

# D YOUNG & CO TRADE MARK NEWSLETTER *no. 116*

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As we go to press we are eager to meet up again in person with all of our clients and contacts in the global IP community; however, despite light emerging at the end of the tunnel for some, the worldwide Covid-19 pandemic suggests this may be difficult for a while yet. We continue to utilise all ways and means to stay connected through virtual channels for now.

As the dust settles on the Brexit agreement between the UK and EU, the effects of Brexit continue to shape the filing and enforcement strategies of many of our clients in the UK and EU including Germany where we are continuing to recruit. We will be providing a practical Brexit update webinar in July and our webinar on the recent Oatly slogan case is now available on demand. Details of both webinars can be found on page 8 of this newsletter.

In the meantime we send our best wishes to all our readers and hope that you remain safe and well.

Richard Burton  
Partner, Trade Mark Attorney  
May 2021

## Events



12-14 May 2021

### AIPLA 2021 Spring Meeting

Partner Jana Bogatz will be speaking at AIPLA's Spring meeting, during the session entitled "Design Rights - Beyond Getting a Design Patent". Jana will discuss "Copyright Harmonization in the EU – Cofemel Decision, What's New and What to do".

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.

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## Passing off / get-up / trade dress

# Original Beauty Technology v G4K Fashion

## "Passing off is not a tort of unfair competition"

Original Beauty Technology (the claimants) and G4K Fashion (the defendants) operate online businesses and design and sell "bodycon" and "bandage" style dresses under the brands HOUSE OF CB and OH POLLY (respectively). The Original Beauty Technology also owns and operates sister brand MISTRESS ROCKS, which is aimed at a slight younger consumer than HOUSE OF CB.

Original Beauty Technology issued court proceedings claiming that G4K Fashion had:

1. infringed UK unregistered design rights and Community unregistered design rights in a number of garments and
2. committed acts of passing off by adopting the same or strikingly similar concepts, style and get-up for their business, fashion, collections, garment designs, packaging, marketing, publicity, website design and social media as Original Beauty Technology.

Although the claim initially involved the alleged infringement of 91 designs, only 20 of those designs were considered at trial (whilst proceedings concerning the remaining 71 designs were stayed). For the purposes of this article, we shall focus more on Original Beauty Technology's passing off claim, as this raises some interesting legal issues.

### Brief background

HOUSE OF CB was initially set up in 2009 as an eBay storefront under the name CELEB BOUTIQUE, which was eventually rebranded to HOUSE OF CB in 2013. In 2014, Original Beauty Technology launched sister brand MISTRESS ROCKS. Similarly, OH POLLY also initially launched as an eBay storefront under the name POLLY COUTURE, before rebranding to OH POLLY in 2015. As there were no major disputes between the parties as to the applicable law, this case turned entirely on its facts.

The judge accepted that if Original Beauty Technology's designs had contributed to G4K Fashion's creation of its own designs then there would have been "copying" for the purposes of UK unregistered design rights and Community unregistered design rights. Based on the

evidence before it, the court was satisfied that:

1. all of Original Beauty Technology's unregistered design rights were valid (despite G4K Fashion relying on 101 prior designs in support of its claim that the designs were invalid),
2. "copying" had occurred, and
3. seven out of the twenty designs had been infringed for the purposes of both UK unregistered design rights and Community unregistered design rights.

### Passing off

Original Beauty Technology claimed that, by copying many of the aspects of its business, G4K Fashion had misrepresented to the public that OH POLLY is a sister brand of HOUSE OF CB. In particular, Original Beauty Technology claimed that (amongst others) the following elements had been copied (together, the "get-up"):

- business model and focus
- garment design
- locations, themes and styling of photoshoots
- models used
- packaging design
- logos
- website design.

It was the emulation of all of these elements that Original Beauty Technology said amounted to passing off.

Original Beauty Technology successfully managed to establish that the get-up, by itself, was capable of denoting trading origin (this is often difficult to prove since the get-up of a product or business is not normally chosen for such a purpose). However, Original Beauty Technology failed to persuade the court that consumers had been deceived into believing that OH POLLY was a sister brand of HOUSE OF CB. This was despite the fact that the judge accepted that G4K Fashion actively and intentionally sought to emulate Original Beauty

Technology's business. For example, it was accepted that the parties' business models and focus were similar and that they each:

1. operate an internet business selling celebrity-inspired fashion
2. use social media heavily
3. generate publicity from third party wearing their garments (including influencers and celebrities)
4. focus on figure-hugging bandage and bodycon dresses for younger women to wear on a night out, and
5. compete against one another.

The judge also accepted that the garments were an important aspect of the distinctiveness of the respective brands and that the garments sold by each party were similar. It was also clear that G4K sought to emulate HOUSE OF CB's style as the judge was directed to various examples of images from OH POLLY, which were said to be both similar to and later in time than HOUSE OF CB images and some of which were shot in the same locations (see image below).



G4K Fashion did not stop there. They also used the same models as those used by HOUSE OF CB and its sister brand MISTRESS ROCKS, all of which had been noticed by consumers, as exemplified by the following social media comment: "oh Polly wanna be house of cb so bad lol down to the same damn models".

G4K Fashion also sought to emulate Original Beauty Technology's packaging, which had been updated by Original Beauty Technology when it moved from "Celeb Boutique" to "House of CB" and by G4K Fashion in May 2018 (see image above right).



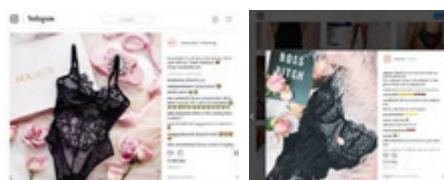
House of CH



Oh Polly

Original Beauty Technology also relied on multiple similarities between the HOUSE OF CB website and the OH POLLY website (desktop and mobile versions). The judge agreed that there were many "obvious similarities" between the respective parties' websites, including banners, footers, the layout of the images of the garments, and use of mottled pink as the background for studio photographs. Two similarities struck the judge as particularly noteworthy, namely, the arrangement of garments by colour (not a usual way of arranging garments on an e-retail site) and the fact that HOUSE OF CB's website directed garment returns to a returns "depot", an American expression also adopted on OH POLLY's website (which the judge considered odd for a Scottish website).

Original Beauty Technology also pointed to the fact that the OH POLLY flatlays (presenting images of garments laid flat) were very close to the HOUSE OF CB flatlays and unlike those of other competitors.



House of CH

Oh Polly

Given all the evidence provided, the judge concluded that G4K had clearly taken steps to emulate HOUSE OF CB and that it had "been able to ride on the coat-tails of the claimants' successful business model, and rather than investing in their own development, or spent money and time trialling different models, styles, locations, packaging

etc, they have obtained an advantage by copying a successful competitor".

Despite this, the passing off claim failed as the judge accepted that passing off is not a tort of unfair competition and therefore required a misrepresentation to be made to consumers. It is not enough if members of the public are merely caused to wonder as to a connection. This, of course, is a question of degree as there will be (as noted by the judge) "some mere wonderers and some assumers", with passing off normally established if there is a substantial number of the latter (even if there is also a substantial number of the former). Unfortunately for Original Beauty Technology, the judge found (reluctantly) that there was insufficient evidence (especially after many years of co-existence) that enough consumers had been deceived into believing that OH POLLY was a sister brand of HOUSE OF CB.

### Key points of interest

This case once again serves as a good reminder of the severe limitations of the law of passing off, particularly in cases involving get-up and trade dress. Part of the issue, which has been seen through the relevant case-law, is recognition by judges of the fact that the average consumer is generally familiar with the existence of look-alikes and tends to look to brand names, rather than get-up, as an indicator of the trade origin of the goods; making establishing misrepresentation that much harder.

This decision should consequently serve as a powerful reminder to brand owners of the uphill battle claimants must face if they are to succeed in bringing a passing off claim based on get-up and of the importance of ensuring that all relevant IP rights are available to them. For example, in this case, the claimants' design infringement claim (although partially successful) would have been easier to plead if they could have pointed to registered designs, which do not require proof of "copying".

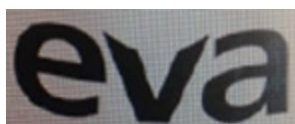
**Author:**  
**Alban Radivojevic**





# Happily eva after! Time to get re-aqua-ainted with global assessment

In February 2019, EvaQua s.r.o. (EvaQua) applied to register the EUTM (below left) in class 32. Envasados Eva S.A. (Eva) opposed the application under Articles 8(1)(a) and (b) based on a number of earlier rights, all covering identical goods. The opposition was assessed on the basis of the mark shown below right:



The opposition division dismissed the Article 8(1)(a) ground immediately, because the marks were clearly not identical. As regards 8(1)(b), identical goods were covered, which were aimed at the public at large whose attention was deemed to be average. The opposition turned on the degree of similarity between the marks.

The opposition division held that the relevant public would perceive the earlier mark as a female first name, which was distinctive for the goods in question.

In the later mark, the opposition division held that some consumers would perceive ZEOLITE as referring to minerals containing sodium, potassium and other elements; for others, it would be meaningless. In any event ZEOLITE was held to be distinctive of the goods.

The verbal element “evaqua” had no meaning, but consumers were likely to break it down into recognisable parts such as AQUA, which many would perceive as a reference to water (having a weak distinctive character for beverages). Consumers may also see the word EVA, which is distinctive of such products.

The signs coincided as regards EVA. They differ in QUA, ZEOLITE and WATER and their figurative elements/colours. The marks were therefore visually and phonetically similar to at most only a very

low degree; and conceptually similar to only a low degree, since consumers would have to go through a mental step to recognise the EVA element in the later mark, and some would not.

Overall the similarities  
were deemed insufficient  
for a finding of a  
likelihood of confusion.

## Board of Appeal

Eva appealed, arguing that all elements of the later mark made reference to water in some way. The only real “trade mark” element was EVA. Although EVAQUA has no meaning, the applicant was obviously trying to achieve an association between the words EVA and AQUA. Visually the application would be seen by consumers as EVA. Conceptually the marks are also very similar: EVA for water/beverage products; and EVAQUA = EVA AQUA = EVA WATER.

The Board of Appeal confirmed that English-speaking consumers would perceive the name EVA in the earlier mark, which was distinctive for beverages; and that “a significant part of the English-speaking public” would interpret ZEOLITE in the later mark as meaning water purified or softened with zeolite minerals. This expression was therefore descriptive. The opposition division had incorrectly considered ZEOLITE to be distinctive.

When perceiving a verbal sign consumers will break it down into elements which suggest a concrete meaning or resemble known words. English-speaking consumers would break down EVAQUA into EVA (distinctive for beverages) and AQUA (very weak).

EVAQUA was the most distinctive element of the application, and since that contained the earlier mark in its entirety at the beginning, there were undeniable similarities. The additional elements of the application counterbalanced those only to a limited extent, particularly since they possess limited distinctive character, and since EVAQUA

is central within the application. Word elements normally have more of an impact on consumers than figurative elements.

The Board of Appeal held the visual similarities to be **low**, not **at the most very low**; and the phonetic similarities to be average, disagreeing with the opposition division that consumers would take a mental step to dissect EVA from EVAQUA. If the name EVA was recognised in both marks, which would be the case for a significant number of consumers, the overall conceptual similarity between the marks was average.

In short, the elements in the application other than EVA did not have the same degree of distinctive character as EVA, and the figurative elements did not add any distinctiveness to the weaker verbal elements.

As such, the Board of Appeal found that as a result of the low degree of visual similarity, the average degree of phonetic and conceptual similarity, and the identity of the goods, there was a likelihood of confusion between the marks for English-speaking consumers. The appeal was therefore upheld.

Author:  
Matthew Dick



## In short

The case serves as a reminder that when two marks share a distinctive verbal element, the presence of additional verbal and figurative elements, if each of these is deemed to be relatively non-distinctive in and by themselves, will not necessarily suffice to avoid a likelihood of confusion.

# Kerrygold v Kerrymaid

## Is the element “kerry” distinctive in the EU?

➤ **Case details at a glance**  
*Jurisdiction: European Union*  
*Decision level: General Court*  
*Parties: Kerry Luxembourg Sàrl (applicant) v EUIPO (defendant)*  
*Date: 10 March 2021*  
*Citation: T-693/19*  
*Decision: <http://dycip.com/t-693-19>*

In this decision the General Court had to decide whether the potentially descriptive meaning of the element “KERRY” (referring to a geographical location in Ireland) and peaceful co-existence in part of the EU would be sufficient to exclude a likelihood of confusion. The General Court said no – at least as long as such descriptive meaning would be understood by only part (and not the majority) of the EU public and co-existence related to only part of the EU.

### Background

Kerry Luxembourg Sàrl (Kerry Luxembourg) had filed for the word sign KERRYMAID in classes 29 and 30, including butter and dairy products. Ornua Co-operative Limited (Ornua) opposed the application based on 18 earlier marks composed exclusively or in part of the word “kerrygold” and registered for goods in classes 1, 5, 29, 30, 32 and 33. Grounds of the opposition were likelihood of confusion and that the mark KERRYMAID would be detrimental to and take unfair advantage of the “kerrygold” marks.

At first instance, the opposition division upheld the opposition in its entirety on the basis that KERRYMAID would take unfair advantage of and be detrimental to the repute of the following figurative mark:



Kerry Luxembourg appealed the decision and Ornua brought an infringement action before the Juzgado de lo Mercantil de Alicante (Commercial Court, Alicante, Spain) claiming infringement based on the same relative grounds for offering goods bearing the sign KERRYMAID on the Spanish market. In light of the infringement action, the opposition proceedings were suspended.

Subsequently, the Spanish court dismissed the infringement action arguing that there was no likelihood of confusion since the only similarity between the marks KERRYMAID and “kerrygold” lay in the common element “Kerry”, which refers to the Irish county known for cattle breeding. Furthermore, it had

### County Kerry is an Irish county known for cattle breeding



been established that the marks coexisted peacefully in Ireland and the United Kingdom.

This decision was appealed and various questions were referred to the Court of Justice of the European Union (CJEU) in relation to the peaceful co-existence and descriptive meaning of a common element in part only of the territory of the EU (decision of 20 July 2017 in case C-93/16).

On appeal, the decision of the Juzgado de lo Mercantil de Alicante was upheld.

The suspension of opposition proceedings was then lifted and the Board of Appeal partially annulled the decision of the opposition division. The opposition was upheld only on the basis of likelihood of confusion in relation to most of the class 29 goods.

The decision was appealed by Kerry Luxembourg to the General Court.

### The decision of the General Court

The General Court dismissed the appeal and confirmed the decision of the Board of Appeal, explicitly holding that neither the EUIPO nor the General Court are bound by the decision(s) of the Spanish courts.

First, the General Court confirmed that the dominant element in the figurative mark is the verbal element “kerrygold”.

While the element “Kerry”, in relation to dairy products such as butter, milk or cheese, was likely to be understood as a reference to the geographical location of County Kerry, Ireland, by “members of the European public who live in Ireland, who have visited Ireland or, possibly, who live in the United Kingdom, because of its proximity to Ireland”, there was no clear indication that the non-English-speaking

public of mainland Europe would understand the term as such. In particular, the General Court held that there was no evidence to support the conclusion that the term “KERRY” was understood by the European public as a whole as a geographical indication.

Furthermore, the General Court confirmed that in lieu of any evidence the contrary, the term “KERRY” had distinctive character in relation to the goods for which the earlier mark was registered – at least for the majority of the EU public.

Aside from that, the General Court held that peaceful co-existence of an EUTM and a national mark in part of the EU (in this case, Ireland and the United Kingdom) would not allow the conclusion that there is no likelihood of confusion in another part of the EU, where peaceful coexistence between that EUTM and the sign identical to that national mark did not exist.

### Author:

Yvonne Stone



### In short

Descriptiveness/non-distinctiveness of a sign (or part of a sign) in only part of the EU does not prevent the finding of distinctiveness/dominance of that sign/part.

Peaceful co-existence in only part of the EU does not prevent the finding of likelihood of confusion.

# Non-use revocation proceedings

## German Federal Supreme Court questions relevance of no-challenge agreements

In T-419/16 (Carrera Brands Ltd v the EUIPO, 16 November 2017) the General Court quashed the relevance of contractual non-challenge agreements in EU revocation proceedings on grounds of non-use. In a remarkable side blow, the general Court even stated that national courts have no authority to sentence a party under national law to withdraw EU revocation applications. In the General Court's opinion, the EUIPO and the EU courts are not bound by the way in which national courts interpret the contents of a no-challenge agreement.

On appeal (C-35/18, 14 June 2018) there was no comment from the Court of Justice of the European Union (CJEU) and so it was only a matter of time until national courts would return to this subject.

In the Leinfelder case (ZR 27/19, 19 November 2020), the German Federal Supreme Court (Bundesgerichtshof – BGH) has now referred two questions on the relevance of no-challenge agreements to the CJEU.

### The questions

In a nutshell, the German Federal Supreme Court seeks CJEU clarification on:

- a. whether the fact that EU revocation proceedings on grounds of non-use do not depend on any specific legitimate interest and can be brought by any natural or legal person, would invalidate a contractual agreement by which a party undertakes in relation to the owner of an EU trade mark, not to challenge that EU trade mark on grounds of non-use, and
- b. whether a final judgment of a member state court, ruling that a defendant should withdraw an application for revocation of an EU trade mark on the ground of non-use, would have to be disregarded in revocation proceedings before the EUIPO and EU courts.

### The underlying case

The parties in the proceedings previously formed a limited partnership (jewellery trading and production), and later agreed on various trade mark assignments, including,

The parties had previously formed a limited partnership to trade and produce jewellery



among other things, an undertaking for the seller not to challenge the Leinfelder trade marks or to assist third parties in doing so. In 2016, one of the defendants terminated the partnership agreement and had its attorney file EU revocation applications against the Leinfelder EU trade marks.

The plaintiff then requested that the court instruct the attorney to withdraw the revocation applications with the EUIPO. Both the Munich District Court and the Munich Appeal Court dismissed the action.

### The decision

The Federal German Supreme Court held that the decision would depend on whether there was a legitimate interest for the plaintiff's request in the national proceedings. This would not be the case if a final (national) judgment granting the request would not give the plaintiff any advantage (worthy of legal protection) in the EU revocation proceedings, which would depend on the interpretation of Art. 56 I a) CTMR/Art. 63 I a) EUTMR.

### Incompatibility with EU trade mark law?

The Federal German Supreme Court generally holds that no-challenge agreements should be allowed and effective as long as they do not violate antitrust law in individual cases. As the enforcement of revocation claims is dispositive, a contractual agreement on the assertion of non-use of a trade mark should, in principle, be possible. If a contracting party agrees not to make use of this right, such an agreement would not violate Sections 134, 138 of the German Civil Code (abuse of rights). It would therefore depend on the individual case whether the agreement containing a no-challenge clause intends or results in an appreciable restriction of competition on

the market (see also the Federal German Supreme Court judgment of 15 December 2015, KZR 92/13 – Pelican/Pelikan).

### Anyone's right of filing an application for revocation (even without legitimate interest) leading to invalidity of the no-challenge clause?

In contrast to the Carrera case, in the Leinfelder case the no-challenge objection did not feature in the revocation proceedings, as it was the fulfilment of contractual claims (aiming at withdrawal of the revocation applications) that were asserted. The general "principle of party's disposition" would allow the withdrawal of a revocation claim at any time, which could also be determined by a national judgment granting the claim for withdrawal. Therefore, a national judgment would not interfere with the autonomous system of EU trade mark law.

### Key takeaways and perspectives

It will be interesting to see whether the CJEU will follow the subtle arguments of the German Federal Supreme Court or whether it will agree with the General Court.

The legal tool "contractual no-challenge agreement", which appeared dulled after the General Court's Carrera judgment, could be re-sharpened by a CJEU judgment confirming the German Federal Supreme Court's perspective. This would allow – by means of national law and before national courts – an EUTM owner to force an adversary – on the basis of a contractual no-challenge agreement – to withdraw a non-use based application for revocation before the EUIPO despite the General Court's opinion on the issue.

Author:  
Gabriel Wittmann





# T-515/19

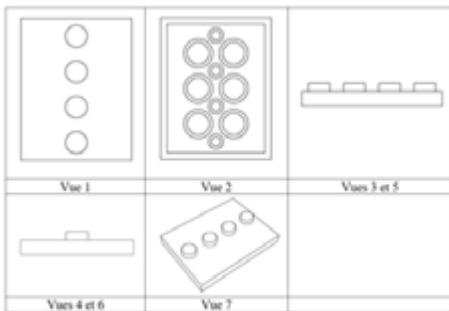
## Lego's brick design remains valid

> **Case details at a glance**  
*Jurisdiction: European Union*  
*Decision level: General Court*  
*Parties: Lego A/S (applicant)*  
*v EUIPO (defendant)*  
*Date: 24 March 2021*  
*Citation: T-515/19*  
*Decision: <http://dycip.com/t-515-19>*

**T**he General Court recently had to consider (in case T-515/19) whether Lego could use the defence of Article 8(3) of the Community Design Regulation (CDR), which exempts modular products from the general “must fit” exclusion from design protection under Article 8(2), and the relationship between the various exceptions of Article 8 in general.

### Facts

Lego is, among other things, owner of the following Registered Community Design:



A motion for declaration of invalidity was filed and based on the assumption that the all the features of the design are solely dictated by the technical function of the product and therefore excluded from protection.

The EUIPO's Cancellation Division rejected the invalidity application, but the EUIPO's Board of appeal then declared the design invalid.

The Board of Appeal made an assessment of what it considered to be the six features of the Lego brick and found all of them were dictated solely by the technical function of the brick (that is, the assembly with, and disassembly from, other bricks in the set).

### GC decision

The General Court annulled the Board of Appeal decision stating the decision contained two mistakes.

First of all, the Board of Appeal did not take into account **all of the features of the Lego brick** when conducting the

functionality test, but only the following:

1. the row of studs on the upper face of the brick;
2. the row of smaller circles on the lower face of the brick;
3. the two rows of bigger circles on the lower face of the brick;
4. the rectangular shape of the brick;
5. the thickness of the walls of the brick; and
6. the cylindrical shape of the studs.

The General Court confirmed Lego's arguments that there are other features such as the smooth surface on the upper face of the design, which should at least be considered.

Second, the Board of Appeal also did not correctly examine if the “**modular system**” exception of Article 8(3) was applicable in this case, as it might literally and explicitly only be applicable to cases of “must fit” parts mentioned in Article 8(2). In this context, the General Court first states that there may be certain overlap and interplay between Article 8(1) dealing with functionality of a product (connection and disconnection of that product) and Article 8(2) regarding “must fit” parts (namely features of interconnection). As a result, there may be cases where one feature

could possibly fall under both provisions. In such a situation it is questionable if the exception of Article 8(3) regarding “modular systems” would then apply with respect to both protection exclusion scenarios.

The General Court affirms this question with reference to Recital 11 CDR and a number of formal arguments. It basically said there might be potential for injustice if the courts were to allow invalidity applicants to tactically base their attack only on the functionality exclusion of Article 8(1) (and not plead the “must fit” exclusion of Article 8(2) even where they would be equally applicable) solely in order to prevent the design owner from relying on the “modular system” exception of Article 8(3). Therefore, the General Court allowed the exemption to apply irrespective of which cancellation ground was chosen.

### Outlook

Lego's design is not totally yet safe as the Board of Appeal will have to conduct a new examination in line with the General Court's comments. However, the outcome will likely not change and Lego's brick may continue to enjoy protection as the smooth surface on the upper face of the design is likely not solely dictated by the technical function of the product.

**Author:**  
**Jana Bogatz**



Was the “modular system” exception of Article 8(3) applicable in this case?



# 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



**S**ix 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.

The 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.

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](http://www.dyoung.com/web-tm-jul21)

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## Webinar - now available on demand



### Oatly capitalises on controversy in General Court distinctiveness decision

It is notoriously difficult to register marks which are perceived to be slogans at the EUIPO, but in this case Oatly capitalised on the controversy surrounding the launch of the mark and ultimately persuaded the General Court that the mark was inherently distinctive.

Abigail Macklin provides a brief summary of all the case details in this bitesize webinar, now available on demand at [www.dyoung.com/en/webinars/tm-oatly](http://www.dyoung.com/en/webinars/tm-oatly).