

# D YOUNG & CO TRADE MARK NEWSLETTER *no.89*

November 2016

In this issue:

**"A story of more woe"** 04

Arrom Conseil loses appeal to the General Court

**Pleased as punch** 05

Confusion strikes again

**Choice words** 06

A hard lesson learnt over settlement  
agreement wording

**A new question of profit?** 07

An update on hyperlinking and copyright  
following GS Media

**Distinctive character** 08

Music to your ears - not!

**Use it or lose it**  
**What qualifies as**  
**genuine use?**

Full story [Page 02](#)



It's hard to believe that 2016 is drawing to a close but there are still plenty of interesting decisions to consider in this edition of the trade mark newsletter. In particular we will be taking a look at issues of genuine use, a knock-out decision for PUNCH in a trade mark opposition, an update on the registration of sound trade marks, as well as the potential pitfalls of release clauses in settlement agreements. Finally, we consider the impact of the GS Media case in relation to hyperlinking and copyright.

We look forward to seeing those readers who will be attending INTA in Florida this month. Do get in touch if you would like to meet with us at this event.

Editor:  
Anna Reid



Events



15-18 November 2016

**INTA leadership meeting, Florida US**  
Trade mark group partners Jeremy Pennant and Helen Cawley and dispute resolution & legal group partner Tamsin Holman will be in Hollywood this November for the INTA leadership meeting.

01-02 December 2016

**IP Summit, Brussels, Belgium**  
Dispute resolution & legal group partner and solicitor Tamsin Holman will be chairing a conference session entitled "Consequences of Brexit on designs and trade marks" on the second day of this summit.

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Genuine use

# Use it or lose it What qualifies as genuine use?

Trade mark proprietors are often faced with the ultimatum 'use it or lose it', but when asked to provide evidence of genuine use of your mark, how far can your actual use stray from the mark as registered?

Article 15(1)(a) of EU Trade Mark Regulations (the Regulation) allows trade mark proprietors to use their marks "in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered" and for such use to support the underlying trade mark registrations. The provision allows trade mark proprietors to modernise their marks and adapt them for different marketing and promotional conditions, as the following General Court (GC) decisions illustrate.

**Hyphen GmbH and Skylotec GmbH**

Hyphen obtained a trade mark registration for the black and white figurative mark,  shown left, in relation to goods and services in classes 3, 5, 9, 24, 25 and 42.

Skylotec filed a non-use revocation action, claiming that hyphen had not made genuine use of their mark over a continuous period of five years. Hyphen produced evidence of use of the mark in the following forms:



No. 1



No. 2



No. 3

At first instance, the Cancellation Division (CD) partially refused the action, finding that hyphen's various uses of the mark (all incorporating a circle device) were sufficient to maintain some of the registration for goods in classes 9, 24 and 25 and services in class 42.

Although hyphen's use was not strictly in the form **as registered**, the CD held that the additional circle element was not distinctive and therefore did not alter the distinctive character of the registered mark.

Skylotec appealed to the Board of Appeal (BoA) and the registration was revoked

in its entirety. The BoA stated that the assessment as to whether hyphen's use was sufficient to support its registration revolved around the distinctive character of the mark as registered, rather than the distinctive character of the addition (the circle). The BoA likened the registered mark to a dumbbell or dog bone, whereas the forms used were akin to a button. As a result, the BoA held that the overall impression of the registered mark was eclipsed by the additional circle element such that the variant forms could not support the registration. Hyphen appealed to the GC claiming the BoA had failed to take proper account of the provision under Article 15(1)(a).

**T-146/15 GC judgment**

The GC annulled the BoA decision: earlier case law made it clear that it was necessary to analyse the distinctive or dominant character of the **added elements** when assessing whether use in a form differing from the mark as registered was sufficient. The BoA had made a "random and necessarily inaccurate comparison" in finding that the forms used resembled a button rather than a dumbbell or bone. The GC reiterated the CD's assessment, that the added component (a circle) was a simple geometric shape devoid of distinctive character which did not alter the distinctive character of the registered mark.

Overall, the GC found that: marks No. 1 and No. 2 were equivalent to the mark as registered; mark No. 2, in sky blue, was held not to be particularly original, so did not significantly alter the mark as registered; and whilst mark No. 3 comprised of (i) the registered mark (ii) the circle (iii) stylised words elements "hyphen c", taking account of the relevant sector (the clothing sector), it was not unusual to juxtapose figurative elements with word elements linked to the designer/manufacturer in question. In other words, the registered mark retained its distinctive character whether surrounded by a circle or not.

**T-204/14 Victor International GmbH v EUIPO**

Gregorio Ovejero Jiménez and María Luisa Cristina Becerra Guibert (the opponents)

- **Case details at a glance**  
**Jurisdiction:** European Union  
**Decision level:** General Court  
**Parties:** hyphen GmbH (applicant) v EUIPO (defendant); Skylotec GmbH (intervener)  
**Citation:** T-146/15  
**Date:** 13 September 2016  
**Full decision:** <http://dycip.com/t-14615>
  
- Jurisdiction:** European Union  
**Decision level:** General Court  
**Parties:** Victor International GmbH (applicant) v EUIPO (defendant); Gregorio Ovejero Jiménez and María Luisa Cristina Becerra Guibert (interveners)  
**Citation:** T-204/14  
**Date:** 07 September 2016  
**Full decision:** <http://dycip.com/t-20414>

opposed an application for the trade mark VICTOR on the basis of a number of Spanish marks including the more relevant figurative mark VICTORIA (shown below) for a range of goods in class 25:

**victoria**

The applicant requested evidence of use and the opponents produced various documents including invoices, catalogues, delivery notes and advertisements. The mark was used in various forms as follows:



The Opposition Division and later the Board of Appeal found use in relation to “footwear (except orthopaedic)” in Spain and considered there to be a likelihood of confusion, upholding the opposition.

The applicant filed an appeal to the GC challenging the nature of the use of the earlier mark and the evidence submitted. In particular, the applicant argued that the mark was not used in the form in which it was registered and that the additional figurative elements and colours altered its distinctive character. It argued that the mark was weak given that “victoria” is allegedly commonly used as a trade mark in the clothing, footwear and accessories sector.

**Use of a mark which does not alter the distinctive character of a registration**

In relation to the evidence submitted, the GC reiterated that in order to examine whether the use of an earlier mark is genuine, an overall assessment must be made, taking into account all the relevant factors.

With regard to Article 15(1) of the Regulation and Article 42(2) and (3), proof of genuine use of an earlier national or EU trade mark which forms the basis of an opposition to an EU trade mark application also includes

**Use of variations of the mark as registered can sometimes support a trade mark registration**



proof of use of the earlier mark in a form differing in elements which do not alter the distinctive character of that mark in the form in which it was registered.

In such situations, where the sign used in trade differs from the form in which it was registered only in negligible elements, so that the two signs can be regarded as broadly equivalent, the above-mentioned provision envisages that the obligation to use the trade mark registered may be fulfilled by furnishing proof of use of the sign which constitutes the form in which it is used in trade.

The GC found that the use of the additional figurative and word elements was of decorative nature only and that the word “victoria” was not weak in terms of distinctive character. The GC found that a common forename can serve as a trade mark if it is capable of distinguishing the origin of goods and services.

In dismissing the applicant’s appeal, the GC rejected its argument that the distinctive character of the word ‘victoria’ is weakened by the fact that, it is commonly used as a trade mark in the clothing sector and for footwear in the territory of Spain.

**Authors:**  
**Richard Burton & Flora Cook**



**In short**

The purpose of Article 15(1) of the Regulation, according to the court, is to avoid imposing strict conformity between the form of the trade mark used and the form in which the mark was registered, and to allow its proprietor to make certain variations to the mark which, without altering its distinctive character, enable it to be better adapted to the marketing and promotion requirements of the goods or services concerned.

Both cases serve as a welcome reminder that evidence showing use of variations of the mark as registered can still support a trade mark registration. However, it is worth bearing in mind that any additions, or deletions, should not alter the distinctive character of the mark as registered.

# “A story of more woe” Arrom Conseil loses appeal to the General Court

In two related cases, the General Court (GC) upheld the decision of the European Union Intellectual Property Office (EUIPO) Board of Appeal, confirming the partial existence of a likelihood of confusion between the figurative sign (below) incorporating the text “ricci” and the earlier trade mark RICCI in relation to certain goods and services, and the taking of unfair advantage of the earlier trade mark NINA RICCI.



## Background

Arrom Conseil (the applicant) applied to register the figurative sign as an EU trade mark for goods and services in classes 3, 25 and 35, including soaps, perfumes, cosmetics, hair lotions, preparations for shaving, leather preservatives, clothing, footwear, and the presentation of goods on communication media for retail purposes of soap, perfumery, fragrances, essential oils, cosmetics, hair and body lotions, make-up and beauty preparations, shaving preparations, footwear and clothing. The earlier trade

The case concerned classes 3,25 & 35



marks were registered for amongst other goods, perfumes, soaps and clothing.

## Comparison of the signs

The applicant argued that the Board of Appeal had erred in their assessment of the similarity between the signs at issue by taking into consideration only what it considered to be the dominant element of the mark applied for, namely the word element “by romano ricci”, and that it had therefore underestimated the impact of the additional word and figurative elements.

The GC dismissed the applicant's argument, finding that the Board of Appeal had taken into account all of the additional elements and had then made a comparison of the two word elements, concluding that although the “roméo has a gun” element was striking, the “by romano ricci” element would attract the relevant public's attention more, because it gave further meaning, as an indicator of source, to the first word element.

The applicant's argument that the dominant element was in fact the first word element “roméo has a gun” was also rejected by the GC. It was found that the relevant public would not give its attention only to the first word element of the mark, but would seek to supplement it, as it gave the impression of a title of, or citation from, an artistic work. The word element ‘by romano ricci’ therefore has the effect of giving further meaning to the first word element, which confers on it an independent distinctive position.

With regard to conceptual similarity, the GC confirmed that the word element “romano ricci” would be perceived as the mark of the house, and that in the field of fashion the designer of a product is likely to be of utmost importance to the relevant public.

## Likelihood of confusion

The GC concluded that the Board of Appeal had been right to find that the marks were visually, phonetically and conceptually similar, and therefore similar overall, and that there was a likelihood of confusion between the marks in relation to goods that were identical, but none in

## Case details at a glance

**Jurisdiction:** European Union

**Decision level:** General Court

**Parties:** Arrom Conseil (applicant) v EUIPO (defendant); Nina Ricci SARL (intervener)

**Citation:** T-358/15 & T-359/15

**Date:** 15 September 2016

**Full decision:** <http://dycip.com/t-35815> & <http://dycip.com/t-35915>

relation to goods and services that were similar to a low degree or different.

## Unfair advantage – NINA RICCI

In relation to the finding of unfair advantage, the applicant submitted that the Board of Appeal had based its findings on mere suppositions.

The Board of Appeal had found that the reputation of the earlier mark NINA RICCI for ‘clothing’ was such that the EU public would establish a link between the marks at issue, despite the presence of additional elements in the mark applied for. The earlier mark NINA RICCI enjoyed a reputation in the European Union as a mark conveying floral, romantic and classical concepts, and on the basis of evidence produced by the intervener, the Board of Appeal found that the mark applied for also conveyed floral and romantic concepts.

The GC dismissed the applicant's arguments and found that the Board of Appeal had made a global assessment and had based its findings on evidence. Consequently the Board of Appeal had been right to find that the mark applied for could take unfair advantage of the reputation of the NINA RICCI mark in respect of goods in classes 3 and 25 and similar services in class 35.

## In short

The decision illustrates that where an earlier mark is entirely reproduced in the mark applied for, it is possible that a likelihood of confusion will be found, even if the mark applied for contains additional, visually striking elements making up a substantial part of the mark.

Author:

Natasha O'Shea



# Pleased as punch Confusion strikes again

➤ *Case details at a glance*

**Jurisdiction:** European Union

**Decision level:** General Court

**Parties:** JT International SA (applicant) v EUIPO (defendant); Corporación Habanos, SA (intervener)

**Citation:** T-633/15

**Date:** 15 September 2016

**Full decision:** <http://dycip.com/t-63315>

When push came to shove, the General Court (GC) dismissed an appeal against the European Intellectual Property Office (EUIPO) Board of Appeal's finding that there was a likelihood of confusion under Article 8(1)(b) EUTMR between the word marks PUSH and PUNCH for identical goods, being various tobacco products in class 34.

### Sparking it up

By way of background, JT International S.A. (the applicant) applied to register the word mark PUSH in March 2013. Corporación Habanos, SA filed an opposition against this application on the basis of a number of national marks for PUNCH (both word and figurative marks), alleging a likelihood of confusion.

### Round one

At first instance, the Opposition Division found that the marks PUNCH and PUSH were similar to varying degrees and that the goods were similar, if not identical. Nevertheless, they emphasised the brand loyalty of smokers and the corresponding high level of attention on the part of the relevant public, such that when assessing the overall impression, the conflicting signs varied in terms of additional letters and differing pronunciations of the suffixes to the extent that a likelihood of confusion was avoided.

### Fighting weight

For reasons of procedural economy, the Board of Appeal and GC focused on the earlier Spanish word mark for PUNCH and the relevant public was considered to be the Spanish-speaking public, who could not make conceptual comparisons between the marks.

Whilst the Board of Appeal agreed the goods were identical and the signs were visually and aurally similar, when taking into account the interdependence principle and the notion of imperfect recollection, they deemed the high degree of attention on the part of the relevant public to be insufficient to exclude a likelihood of confusion. The Board of Appeal highlighted the manner of sale of various tobacco products in Spain, noting that consumers must request such goods over the counter or purchase them from vending machines; in

There was a likelihood of confusion between the marks in class 34 (tobacco products)



this regard, the enhanced level of attention may not be sufficient to overcome confusion in a noisy, crowded or dimly-lit venue.

### Pushback

On appeal, the applicant pushed back on the Board of Appeal's assessments relating to the high level of attention and the way in which the relevant public came into contact with the goods. The GC agreed that the relevant public, being Spanish-speaking consumers, had a high level of attention in light of the attachment they feel to specific tobacco brands and the expensive nature of the goods (particularly cigars). Finding that the goods were identical, the GC utilised the standard test for similarity of marks and considered that:

- **Visually**, the marks both consist of one word and share three identical letters including the first two letters and the final letter; consumers generally pay more attention to the beginnings of word signs than to the end and even though the marks are short, the differences in the middle strings did not rule out a finding of similarity.
- **Phonetically**, both PUSH and PUNCH are one syllable, with the same vowel ("U") and, importantly the same sounds at the beginning ("PU"), but also the same sounds at the end ("CH"/"SH"). Thus the signs were similar, even when taking into account the changes invoked by English pronunciation and the lack of an additional "N" in PUSH. The nature of sale of the goods, for

example noisy surroundings, would only exacerbate similarity, although phonetic similarity is less important than visual similarity given how the goods are sold.

- **Conceptual** comparison was not possible as the word PUNCH would not be understood by the Spanish-speaking public.

### The punchline

Overall the GC found there to be a likelihood of confusion, even when taking into account the fact that the sale of tobacco products may be in a shop that is not busy, dark or noisy. The fact that the marks were visually similar and coincided in three out of the four or five letters, including those at the beginning and the end, gave sufficient rise to a likelihood of confusion.

### In short

This decision illustrates the difficulties encountered by companies when seeking registration of marks which may contain identical letters at the beginnings and ends of marks and is indicative of a relatively low threshold for likelihood of confusion.

**Author:**  
Jennifer Heath

# Choice words

## A hard lesson learnt over settlement agreement wording

> Case details at a glance

**Jurisdiction:** England and Wales

**Decision level:** Intellectual Property Enterprise Court (IPEC)

**Parties:** Oran Pre-Cast Ltd v Oranmore Precast Ltd and others

**Citation:** [2016] EWHC 1846 (IPEC)

**Date:** 21 July 2016

**Full decision:** [dycip.com/ewhc1846ipec](http://dycip.com/ewhc1846ipec)

A recent Intellectual Property Enterprise Court (IPEC) decision has found that vague wording used in a compromise agreement was sufficient in scope to release the defendants from liability in relation to trade mark infringement and passing off.

The decision issued by the IPEC concerns a UK trade mark owner's claim to trade mark infringement and passing off. Both parties were in the business of manufacturing pre-cast concrete products.

The claimant's company, Oran Pre-Cast Ltd, owned a UK trade mark for ORAN PRE-CAST. Following an acrimonious split from the claimant's company the defendants set up Oranmore Precast Ltd and commenced use of the signs ORANMORE PRE-CAST and ORANMORE, along with the domain name [oranmore.co.uk](http://oranmore.co.uk). The defendants were previously the director and general manager of the claimant's company.

The defendants sought to rely on a compromise agreement which had been agreed between the parties in a series of three letters. In particular, the defendant's relied on the wording in the claimant's letter to the defendant which stated "no claim against you, Richard Burke [defendant], in contract, common law and/or statute". The defendants believed this wording released them from any potential claim to infringement by the claimant.

The court considered that the wording of the release, whilst concise, was extremely wide-ranging.

**As the release wording did not contain any explanatory definitions to assist in defining its scope, the court found that the context in which the release was given was of particular importance.**

### The wording in the compromise agreement released the defendants from liability



The court believed the compromise agreement was aimed at resolving all matters between the parties and provided a "clean slate". The claimant argued that the agreement should be limited to Irish law and not cover future claims. However, the court found there was no context in the background of this case to necessitate implying such limitations into the wording, plus this would in effect defeat the object of the agreement which was to provide the parties with the desired "clean slate".

In its decision the court found that any reasonable person with all background knowledge of the parties at the time would have understood the letter to have meant the release covered all known and foreseeable claims connected with the defendant leaving the claimant's company, and as such would encompass the allegations of trade mark infringement and passing off included in the claim.

As a result, the court found the wording relied on by the defendants operated as a release of liability of one of the defendants, Mr Burke, from the infringement and passing off claims. Further, as the parties were alleged joint *tortfeasors* it was found that the release automatically extended to the other defendants.

In a case where the signs at issue are highly similar and the parties operate in the same business field, a finding of trade mark infringement and passing off seemed inevitable, especially given evidence of consumer confusion which had been

submitted by the claimant. However, whilst the court confirmed that it would have found the defendants liable for trade mark infringement and passing off, the wording in the compromise agreement rendered the claims against the defendants null and void.

It is noteworthy that in this case the claimant appears to have not sought legal assistance at the time of the letters, or when heard before the IPEC, whereas the defendants did. Whilst legal representation increases costs, cases such as these prove how vital it is to seek legal advice before attempting to draw up any form of agreement.

As the release wording did not contain any explanatory definitions to assist in defining its scope, the court found the context in which the release was given was of particular importance.

### In short

This case serves as a helpful reminder of the importance of ensuring wording of any agreement is fully considered and well-defined in its scope to avoid any potential future issues.

**Author:**  
Wendy Oliver



# A new question of profit? An update on hyperlinking and copyright following GS Media

➤ Case details at a glance

**Jurisdiction:** European Union

**Decision level:** Court of Justice

**Parties:** GS Media BV v Sanoma Media

Netherlands BV, Playboy Enterprises

International Inc, Britt Geertruida Dekker

**Citation:** C-160/15

**Date:** 08 September 2016

**Full decision:** [dycip.com/c-16015](http://dycip.com/c-16015)

The issue of hyperlinking and embedding content online is a niche yet important topic, which demonstrates the difficult balance for the courts to strike between a strict application of the law and understanding the practical effects of a decision.

## Svensson v Retriever Sverige

Before GS Media, the leading case in the area of copyright infringement by a communication to the public via hyperlinked content was *Svensson & Others v Retriever Sverige AB* (C-466/12).

In *Svensson*, it was held that providing hyperlinks to copyrighted material could be an act of communication under Article 3 Directive 2001/29/EC (Info Soc Directive), however, if the linked content was already 'freely available' there was no 'new' public accessing the content and therefore no act of infringement. Whilst this decision was generally welcomed, it did raise a number of practical questions such as the definition of 'freely available' – did this include content that was deeply hidden on the internet, albeit free to access? *Svensson* also introduced an unwelcome psychological element to the test of infringement, as the test included consideration of what public the rights holder was considering when the original content was uploaded, and whether the public accessing the content via the hyperlink was an additional unforeseen audience. Lastly, commentators queried liability for infringement if the hyperlink linked to content that was unauthorised by the rights holder.

## The case of GS Media BV v Sanoma

*Media Netherlands BV & others* (C-160/15) provides the next chapter in this area of law.

By way of factual background, in *GS Media* an online publisher provided a hyperlink to leaked photographs. The rights holder requested a take down of this unauthorised content; however the publisher refused (noting that the rights holder successfully managed to remove the content by contacting the image company, which blocked the photographs). The Court of Justice of the European Union unusually applied the law in its judgment,

## Assessing liability for infringement if a hyperlink links to unauthorised content



as opposed to leaving the national court to interpret the principles. Whilst the decision confirmed the previous position regarding the question of accessibility of the linked content, (ie, that linking to authorised, freely accessible content would not constitute an act of infringement, whilst linking to content that was authorised but not freely accessible (eg, behind a paywall) may result in infringement), *GS Media* goes further to consider the nature of unauthorised content. It was held that if the linked content is freely accessible but not authorised by the relevant rights holder, there are now three options to consider:

- If the publisher is aware that the content is unauthorised, there may be infringement (ie, the rights holder notifies the publisher and requests a takedown).
- If the (non-profit making) publisher does not know the content is unauthorised, there is no infringement.
- If the profit-making publisher links to content that is unauthorised, there is infringement – rebuttable if the publisher can prove they did not know the nature of the content. It is important to note that the usual defences can still apply; except if the rights holder notifies the publisher that the linked content is unauthorised and the publisher does not remove the link, the publisher cannot rely on the exceptions

in Article 5(3) Info Soc Directive.

As it stands, we are left with a number of dubious terms which will require definition and closer analysis, eg, 'freely accessible' and 'profit'. It is also not clear how this will affect publishers who link to leaked information (as clearly they are aware of the unauthorised nature of the content) or how far the chain of liability will run through interlinking websites (ie, if website A links to website B, which in turn links to the copyrighted content, is website A liable (especially if website B is non-profit)?).

## In short

The decision in *GS Media* was expected to clarify the position in *Svensson*, which had resulted in some impractical consequences if followed strictly. Whilst the *GS Media* judgment has moved the position forward, further case law is still required to consider and define this area of law.

**Author:**  
Verity Ellis



# D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

## Distinctive character Music to your ears - not!

In this case the General Court (GC) confirmed that sound marks need to be in tune with distinctive character to achieve registration. Globo Comunicação e Participações S/A (Globo) applied to register the sound mark (shown below) initially for goods and services in classes 9, 16, 38 and 41. The specification was later limited and covered “DVDs and other digital recording media; computer software; applications for tablets and smartphones” in class 9, “television broadcasting services” in class 38 and a range of educational and entertainment and television programmes in class 41.



### Prelude

The sound mark was refused registration by the European Intellectual Property Office (EUIPO) under Article 7(1)(b) of the EUTMR because it consisted of a simple banal ringing sound that could not be perceived as an indication of commercial origin.

### Overture

The objection was maintained by the Board of Appeal who agreed, saying that “the mark applied for consisted of the repetition of a sound that resembled a ringtone which was banal in every respect, notwithstanding the fact that the mark consisted of a staff with a treble clef with a tempo of 147 crotchets per minute, repeating two G sharps”. It went on

to say that the trade mark was “a very simple sound motif, that is to say, in essence, a banal and commonplace ringing sound which would generally go unnoticed and would not be remembered by the target consumer”.

### Cadence

The GC agreed and said that a sound mark must have “a certain resonance which enables the target consumer to perceive and regard it as a trade mark and not as a functional element or an indicator without inherent characteristics”. Overall, the trade mark was considered excessively simplistic and no more than a simple repetition of two identical notes, unable to function as a trade mark unless it had acquired distinctiveness through use.

### In short

The EUIPO, the Board of Appeal and GC were harmonious in their decisions that the trade mark was off key in terms of its registrability.

### Author:

Helen Cawley



### Case details at a glance

**Jurisdiction:** European Union

**Decision level:** General Court

**Parties:** Globo Comunicação e Participações S/A (applicant) v EUIPO (defendant)

**Citation:** T-408/15

**Date:** 13 September 2016

**Decision:** <http://dycip.com/t-40815>

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