

# D YOUNG & CO TRADE MARK NEWSLETTER *no. 119*

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Welcome to our November newsletter, our final one for 2021. As we head to the end of the first full calendar year of 'Brexit proper', it is reassuring to see that worldwide trade mark filings soared in 2020, despite the pandemic (with a 26.5% increase in the UK; and 12.2% in Germany). Against that backdrop, we are pleased to be ranked in the top tier of both The Legal 500 UK 2022 and the Chambers & Partners UK guides. As the world takes tentative steps to opening up again, we look forward to being able to see friends and colleagues from around the world in person soon. Until then, we hope that our growing library of trade mark webinars will keep you entertained as the long winter evenings draw in.

Matthew Dick  
Partner, Solicitor

## Webinars



### Archangel alchemy - UK IPEC considers "goodwill"

#### On demand webinar

Jake Hayes has prepared a brief update on [2021] EWHC 2546 (IPEC). CLAIRE STONE (claimant) and ALEXANDRA WENMAN (defendant). This case provides fresh insight into the IPEC's treatment of "goodwill" in UK trade mark law. <http://dycip.com/tm-archangel-nov21>.

### Brexit and trade marks webinar

#### On demand 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. <http://dycip.com/tm-brexit-jul21>.

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# The counterclaim with wings Defendant successfully establishes earlier use of ARCHANGEL ALCHEMY

In trade mark litigation, it is critical to consider all potential obstacles lying in the path of a successful outcome. Prior unregistered rights of an alleged infringer are just such obstacles, which can be easily overlooked or their importance misunderstood or misjudged. In the recent judgment *Claire Stone v Alexandra Wenman* [2021] EWHC 2546 (IPEC), prior rights took flight and came to the aid of the defendant by establishing that she had the sufficient earlier goodwill in the sign ARCHANGEL ALCHEMY in order to overcome a trade mark infringement claim.

## Background

The claimant, Claire Stone, is the author of a best-selling book, a spiritual advisor to celebrities, and a therapist who has been providing spiritual / metaphysical education and coaching courses for over 20 years, both in person and online. In mid-2019, Ms Stone began marketing an online course using the name "Archangel Alchemy". Later that year she registered the word mark ARCHANGEL ALCHEMY in respect of a variety of class 41 services including training courses for soul development, yogic sciences, holistic health and celestial beings.

The defendant, Alexandra Wenman, is also an author and a spiritual and metaphysical therapist. She was the former editor of the popular publication "Prediction Magazine" between 2010 – 2013 and had, since 2011, been offering spiritual and holistic education, training and therapy sessions in person and online. She claimed to have used the sign "Archangel Alchemy" (and also the sign "The Archangel Alchemist") since around 2010 in relation to spiritual and holistic services.

In May 2020, only several months after her trade mark was registered, Ms Stone launched court proceedings, alleging that Ms Wenman's online courses infringed the trade mark. Ms Wenman denied infringement and counterclaimed for passing off on the basis that, before the relevant date, she had accrued sufficient goodwill in ARCHANGEL ALCHEMY such that the relevant public would have come to rely on her use of the sign in relation to such

services. She further sought a declaration of invalidity of the claimant's trade mark on a similar basis. By the time of trial, the issues narrowed somewhat and it was agreed that the claim would stand or fall on the defendant's ability to prove sufficient goodwill. The case was heard before Her Honour Judge Melissa Clarke in the UK's specialist Intellectual Property Enterprise Court (IPEC), which is accustomed to hearing cases brought by individuals and SMEs.

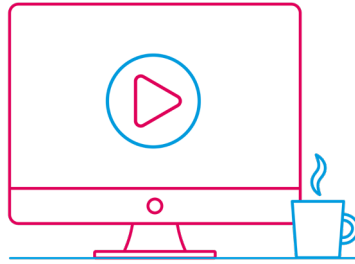
## Goodwill

Goodwill, of course, is one of the classical trinity of elements that make up the tort passing off. Often described as "the attractive force that brings in custom", the consideration of goodwill in this context was establishing whether the defendant used the sign Archangel Alchemy as an indicator of origin and/or whether the sign had an attributable reputation.

Ms Stone accepted that the defendant did in fact use the words "Archangel Alchemy" for a considerable period of time before she had. Her case, therefore, was predicated on the basis that Ms Wenman was not "using the sign as a trade mark". In the alternative, she alleged that if any goodwill had been generated, it had dissipated through the passage of time or attached to her own name, rather than the sign.

In contrast, the defendant's primary case was that she had consistently and continually since 2010 used the sign in relation to the services she provided, particularly spiritual education and training. Ms Wenman relied on 33 full-page columns she wrote entitled "Archangel Alchemy" when she was editor of Prediction Magazine between 2010 and 2013. Although she did not specifically refer to herself as "Archangel Alchemy", HHJ Clarke held that these articles contributed to the defendant's reputation as "The Archangel Alchemist who carried out Archangel Alchemy", which was a springboard upon which she grew her business. The judge also considered the evidence of four of the defendant's customers who said, generally, that those introducing Ms Wenman and her work would

#### > Related webinar



We've published a short "bite-sized" webinar about this decision that you can access on demand at: <http://dycip.com/tm-archangel-nov21>.

#### > Case details at a glance

*Jurisdiction: England & Wales*

*Decision level: IPEC*

*Parties: CLAIRE STONE (claimant) and ALEXANDRA WENMAN (defendant)*

*Date: 22 September 2021*

*Citation: [2021] EWHC 2546 (IPEC)*

*Link to decision: [dycip.com/stone-wenman](http://dycip.com/stone-wenman)*

#### In this case prior rights took flight and earlier goodwill overcame an infringement claim



In relation to whether the goodwill had dissipated, the judge accepted Ms Wenman's evidence that the signs mattered to her and were integral to the business. This was supported by her year-on-year increase in income and that her courses and retreats had been continually offered from 2016 and beyond.

In Judge Clarke's judgment, it followed that someone looking for Ms Wenman's course on the relevant date might find Ms Stone's course marketed under the registered mark, and might attend it, assuming that it must be, or be connected with, Ms Wenman's course, which would amount to misrepresentation. The trade mark was held invalid, and counterclaim for passing off held successful.

#### Author:

Jake Hayes



#### In short

The result in this case is not entirely unexpected, but it does raise a point about what the court is willing to accept as evidence of goodwill in the UK. As demonstrated in this case, the court will always look at the use of a sign in the overall context; even in a situation like this one where the defendant accepted she was rather poor at marketing herself, she rarely, if at all, referred to herself as the sign, and attributed only a small percentage of her business having been done under the sign. The undoing of it for the claimant, however, was not appreciating that Ms Wenman's use, even as a "secondary mark", had been on a sufficient scale to generate protectable goodwill which was more than trivial.

refer to her as "the Archangel Alchemy". Questioning whether the evidence should be criticised as subjective, the judge held that "subjective evidence from a customer... is valuable evidence of reputation".

The defendant accepted that she had not been particularly good at marketing herself, which she said accounted for the scant documentary evidence of "trade mark use". The issue was whether, amidst all her other activity, the small amount of sales of courses that taught Archangel Alchemy would amount to use of the sign as a brand indicator. The judge dispelled any question whether such use needed to be extensive and, interestingly, the judge looked beyond sales figures of the courses, taking in the overall context: "There is ample clear evidence, in my judgment, that the defendant was very busy, despite her fairly uninformative website, carrying out events and one-to-one

sessions, and large shows, and retreats". She went on to say, "In oral evidence she estimated that about 15% - 25% of her work related to Archangel Alchemy... even if she is exaggerating and only 5% or 1% of that work is attributable to Archangel Alchemy... in my judgment that is more than trivial".

In relation to whether the defendant used ARCHANGEL ALCHEMY as an indicator of origin, there was "ample evidence" from witnesses that they considered Ms Wenman to be the Archangel Alchemist practising Archangel Alchemy and that third parties introduced her by reference to "Archangel Alchemy with Alexandra Wenman". This, the judge held, was trade mark use in the same way the claimant used her mark. The judge was satisfied, therefore, that such use of the words were indicators of origin, and not simply allusive labels for modules or words that were otherwise commonly used in the field.



# Frida Kahlo

## Portrait of a woman

### Case details at a glance

Jurisdiction: European Union

Decision level: EUIPO Board of Appeal

Parties: Frida Kahlo Corporation v Dña

Mara Cristina Teresa Romeo Pinedo

Date: 28 September 2021

Citation: Joined cases R 381/2021-4  
and R 490/2021-4

In 2019, Mara Cristina Teresa Romeo Pinedo applied to register the trade mark shown below at the EUIPO in relation to various goods in classes 3, 9, 14, 16 and 25.



Frida Kahlo Corporation opposed the application on the basis of a likelihood of confusion with its earlier EUTM registrations, including word mark FRIDA KAHLO and the marks shown below, and the Opposition Division partially rejected the application.



Both parties appealed the decision, which was subsequently upheld by the Board of Appeal.

### Opposition Division decision

The earlier figurative trade mark depicting a woman covers goods in classes 16 and 25. The Opposition Division found that the word elements in this earlier mark are illegible

and therefore will not be taken into account for the purposes of the comparison with the contested mark. Frida Kahlo Corporation argued that the woman represented in the respective trade marks will be associated with the Mexican artist Frida Kahlo. However, it did not file any evidence to support this and the claim was rejected.

The Opposition Division found that the earlier figurative mark, which showed a portrait of a woman, and the contested mark, which showed a partial portrait of a woman together with stylised letters, are visually and conceptually similar to an average degree.

Frida Kahlo Corporation did not expressly claim that the earlier figurative mark has a particular distinctive character as a result of widespread use or reputation, and it was found to have a normal degree of distinctive character.

The Opposition Division concluded that there was a likelihood of confusion between the marks in respect of the identical and similar goods covered by the application in classes 9, 16 and 25.

With regard to the remaining earlier marks relied on, namely the figurative marks for "FK" and "Frida Kahlo" and the word mark "FRIDA KAHLO", the Opposition Division found that these are different to the contested mark, so there was no likelihood of confusion. The opposition was therefore partially successful and the application refused in respect of goods in classes 9, 16 and 25.

### Appeals to the Board of Appeal

Both the opponent and the applicant appealed the Opposition Division's decision. Frida Kahlo Corporation, the opponent, claimed that there is a likelihood of confusion with all of the earlier marks relied on. It argued that all of the trade marks under comparison are conceptually identical as they all evoke the Mexican artist Frida Kahlo. It also included reference to a number of previous contractual relationships between the parties, court disputes and commercial practices.

Mara Cristina Teresa Romeo Pinedo, the

applicant, pointed out that it is the universal heir of the intellectual property rights of Frida Kahlo and that it has legitimate rights in the name, signature, image and pseudonym of the artist. It claimed that the Frida Kahlo Corporation therefore has no legal standing. It argued that there are significant differences between the earlier marks relied on and the contested mark, and that there is no likelihood of confusion between the marks.

The Board of Appeal dismissed both appeals. It upheld the Opposition Division's finding that there is no likelihood of confusion in relation to the latter three earlier marks, which are different to the mark applied for. It also upheld that there is a likelihood of confusion with the first earlier figurative mark relied on.

With regard to the issue of the commercial relationship and disputes between the parties, the Board of Appeal found that the documents show that both parties have legal standing for the proceedings. Other commercial or litigious matters fall outside the scope of the present appeal.

Author:  
Natasha O'Shea



### In short

It may seem surprising that Frida Kahlo's unique image was deemed simply as representing a portrait of a woman, however in the absence of evidence to show that the earlier marks enjoy an enhanced degree of distinctive character, this is not unexpected. A different decision may arguably have been reached if evidence showing the renown of the artist and her image had been filed, and possibly also if the word elements in the earlier figurative mark had been clearer.

# The gravity of Brexit

## Post Brexit technical questions and a deadline reminder

**T**he deadline of 30 September 2021 to file a UK application claiming priority from an EU trade mark application which was pending on 30 December 2020 has passed.

We would like to thank all our clients for their timely instructions to meet this deadline. The run up to 30 September 2021 was no doubt a busy period for all IP attorneys in the UK and for the UKIPO.

### 31 December 2021 deadline reminder



The only Brexit deadline remaining is 31 December 2021 to record a registrable transaction in respect of a comparable UK trade mark for a licence or security interest already registered with the EUIPO - so this is just a gentle reminder to those who fall into this category.

### The GRAVITY of BREXIT

Following Brexit, the UKIPO has had to deal with some technical questions on when EU trade marks can be relied on or whether comparable UK trade marks are appropriate.

This case involved an appeal on an invalidation action against a UK trade mark which was based on two earlier international trade marks, including the word mark GRAVITY, which designated the EUIPO. Both of the earlier marks are protected in class 24 for "bed blankets".

One of the grounds of appeal was whether the declaration of invalidity could be based on an international trade mark designating the EUIPO, because the decision was made after the UK had left the European

Union. The applicant argued that all international trade marks designating the EU ceased to have effect in the UK by the time the hearing officer's final decision was made on 07 January 2021.

A preliminary decision was issued by the hearing officer on 25 September 2020. The decision was provisional as the EUIPO designations were not yet protected. On 14 December 2020, the hearing officer was advised that protection of the international trade marks at the EUIPO had been granted. A supplementary decision followed which was issued on 07 January 2021 confirming the invalidation action had been successful.

The appointed person agreed with the hearing officer's assessment and confirmed they were correct to base a decision on the international trade marks designating the EUIPO. This was because the application for a declaration of invalidity had been made before 31 December 2020 and when these trade marks were deemed earlier rights.

**Had the declaration of invalidity been filed on 01 January 2021 (or thereafter), the relevant rights to rely on would be comparable UK trade marks.**

If you have any questions relating to the UK and/or Brexit, please contact your usual D Young & Co advisor.

### Author:

**Helen Cawley**



### Case details at a glance

*Jurisdiction: England & Wales*

*Decision level: UKIPO*

*Parties: Senso-Rex Ltd and Gravity Products Ltd*

*Date: 22 July 2021*

*Citation: O/557/21*

*Link to decision: <http://dycip.com/gravity>*

# UK design registration database

## Design cloning process update

**T**he UKIPO has been updating the UK design register to include all newly cloned UK design registrations stemming from affected EU design registrations, and international Hague design registrations designating the EU. At the end of October 2021 the UKIPO reported that a number of cloned UK design registrations were still to be added to the UK design register (<http://dycip.com/ukipo-find-design>). It has since confirmed that some of these remaining cloned UK design registrations should now be viewable.

Cloned UK design registrations stemming from EU design registrations should be accessible on the UK design register by searching for the underlying EU design registration number, prefixed with "9":

EU design registration number	Cloned UK design registration number
004048098-0004	90040480980004
000000021-0001	90000000210001

Cloned UK design registrations stemming from an affected EU designation of an international Hague design registration (which will now sit outside the Hague design registration system), should be accessible by using the underlying Hague design registration number, prefixed with "8" and suffixed with three zeros:

Hague design registration number	Cloned UK design registration number
D069629-0001 (DM/069 629)	806962900010000
D069629-0002 (DM/069 629)	806962900020000

Some, but regrettably not **all**, cloned UK design registrations are also accessible via the EUIPO DesignView database. We will continue to monitor for any further updates to the UK design register, and other related design registration databases covering UK design registrations.

### Author:

**William Burrell**



# Speaking the trade mark language

## Oppositions flock to BLACK SHEEP RESTAURANTS

➤ **Case details at a glance**  
*Jurisdiction: European Union*  
*Decision level: EUIPO*  
*Citations: Oppositions B 3 054 022 and B 3 055 819*

**B**lack Sheep Restaurants Limited applied to register the figurative EU trade mark shown below, featuring a sheep device above the wording “BLACK SHEEP RESTAURANTS”, for “restaurant services” and “services for providing food and drink” in class 43.



Black Sheep Restaurants received two oppositions against its application, both of which highlight how the EUIPO's interpretation of the relevant public's ability to speak the language of the marks is a relevant factor in the likelihood of confusion assessment.

### LE MOUTON NOIR

Back in June 2021, the applicant was successful in overcoming an opposition brought by Cherry Tree S.Å. R.L. The opposition claimed a likelihood of confusion with earlier French and Benelux national word marks for LE MOUTON NOIR.

In defining the relevant public, the territory or territories in which the earlier right is protected is a relevant factor. In this case, the likelihood of confusion was analysed on the basis of the earlier Benelux mark, which covered identical services and had a wider spectrum of languages to analyse (namely French, German and Dutch) than the French mark (which would be analysed solely from the perspective of the French-speaking public).

As the marks “LE MOUTON NOIR” and “BLACK SHEEP RESTAURANTS” (fig.) were held to be dissimilar visually and phonetically, there had to be some conceptual similarity for there to be any possibility of confusion.

Before reaching a conclusion on conceptual similarity, the EUIPO noted that regardless of whether the Benelux consumer is a French,

German or Dutch speaker, the earlier mark “LE MOUTON NOIR” and the element “BLACK SHEEP” in the applied for mark would be considered distinctive, as they held no direct meaning in relation to food and beverage services. Whereas, regardless of whether the Benelux consumer understands English, the element “RESTAURANTS” in the applied for mark would be considered non-distinctive, as RESTAURANTS has the same meaning in French, German and Dutch and is descriptive of the services.

In terms of the distinctive elements of the marks, it was held that only the French-speaking public would understand LE MOUTON NOIR to mean “a black sheep”, whilst only the Dutch-speaking public would understand the English meaning of “BLACK SHEEP” in the application. Therefore, only the French-speaking public would associate the concept of a sheep in LE MOUTON NOIR with the distinctive and dominant sheep device in the application, leading to a below average degree of conceptual similarity for French speakers.

The visual and phonetic differences were deemed to outweigh the conceptual similarities for the French-speaking public, and overall, there was no likelihood of confusion. As the French national mark covered services of lower similarity and would be analysed by the same (French-speaking) public, the opposition remained unsuccessful.

### BLACK SHEEP COFFEE

The next opposition reached a decision in October 2021, and was filed by Conilon Limited on the basis of a word EUTM for BLACK SHEEP COFFEE, which covers food, drink and restaurant services in class 43. This time, the opposition was successful on the grounds of a likelihood of confusion.

As in the first opposition, the services were identical. However as one of the earlier marks relied on was an EUTM, the relevant public was the public at large in the EU. The marks were analysed from the perspective of the English-speaking public, which was cited as Ireland and Malta, as well as those with a basic understanding of English, including the Scandinavian

countries, the Netherlands and Finland.

The EUIPO held that the English-speaking part of the public would understand the meaning of the common element “BLACK SHEEP” and would consider it to be distinctive of food, drink and restaurant services. For any part of the public that was not English-speaking, the words “BLACK SHEEP” would be meaningless and distinctive.

In relation to the differing elements - “COFFEE” and “RESTAURANTS” - it was noted that these are pronounced like the English words in other EU languages (for example, “café” in French or “Kaffee” in German; and “ristorante” in Italian or “restaurant” in Spanish) and were non-distinctive.

It followed that for food and drink services in particular, the public would seek to designate the establishment by its name, which would be the words “BLACK SHEEP”, and that aurally, most relevant consumers would not pronounce “COFFEE” or “RESTAURANTS”. The marks were therefore held to be visually similar to a below average degree; aurally highly similar or identical; and conceptually highly similar to the English-speaking public, as both marks contain “BLACK SHEEP” in English and the application contains the additional, distinctive sheep device.

Overall, it was held that there was a likelihood of confusion at least for English-speaking consumers. As a likelihood of confusion for only part of the relevant public in the EU is sufficient to reject an application, the opposition was successful.

**Author:**  
**Jennifer Heath**



### In short

These cases highlight how the EUIPO's interpretation of the relevant public's ability to speak the language of the marks impacts the likelihood of confusion assessment.



# Motif marks

## Appeals court rejects Steiff's claims of infringement of bear mark

➤ World Trademark Review

This article was first published on World Trademark Review on 23 September 2021 (see [www.worldtrademarkreview.com](http://www.worldtrademarkreview.com)).



We are regular contributors to the World Trademark Review with a focus on trade mark developments in Germany. All our articles to date can be found on the WTR website: [www.worldtrademarkreview.com/reports/international/germany](http://www.worldtrademarkreview.com/reports/international/germany).

The use of symbols and motifs on garments has, in the recent past, been discussed before the courts. A prominent recent example for the European Union may be the COFEMEL case on copyright protection (12 September 2019, Case C-683/17). In German case law, the qualification of the model designation SAM as a secondary mark for a jeans model resulted in a decision from the German Federal Supreme Court (07 March 2019, Case ZR 195/17).

In a similar context, a recent decision from the Frankfurt Court of Appeal (6 W 34/21) serves as a strong reminder of the potential risks in enforcing, even very well-known, motif marks in the clothing context against competitors using highly similar motifs.

### Facts

The plaintiff is the famous German cuddly toy manufacturer, Steiff. In its more recent history, the plaintiff became increasingly involved in premium baby and child clothing, and owns marks for clothing in several figurative variants of its famous stylised bear head. This includes two German marks showing a 2D teddy-bear head – one with and the other without the famous “button-in-the-ear” on a yellow pennant, the unique feature of the company’s cuddly toys. Further, the plaintiff owns an EU trade mark showing the outline of a stylised teddy bear head.



The plaintiff sought a preliminary injunction from the Frankfurt District Court against the defendant, which sold various pieces of baby clothing with different bear motifs on the front chest area.



With the exception of one piece of clothing, the court entirely rejected the claims. In its appeal, the plaintiff requested the Frankfurt Court of Appeal to revoke the district court’s decision and to accept the claims for injunctive relief in its entirety.

### Decision

The Frankfurt Court of Appeal confirmed the district court’s decision, arguing that infringement requires “use [of the bear] as a trade mark”, meaning the relevant public would have to perceive the challenged bear logos each as an indication of origin in the specific circumstances of use.

In this regard, the labelling practices in the clothing sector (that is, the kind, manner and positioning of logos/motifs) was found to have a decisive influence on whether a motif is understood either as a trade mark (indication of origin) or merely as a decorative element.

The relevant public would not generally perceive pictures, motifs, symbols and words attached on the front of a garment as an indication of origin, especially as stylised animals are a common motif on baby and child’s clothing.

The Frankfurt Court of Appeal further confirmed that the plaintiff’s own labelling practice, the teddy-bear head with a yellow pennant positioned on the chest area of the garments, may indeed be perceived as an

indication of origin. However, this perception is attributed largely to the stylised yellow pennant on the ear of the bear (referring to the well-known “button-in-ear” for stuffed animals). The teddy-bear motif in itself would be perceived by the relevant public as a purely decorative element, even when attached to the chest area.

The court stated that, in principle, a mark’s reputation could lead to the perception of this motif as indication of origin. However, in the case at hand, the evidence of alleged reputation provided by the plaintiff was rejected as insufficient.

### Comment

It is commonly accepted in trade mark law that trade mark protection does and should not extend to the protection of mere motifs. For fashion brand owners, the increased reputation of a motif can be a way out of this dilemma.

The fact that the quite famous plaintiff in the underlying case had difficulties demonstrating reputation should, however, be a strong reminder to trade mark owners that it is always worth having a solid base of *prima facie* evidence for reputation in one’s back pocket.

Specifically, the tight deadlines under German law for requesting a preliminary injunction (up to two months from learning of infringement, depending on local jurisdiction) and the required in-company coordination on the client side hardly allow possible plaintiffs time to start collecting convincing facts and data for demonstrating reputation only upon detection of a specific infringing product or advertisement on the market.

Also, the specific standards of evidence in preliminary proceedings under German procedural law may require the reasonable disclosure of information via *affidavit*, which should always be carefully considered from a business perspective.

Author:

Gabriel Wittmann



# D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

*D Young & Co news*

## Legal 500 & Chambers 2022 Top rankings for D Young & Co

**W**e are delighted to celebrate the news that our patent and trade mark attorney teams have again been ranked top tier by Chambers UK and Legal 500 UK.

We are grateful to our clients and colleagues who participated in the directory research process.



Client testimonials include the following comments:

"D Young & Co's trade mark team is highly pragmatic – they balance genuine commercial understanding with impeccable knowledge of the law. Their advice is

always direct, to the point and well judged."

"The practice covers all key IP areas and manages to provide comprehensive and in-depth legal advice which is tailored to the client's needs and preferences. The legal analysis is top-notch while still managing to remain pragmatic and business oriented."

"The team members are highly responsive, very professional, very knowledgeable while being nice and fun people to work with. They know their clients and their preferences and manage to provide tailored advice every time around."

A client describes this as "a firm with talent to find great and easy to apply solutions for difficult matters." In addition, the team's "efficiency, promptitude and easy understanding of the issues are their main strengths."

To read the full commentary about the firm please visit our website: [www.dyoung.com/news](http://www.dyoung.com/news).

### Contact details

London  
Munich  
Southampton

T +44 (0)20 7269 8550  
F +44 (0)20 7269 8555

[mail@dyoung.com](mailto:mail@dyoung.com)  
[www.dyoung.com](http://www.dyoung.com)

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### Contributors

Senior Associate, Patent Attorney

**William Burrell**  
[wnb@dyoung.com](mailto:wnb@dyoung.com)  
[www.dyoung.com/williamburrell](http://www.dyoung.com/williamburrell)



Partner, Trade Mark Attorney

**Helen Cawley**  
[hjc@dyoung.com](mailto:hjc@dyoung.com)  
[www.dyoung.com/helencawley](http://www.dyoung.com/helencawley)



Partner, Solicitor

**Matthew Dick**  
[mjd@dyoung.com](mailto:mjd@dyoung.com)  
[www.dyoung.com/matthewdick](http://www.dyoung.com/matthewdick)



Senior Associate, Solicitor

**Jake Hayes**  
[jmh@dyoung.com](mailto:jmh@dyoung.com)  
[www.dyoung.com/jakehayes](http://www.dyoung.com/jakehayes)



Associate, Trade Mark Attorney

**Jennifer Heath**  
[jxh@dyoung.com](mailto:jxh@dyoung.com)  
[www.dyoung.com/jenniferheath](http://www.dyoung.com/jenniferheath)



Associate, Trade Mark Attorney

**Natasha O'Shea**  
[nlo@dyoung.com](mailto:nlo@dyoung.com)  
[www.dyoung.com/natashaoshea](http://www.dyoung.com/natashaoshea)



Associate, Rechtsanwalt

**Gabriel Wittmann**  
[gmw@dyoung.com](mailto:gmw@dyoung.com)  
[www.dyoung.com/gabrielwittmann](http://www.dyoung.com/gabrielwittmann)



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