

# D YOUNG & CO TRADE MARK NEWSLETTER *no.58*

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**A New Hope**  
Supreme Court's  
decision in the  
copyright dispute  
involving the  
Stormtrooper  
costume design  
from the Star Wars  
films establishes  
possibility to sue  
for foreign copyright  
infringement  
in England



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## Events



14-16 September 2011

### IPIC 85th Annual Meeting

Jackie Johnson will be attending the Intellectual Property Institute of Canada's 85th Annual Meeting in Chicago, USA.

8-12 November 2011

### INTA Leadership Meeting

Jeremy Pennant and Ian Starr will be attending the INTA Leadership Meeting in Miami Beach, Florida, USA.

More information: [www.dyoung.com/events](http://www.dyoung.com/events)

## Editorial



Welcome to the September 2011 issue of our trade mark newsletter. Many of you may be settling back behind the desk after a summer vacation and we are pleased to be able to update you on cases that have been reported in your absence.

This edition features the case *Lucasfilm v Ainsworth* in which the Supreme Court upheld the earlier judgments in considering that the helmet of the "fascist white-armoured suits" worn by the Stormtroopers in the 1977 *Star Wars* film is not a 'sculpture' and, more significantly, held that it is possible to sue for infringements of a foreign copyright in England. We also summarise the most important issues arising from the Court of Justice's ruling on *L'Oréal v eBay*, a case we previously featured in our January 2011 newsletter.

As ever, we very much welcome feedback from our readers and also invite you to regularly view our legal updates and articles, accessible on our website at [www.dyoung.com/knowledgebank](http://www.dyoung.com/knowledgebank).

If any reader has plans to visit London in the autumn, please make contact as we would be happy to welcome you to our offices.

Editor:

Jackie Johnson



## Article 01

# Star Wars The End of the (Legal) Saga?

On 27 July 2011, the Supreme Court in London (formerly referred to as the House of Lords) delivered judgment in the long-running dispute involving the iconic Stormtrooper costume design used in the *Star Wars* films. The litigation was between the filmmakers, Lucasfilm, and an Englishman, Mr Ainsworth, who produced the original Stormtrooper helmets used in the first *Star Wars* film (*Star Wars Episode IV – A New Hope*), which was released in 1977.

In 2004, Mr Ainsworth used his original 1970s tools to produce replica Stormtrooper helmets which he sold in small quantities to the public. Lucasfilm, who had established a substantial business in replica Stormtrooper costumes following the huge commercial success of the *Star Wars* films themselves, sued Mr Ainsworth in the United States and, in 2006, obtained a significant damages award there against him. That award was never satisfied and Mr Ainsworth, who was domiciled in England, challenged the jurisdiction of the US Court. Lucasfilm subsequently commenced proceedings in the English High Court, pursuing a variety of claims, including for infringement of English copyright, enforcement of the US judgment and infringement of US copyright.

### The Lower Court decisions in England

In 2008, at first instance, the English High Court dismissed the English copyright claims, on the basis that the original helmet made by Mr Ainsworth was not a work of sculpture and that certain defences under sections 51 and 52 of the Copyright Designs & Patents Act 1988, relating to the reduced term of protection for industrial designs, were available. The judge also dismissed the claim for enforcement of the US judgment but left open the possibility for the English Court to determine issues of infringement of foreign copyright, in appropriate cases.

The Court of Appeal subsequently upheld most of the High Court's ruling, except that it disagreed that the US copyright infringement claims were justiciable in England. It held

### Replica helmets have become popular



instead that the common law rule in *British South Africa Co v Companhia de Moçambique* [1893] AC 602, namely that an English court had no jurisdiction to entertain an action for the determination of title to foreign land or recovery of damages for trespass to foreign land, established a general principle that was equally applicable to a claim for infringement of a foreign IPR such as copyright.

### Issues before the Supreme Court

Lucasfilm appealed to the Supreme Court. There were two live issues in the appeal:

1. whether the helmet was a 'sculpture' and therefore protectable as a work of artistic copyright under English law; and
2. whether the English Court had jurisdiction over a person domiciled in England in relation to acts of infringement of American copyright committed in America.

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➤ Missed anything?  
In between issues of this newsletter we posted news about the reclassification of UK trade mark registrations and the UK IPO's Trade Marks Tribunal Practice Notice (2/2011). Visit our website for up to the minute IP related articles and news.

In relation to the first point, the Supreme Court agreed both with the High Court and Court of Appeal, holding that the Stormtrooper helmet was **not** protected by English copyright as a sculpture.

The Supreme Court made the following observations:

*“44. It would not accord with the normal use of language to apply the term ‘sculpture’ to a 20th century military helmet used in the making of a film, whether it was the real thing or a replica made in different material, however great its contribution to the artistic effect of the finished film. The argument for applying the term to an Imperial Stormtrooper helmet is stronger, because of the imagination that went into the concept of the sinister cloned soldiers dressed in uniform white armour. But it was the Star Wars film that was the work of art that Mr Lucas and his companies created. The helmet was utilitarian in the sense that it was an element in the process of production of the film.*

*48. There is one other matter to which the Court of Appeal attached no weight, but which seems to us to support the judge’s conclusion. It is a general point as to the policy considerations underlying Parliament’s development of the law in order to protect the designers and makers of three-dimensional artefacts from unfair competition. After reviewing the legislative history the Court of Appeal took the view (para [40]) that there was no assistance to be obtained from the relationship between copyright and registered design right. We respectfully disagree, especially if the relatively new unregistered design right is also taken into account. It is possible to recognise an emerging legislative purpose (though the process has been slow and laborious) of protecting three-dimensional objects in a graduated way, quite unlike the protection afforded by the indiscriminate protection of literary copyright. Different periods of protection are accorded to different classes of work. Artistic works of art (sculpture and works of artistic craftsmanship) have the fullest protection; then come works with ‘eye appeal’ (AMP Inc*

*v Utilux Pty Ltd [1971]FSR 572); and under Part III of the 1988 Act a modest level of protection has been extended to purely functional objects (the exhaust system of a motor car being the familiar example). Although the periods of protection accorded to the less privileged types have been progressively extended, copyright protection has always been much more generous. There are good policy reasons for the differences in the periods of protection, and the Court should not, in our view, encourage the boundaries of full copyright protection to creep outwards.”*

As to the issue of justiciability of the claim for infringement of US copyright, the Supreme Court overturned the Court of Appeal and held that it is possible to sue for infringement of a non-EU copyright in England, on the basis of its in personam jurisdiction over an English-domiciled defendant.

The Supreme Court’s reasoning was as follows:

*“87. Two important developments in European law have undermined any argument that there is a substantial policy reason for the view that actions for infringement of intellectual property rights cannot be brought outside the State in which they are granted or subsist.*

*88. First, article 22(4) of the Brussels I Regulation (formerly article 16(4) of the Brussels Convention) provides that, in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is deemed to have taken place, have exclusive jurisdiction irrespective of the domicile of the defendant. This is an exception to the general domicile rule of jurisdiction, and has to be construed strictly. It applies only to intellectual property rights which are required to be deposited or registered, and does not apply to infringement actions in which there is no issue as to validity.*

*91. The second relevant piece of European legislation does not apply to the present*

*proceedings because it came into force only on 11 January 2009, but it also shows clearly that there is no European public policy against the litigation of foreign intellectual property rights. Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) applies wherever in the world a tort was committed. It plainly envisages that actions may be brought in Member States for infringement of foreign intellectual property rights, including copyright.”*

### Conclusion

The most interesting legal aspect of the Supreme Court’s decision is that it establishes that it is possible to sue for infringements of a foreign (in this case US) copyright in England. Whilst it has long been possible to sue for infringements of copyright of an EU country, there had been judicial reluctance to extend this to non-EU countries. Essentially, you can now sue if:

- a. the defendant is domiciled in England; and
- b. that defendant has (allegedly) committed an act of copyright infringement in the other country.

Whether this will lead to more proceedings for foreign copyright infringement in England remains to be seen, but if there is an English-domiciled defendant who has infringed in a number of countries then the option is now there. This should certainly help in infringement cases where the activities are global, especially in the digital arena.

### Author:

Tamsin Holman



### Useful links:

Full text of decision:

<http://bit.ly/qYfLVv>



# Keyword Advertising and Trade Mark Infringement

## CJEU Issues Ruling in L'Oréal v eBay

The Court of Justice of the European Union (CJEU) has recently released a long awaited ruling on the preliminary questions referred to it by the High Court of England and Wales in the case of L'Oréal v eBay.

The ruling dealt with several issues, but of most interest to trade mark holders and operators of online marketplaces, such as eBay, will be the CJEU's comments in relation to the following areas:

- the use by eBay of keyword advertising
- eBay's potential liability under the E-Commerce Directive (Directive 2000/31/EC); and
- the interpretation of Article 11 of the Enforcement Directive (Directive 2004/48/EC).

These are each considered in detail below:

### Use by eBay of keyword advertising

The CJEU confirmed that eBay's use of keywords corresponding to L'Oréal's trade marks to promote its own services as an online marketplace was not use in relation to goods or services that were identical with, or similar to, those for which L'Oréal's marks were registered. Such use should, however, be assessed under the provisions which protect marks with a reputation.

In contrast, where eBay uses keywords corresponding with L'Oréal's trade marks to promote offers for sale of those goods by its customers then this does constitute use in relation to goods and services which are identical to those for which the trade marks are registered. The CJEU confirmed that this analysis is not altered by the fact that the operator is using the mark in relation to a third party's goods, where the use creates a link between the keyword and the service. Applying the case of Google France, the CJEU reiterated that rightholders are entitled to prevent such use where the advertising does not enable a user to ascertain whether the goods originate from an official source.

### eBay's potential liability under the E-Commerce Directive

One of the questions referred concerned whether an operator such as eBay could be liable if allegedly infringing signs are displayed on its website (the marketplace), rather than in a sponsored link.

The CJEU again cited the Google France case and confirmed that it was the seller not the website operator who was using the signs in such advertisements. Accordingly, the liability of an operator as a facilitator of such use will depend on whether or not the operator falls within the exemption from liability set out in Article 14 of the E-Commerce Directive.

Article 14 of the E-Commerce Directive includes the following provisions:

- "1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:*
- a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent;*
  - b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information".*

The CJEU confirmed that an operator will not be deprived of the exemption merely because it stores offers for sale on its server, sets the terms of its service and is remunerated for this service. However, an operator may be liable if it took an active role in optimising the presentation of its customers' advertisements or in promoting such advertisements, as in these situations the operator had knowledge of, or control over, the data stored.

The CJEU also considered that an operator might fall outside the Article 14 exemption, even if it had not taken an active role, if it was

aware of circumstances on the basis of which a diligent economic operator should have identified the unlawful activity in question and acted to expeditiously remove the information from its website. Such circumstances may arise where an operator conducts an investigation of its own initiative and uncovers unlawful activity or where an operator is notified of an alleged infringement (although the latter will not automatically exclude the exemption).

### Interpretation of Article 11 of the Enforcement Directive

Article 11 requires Member States to ensure that rightholders are able to apply for an injunction against intermediaries, such as online marketplaces, whose services are used by third parties to infringe intellectual property rights. The CJEU confirmed that Article 11 required Member States to ensure that national courts could grant injunctions ordering the operator of an online marketplace to take measures, not only to end the infringement of intellectual property rights by users of its services, but also to prevent further infringements of the same kind. The CJEU reiterated that such injunctions should not create barriers to trade and must be "effective, proportionate and dissuasive".

Whilst the CJEU confirmed that operators of an online marketplace could not be ordered to actively monitor the data of each customer for infringements, online marketplaces may be required to suspend the account of a particular infringer or to take steps to make it easier to identify sellers (provided that such sellers were selling commercially and not privately). In practice, this is likely to mean more onerous obligations for eBay and other operators of online marketplaces in the future.

This decision will be welcomed by brand owners who will await with interest the related decision of the High Court in London.

Author:  
Anna Reid



# Words Alone Are Not Enough General Court Rules on Likelihood of Confusion in Epilex v E-Plex

**T**he judgment in this case by the General Court of the European Union, reconfirms that merely excluding the goods covered by an earlier registration will not, in itself, remove the potential for confusion to arise between two similar marks.

Longevity Health Products, Inc had sought to register E-PLEX as a Community trade mark. During the course of proceedings before OHIM the applicant limited the specification to exclude medicines to combat diseases in connection with the central nervous system.

The application was opposed by Tecnifar on the basis of their earlier national registration for EPILEX in Portugal, protected in respect of ‘anti-epileptics’. Both the Opposition Division and the Board of Appeal upheld the opposition on the basis that, notwithstanding the limitation of the specification for the application, there still existed a similarity between the two sets of goods such that confusion was likely to arise given the similarity between the marks as well.

The applicant appealed the case to the General Court accepting the Board of Appeal’s conclusion that in respect of healthcare products, the consumers’ attentiveness at the moment of purchase is higher than normal.

The General Court considered the comparison of the goods and concurred with the Board of Appeal in holding that even with the expressly excluded items, the goods in question:

- are of the same nature, namely pharmaceutical preparations;
- have the same purpose or intended purpose, namely to treat human health problems;
- are aimed at the same consumers, namely healthcare professionals and patients; and
- use the same distribution channels, namely health centres and pharmacies.

In light of the above, the Court concluded that the similarities between the goods outweighed the differences to the extent that there existed some degree of similarity

## Likelihood of confusion



between the goods in question. This followed the earlier case T-487/08 *Kureha v OHIM – Sanofi-Aventis* (KREMEZIN). In that case, the applicant had excluded drugs administered intravenously or used in the treatment of heart conditions from the specification for an application in an attempt to overcome an opposition but failed. The General Court confirmed there was still a degree of similarity between the two sets of goods such that, when considered in conjunction with the similarity between KRENOSIN and KREMEZIN, there still existed a likelihood of confusion.

Returning to their consideration of EPILEX v E-PLEX, the General Court agreed with the Board of Appeal that the signs at issue had an average degree of visual and phonetic similarity.

The General Court went on to confirm that in assessing the likelihood of confusion globally and taking account of all factors relevant to the case, in particular the interdependence between the similarity of the signs and the similarity of the goods designated, the Board of Appeal’s decision to refuse the application should be upheld.

The General Court’s judgment reconfirms the earlier decisions taken in cases T-33/08 OPDREX and T-146/06 ATURION. The first of these stated that an exclusion from the list of goods in a specification for an application will not, in itself, remove any similarity with

the goods in question protected by an earlier registration. The ATURION case, as in KREMEZIN, confirmed that specifically in relation to goods in Class 5, similarity can still arise even where the goods covered by the earlier registration have expressly been excluded.

For applicants to succeed in cases where the circumstances are similar to the facts outlined above, more will be required than just an attempt to differentiate in terms of the wording of the specification. For example, where an applicant can show that the products are aimed at different consumers, or differ in their nature or intended purpose, there may be better prospects for defeating an opposition. Although not necessarily always easy to achieve, a good starting point is to choose a mark which does not conflict with any earlier right!

**Author:**  
 Jeremy Pennant



**Useful links:**  
 Full text of decisions:

T-161/10: <http://bit.ly/t16110>

T-487/08: <http://bit.ly/t48708dec>

T-33/08: <http://bit.ly/t3308dec>

T146/06: <http://bit.ly/t14606>

# What's in the Headlines?

## Court of Appeal Reaches Decision in NLA v Meltwater

In this much talked about decision, the Court of Appeal concluded that end-users of media monitoring services are liable to infringe the copyright in newspaper headlines and articles when they receive and/or use such services and, therefore, require a licence from newspaper publishers.

In reaching this conclusion, the Court of Appeal made the key finding that headlines are capable of being protected as literary works, despite the historical reluctance of the English Courts to confer such protection upon them.

### Background

The Newspaper Licensing Agency (NLA), the first claimant, is the UK collecting society which manages licensing schemes on behalf of newspaper publishers (some of which were co-claimants in the proceedings). NLA's licensing schemes include two specific licences capturing the activities of media monitoring organisations such as Meltwater Holding BV (Meltwater), namely:

- the Web Database Licence (WDL), which is sold to the providers of media monitoring services; and
- the Web End-User Licence (WEUL), which is aimed at the recipients of such media monitoring services (eg, Meltwater's customers).

Meltwater's media-monitoring services (Meltwater News) contain:

1. a hyperlink to each relevant article. The link is the headline from the article. By clicking on the headline, the user can access the article as it appears on the publisher's website;
2. the opening words of the article after the headline; and
3. an extract from the article showing the search term(s) selected by the user in context, ie, the search term with the words preceding and following it.

All of the above is subject to the length constraints imposed contractually under

the WDL: ie, the text extracted from an article cannot exceed 256 characters (excluding spaces).

### The dispute and the First Instance decision

The key legal issues to determine were whether:

1. newspaper headlines attract copyright protection; and
2. text extracts (with or without headlines) constitute a substantial part of an original literary work (ie, the related newspaper article).

On this basis, the crux of the dispute was whether Meltwater's customers (ie, the PR industry) require a licence from NLA in order to lawfully receive Meltwater News. In particular, whether it is a copyright infringement on the part of Meltwater's customers to:

1. Receive and read Meltwater News, whether by email or by accessing it via Meltwater's website? In other words, are the recipients of Meltwater News making an unauthorised copy of the headlines, opening words of the articles and/or the article extracts, and are they in possession of such infringing items?
2. Click on the link to the article, in that the user will make an unauthorised copy of it and be in possession of such infringing item?
3. Forward Meltwater News or its content to third parties?

At first instance, Proudman J had found that there is prima facie infringement when a copy of Meltwater News is:

1. made on the users' computers and remains there until deleted;
2. viewed by a user via Meltwater's website; and
3. made by linking to an online article (as the whole article is uploaded on the user's computer).

### The appeal

The Court of Appeal agreed with Proudman J's conclusions and dismissed the appeal, stating that Meltwater's customers need a licence for their activities, as these involve restricted acts of copying because, factually,

the copies made are not the same copies as those sent by Meltwater.

To reach this conclusion, the Court of Appeal made a number of interesting findings including the following:

### Headlines as original literary works

*The Court confirmed that headlines are capable of being protected as literary works, in that they are "plainly literary" as they consist of words and are capable of being "original" in copyright terms.*

Historically, literary works have been defined as "something that affords information, instruction or pleasure in the form of literary enjoyment" (*Exxon Corporation and Others v Exxon Insurance Consultants International Ltd* [1982] Ch. 119). The Court of Appeal has now arguably simplified the definition, potentially only to the exclusion of single words.

In relation to originality, the Court of Appeal observed that the UK originality test has not been glossed by the Court of Justice of the European Union (CJEU)'s decision in *Infopaq International v Danske Dagblades Forening* (C-5/08 [2009] ECDR 19), where it was held that copyright "is liable to apply only in relation to subject matter which is [...] the author's own intellectual creation". The Court of Appeal interpreted 'author's own intellectual creation' to connote **origin**, not merit or novelty. Therefore, as long as headlines are an expression of the author's labour and skill, they satisfy both the CJEU's test and the traditional common law test in *Ladbroke v William Hill* [1964] 1 WLR 273.

### Substantial copying

The Court of Appeal found that the text extracts (with or without the related headlines) reproduced by Meltwater

## Useful links

Full text of decisions:

[2011] EWCA Civ 890: <http://bit.ly/qBupaS>

C-5/08: <http://bit.ly/p4JJix>

Meltwater website: [www.meltwater.com](http://www.meltwater.com)

## Provision of links to articles will now require a licence from the copyright owner



the technological process and any acts of copying must be stored and deleted automatically in the process.

Following Proudman J, the Court of Appeal held that the copying made by users of Meltwater News:

1. is not incidental and intermediate, but involves 'consumption of the work' (even if temporary);
2. is occasioned by 'the voluntary human process of accessing' a specific webpage as opposed to being a part of a technological process; and
3. has an independent economic significance as the copying is part and parcel of the product offered by Meltwater to its customers.

## Conclusion

From a copyright law perspective, the key finding is that headlines are capable of being original literary works, which goes against the English Courts' historical approach.

Interestingly, the Court of Appeal's definition of literary work as a work which "contains words" makes no reference to the provision of information, instruction or pleasure, which is very much in favour of creators of literary works, in particular slogans, titles and, indeed, headlines. Also, of relevance is the confirmation that the CJEU's originality test (author's own intellectual creation) does not qualify the traditional English common law test of 'author's skill and labour invested in the creation of the work'.

The main commercial consequence of this decision is that any organisation who is in the business of providing links containing headlines and/or small extracts from larger literary works (possibly as short as 11-word texts, see Infopaq) is bound to require a licence from the copyright owner for its own acts of copying as well as those carried out by its clients.

Author:  
Cam Gatta



and its customers constituted a substantial part of the articles from which they had been taken. Following Proudman J, the Court of Appeal held that, in most cases, text extracts and headlines will represent "an unfair appropriation of the author's labour and skill which went into the creation of the original article" and that, accordingly, the activities of Meltwater's customers are "sufficiently likely to constitute prima facie infringements of copyright".

## Defences

The appellants did not succeed in raising any valid defences under the Copyright, Designs and Patents Act 1988 (as amended).

In particular, they argued the temporary copying exception under section 28A, whereby copyright in a literary work is not infringed by the making of a temporary copy which is transient and incidental, which is an integral and essential part of a technological process solely intended to enable:

- a. transmission of the work in a network between third parties by an intermediary; or
- b. a lawful use of the work, and which has no independent economic significance.

The CJEU further amplified the conditions of the exception in the Infopaq case by stating that the defence is restricted to what is necessary for the proper completion of

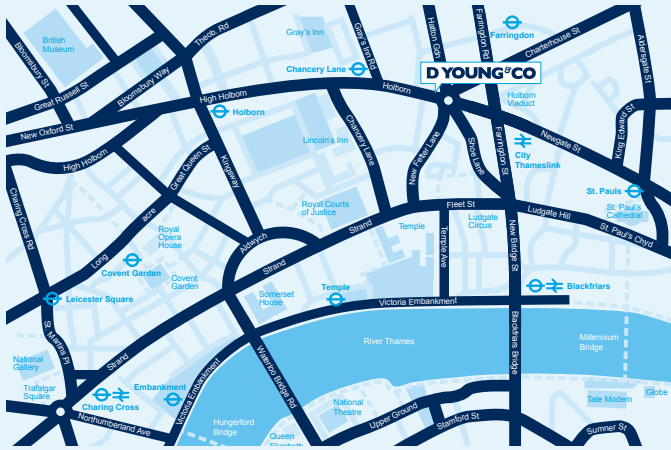


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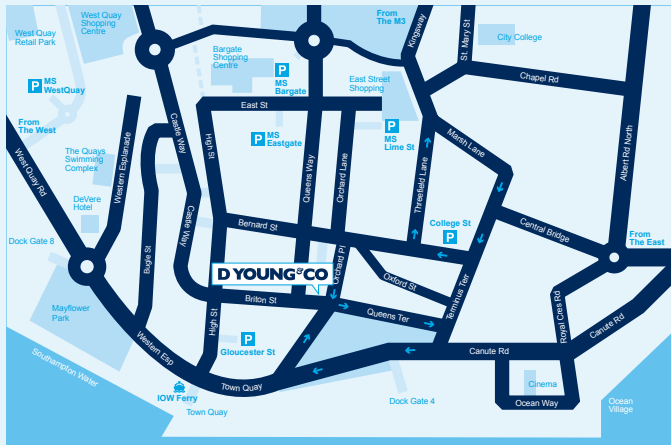
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