

D YOUNG & CO TRADE MARK NEWSLETTER *no.101*

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Registrability Seeing a distinct pattern?

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In this edition of our trade mark newsletter we are extremely pleased to welcome our new partner, trade mark and design specialist, Jana Bogatz. Jana joins our Munich office team as a German lawyer advising on contentious and non-contentious aspects of national and international trade mark, design, copyright and unfair competition law. We look forward to introducing Jana to our clients and colleagues at INTA this month.

D Young & Co trade mark team, November 2018

Events



06-09 November 2018

INTA leadership meeting, New Orleans, US

New Munich partner Jana Bogatz will accompany partners Jeremy Pennant, Helen Cawley and Gemma Kirkland to the INTA leadership meeting in the US. Do get in touch if you would like to arrange a meeting.

08 November 2018

CITMA conference, Birmingham, UK

Trade mark attorney Jennifer Heath will be attending the Autumn CITMA conference.

www.dyoung.com/news-events

Brexit news



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Pattern marks / registrability

Registrability Seeing a distinct pattern?

Patterns are difficult to obtain registered protection for as they are typically considered to lend an aesthetic appeal to goods.

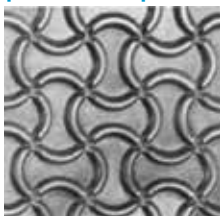
The pattern mark is a 'new' creature at the EUIPO, as it only became possible to categorise applications in this manner from 01 October 2017 onwards. Whilst the concept did exist before then, pattern marks were covered under the broader category of "figurative" marks.

There are currently 25 pattern marks lodged on the EUIPO database (not limited by status pending/registered/refused etc.), and 10 of them are registered. This makes up a very small proportion of the 1,130,862 EU trade marks registered at the Office. The number of "figurative" trade mark registrations, which stands at 483,305, naturally includes marks consisting of combined word and device elements, as well as patterns.*

Are patterns inherently registrable? Optimistically, looking at the figures relating to the new categorisation, a 10 out of 25 registration rate (and granted without the need to show acquired distinctiveness) appears promising.

However, considering the category of "figurative" marks includes those consisting of combined device and word elements, but also the "pre-1 October 2017" patterns, the statistics do not paint a clear picture of the EUIPO's view on the inherent registrability of pure pattern marks.

Examination – when is a pattern not a pattern?



In March 2012, Birkenstock filed a German national application for the figurative mark as shown (left.)

The criss-cross wave design features on the soles of Birkenstock-branded footwear, as well on marketing materials.

In June 2012, Birkenstock used its German right as the basis for an international registration (IR) designating the EU and Turkey. The German Trade Mark Office granted registration. The IR designating the EU (IR No. 1132742) covered goods, *inter alia*:

- **Class 10** "Surgical, medical, dental and veterinary apparatus and instruments; artificial limbs, eyes and teeth; orthopaedic articles; suture materials; suture materials for operations; orthopaedic footwear, ..."
- **Class 18** "Leather and imitations of leather, and goods made of these materials and included in this class; animal skins, hides; ..."
- **Class 25** "Clothing, headgear, footwear; ..."

The EUIPO refused the EU designation as the sign was held to be non-distinctive. The examiner considered the sign to be a pattern which was not markedly different from other shapes/patterns used in connection with the goods at issue. As such, the relevant public would not consider the sign to be indicative of goods originating from Birkenstock.

Birkenstock argued that the sign was a "figurative" mark, not a "pattern", and that the examiner's interpretation was therefore flawed. Further, it pointed out that the sign had been used by the company and its affiliates for over 40 years. However, the examiner was not persuaded and issued a final decision refusing the designation and Birkenstock appealed to the Board of Appeal (BoA).

BoA – "nowt" and crosses

The BoA ultimately upheld the examiner's decision refusing the EU designation for all of the goods specified. This was in spite of Birkenstock's argument that the examiner had misconstrued the nature of the mark: it was a figurative mark, not a pattern or shape. Birkenstock argued that the criterion that the sign should "depart significantly from the norms or customs of the sector" in order to be distinctive should not apply to the designation. (The criterion was, after all, primarily

➤ *Case details at a glance*
Jurisdiction: European Union
Decision level: European Union
Intellectual Property Office
Parties: Birkenstock Sales GmbH v European Union Intellectual Property Office
Date: 13 September 2018
Citation: C-26/17 P
Full decision (link): dycip.com/birkenstock

10 out of 25 pattern marks currently lodged on the EUIPO database are registered



of those goods (that is, the pattern can be deemed inherently registrable). It therefore found the mark to be registrable in connection with “artificial limbs, eyes and teeth”, “suture materials; suture materials for operations” in class 10 and “animal skins, hides” in class 18.

CJEU – continuing the trend

Birkenstock then appealed to the CJEU arguing that the GC relied on the “possibility” that the sign at issue may be used as a surface pattern as the relevant criterion. Birkenstock pointed to case law (Diechmann v OHIM - Case C 307/11) that suggested that registration should only be refused if a surface pattern is “the most likely use” of the mark applied for.

The CJEU disagreed. It said that “[t]here is an inherent probability that a sign consisting of a repetitive sequence of elements will be used as a surface pattern and thus will be indissociable from the appearance of the goods concerned”. The CJEU said that the case law that Birkenstock had cited could be distinguished from the case at hand as it did not concern a mark consisting of a repetitive sequence of elements (it was for a mark consisting of a curved band and dotted lines).

Author:
Flora Cook



In short

There is degree of fluidity regarding the criteria that can be used when examining trade mark applications. Irrespective of their categorisation, signs will only be considered inherently registrable if they have the ability to denote trade origin. The CJEU decision suggests that it will continue to be difficult to obtain registration for pattern marks, especially where there is a possibility that the goods at issue can bear a pattern.

developed to prevent the registration of shape marks which coincided with the shape of the goods themselves. The justification: consumers do not tend rely on the shape of a product as an indicator of trade origin.)

The BoA’s response was that the classification of the sign was irrelevant in determining whether or not that criterion applied. Instead, the question was whether the sign was indistinguishable from the appearance of the products designated. The same criterion has been applied in cases assessing the registrability of 3D marks, figurative marks consisting of 2D representation of a product, as well as signs consisting of designs applied to the surface of products. In other words, it was open to the examiner to find the mark did not “depart from the norms of the sector” even though the mark was not a shape.

Could the pattern be applied to the goods in question? The BoA thought so, and held that the mark was a simple surface pattern which could be applied to **all** of the goods for which registration was sought. Further, it commented that Birkenstock’s statement that it had used the sign for more than 40 years did not amount to a valid claim of acquired distinctiveness. Birkenstock had

only provided an image showing the sign (in combination with the company’s name, as part of a shoe display) and that was insufficient to evidence acquired distinctiveness.

General Court – making waves

The GC considered the characteristics of the sign and found: “It is therefore a sign composed of a series of components that repeat themselves regularly and lends itself particularly well to being used as a surface pattern... where a sign in itself is made up of a repetitive sequence of elements, EUIPO may take into account the intrinsic characteristics of that sign in order to examine its nature, **including the question whether it is a sign that is indissociable from the appearance of the goods covered. In the present case, the Board of Appeal based its reasoning on an analysis of the intrinsic characteristics of the sign at issue.** That approach cannot be criticised.” (emphasis added).

In other words, if a figurative sign can be interpreted as a pattern, it can be treated as one, irrespective of its categorisation. However, the GC found that it is only when the use of a surface pattern is “unlikely” in light of the nature of the goods that such a sign may not be considered a surface pattern in respect

UKIPO implementation of EU Trade Mark Directive 2015

Important changes to the Trade Marks Act & Rules

➤ **Further advice**

For further advice on the impact these changes may have please contact your usual D Young & Co advisor.

The Trade Marks Act 1994 (TMA) and Trade Marks Rules 2008 are due to change following implementation by the UKIPO of the EU Trade Mark Directive 2015. This article sets out a summary of the various changes due to come into effect on 14 January 2019.

Representation of a trade mark

The TMA will no longer specify that a trade mark be represented graphically. This in turn will make it possible to secure protection for a wider range of marks such as those that incorporate sound, motion, multimedia and holograms. However, whilst the UKIPO (and EUIPO) will now accept these 'new' types of marks it will not be possible to use them as base registrations for international registrations, as graphical representation remains a requirement at WIPO.

Extension of technical function prohibition

The technical function prohibition will be extended to cover not just shapes but any characteristic which is intrinsic to the goods being applied for.

Notification of earlier rights

The UKIPO will no longer cite marks in search reports or at examination that have expired (although it may be possible those marks are later restored by late renewal).

Oppositions - proof of use

The relevant period to provide evidence of use in opposition proceedings will change to the five year period preceding the filing (or priority) date of the opposed mark.

Collective marks

- The definition of who can hold a collective mark will be extended to include 'legal persons governed by public law' and the nature of the associations which may be holders has been clarified.
- Regulations concerning the use of a collective mark must include conditions of use and sanctions if the mark has been misused.
- If a collective mark contains a certain geographical area, the regulations must allow any person whose goods or services originate in that region to become an authorised user (as long as they meet all other conditions).
- It will become possible for a member of the

association (an authorised user) to take legal action against a potential infringer if there are agreements or permissions in place for them to do so, as well as intervene in infringement proceedings before the court to obtain damages.

Goods in transit / counterfeits

Where goods passing through the UK are detained, the law will change to require the person shipping the goods to prove there is no applicable right to stop the goods being marketed in the country of destination. The provisions relating to infringement will also be extended to give greater scope for taking enforcement action against those preparing to counterfeit goods.

Generic terms in dictionaries

Where a publisher incorrectly identifies a trade mark as a generic term in a dictionary it will be possible to ask the publisher to make it clear the entry is in fact a registered trade mark. If not done promptly it will be possible to seek assistance from the Court to order the correction, destroying of existing copies and/ or other remedies at the Court's discretion.

Trade marks registered incorrectly in the name of an agent or representative

It will be made possible to take action against a trade mark filed or registered in the name of an agent or representative whether or not that party is based within the UK or elsewhere.

Infringement cases

The following changes will come into effect regarding infringement cases:

- It will no longer be necessary to take separate invalidation action against a registered UK trade mark before or alongside infringement proceedings. The Courts will now consider invalidation-related issues during the course of infringement proceedings.
- The use of a trade or company name (or part of that name) will be specifically included within the list of infringing acts.
- The 'own name' defence will only apply to personal names and no longer apply to use of a company name.
- As a defence in infringement proceedings it will be possible to request proof of use of the earlier mark (where applicable) to

remove the need to file separate revocation proceedings to contest its validity.

- The fact an earlier similar mark was listed 'expired' at the time of applying to register a later trade mark may, in certain circumstances, provide a defence against infringement proceedings.

Invalidation cases – proof of use

Where a mark relied on has been registered over five years it will become possible for the holder of the contested mark to not only request proof of use for the five year period running up to the filing of the invalidation action, but also the five year period prior to the filing (or priority) date of the contested mark.

Licences

- It will be possible for trade mark owners to take legal action under trade mark law where a licensee fails to observe the provisions in the licence including how long it lasts, the way the mark is used, what goods or services are covered, the geographic area of use and quality of the goods or services.
- It will be possible for a licensee under an exclusive licence to take legal action against an infringer should permission to do so be refused or not forthcoming from the trade mark holder. Licensees with a non-exclusive licence will still require permission.
- A licensee will be able to intervene in infringement proceedings before the Court to obtain damages.
- The provisions will be extended to pending applications as well as registrations.

Division of marks

The existing provisions will be extended to include registrations.

Renewals

The UKIPO will start sending renewal reminders six months before a mark expires (presently four months before). When filing a late renewal it will become necessary to demonstrate that the failure to renew was 'unintentional' (previously the test considered whether it was 'just' to allow the late renewal).

Author:

Wendy Oliver-Grey



Mitsubishi v Duma Forklifts Parallel imports without the trade mark?

👉 *Case details at a glance*
Jurisdiction: European Union
Decision level: Court of Justice
Parties: Mitsubishi Shoji Kaisha Ltd,
Mitsubishi Caterpillar Forklift Europe BV v
Duma Forklifts NV, G.S. International BVBA
Date: 25 July 2018
Citation: C-129/17
Full decision (link): dycip.com/mitsubishi-duma

Duma bought Mitsubishi forklift trucks from outside the EEA, removed the trade marks from the trucks and imported them into the EEA



It is established case law that a trade mark owner can prevent the import of its products into the European Economic Area (EEA) where it has not consented to such imports (often referred to as parallel or grey imports).

Broadly, the rationale is that, while the trade mark owner may have exhausted its trade mark rights outside of the EEA, it has not exhausted them within the EEA.

What happens if the importer removes the trade marks from the product all together?

This was the situation in *Mitsubishi Shoji Kaisha v Duma Forklifts NV*. Here, the defendants, Duma, purchased Mitsubishi forklift trucks from outside the EEA, placed them in a customs warehousing procedure, removed the trade marks from the forklift trucks (including the mark MITSUBISHI and the device mark below) and imported them into the EEA.



In response, Mitsubishi commenced trade

mark infringement proceedings in the *Rechtbank van koophandel te Brussel* (Commercial Court, Brussels, Belgium).

Mitsubishi reasoned that the removal of its trade marks, without its consent, was an infringement of the right of the proprietor of the mark to control the first placing on the market in the EEA of the goods bearing that mark and harmed the mark's functions of indicating origin and quality, as well as the functions of investment and advertising.

The court found against Mitsubishi and so it appealed to the *Hof van beroep te Brussel* (Court of Appeal, Brussels, Belgium). This referred, among others, the following question to the Court of Justice of the European Union:

“(1) (a) Do Article 5 of Directive 2008/95 and Article 9 of Council Regulation No 207/2009 cover the right of the trade mark proprietor to oppose the removal, by a third party, without the consent of the trade mark proprietor, of all signs identical to the trade marks which had been applied to the goods (debranding), in the case where the goods concerned have never previously been traded within the EEA, such as goods placed in a customs warehouse, and where the removal by the third party occurs with a view to importing or placing those goods on the market within the EEA?
(b) Does it make any difference to the answer to question (a) above whether

the importation of those goods or their placing on the market within the EEA occurs under its own distinctive sign applied by the third party (rebranding)?”

The CJEU found in favour of Mitsubishi, reasoning that the removal of the trade marks deprived the trade mark owner of certain functions of the trade mark, including the right to control the initial marketing in the EEA of the goods, the advertising function and the origin function.

Author:
Antony Craggs



In short

This case illustrates that importers cannot circumvent the rules on parallel (grey) imports by removing the relevant trade marks from the products themselves.

Neuschwanstein Bundesverband Souvenir - Geschenke - Ehrenpreise eV v EUIPO

➤ **Case details at a glance**
Jurisdiction: European Union
Decision level: Court of justice
Parties: Bundesverband Souvenir - Geschenke - Ehrenpreise eV (appellant), European Union Intellectual Property Office (defendant) and Freistaat Bayern (intervener)
Date: 06 September 2018
Citation: C-488/16 P
Full decision (link): dycip.com/neuschwanstein

This is a case in which the European Court of Justice has made a decision on a mark consisting of a German word that is not in accordance with the decision made by the German Federal Supreme Court on the same mark.

The case concerns an appeal against the decision of the General Court on the trade mark NEUSCHWANSTEIN. NEUSCHWANSTEIN is the name of a beautiful castle in Bavaria. The castle has featured in films such as CHITTY CHITTY BANG BANG and is a museum and a tourist destination.

Freistaat, the Bavarian federal state, successfully registered the mark NEUSCHWANSTEIN in several classes. Bundesverband applied to invalidate the registration on the grounds that it was a geographical location and that the application had been filed in bad faith. The Cancellation Division decided that the mark did not consist of an indication of geographical origin and the application was not considered to have been filed in bad faith. The Board of Appeal agreed with the Cancellation Division and the General court dismissed the appeal.

The appellant's arguments, that the General Court had incorrectly decided that the public's degree of attentiveness is higher for certain goods and services, that the mark is colourful and original and that the name is not geographical because it is primarily the name of a museum, failed: the appellant did not support its arguments by showing any distortion of the facts.

The appellant submitted that the General Court was incorrect in connection with the descriptiveness of the mark, referring to the Windsurfing Chiemsee case and the fact that geographical names should remain available for others to use on souvenir items. The General Court had found that the name did not signify to the public a place of manufacture or marketing of souvenir products but a museum location with a focus on heritage conservation. The court agreed with the General Court that the goods covered

Neuschwanstein is a beautiful castle in Bavaria, as featured in CHITTY CHITTY BANG BANG



by the application are everyday consumer goods and not souvenir items and that the services are everyday services that relate to the management and operation of the castle.

The court stated that, just because the goods might be sold as souvenir items, it is irrelevant for the purpose of assessing the descriptive character of the name:

“the souvenir function ascribed to a product is not an objective characteristic inherent to the nature of that product, since that function is determined by the free will of the buyer and is focussed solely on that buyer's intentions”.

The court concluded that the public would not consider that the name indicated an essential characteristic of the goods and/or services and the appellant had not proved that the name was indicative of

the geographical origin of the goods. The appellant had pointed out that the German Federal Supreme Court had cancelled registration of the same name as a national trade mark with respect to similar goods but, as usual, the General Court was not obliged to follow a national decision.

Finally, the appellant contended bad faith on the basis that the application was filed to prevent third parties from using the sign on souvenirs. This failed as the appellant could not prove this basis for the filing; the court pointed out that registration may have been sought for the legitimate reason that the applicant may be aware of a third party who is new to the market and who might be trying to take advantage of the applicant's brand.

Author:
Jackie Johnson



In short

The state has achieved registration of the name of the castle and it will be interesting to see if the brand is strongly enforced.

Hasbro retains MONOPOLY trade mark Kreativni's challenge to Hasbro unsuccessful

Case details at a glance
Jurisdiction: United Kingdom
Decision level: UK Intellectual Property Office
Parties: Hasbro Inc, Kreativni Dogadaji d.o.o.
Date: 14 August 2018
Citation: O/501/18
Full decision (link): dycip.com/monopoly



MONOPOLY has been registered as a trade mark in the UK for board games since 1952, some years following the first release of the well known game in 1935.

This decision concerns an application to revoke Hasbro's registration on the ground that the trade mark was not been put to genuine use.

Kreativni claimed that the mark should be revoked from November 1957 based on the rule that a mark should be revoked if it is not used in the five-year period after the mark is registered. In addition, Kreativni argued that there was no genuine use in three other five-year periods.

Evidence submitted by Hasbro showed that annual UK sales figures run into millions of pounds. Some 20 million sets of the MONOPOLY board game have been sold in the UK since 1935.

Kreativni submitted that "...documentary evidence furnishing proof of use of the mark shall consist of indications concerning the place, time, extent and nature of use of the trade mark for the goods in respect of which it is registered. Moreover, it is stipulated that the evidence shall, in principle, be confined to the submission of supporting documents and items such as packages, labels, price lists, catalogues, invoices, photographs, newspaper advertisements and statements in writing, sworn or affirmed, or having a similar effect under the law of the state in which the statement is drawn up."

The registrar did not accept Kreativni's criticism of Hasbro's evidence as far as it concerned alleged deficiencies in the types of materials exhibited and the fact that the witness was employed by Hasbro. They distinguished between the considerations and requirements when filing evidence of use under the European Trade Mark Regulations which, the registrar noted, are not applicable to the UK. Further, the registrar highlighted that the date offered by Kreativni was incorrectly

Kreativni's throw of the dice was unsuccessful as the application for revocation failed



calculated and therefore the mark had in fact been used during the relevant period.

The registrar noted that an assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole.

The registrar considered that Hasbro amply showed that it had made use of MONOPOLY in relation to the goods for which it was registered, significantly in the final relevant period.

Although the use shown reflected a single type of board game, the registrar noted that "it would be perversity to try to sub-categorise the specification". The specification which was registered, "board games", was therefore a fair specification.

Finally, the registrar dealt with the form of the mark used because the Trade Marks Act 1994 states that "use of a trade mark includes use in a form differing in elements which do not

alter the distinctive character of the mark in the form in which it was registered". On this point it was noted that the distinctiveness of the mark as registered was in the plain word MONOPOLY. The mark as used was presented on a black rectangle and contains a shaded element to the white letters:

The background was considered to make no difference to the distinctive character of the mark as registered; the background was there to enable the letters, which are white, to be seen. It also made no difference that the letters were white instead of black because the registration of a plain word mark notionally covers such use. The registrar concluded that the mark as used remained, without doubt, the word MONOPOLY.

Author:
Richard Burton



In short

Overall, Kreativni's throw of the dice was unsuccessful as the application for revocation failed and they were ordered to pay Hasbro a contribution to their costs.

D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

Welcoming new partner Rechtsanwältin Jana Bogatz Munich office appointment

In the September issue of this newsletter we asked you to look out for an announcement at the start of October. For those of you that haven't seen this announcement, we're delighted to introduce you to our new trade mark and design specialist Jana Bogatz who joined our Munich office on 01 October 2018.

Jana is a German lawyer and advises on both the contentious and non-contentious aspects of national and international trade mark, design, copyright and unfair competition law. We know Jana well having worked alongside her on various matters going back more than ten years. She will be an extremely valuable member of the team. Her legal advisory work includes all contentious and non-contentious aspects of national and international trade mark, design, copyright and unfair competition law. Her focus is in particular on the development of global trade mark and design filing strategies, the optimisation of trade mark and design portfolios, the enforcement of trade marks, designs and domains against infringements and dilution by third parties through court actions, as well as negotiation and conclusion of IP-related agreements.

Jana represents clients in proceedings before the German Registry and Courts, as well as at the EUIPO and the European Courts in Luxemburg (GC and CJEU).

Partner, Rechtsanwältin

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Jana will also be joining a number of us at the INTA leadership meeting this month.

Many of you will know that we opened our Munich office in early 2016, before the Brexit referendum, and it was always our intention to grow and develop this office by continuing to add both trade mark and patent specialists into our team in Germany. Jana's arrival has added significantly to our team and supports our ability to continue to offer all of our usual services whatever the outcome of the Brexit negotiations. We understand that the uncertainty of Brexit, insofar as it affects our clients' valuable IP portfolios, is unsettling. Rest assured we are monitoring matters closely and will provide timely updates on any material changes so that, with our advice, you can make informed decisions that are best suited to your commercial strategies. For our latest Brexit advice please visit www.dyoung.com/knowledgebank/ip-brexit.

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We have published advice from the UK Government, 24 September 2018, regarding a no deal Brexit, on our website: [www.dyoung.com/
knowledgebank/
ip-brexit](http://www.dyoung.com/knowledgebank/ip-brexit)