

# D YOUNG & CO TRADE MARK NEWSLETTER *no.94*

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## Offended by Brexit? Brexit Drinks Ltd v EUIPO



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As we go to press we are delighted to share the good news that our colleague Jennifer Heath has passed the Professional Certificate in Trade Mark Practice with Commendation. Jennifer is therefore qualified to practice as a Chartered Trade Mark Attorney. We wish Jennifer every success in her future career with D Young & Co.

The D Young & Co trade mark team



**17-19 September 2017**  
**IPO annual meeting,**  
**San Francisco, US**

D Young & Co patent and trade mark attorneys will be attending the annual Intellectual Property Owners Association (IPO) meeting. Partner Matthew Dick will be speaking during the "International Trade Mark Issues" session on Tuesday 19 September.

**19-22 September 2017**  
**MARQUES conference,**  
**Prague, Czech Republic**

Partner Jackie Johnson and Senior Associate Anna Reid will be attending the 31st MARQUES Annual Conference "Brands and Culture". The conference will look at the cultural, political and social influences that shape brands in the global marketplace.

**07-10 November 2017**  
**INTA leadership meeting,**  
**Washington, US**

Trade mark team partner Jeremy Pennant will be attending the INTA leadership meeting in Washington DC this November. The meeting brings together INTA volunteers and leaders once a year to advance the association's objectives and goals.

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London - Munich - Southampton

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



LinkedIn: [dycip.com/dyclinkedin](https://www.linkedin.com/company/dycip)  
Twitter: [@dyoungip](https://twitter.com/dyoungip)

# Offended by Brexit? Brexit Drinks Ltd v EUIPO

In July 2016, Brexit Drinks Ltd (the applicant) applied to register the word mark BREXIT in the EU in classes 5, 32 and 34 for goods including supplements, energy drinks and cigarettes.

The examiner rejected the application in its entirety on the grounds that it was devoid of distinctive character under Article 7(1)(b) EUTMR and contrary to public policy or to accepted principles of morality under Article 7(1)(f) EUTMR.

The examiner reasoned that:

- All European citizens will be familiar with the term BREXIT. Brexit bears serious consequences not just for Britain but for European society as a whole.
- Article 7(1)(f) does not require the sign per se be illegal or offensive, but that granting a monopoly of the sign would be perceived as such. EU citizens would be deeply offended if the mark BREXIT was registered and used as a mere 'product identifier' and not for its original purpose.
- The mark would have an offensive impact on the sensitivity of the average European consumer, in particular for those who voted remain. It represents an attempt to play down the importance of Brexit as a momentous event in modern European history.
- Through intensive use of the mark BREXIT in social and world media, it will merely be seen as a motto for the withdrawal of the UK from the EU and not as an indicator of trade origin of the goods applied for.

**Appeal**

The applicant appealed the examiner's final decision to the EUIPO Board of Appeal, claiming inter alia that there are no grounds for believing that BREXIT is a 'sensitive' subject for British consumers;

the UKIPO has already registered various BREXIT trade marks; the mark BREXIT does not conflict with any basic European values and that the mark is not descriptive for the goods in question.

**Public policy and morality**

The Board of Appeal first examined the Article 7(1)(f) EUTMR ground for rejection. After taking into account the context in which the term BREXIT was coined, it concluded that the term embodies a sovereign political decision and has no moral connotations. The examiner had not provided any evidence to support her finding that the mark would be felt to be offensive by the average European consumer, and in particular by those who voted remain. The Board of Appeal went on to find that the refusal of registration under this ground might be contrary to freedom of expression.

**Freedom of expression**

Article 11 of the EU Charter of Fundamental Rights, which corresponds to Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides that "everyone has the right to freedom of expression". Article 10(2) ECHR provides: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such ... restrictions ... as are prescribed by law and are necessary in a democratic society..., for the prevention of disorder or crime, for the protection of ... morals."

The Board of Appeal noted that it is clear from the case law that the registration of marks such as BREXIT may not be refused merely because the ideas themselves may "offend, shock or disturb" a significant part of the relevant public, being in the present case those who voted remain. The case law dictates that any restrictions to freedom of expression must be established convincingly, however the examiner in the contested decision had not given any evidence of a 'pressing social need' and therefore had not justified the need for a restriction on freedom of expression.

It was found that whilst the EU referendum

➤ *Case details at a glance*

*Jurisdiction: European Union*

*Decision level: EUIPO Board of Appeal*

*Parties: Brexit Drinks Ltd v EUIPO*

*Citation: R 2244/2016-2*

*Date: 28 June 2017*

*Decision: <http://dycjp.com/r22442016-2>*

**Brexit Drinks applied to register word mark BREXIT for goods in classes 5, 32 and 34**



relation to the goods applied for; made no laudatory claim; was invented, coined and playful; and conveyed no information about the goods or their qualities. It was held that the mark BREXIT was in fact distinctive for the goods applied for. The contested decision was therefore also annulled in relation to the Article 7(1)(b) ground for rejection.

**Conclusion**

The appeal was successful and the contested decision was annulled in its entirety.

**Author:**

**Natasha O'Shea**



result and its consequences may have upset a part of the UK public, being upset does not constitute offence. The fundamental right to freedom of expression protects strong opinions, even if they may offend a part of the public. Furthermore, when used in relation to the goods applied for, the “political and hotly controversial message of ‘BREXIT’ dissolves in humour”. The Board of Appeal therefore concluded that the term BREXIT could not be found to be immoral.

The Board of Appeal stated that the “patronizing approach evident in the contested decision is out of place”.

**It is irrelevant whether Brexit turns out to be a good or bad decision; a perfectly lawful decision taken by the UK government cannot be attacked on the grounds that it is contrary to public policy or to accepted principles of morality.**

**Registered UK trade marks**

It was noted by the Board of Appeal

that the UKIPO has registered various marks consisting of or containing the term BREXIT, including:

- “BREXIT THE MUSICAL” for theatre services in class 41;
- “English Brexit Tea” for goods including tea in classes 4 and 30;
- “BREXIT BLUE” for cheese products in class 29;
- “BREXIT” for goods and services including clothing, footwear, headgear in classes 9, 21, 25 and 35.

It was held that, given that the emotional impact of Brexit is presumably greater in the UK, it would be odd if the UKIPO had accepted the above trade marks if the term BREXIT did indeed fall foul of public policy or the basic norms of society.

The contested decision was therefore annulled in relation to the Article 7(1)(f) ground for rejection.

**Distinctiveness**

In relation to the Article 7(1)(b) ground for rejection, the Board of Appeal found that the mark was highly memorable when used in

**In short**

It is interesting that the Board of Appeal took the registered UK trade marks into account in their assessment of the Article 7(1)(f) ground for rejection.

The EUIPO usually dismisses the argument that the previous acceptance of identical or similar marks should be persuasive in allowing acceptance of an application, stating that the EUIPO is not bound by the UKIPO’s decisions or its own decisions.

Whilst the facts of the present case are unique, the decision shows that the previous acceptance of similar or identical marks may in particular circumstances be a relevant factor.

# Position marks

## Christian Louboutin v Van Haren Schoenen

Case details at a glance

Jurisdiction: European Union

Decision level: Advocate General

Parties: Christian Louboutin, Christian

Louboutin SAS v Van Haren Schoenen BV

Citation: C-163/16

Date: 22 June 2017

Decision: <http://dycip.com/c-16316>

This Advocate General (AG) opinion suggests that obtaining/retaining protection for non-traditional signs (in particular position marks) may become increasingly difficult.

### Background

Christian Louboutin (Louboutin) obtained a Benelux trade mark registration in class 25 for “footwear (other than orthopaedic footwear)” in 2010. The registration was limited in 2013 to “high heeled shoes (other than orthopaedic shoes)”. The registration included the following description: “the colour red (Pantone 18 1663TP) applied to the sole of a shoe as shown (the contour of the shoe is not part of the trade mark but is intended to show the positioning of the mark)”. The mark is shown below:



Louboutin sued the Dutch retailer Van Haren for selling high-heeled women’s shoes with red soles. The initial decision went in Louboutin’s favour but Van Haren challenged the validity of Louboutin’s registration, arguing that it is a two-dimensional mark (the colour red) which conforms to the shape of the shoes and gives substantial value (an objection under Article 3(1)(e)(iii) of Directive 2008/95/EC).

The Dutch Court (Rechtbank Den Haag) stayed proceedings and asked the Court of Justice of the European Union (CJEU) to clarify whether “shape” under Article 3(1)(e)(iii) is limited to 3-dimensional properties, like contours, measurements and volume, thus excluding colours.

### AG’s opinion

The AG’s view was that classification as a figurative mark does not prevent it from being considered “a mark consisting of the shape of

the goods”. The question is whether the mark seeks to protect colour *per se*, or colour in conjunction with other characteristics relating to shape. Protection was not being sought for a colour in the abstract, but in the context of a high-heeled shoe. The colour relates to a well-defined part of the goods (the sole of a shoe), and the AG found it possible for the colour to be considered “indissociable from a specific element of the goods”.

Louboutin’s registration did not seek protection for the contours of the shoe, but that was not decisive. Consideration should be given to whether the sign garners its distinctive character from the colour *per se*, or the exact positioning of that colour in relation to other elements of the goods. The AG leaned towards the latter, finding that the mark is best conceptualised as consisting of the shape of the goods which seeks protection for colour in relation to that shape.

In assessing whether Art 3(1)(e) should apply, the AG looked at the aim of the provision, which is to prevent monopolisation of functional/technical characteristics. He stated “colour can be an essential practical characteristic of certain goods, such that monopolisation of colour, in relation to an element of the shape of the goods, would remove freedom from competitors to offer goods incorporating the same functionality”. He considered the provision to potentially apply to signs consisting of the shape of the goods which also seek protection for a certain colour.

Whilst the request for a preliminary ruling did not specifically seek clarification of Art 3(1)(e)(iii), namely shapes which give substantial value, the AG noted that the provision could ensnare shape marks which had other essential functions, besides aesthetic appeal.

If Louboutin’s registration were to be considered a colour mark, it would not fall foul of Art 3(1)(e). However, as the AG acknowledged, colour marks are not typically considered inherently distinctive. Whilst colour marks can acquire distinctiveness through use, there is a balance to be struck by not unduly restricting the availability of colours for third parties. Similar policy considerations apply to shape marks – there is an underlying interest

in keeping technical/functional shapes in the public domain. However, signs falling foul of shape objections cannot be ‘saved’ by acquired distinctiveness. If the CJEU follows the AG’s opinion, it may spell the end for Louboutin’s Benelux registration.

Author:

Flora Cook



### In short

The AG’s opinion allows for Louboutin’s mark to be categorised as a sign consisting of the shape of the goods, seeking protection for a colour in relation to that shape. Further, if the red colour is considered to be a functional element then Louboutin’s registration may be deemed invalid.

The opinion indicates that “shape” under the current Directive 2008/95 can be interpreted broadly and include non-three-dimensional characteristics. However, the new EUTM Directive 2015/2436 refers to “signs which consist exclusively of the shape, or another characteristic”, which may lead to more intuitive objections against two-dimensional features, like colour as applied to goods.

Ultimately, the opinion suggests that shape objections are more readily applicable to non-traditional trade marks such as position marks.

# Registered Community design cases

## Lessons for the future to achieve shorter trials

➤ *Case details at a glance*  
**Jurisdiction:** England & Wales  
**Decision level:** High Court (Patents Court)  
**Parties:** Spin Master Limited v PMS International Group  
**Citation:** [2017] EWHC 1477 (Pat)  
**Date:** 09 May 2017  
**Decision:** <http://dycip.com/ewhc1477>

**U**K Court provides practical guidance in relation to claims for infringement of registered Community designs (RCDs) and related counterclaim.

Mr Justice Carr has recently issued a decision following a case management conference which provides advice to parties involved in litigation relating to RCD infringement on how to achieve short, cost-effective hearings. In particular, Mr Justice Carr made the following comments in relation to the directions and cost budgets proposed by the parties at the case management conference:

- The cost budgets of £776,000 for the claimant and £360,000 for the defendant were far too high and should be reduced.
- Generally there is no reason why registered design cases should last for days. In this instance the claimant's estimate of six days for trial and the defendant's estimate of four days, were too long. Three days was ample.
- The fact that a defendant may have copied a claimant's design is not relevant to the question of design freedom. Proof of copying in a registered design claim may be useful prejudice, but it goes no further than that and disclosure was not ordered in respect of allegations of copying.
- Verbal descriptions of the alleged infringing products in question are of limited assistance and enlarged photographs of the products will be more helpful.
- Disclosure of further information which related to the nature and magnitude of the claim for financial relief in the counterclaim was not ordered, as this was a matter for the inquiry (if the counterclaim was successful).
- The claimant was not allowed to amend its pleadings to seek bonus damages at this stage, nor to plead an *ex turpi causa* defence. If the claimant was successful in its infringement action it could apply for the amendments at that stage.
- In relation to alternative dispute resolution (ADR), this would not be ordered at this stage. However, following an exchange of evidence the parties



Mr Justice Carr has given advice to achieve short, cost-effective hearings

- would be expected to mediate.
- There are very limited issues upon which expert evidence is admissible. Expert evidence would be allowed in relation to two issues only (1) whether any of the features of appearance of the product are solely dictated by its technical function, and (2) to what extent, if any, is the degree of freedom of design limited by the functional nature, if any, of certain features. Such evidence should be limited in length and there should be no cross-examination without permission.

Mr Justice Carr also set out a number of "lessons for the future" which should be considered by those conducting litigation in order to try to achieve shorter trials in RCD cases, as follows:

1. The parties should ideally produce images at an early stage to show the differences or similarities upon which they rely, and in the case of the defendant, those features which are wholly functional or in which design freedom is said to be limited. Requests for further information are unlikely to be helpful.
2. Claimants should not try to introduce or seek disclosure in relation to copying. The parties should carefully consider why, if at all, disclosure is necessary, rather than agreeing to standard or even issue based disclosure.
3. Expert evidence as to whether the alleged infringement produces on the informed user the same or a different overall impression as the registered design should not be included in cases concerning consumer products.
4. The parties should try to limit the

- length of expert evidence to an agreed number of pages.
5. If any evidence of fact is to be introduced, the court will need to be satisfied of its relevance.
  6. The parties should be prepared at the pre-trial review to identify issues on which cross-examination is necessary and to explain why.
  7. Where multiple designs, or multiple infringements, are alleged, the parties should each select a limited number of samples on which the issues can be tested.
  8. The parties should give careful thought to those issues which can be postponed to a damages enquiry, which will only need to be considered if liability is established.

**Author:**  
Anna Reid



### In short

This decision provides a useful overview of the approach a court is likely to take to the directions and costs budgets proposed at the case management conference by those involved in RCD infringement proceedings. It also contains a useful overview of practical issues which should be considered by the parties to help achieve shorter trials in RCD cases in future.

# Likelihood of confusion

## Comparison of trade marks in different EU languages by the EUIPO

Case details at a glance

Jurisdiction: European Union

Decision level: Opposition Division

Parties: Huawei Technologies Co Ltd v Taiwan Wachine Co Ltd

Opposition: B 2 683 319

Date: 18 July 2017

In a recent decision of the EUIPO, the opposition division found that the trade mark HUAWEI was confusingly similar to WAWEI (Device). The comparison of trade marks included an analysis in a number of European Union languages.

### Background

On 03 November 2015, Taiwan Wachine Co Ltd (Taiwan Wachine) applied to register the trade mark WAWEI (device) for food and drink in classes 29, 30 and 32 under EUTM application no. 14759096.



The trade mark was opposed by Huawei Technologies Co Ltd (Huawei) who own EUTM registration no. 996729 HUAWEI covering all 45 classes which was registered on 17 February 2012.

The opposition was based (amongst other grounds) on a claim of likelihood of confusion and association between the trade marks.

### The average consumer

The opposition division stated that the goods contained in the application are every day food and drink items and concluded that the relevant public would be the average consumer who is deemed to be reasonably well-informed and reasonably observant and circumspect.

### Comparison of goods

Huawei's earlier trade mark registration covered a broad range of goods in classes 29, 30 and 32. The office found that the majority of these goods were identical, with the remaining goods being regarded as similar.

### Comparison of marks

#### Visual comparison

The trade marks were found similar as they share the letters "AWEI". The opposition division noted that the trade marks have different beginnings, but commented that

"while it is true that the beginning of the marks is the part that first captures the consumer's attention, it must be recalled that the argument cannot hold in all cases and does not, in any event, cast out on the principle that the assessment of the similarity of marks must take account of the overall impression created by those marks".

Huawei claimed that the figurative element in the application would be seen as decorative and would have limited effect on the comparison of the signs. They also reiterated the principle that the verbal element of the sign usually has stronger impact than a figurative component.

#### Aural comparison

The signs are similar insofar as the pronunciation of "AWEI".

Interestingly, the opposition division went on to analyse the trade marks in different languages of the European Union.

Firstly, in Polish, the opposition division observed that the letter "H" at the beginning of a word is always pronounced. In Polish, the differences between HUAWEI and WAWEI would lie in the elements "HU" and "W". In contrast, Spanish and French speakers do not pronounce the "H" at the beginning of the word and the letters "U" and "W" would be similar.

The opposition division concluded that the trade marks would be similar to an average degree to Polish-speaking consumers and similar to a high degree for French and Spanish speakers.

#### Conceptual comparison

As neither word has any meaning, a conceptual comparison is not possible.

#### Global assessment

Overall the opposition division found that the differences between the signs were confined to the first letters and sounds

in the elements 'HU' versus 'W'.

The figurative element of the trade mark application which is a Chinese character together with the stylisation of the word element has limited effect on the overall comparison.

Although there is a risk of relying too much on 'mechanical quantitative evaluation' it is a fact that counting the number of letters, identifying the identical letters and comparing their order in the trade marks can provide certain guidance on similarity.

For this case, the verbal elements share four letters while in total they consist of six/five letters. The overall impression of the trade marks is clearly similar.

#### Coexistence

The applicant argued that the trade mark co-existed in Taiwan, but because co-existence was not in the relevant territory (the EU); it was not considered by the office.

#### Decision

Overall, the EUIPO found that the opposition was well-founded and refused the trade mark application in its entirety.

#### Author:

Helen Cawley



#### In short

This decision highlights the importance placed by the EUIPO of comparing trade marks in the different languages of the European Union. If trade marks are pronounced differently in different member states or vice versa, evidence of such might be helpful to support arguments for comparing trade marks.

# BMW v Technosport

## Use by unauthorised repair provider provides repair for unauthorised use

🔍 Case details at a glance

**Jurisdiction:** England & Wales

**Decision level:** Court of Appeal (Civil Division)

**Parties:** Bayerische Motoren Werke

*Aktiengesellschaft v Technosport*

*London Ltd and George Agyeton*

**Date:** 21 June 2017

**Citation:** [2017] EWCA Civ 779

**Decision:** <http://dycip.com/ewcaciv779>

A recent Court of Appeal judgment has confirmed that use of a trade mark alongside another trading name could well result in consumers assuming a commercial link between the two.

Technosport is a vehicle repair specialist, dealing mostly with BMWs and Minis. It has no official connection with BMW, other than as a purchaser/user of BMW parts.

BMW claimed trade mark infringement relating to three European Union trade marks (EUTMs) (BMW word mark; the BMW roundel logo; and the Motorsport M logo). The logos had all been used on signage, on a van, on business cards, and on Technosport's website.

At first instance, the court had held that the average consumer would believe that the roundel and M logos would only be displayed by businesses which were authorised by BMW. Such use would therefore lead consumers to believe that Technosport was an authorised dealer and constituted an infringement (not contested on appeal).

BMW also complained that the word mark had been used alongside Technosport on clothing, directly underneath the word TECHNOSPORT, or alongside it on a single line; in the Twitter handle "@technosportBMW"; and on the rear of a van, also in a single line.

Technosport had argued that its use of the word mark merely accurately conveyed the message that it was a garage specialising in the maintenance/repair of BMW cars. The same defence had been rejected in relation to the logo marks, and BMW argued that it should also be rejected in relation to the word mark. Authorised dealers tended to style themselves by using a trading name immediately followed by "BMW" (eg, "Stephen James BMW"). The first instance judge had held such arguments to be "flimsy", noting that it would probably only be supported by evidence from actual consumers (which had not been adduced).

BMW appealed this point, arguing that consumers would perceive the Technosport BMW sign as a trading name that did not merely

describe what the company did. The company could accurately describe its services in other ways which did not suggest an economic link, and the judge had been wrong to require further evidence. Otherwise, any independent repairer could incorporate the BMW mark into its trading name without objection.

The decision of the Court of Justice of the European Union (CJEU) in *Bayerische Motorenwerke AG and another v Deenik* (C-63/97) had held that a trade mark owner may not object to third parties using its mark to inform consumers that they carry out repair/maintenance of goods covered by the mark and sold with the owner's consent, unless such use may create the impression that there is a commercial connection between the parties.

**BMW claimed that the immediate juxtaposition of the Technosport and BMW marks meant that consumers may assume the businesses were commercially connected.**

The Court of Appeal held that the trial judge had been wrong to require BMW to adduce evidence that such juxtaposition would convey the impression that the dealer is authorised. The judge merely had to assess whether use of the sign "Technosport BMW" could or did convey that impression, and he could make that assessment himself.

Use on the van consisted of the words "Technosport – BMW" above the roundel logo, a telephone number and a website address. Technosport had tried to argue that a strict "mark for sign" comparison should be undertaken, ignoring the presence of the roundel. However, the Court of Appeal followed *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2012] EWCA Civ 24, noting that an allegedly infringing sign "is not to be considered stripped of its context".

Nevertheless, even without the logo the court held that there was an obvious risk that consumers would interpret the trading style

"Technosport BMW" to indicate a commercial connection with BMW. There was nothing in the sign to indicate that it was being used purely informatively, which could have been achieved by Technosport's using a phrase such as "BMW repair specialist" in a manner visually distinct from the name Technosport.

The risk of consumers inferring a commercial connection did not depend on it being the universal practice of authorised distributors to use that naming convention, although many did. Rather, the risk exists because consumers naturally interpret use of a mark within a trading name in such a manner, and without further explanation, as being an identifier of the business and the service it provides. It therefore naturally carries the risk that it will convey the impression of a formal connection with BMW. The same applied to use of the mark on shirts and on Twitter.

**Author:**

**Matthew Dick**



### In short

The use of registered IP rights by spare parts manufacturers and those offering repair/maintenance services is a common occurrence, particularly within the lucrative automotive industry.

This decision will be welcomed by brand owners, as it confirms that not all trade mark use by entities offering such services is lawful. If there is any risk that consumers could infer a commercial connection between an unauthorised dealer and a trade mark owner through the former's use of the latter's mark, such use can be prevented.

# D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

## Appointed Person design appeal Ahmet Erol v Sumaira Javaid

**T**he first ever registered designs Appointed Person decision has been handed down. This was made possible by the Intellectual Property Act 2014 which allows for appeals to the Appointed Person in UK design cases.

The case involved designs owned by Erol for clothing bearing a stylised Union Jack. Javaid had sought to invalidate the designs arguing that they lacked novelty or individual character.

The Appointed Person, Martin Howe QC, agreed that the designs lacked individual character compared to available prior art and as such were invalid. In doing so he refused to allow Erol to submit further evidence and the appeal was dismissed.

Appeals to the Appointed Person have long been a lower cost alternative to appeals to the High Court in trade mark cases.

This decision makes it clear that the Appointed Person could be used more frequently in design proceedings.

Howe said in his decision: "Unless there is a relevant difference between substantive designs law and trade mark law which justifies a different approach, or some other specific and concrete reason, the Appointed Persons for designs appeals will follow and apply the established practice and procedural decisions of the Appointed Persons in trade mark appeals."

Appeals to the Appointed Person cannot be appealed further and decisions are final; however, whilst the number of Appointed Person design appeals will likely be far outweighed by trade mark cases, it is now a viable option worth considering in UK registered design proceedings.

**Author:**  
Richard Burton



**Useful link**  
Full decision, O-253-17, 18 May 2017: <http://dycip.com/O-253-17>

### 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

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, Trade Mark Attorney

**Richard Burton**  
[rpb@dyoung.com](mailto:rpb@dyoung.com)  
[www.dyoung.com/richardburton](http://www.dyoung.com/richardburton)



Senior Associate, Solicitor

**Anna Reid**  
[amr@dyoung.com](mailto:amr@dyoung.com)  
[www.dyoung.com/annareid](http://www.dyoung.com/annareid)



Associate, Trade Mark Attorney

**Flora Cook**  
[fec@dyoung.com](mailto:fec@dyoung.com)  
[www.dyoung.com/floracook](http://www.dyoung.com/floracook)



Trade Mark Assistant

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

