately and without further thought perceive the word FUNTIME to mean that using the [toys] could result in an enjoyable time". On the contrary, he said, further thought would be required to reach that conclusion.

The judge concluded that the trade mark did make an indirect allusion to a characteristic of the goods, but despite this held that the mark was inherently distinctive (although to a low degree). However, to fall foul of the prohibition, the mark must consist "exclusively" of the specified characteristics, which, he held, FUNTIME did not.

In relation to infringement, the judge was asked to consider two key issues:

Case details at a glance

Jurisdiction: England and Wales

Decision level: IPEC

Parties: Luen Fat Metal and Plastic

Manufactory Limited v Jacobs &

Turner Limited t/a Trespass

Date: 12 December 2018

Citation: [2019] EWHC 118 (IPEC)

Full decision (link): dycip.com/trespass

1. was the defendant's use of the sign "use as a trade mark"; and
2. did the presence of the defendant's own trade mark prevent any likelihood of confusion.

In relation to issue 1), the judge considered whether the use of a stylised FUN TIME logo was use "for the purpose of distinguishing the goods and services". He held that the average consumer would not regard the logo as anything other than trade mark use, and was clearly for the purpose of distinguishing the goods from others. In relation to the proximity of the defendant's logo on the packaging, the average consumer (particularly one paying little attention) would likely regard FUN TIME as being a sub-brand of Trespass.

In relation to issue 2), the judge rejected the argument that the relative strength of the defendant's brand-power would be sufficient to overcome consumer confusion where FUNTIME and the Trespass mark are used in close proximity.

The judge considered the decision in *Frank Industries PTY Ltd v Nike Retail BV* [2018] EWHC 1893 (Ch) where Nike failed on similar arguments. If anything, the judge concluded, the average consumer would likely have thought FUNTIME was owned by Trespass, or was in some way economically linked.

Having found infringement under section 10(2)(b), the judge considered infringement under section 10(3) and deftly held that that the UK mark did have a reputation in the UK, which provided a link in the mind of the average consumer causing detriment to the distinctive character of the mark without due cause.

Infringement under 10(3) was also established. Having found infringement, the judge chose not to consider infringement under the equivalent provision under EU law, which is a reasonably tricky area, and was not required in this instance.

Author:
Jake Hayes



US Global IP index UK ranks 2nd out of 50

UK ranks 2nd in US Global IP index



The UK Intellectual Property Office (UKIPO) was pleased to announce last week that the UK has been ranked second in the US Chambers of Commerce Global IP index, out of 50 countries. The index considers factors that ensure businesses can obtain, exploit and enforce IP rights.

In the report, the UK is praised for its sophisticated IP environment across all industries and forms of IP, and also for its effective enforcement of those rights.

This was highlighted by the work of its specialist crime unit and cross-industry and government cooperation. The report also highlighted the UK's generous R&D tax incentives and its patent box scheme.

The report recognises the potential challenges presented by the UK's likely withdrawal from the European Union (EU), but notes that the UK government has acted unilaterally to ensure continuity of protection for the UK components of EU IP rights.

The UKIPO concludes: "The UK provides one of the very best intellectual property (IP) environments in the world".

Author: Doug Ealey



UK grants ex-parte pan-EU injunction for design infringement Philip Morris protects IQOS with registered Community design

In a powerful blow to a Chinese competitor, Philip Morris has deployed its registered Community design (RCD) in order to block sales of a heated tobacco device, obtaining interim pan-EU injunctive relief from the English Court.

The ability to obtain interim injunctions from national courts in EU countries varies from state to state, and is rarer in the UK than is typically the case in other countries such as Germany. Nevertheless, in the right circumstances, this highly effective form of relief can be obtained from the UK courts.

The ability of the UK courts to grant such pan-EU relief post-Brexit will largely depend on whether a transitional withdrawal agreement can be successfully implemented.

In Philip Morris Products SA & Anr. v Shenzhen Shunbao Technology Co Ltd, Philip Morris alleged infringement of a registered Community design corresponding to its IQOS heated tobacco device, by Shunbao's "AMO" device. The AMO device was already being marketed in China and there were plans to launch it at a major UK trade show, Vaper Expo 2018.

Images of the AMO device, IQOS device and one of the RCD drawings, are shown below:



Serious issue to be tried and presumption of validity

Although the court did not have to make a finding of infringement at the interim injunction stage, the Judge was satisfied that the similarities between the AMO device and the RCD were such that there was a "serious issue to be tried" and that Philip Morris had a "good arguable case".

At this stage, the Judge also proceeded on the basis that the registered design should be treated as valid, in line with the Community Designs Regulation.

Possibility of unquantifiable harm

Having heard submissions as to the possible reputational harm that could be suffered by Philip Morris in the event that the AMO device proved to be of inferior quality, the Judge also factored the possibility of unquantifiable damage into his assessment.

As a result of the injunction, the AMO device could not be exhibited at a leading vape trade show, nor marketed anywhere in the EU pending a decision on infringement at a future trial.

The power of design

This decision demonstrates the real value of having EU registered design protection.

Quick and inexpensive to obtain, with no substantive examination, an RCD benefits from a presumption of validity and is much easier to obtain than 3D trade mark protection.

As this case shows, in the right circumstances, an RCD can also be used to obtain pan-EU injunctive relief on an urgent basis, and is therefore an effective weapon for tackling look-a-like products.

Author: Tamsin Holman



Polo logo appeal dismissed

The importance of evidence of use and registrations

➤ Case details at a glance

Jurisdiction: European Union

Decision level: Board of Appeal

Parties: STYLE & TASTE SL v

The Polo/Lauren company LP

Date: 07 January 2019

Citation: R 1272/2018-5

Full decision (link to PDF download):

dycip.com/polo-logo

The European Union Intellectual Property Office (EUIPO) Board of Appeal has decided that a declaration of invalidity filed by Style & Taste's against Ralph Lauren's Polo logo did not contain sufficient evidence to support the claim.

Background

Polo/Lauren registered the Polo logo shown below in 2005.



In 2016 Style & Taste filed a request for declaration of invalidity of the European trade mark (EUTM). It claimed that the Polo mark was based on their earlier Spanish industrial design right, as set out below:



In May 2018, the EUIPO Cancellation Division rejected the request in its entirety on the basis that:

1. Style & Taste had failed in providing a translation of the registered certificate for the earlier Spanish industrial design, thus not proving the validity and scope of the protection of the earlier right;
2. By only referring to national law and not providing evidence based upon it, this could not be considered sufficient; and
3. Style & Taste had failed to submit the relevant national legislation in force or provide a logical argument stating why it should succeed in preventing the use of the EUTM.

Style & Taste challenged Polo/Lauren's Polo logo, registered in 2005



The decision was appealed to the EUIPO Board of Appeal in July 2018.

The Board of Appeal decision

The Board of Appeal referred to Article 60(2)(d) of Regulation 2017/1001 on the European Union Trade Mark (EUTMR) which recognises the possibility of relying on a design right as an earlier right; however, it said that it could only take into account the rights that exist when coming to a decision (as set out in the Metro case). The only right relied upon by Style & Taste was an earlier Spanish industrial design right which lapsed in May 2017.

Style & Taste did not provide a copy of a request for the renewal of that earlier right, nor did they file arguments regarding the status of that right. Consequently, the Board of Appeal concluded that the only earlier right on which the request for a declaration of invalidity was based ceased to be valid due to its non-renewal.

Accordingly, the request for a declaration of invalidity was unfounded and rejected since there was no earlier right within the meaning of Article 60(2)(d) EUTMR.

Therefore, there was no need for the Board of Appeal to decide on whether the cancellation applicant was able to meet the requirements of invalidity laid down by Article 60(2)(d) EUTMR. The appeal was dismissed.

Author:

Richard Burton



In short

This decision is the latest case (following the recent BIG MAC decision – see our article <https://dycip.com/bigmac>) that demonstrates the importance of providing adequate evidence of use and/or registrations when either bringing or defending a claim.

If earlier rights cease to exist and claims are not properly substantiated then they are destined to fail sooner or later.

WIPO changes in procedure International Hague registered design applications



With effect from the start of 2019, two key administrative changes came into force at the World Intellectual Property Organisation (WIPO) concerning the handling of international Hague registered design applications. Under the Hague design registration system, it is possible to obtain registered design protection in a number of territories around the world (including the UK, Germany and the EU) via the use of a single registered design application applied for centrally at the WIPO. A summary of the two key changes is outlined below.

Change 1: removal of the need to submit a power of attorney on filing

Under the previous rules, for any agent nominated to represent the applicant of a Hague registered design application, it was necessary to complete a power of attorney form signed by the applicant. For new Hague registered design applications submitted going forward, it is no longer necessary to complete a power of attorney form, so long as the agent for the application is nominated at the time of filing the application.

Where the agent is nominated at any time after the initial filing of the application, a power of attorney form will still be necessary.

Change 2: abolishment of the use of fax to send communications to WIPO concerning Hague design applications

As from the start of 2019, communications

sent to the WIPO relating to a Hague design application will no longer be allowed to be sent by fax. Instead, users will either have to send such communications by letter, or by using the electronic E-Filing Portfolio Manager portal on the WIPO's website.

Further information from WIPO about the E-Filing Portfolio Manager can be found at: www.wipo.int/hague/en/how_to/file/file.html.

Observations

Overall, the above changes represent a positive for users of the Hague design registration system.

Particularly following the removal of the requirement for a power of attorney form on filing, this change should also make the Hague system a more popular avenue of choice for those seeking design right protection around the world.

If you are interested in obtaining design right protection via the Hague system, or have any questions in respect of the above, please do not hesitate to contact one of the attorneys or solicitors in our design team.

Further information about our design services, including our guide to registered designs and information about our design book "European Design Law" can be found at: www.dyoung.com/en/services/designs.

Author:
William Burrell



WTR 1000 & IP Stars D Young & Co ranked top tier for trade marks!

We are delighted to report that our trade mark attorneys and solicitors have again been ranked as a top tier trade mark services team in both the World Trade Mark Review 1000 (WTR 1000) and Managing Intellectual Property Magazine's IP Stars.

IP Stars top tier firm 2019

As well as being ranked as a top tier firm for trade mark prosecution we are also pleased to report that our ranking for trade mark contentious work has moved up from 'notable' to tier 3 in the same survey.

Managing Intellectual Property **IP STARS**
TOP TIER FIRM 2019

Managing IP writes that "the aspects assessed for the firm rankings include expertise, workload, market reputation/record, outcomes achieved for clients, and unique strengths in a given practice area".

WTR 1000 gold 2019

The WTR 1000 has ranked D Young & Co as a top tier (Gold) UK trade mark firm.



The directory writes that:

"Leading European IP setup D Young & Co is in fine health as demonstrated by growth in its dispute resolution group via lateral hires in Munich and in London; promotions to partnership; and many new high-profile clients... For 2019 the ensemble again garnered some of the most enthusiastic feedback of any UK firm"

This is a fantastic start to the year for the team and we are very grateful to our clients and contacts for their contribution to the research carried by both legal directories.

D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

Webinar invitation

IP after Brexit A practical guide to UK & EU trade mark and design practice

Webinar invitation: A practical guide to post-Brexit UK & EU trade mark and design practice



Taking place at 9am and 5pm (GMT) on Tuesday 19 March 2019, this webinar will provide expert insight and practical guidance on handling trademarks and designs in a post-Brexit IP landscape. The session will walk delegates through the practices of the UKIPO and will deal with trade mark applications and oppositions and design filings. We will highlight the differences in the practice of the UKIPO and the more familiar practices of the EUIPO.

Speakers Helen Cawley and Richard Burton are qualified UK and European trade mark and design attorneys and members of the Chartered Institute of Trade Mark Attorneys (CITMA). Jana Bogatz is a German attorney (Rechtsanwältin) who specialises in European trade mark and design law. Working from

D Young & Co's UK and German offices Helen, Richard and Jana are able to offer a complete guide to UK and EU practice post-Brexit.

This webinar will be of interest to non-UK/EU based IP practitioners and in-house counsel with an interest in UK & EU filings post-Brexit, trade mark and design right owners whose existing IP portfolios include UK & EU design and TM registrations, and trade mark and design right owners planning to file in the UK & EU post-Brexit.

Registration

The webinar will broadcast at 9am and 5pm GMT on Tuesday 19 March 2019 and will then be available on-demand. Register early at <https://dycip.com/webinar-mar19> to secure your webinar seat.

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