

CITMA REVIEW

ISSUE 463 MARCH/APRIL 2021

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doing enough
on diversity?



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QUESTION
IS WHAT
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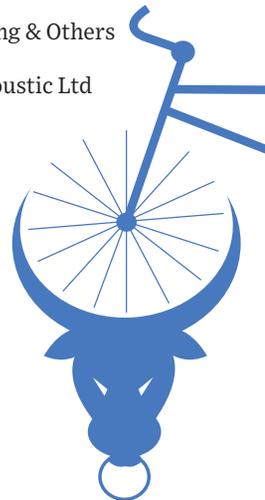
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PRESIDENT'S WELCOME A NEW BEGINNING OFFERS OPPORTUNITY

I am pleased to report that we have begun 2021 in much the same way as we left 2020, working closely with the UK IPO to ensure the Brexit process and its aftermath is as smooth as possible for you and the industry as a whole.

The theme for our Spring Conference is “A new beginning”, and I am looking forward to hearing from a wealth of excellent speakers from across the profession. Things are changing and it’s important to understand what this means for our practice. The avatar-based platform we will be using allows you to network, too. I look forward to seeing your virtual selves online.

We are putting an even greater spotlight on the importance of diversity and inclusion this year. On 8th March, I hope you will join me in celebrating International Women’s Day with a webinar aimed at challenging the gender pay gap, overcoming unconscious bias and empowering women to pursue positions in leadership.

In order to improve the online content we provide for you, we will be reducing the number of issues of *CITMA Review* from eight to six per year. This change will enable us to focus more on making our online content as valuable and insightful as possible. We will of course still provide the same great analysis in print.

I am confident that 2021 will continue to bring new opportunities, as levels of UK trade mark filings increase and we see an uptick in UK contentious proceedings. I believe we can progress into this new beginning with a very positive feeling about the future. This is a very interesting time for trade marks and designs in the UK.

Richard Goddard, CITMA President



ABIGAIL DEWS

BECKY KNOTT

JESSICA GUEST

Awards honour top students

Once again, our annual CITMA Awards have recognised the top trade mark students in the country. We congratulate all of the winners for their achievements, of which they can be justly proud.

These prizes are given to the highest-achieving students on the Trade Mark Attorney courses at Bournemouth University, Nottingham Law School and Queen Mary University of London.

We have also presented the Roy Scott Award for the top mark achieved on the CITMA Paralegal Course, and the Hogarth Chambers Award, which celebrates the highest mark achieved by a Chartered Trade Mark Attorney on the Intellectual Property Litigation and Advocacy course at Nottingham Law School.

We hope to once again present our awards in person later this year.

SPRING CONFERENCE: EARLYBIRD TICKETS STILL AVAILABLE

Join us at our virtual conference to gain insight into the shifting sands of trade mark law and how these changes will affect you. Book now at citma.org.uk/spring-2021



CITMA AWARD WINNERS 2020:

Hogarth Chambers Award
Becky Knott, Barker Brettell

Roy Scott Award
Christine Bett, Murgitroyd

Postgraduate Certificate in Trade Mark Law and Practice at Queen Mary University of London
Jessica Guest, Boulton Wade Tennant

Postgraduate Certificate in IP at Bournemouth University
Abigail Dews, Marks & Clerk

Professional Certificate in Trade Mark Practice at Nottingham Law School
Oliver Gray, Dehns

Please join us in congratulating the award winners on their outstanding achievements.



NEW CIPA PRESIDENT

The Chartered Institute of Patent Attorneys (CIPA) has appointed Alicia Instone as its President. She succeeds Richard Mair.

Alicia started her one-year term of office on 1st January 2021. Alasdair Poore has become the new Vice-President.



IPREG CLARIFIES USE OF EUROPEAN TITLES

IPReg has confirmed that titles including the term “European” can be used by UK Attorneys post-Brexit. However, Attorneys have been reminded not to mislead clients about what rights of representation they do or do not have to appear before European bodies. Find out more at citma.org.uk/ipreg-titles



SAVE THE DATE FOR OUR CHRISTMAS LUNCH 2021

We are delighted to announce that our Christmas Lunch will return on 3rd December 2021 at a wonderful new venue: The Royal Lancaster hotel in London. We look forward to welcoming you there and making up for the occasions we missed last year. Find out more at citma.org.uk/christmas-lunch-2021



HOW INCLUSIVE ARE YOU?

There's an easy way to learn where your organisation stands on diversity, explains Andrea Brewster

We all want to do our best for diversity and inclusion (D&I), but we may not always know exactly what more we – our organisation or our department – can do. That's why IP Inclusive has put together an easy online quiz that can help you identify your strengths and weaknesses when it comes to embedding D&I.

The first crucial question is whether your organisation has signed up to the IP Inclusive EDI Charter. This signals a public endorsement of the principles of equality, diversity and inclusion (EDI). Signing up to the Charter involves making six commitments, which are designed to be achievable by individuals and organisations working in or with IP – whatever their size and structure, wherever they are based and whatever the nature of their involvement with IP.

If your organisation has already taken that step, it's certainly on the right track, but what's just as important is making sure that employees know that it has done so. The next nine questions in our questionnaire are designed to bring that to light. For example, they ask:

- Whether your organisation has a D&I committee or another similar structure to champion this issue;
- Whether it offers unconscious bias training;
- Whether your firm collects D&I data; and
- Whether your organisation has a mental health policy.

If your answers to these questions are mostly “yes”, that means your firm has put EDI values into practice and you are aware of it. But there may be more you can do, for instance by getting involved with one of our

perhaps you could suggest your organisation goes further with a Steps to Inclusion review, a tool offered by IP Inclusive partners Focal Point Training to help Charter signatories benchmark their D&I credentials, identify ways to improve and prioritise future actions.

If your answers are mostly “don't know”, it could be that responsibility for inclusion doesn't fall under your job description, so you haven't focused on it. However, equality, diversity and inclusion are not issues that are owned by any one person. They are everybody's responsibility – and the duty of the organisations we work for, our clients and society as a whole.

Alternatively, a lot of “don't knows” might suggest that D&I isn't taken seriously enough in your organisation and an inclusive approach isn't yet seeping through into the corporate culture. If that's the case, the next step is simple: just go to the IP Inclusive website to jump-start your organisation's more inclusive future.

Access the quiz at ipinclusive.org.uk/how-inclusive-are-you

“

Equality, diversity and inclusion are not issues that are owned by any one person. They are everybody's responsibility

five support communities. See IP Inclusive's website for details.

If your answers are mostly “no”, that means there may be room for improvement. But if you have been compelled to take the test, you are likely to be someone who would like their firm to do better. If so,



Andrea Brewster OBE

is Lead Executive Officer at IP Inclusive

Find out more at ipinclusive.org.uk

Come and visit us at the CITMA virtual conference.



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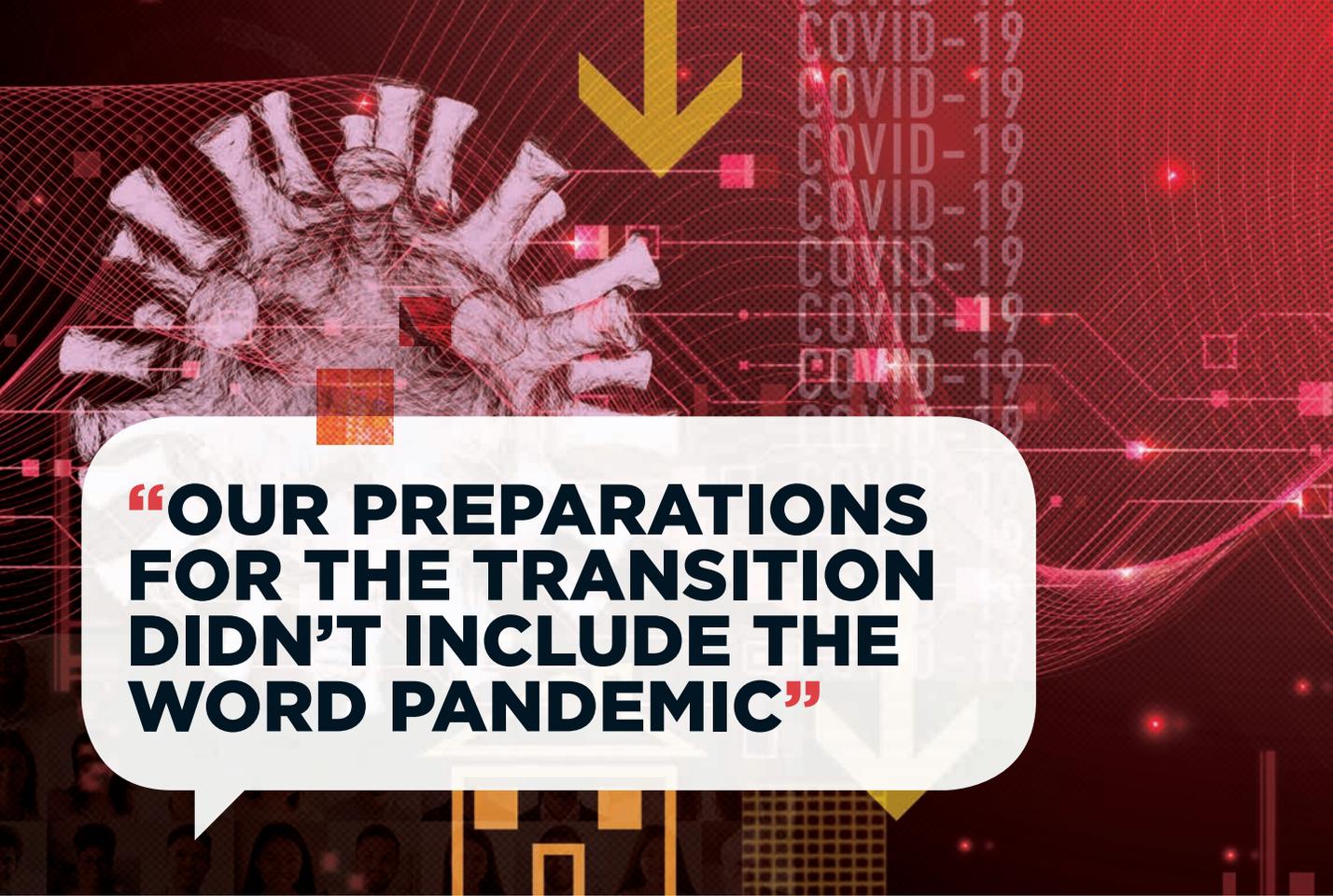
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“OUR PREPARATIONS FOR THE TRANSITION DIDN'T INCLUDE THE WORD PANDEMIC”

As she moved into a new role, Kate Swaine also had to contend with a very different world

I always knew that Gordon Harris would be a tough act to follow as the IP Team Leader at Gowling WLG. No matter how much we prepared for the transition, his experience and impact in shaping the team over many years were not things that could simply be replaced. However, in all our discussions, neither Gordon nor I ever uttered the word pandemic.

Nonetheless, the handover on 1st May 2020, which should have been accompanied by team drinks and a celebration of Gordon's achievements to date (I say “to date” because he is still a very busy team partner!), had to be conducted by videoconference.

Like everyone else, our team had to adapt overnight. Some changes were initially very welcome. No one complained about saving two hours a day on the daily commute. Several people noticed that their bank balances were looking a lot healthier

due to the lack of multiple takeaway coffees that used to punctuate our days. However, as weeks turned into months, some started to speak nostalgically of decaf, skinny, extra wet, almond lattes. Others, and I am included in this, even began to realise that the commute was a useful transition period between home and work. Team meetings conducted from your kitchen do tend to blur those lines.

That brings us to Zoom (other video platforms are available, of course). We have truly embraced videoconferencing – not just for client calls and meetings but also for social catch-ups, job interviews, training, supervision and even the Christmas party. That has made my role easier. I have actually seen some colleagues in overseas offices more frequently than I would pre-pandemic, and I am determined not to lose that once we are back in the office. It may

not be the same as seeing someone face to face, but it has allowed our team to maintain and in some cases improve those personal connections. It does also make a real difference to see a friendly face on those days when the world and its news have felt a little overwhelming.

However, becoming one with the world of videoconferencing is not all good. Most of us no longer worry about sartorial elegance from the ribcage down. If an item of clothing doesn't have an elasticated waist, I don't want to know. I have lost the ability to blink after hours of staring at the screen. I am slightly deaf in my left ear from using my headset, and my face seems to have settled into a perma-grin that scares my children and the dog. We may all need to work on that before we return to the office.

On the plus side, videoconferencing has meant that we have got to know our clients and colleagues a lot better. I recognise their pets (which frequently appear on screen and on keyboards) and their children (who creep into the room with queries about homework, when dinner will be ready, a complaint about the WiFi and, on one occasion, brandishing a



full potty). I have also learned that very few people actually mind these interruptions. We accept them as an inevitable hazard of remote working in challenging times, and it is actually quite reassuring to see that we are all facing our own daily obstacles.

Movement has become a key challenge of remote working. It is all too easy to unthinkingly sit in front of a screen for hours on end. Our team members have embraced various solutions to this, including exercise breaks with Joe Wicks, walking calls rather than yet more Zooms and blocking out “stand-up time” in diaries. The pre-Christmas period also helped a little. The almost constant carousel of deliveries each day required me to lever myself out of my chair. It also delivered one of the high points of lockdown when I was asked to show my driving licence as proof of age in order to take delivery of a bottle of bourbon. For a brief moment, I thought that perhaps lockdown had helped my visage but my hopes were crushed by Pete from UPS’s assurance that he had to ask everyone for proof of age, “no matter how old they look”. Thanks a lot, Pete.

Webinars have become the order of the day. We have more digital resources than ever before and arguably more opportunities for engagement than we had pre-pandemic. The movement of in-person conferences to online has tested everyone’s IT capabilities, but I suspect those digital platforms are here to stay for many events and have had a positive impact. Having said that, I am still addressing the issues caused when I lost control of my avatar at the CITMA Autumn Conference. If I stood on you, sat on you or walked through you, then please accept my apology.

As we move into 2021, I will take forward some valuable lessons from 2020. I do not underestimate the challenges that our team has faced in having to adapt our homes into office space while also trying to

accommodate home schooling, the videoconferencing timetables of partners or housemates and the everyday movements of a household. Remote working in some form is here to stay for most of us, but for some I know that a return to the office will be a welcome relief.

We actually have some team members who I have never met in person. Online cookie decorating, coffee breaks, “wine o’clock” and quizzes have all helped to sustain that essential team glue, but they are not quite the same. So I look forward to team socials with everyone in the same place, meetings where I don’t need to worry about whether the broadband will hold out – and yes, I’m looking forward to raising a glass with Gordon and the team to mark all of the events of the past year, good and bad, in person. ●



Kate Swaine

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CATCHING UP



WITH KATE

In the run-up to International Women's Day, we ask former CITMA President Kate O'Rourke to reflect on what makes IP an attractive sector for women and how things have changed over the course of her career

CITMA Review: On 1st April you'll have been in your current role as Head of Trade Marks at Mewburn Ellis for two years. How has this position changed since you first took it on?

Kate O'Rourke: When I joined Mewburn Ellis as Head of the trade mark group and as a Partner, it was an entirely new role. We now have a management committee that includes the practice group leads, and that was something I fought for. There are now five practice group leads on the management board.

The other thing that has happened this past year is that I was made the lead on all of the Brexit planning at the firm. In that role, I interact with a lot of the IP support services whose working lives are going to be affected now that they can no longer work directly with the EUIPO. Everyone talks about the impact on Chartered Trade Mark Attorneys and our right to representation at the EUIPO, but in fact it is the people on the ground whose work is changing – those doing records work, renewals work, filing – and we have to put in a lot of time and effort to make sure we bring everyone along with us. Without them, we Chartered Trade Mark Attorneys won't be able to do our job for clients.

CR: And of course you've had to contend with COVID-19. How has this affected your leadership approach, and how you have bedded in?

KO: My primary leadership style is collaborative – it's about people. And having that as my focus has made things more difficult in a year of COVID-19. I'm responsible for team members in London, Bristol

and Munich, and I like to visit those offices as much as possible, which has simply not been possible. So I've had to work through that.

Obviously, we have video technology and great IT, so it was easy for us at Mewburn Ellis to move to working at home. But I have had to adjust, to be more alert to what might be going on in the background, the kind of thing you often sense when you meet and talk with people in person. Relating over the phone or via a screen is not the same.

I've had to put much more effort into making sure that I understand if there are difficulties in people's lives or working environments, or if people are struggling. I've not necessarily missed being in an office, but I have missed that interaction with people, to make sure that they are doing OK and that they are on top of their work.

Happily, we can see the light at the end of the tunnel, but we know it's going to take a bit of time to get there.

CR: What makes IP an attractive sector for women? When did you enter the profession and how?

KO: For me, university was a key moment. That was when I began to be interested in trade marks. It was a bit of an accident: I had a part-time job at a trade mark firm. I then got a job at a trade mark firm in Sydney when I graduated.

The fact that I was a specialist in trade marks meant that I had transferrable skills to England. I've now been in the UK for a very long time, initially at a boutique IP firm and for many years in large law firms. Soon after coming to the UK, I completed the exams ▶

“ My primary leadership style is collaborative – it's about people. And having that as my focus has made things more difficult in a year of COVID-19

MORE THAN 50% OF CHARTERED TRADE MARK ATTORNEYS ARE FEMALE

to become a trade mark attorney and I qualified as an English Solicitor. The advantage of having those two qualifications was that it meant I could become a Partner in an English law firm and then a Partner in an IP firm.

Having the dual qualification and encouraging people to do the same is slightly controversial, but I think it's something we shouldn't shy away from recommending, because it does mean that people have an expanded choice in terms of whether they want to fulfil their careers at law firms or specialist boutique IP firms. That choice is great for anyone, but particularly for women. A lot of General Counsel at big companies are looking for people with legal qualifications, not just trade mark attorney qualifications. Many women prefer to work in-house rather than in private practice, so extra qualifications always help, I would say.

CR: The UN's focus for International Women's Day (IWD) this year is "Women in leadership: Achieving an equal future in a COVID-19 world". How have law firms changed over the course of your career in terms of supporting women? What have you noticed?

KO: The firms that I first worked in, both IP and law firms, were male-dominated, particularly at the top management and partnership level,

“ Having the dual qualification and an expanded choice is great for anyone, but particularly for women

no question about that. Is it better now? It certainly is in the trade mark field. More than 50 per cent of Chartered Trade Mark Attorneys are female. Is that reflected within the management and partnership of IP firms? I'd say it's getting better, and there is definitely a recognition that if you do not have female representation at the top of the firm, then something is wrong.

All of my initial negotiations with Mewburn Ellis were with Joanna Cripps, who is one of the most senior partners. She was

pivotal to my decision to join the firm. Her presence indicated to me that Mewburn Ellis was not afraid of having strong, able women at the top.

Interestingly, I've been on a bit of a hiring spree lately and most of the applicants have been female. There was the sense that some of them had noticed that there were strong women at the top of the tree. A number of female applicants – particularly for positions in the Munich office – could also see that there was much more emphasis on work/life balance at Mewburn Ellis than there is at some of the more traditional German firms. That was a really strong message, and we heard it from the two new Paralegals we've hired as well. I think there is still a difference in attitudes between the UK and German firms; Mewburn is seen as offering a career path that isn't as rigid and in which it doesn't take as long to make progress.

As regards the impact of COVID-19, the big message here is that increased flexibility is good for everyone, and that working from home could be good for women, but only if schools stay open. There's no question that the burden of caring usually falls more on women than on men.

CR: In terms of bringing more women into STEM professions and increasing diversity across the IP spectrum, where do you feel we stand now?

KO: First, I have to say that it's not a new topic. I used to be Vice Chair of Governors at City and Islington College, and we were trying to encourage more women to get into STEM 10 years ago. I think some of that push is now bearing fruit. At Mewburn Ellis, 50 per cent of our 32 technical trainees this year are female, and while the national average of women graduating in STEM subjects last year was just 26 per cent, 50 per cent of our 2020 intake on the Patent Attorney side was female.

In terms of diversity and inclusion (D&I) in the IP profession in general, I'm so pleased that IP Inclusive is going from strength to strength. It's now just a structural part of IP in the UK; you couldn't imagine not having it.

At Mewburn Ellis, the D&I agenda is being driven by the management board. The first thing we did was a staff survey in order to find out how our staff currently feel and to identify what we look like as a firm at the moment. Then we can build on that to make sure we put in some stepping stones for the future to ensure we become more diverse. We ask managers may look around, but are we seeing everything? Obviously not, as not all disability or diversity can be seen.

We do want to be representative of our local communities and, particularly in London, we can't say that we are right now, especially in terms of ethnic diversity.

We're doing better as regards women. We're increasingly hiring female Patent Attorneys and Trainees, and that's partly because people have been encouraged to look beyond the usual suspects – beyond Oxbridge graduates and the universities the Partners went to, and beyond people who look like you – as well as thinking about the benefits of hiring people from different backgrounds. That could ultimately refresh the whole firm.

CR: How have you supported women to progress through your management role? Is that something you take seriously?

KO: I do. One of the things that is really important from a management perspective is that you allow other people to lead on an initiative. So it's not about you doing everything or taking all the glory. It's about identifying what other people might be interested in, letting them run with it and giving them a bit of authority – even with the Trainees. That's important. If people feel they have ownership over something, be it a project or a client relationship, then they are happier and you get more out of them.

CR: What's your best piece of advice for young women taking their first steps in the profession?

KO: Follow a passion. If that's fashion, for instance, you could focus on trade marks in fashion, or any other area. As a manager, I love being able to let people run with

their passions. For me, following a passion has been about some of the softer areas, particularly in relation to pro bono services, so I'm active in both the INTA and UK IP pro bono programmes. Having a passion that you can follow and which marks you out as someone who cares about a particular area can be really important, rather than just going with the flow and following. Find something you can lead on.

CR: From where you are now, what do wish you'd known as a woman progressing in an IP career?

KO: That you should never be afraid to take on something new. And say "yes". Stick your hand up. Volunteer for things. Men aren't afraid. If it doesn't go perfectly, you've still learned something – and next time it will. Don't overwhelm yourself, but never underestimate yourself.

CR: Reflecting on the overall IWD theme of "Choose to challenge", where do you feel we stand in terms of creating a more gender-equal IP world?

KO: There is a lot of work we still need to do. There are too many men at the senior partnership level of all IP firms. It will take time, but it's really important for people like me in management to encourage younger women to put themselves forward for career progression. There is still a battle to be had to make sure that women get to the top of the partnership tree. ●

Kate was speaking to CITMA Review Editor Caitlin Mackesy Davies.

“ There is definitely a recognition that if you do not have female representation at the top of the firm, then something is wrong

Kate is due to contribute to CITMA's IWD webinar on 8th March and our Spring Conference on 25th March





AT YOUR SERVICE

This time last year, the UK IPO wasn't considering the issue of UK address for service rules post-Brexit. Here's how we helped it to see things differently

As we move into a post-Brexit 2021, only a UK, Gibraltar or Channel Islands address will be allowed on new proceedings before the UK IPO. The enactment of legislation to bring this about was, as CITMA President Richard Goddard says, a positive change that will “help to protect the UK's world-leading intellectual property environment, those who work within it and the businesses who rely on the expertise of UK IP legal professionals”. He also notes that “it is in the interests of

IP owners with UK rights to have a qualified professional who is familiar with UK law and practice advising them”. Yet, as late as November 2020, this outcome was not a foregone conclusion – and CITMA was hard at work to get it over the finish line.

Ever since the EU referendum result was announced in June 2016, we have taken a lead on developing options and solutions for the future of IP in the UK. By June 2017, we were meeting with the European Commission and members of the EU's Brexit negotiation team to brief officials on a raft of issues,

including rights of representation, exhaustion of rights, enforcement and goods in transit. By July 2017, we had published our official position paper on rights of representation and registered rights. It provided a clear steer to the UK Government and other stakeholders as to what the trade mark legal profession was calling for.

DEDICATED CAMPAIGN

In April 2020, we began a dedicated campaign to ensure that the UK Government was alive to the issue of representation and address for service (AfS). This involved a two-pronged strategy aimed at directly influencing the IP Minister through parliamentary channels and indirectly through media, member and ally engagement.

On the parliamentary side, we prepared briefings for a range of MPs and peers and compiled a list



“ *As late as November 2020, the present outcome was not a foregone conclusion – and CITMA was hard at work* ”

of key influencers. Parliamentary questions were suggested and sent to key figures, and ministerial letters were sent to the Department for Business, Energy and Industrial Strategy, the Treasury, the Ministry of Justice, the Department for Digital, Culture, Media and Sport, the Department for International Development and No. 10 itself. The issue was also raised with the All-Party Parliamentary Group for Intellectual Property (IP APPG).

Continued contact was made with the Brexit Select Committee, including submissions to the Lords’ EU Services Sub-Committee and the Committee on the Future Relationship with the EU, keeping all members up to date and under pressure.

Following this engagement, Lord Smith of Finsbury, Lord Clement-Jones (Treasurer, IP APPG) and Baroness Neville-Rolfe (a former Minister and a member of IP APPG) submitted written parliamentary questions on the issues of UK AfS and rights of representation for UK professionals before the EUIPO.

The UK IPO confirmed that it would publish a consultation on the AfS issue. Having responded to the consultation ourselves, we then set about encouraging allies and members to do the same by hosting information sessions and preparing template letters.

OVERWHELMING SUPPORT

In November, the UK IPO’s Chief Executive Tim Moss told our Autumn Conference that the IPO was treating the issue of AfS as “a top priority”. Shortly after that, the Government reported on its proposed change to AfS, which received overwhelming support in a “call for views”. Ninety-two per cent of respondents were in favour of the change, and the same number said that it would have a positive effect on their business.

In total, the call for views was answered by 1,068 people. Of these, 97 per cent had offices in the UK, 38 per cent were based in the EU or EEA, and 11 per cent were located elsewhere in the world. Asked which areas of IP they operated in (multiple answers were allowed), 96 per cent said they worked in trade marks, 93 per cent said registered designs, 85 per cent said patents, and 83 per cent said unregistered designs.

Ultimately, of course, the Government announced that the change would be made, and the legal means to amend the UK IPO’s AfS rules was laid in Parliament.

The statutory instrument tabled by IP Minister Amanda Solloway removed reference to the EEA and meant that only a UK, Gibraltar or Channel Islands address would be allowed on new proceedings before the UK IPO after 1st January 2021. (Previously, a correspondence address within any of the other 30 countries of the EEA could be used in proceedings.)

New trade mark, design and patent applications and oppositions will need a UK address, but the same will not be required for the renewal of existing registered or granted rights. The new rules will include transitional provisions for ongoing cases. The more than two million EU trade mark and registered Community design rights that will be recreated on the UK register will not need a UK address for three years following the end of the transition period.

It was a long campaign, and we join Tim Moss in welcoming the legislation as we all settle in to see what effects Brexit will have on our profession. Whatever is in store for us all, the changes – as Moss said – “will help to establish more of a level playing field for the UK, reflecting our new status as an independent nation”. ●

MAKING OUR POINT IN THE MEDIA

Our campaign included engagement with the IP and mainstream press to gain as much coverage of the issue as possible. In particular, CITMA President Richard Goddard contributed a lengthy opinion piece to *City A.M.* in June, in which he contended that the Government’s concept of “taking back control” would not be reflected in the practical effect of Brexit on representation rights unless steps were taken. Goddard also appeared in *IP Magazine*, *Managing IP* and *World IP Review*.



NEW BLOOD IS NEEDED

Aaron Wood laments the fact that firms still don't seem to be developing junior Counsel

Last year when I compiled the yearly and five-yearly appearances data for the *Review*, we saw that around 31 per cent of all disputes were being resolved via a hearing. This year, that figure has risen slightly to 35 per cent. Part of that change can be accounted for by a more stable number of hearings and a drop in the number of published decisions (down by a total of 92, or 17 per cent).

It is possible that the state of the global economy has led to fewer oppositions (or more being resolved through settlement). And where there have been hearings, what's

noticeable is that 53 per cent were carried out by Trade Mark Attorneys (TMAs) in 2020, compared with 46 per cent being undertaken by Solicitors or TMAs in 2019.

LONG-TERM NUMBERS

Looking at the five-year data, we can see that 31 firms have had two or more hearings per year over the period (up from 27 last year), and 61 have had at least one per year over that period (up from 52 last year). This suggests an increase overall in the relevance of dispute work for a number of practices, which is not surprising. Given the expected growth in disputes at the UK IPO as a result of Brexit,

2020 APPEARANCES: TOP 10 FIRMS

Position	Firm	Total
1	<i>Blaser Mills</i>	13
2	<i>Wilson Gunn</i>	7
=	<i>Baker McKenzie</i>	7
=	<i>Lane IP</i>	7
=	<i>Stobbs IP</i>	7
6	<i>Bird & Bird</i>	6
7	<i>Dolleymores</i>	5
=	<i>D Young & Co</i>	5
=	<i>Fieldfisher</i>	5
=	<i>HGF</i>	5

Murgitroyd and Potter Clarkson also made five appearances.

2020 APPEARANCES: TOP 10 TMAs/SOLICITORS

Position	Name	Firm	Total
1	Aaron Wood	Blaser Mills	13
2	Julius Stobbs	Stobbs IP	6
3	Andrew Marsden	Wilson Gunn	4
4	Ian Bartlett	Beck Greener	3
=	Philip Hannay	Cloch Solicitors	3
=	Rachel Wilkinson-Duffy	Baker McKenzie	3
7	Leighton Cassidy	Fieldfisher	2
=	Patricia Collis	Bird & Bird	2
=	Barbara Cookson	Filemot Technology Law	2
=	Alan Fiddes	UDL	2

Angela Fox (Maucher Jenkins), Olivia Gregory (Appleyard Lees), Chris Hoole (Appleyard Lees), Paul Kelly (FRKelly), Martin Krause (Haseltine Lake Kempner), Ross Manaton (Bromhead Johnson), Richard May (Osborne Clarke), Allister McManus (Elkington + Fife) and Hiroshi Sheraton (Baker McKenzie) also made two appearances.

2020 APPEARANCES: TOP 10 BARRISTERS

Position	Name	Chambers/Firm	Total
1	Charlotte Blythe	Hogarth Chambers	19
2	Jamie Muir Wood	Hogarth Chambers	11
3	Philip Harris	Lane IP	7
4	Benet Brandreth QC	11 South Square	5
=	Jonathan Moss	Hogarth Chambers	5
6	Chris Aikens	11 South Square	4
=	Georgina Messenger	Three New Square	4
8	Ashton Chantrielle	8 New Square	3
=	Gwilym Harbottle	Hogarth Chambers	3
=	Victoria Jones	3PB	3

Amanda Michaels (Hogarth Chambers), Andrew Norris QC (Hogarth Chambers) and Thomas St Quintin (Hogarth Chambers) also made three appearances.

we should expect that number to grow still more, and I would imagine that a few new names will rise in the rankings off the back of marketing efforts.

Each year, we look at how tightly the appearance numbers congregate around just a few individuals. This year, the top five TMAs and Solicitors by appearances contributed 28 per cent of all appearances in that category. And this is not unique to TMAs. If we include Barristers in the figures, we see the top

five individuals (regardless of background) contributing 26 per cent of the overall appearances. The top three alone contributed 20 per cent of all appearances.

Comparing the top figures for 2020 with those from 2019, we see repeat appearances by 60 per cent of members of Counsel and 50 per cent of TMAs/Solicitors. This suggests a recurring turnover of advocacy work for those Attorneys, and of course plenty of regular repeat work for those particular members of Counsel.

“ Repeat appearances by 50 per cent of TMAs/Solicitors suggest a recurring turnover of advocacy work for those Attorneys

NEXT YEAR'S OUTLOOK

Looking ahead, it is possible that the trumpeted rise in oppositions will arrive during 2021, but with the economic climate being what it is, this rise may be dampened. The arrival of Amazon's IP Accelerator to the UK may give a small handful of firms a boost in the number of disputes they are handling. It seems likely, however, that the same names will grace the lists next year, with the only changes coming perhaps as a result of the overbooking of certain members of Counsel.

What we are not seeing at present is a gradual shift in appearances towards juniors. Some of the more recent additions to the bar are yet to make their UK IPO debuts, and there is a long list of juniors who are yet to make the UK IPO a regular source of work. Of course, it is possible that this is because they are busy supporting patent matters, but I see an iceberg looming on the horizon in relation to certain chambers. Having not established some of their juniors for this work, they are likely to fall further behind those other chambers that seem to have developed more of a “conveyor belt” of talent. ▶

APPEARANCES 2016-2020

The longer-term view of
in-person litigation activity

2016-2020 APPEARANCES: TOP 20 FIRMS

Position	Firm	Total
1	Blaser Mills	41
2	Stobbs IP	33
3	D Young & Co	27
4	Wilson Gunn	26
5	HGF	24
6	Bird & Bird	23
7	Haseltine Lake Kempner	22
8	Beck Greener	21
=	Potter Clarkson	21
=	Withers & Rogers	21
11	Lane IP	20
12	UDL	19
13	Marks & Clerk	18
=	Murgitroyd	18
15	CMS Cameron McKenna Nabarro Olswang	17
16	Dolleymores	15
17	Appleyard Lees	14
18	Kilburn & Strode	13
=	Lewis Silkin	13
20	Baker McKenzie	12

Fieldfisher, Mathys & Squire and Trade Mark Wizards also made 12 appearances.

All data presented is based on the relevant calendar year(s). Raw data collected from the UK IPO by the author. Where entities are tied, they are ranked in alphabetical order. Figures are not independently audited and should not be relied on for official reporting, marketing, advertising or publicity purposes. Neither CITMA nor the CITMA Review can accept responsibility for errors or omissions.



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2016-2020 APPEARANCES: TOP 20 TMAs/SOLICITORS

Position	Name	Firm	Total
1	Aaron Wood	Blaser Mills	41
2	Julius Stobbs	Stobbs IP	30
3	Alan Fiddes	UDL IP	14
4	Ian Bartlett	Beck Greener	13
5	Martin Krause	Haseltine Lake Kempner	12
6	Andrew Marsden	Wilson Gunn	9
7	Leighton Cassidy	Fieldfisher	8
=	Patricia Collis	Bird & Bird	8
=	Matthew Dick	D Young & Co	8
10	Marisa Broughton	Withers & Rogers	7
=	Barbara Cookson	Filemot Technology Law	7
=	Lee Curtis	HGF	7
=	Phillip Hannay	Cloch Solicitors	7
=	Chris McLeod	Elkington + Fife	7
=	Rachel Wilkinson-Duffy	Baker McKenzie	7
16	Paul Kelly	FRKelly	6
=	Rigel Moss-McGrath	HGF	6
=	Florian Traub	Pinsent Masons	6
19	Rowland Buehrlen	Beck Greener	5
=	Angela Fox	Maucher Jenkins	5

Chris Hoole (Appleyard Lees), Jeremy Pennant (D Young & Co), Terry Rundle (Wilson Gunn), Max Stacey (Baron Warren Redfern) also made five appearances.

2016-2020 APPEARANCES: TOP 20 BARRISTERS

Position	Name	Chambers/Firm	Total
1	Charlotte Blythe	Hogarth Chambers	57
2	Jonathan Moss	Hogarth Chambers	29
=	Jamie Muir Wood	Hogarth Chambers	29
4	Thomas St Quintin	Hogarth Chambers	27
5	Amanda Michaels	Hogarth Chambers	22
6	Philip Harris	Lane IP	21
7	Ashton Chantrielle	8 New Square	18
=	Andrew Norris QC	Hogarth Chambers	18
9	Benet Brandreth QC	11 South Square	17
=	Simon Malynicz QC	Three New Square	17
11	Chris Aikens	11 South Square	16
12	Christopher Hall	11 South Square	14
=	Michael Hicks	Hogarth Chambers	14
=	Guy Tritton	Hogarth Chambers	14
15	Michael Edenborough QC	Serle Court	13
=	Denise McFarland	Three New Square	13
17	Fiona Clark	8 New Square	11
=	Victoria Jones	3PB	11
=	Daniel Selmi	Three New Square	11
=	Nick Zweck	Hogarth Chambers	11

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MAN ON MAN ON

THE THE

Past CITMA President Philip Harris considers what he hopes to bring to the position of Appointed Person at the UK IPO

CITMA Review: How has the practice of advocacy in the trade mark and IP space changed over the course of your career?

Philip Harris: It has changed completely. When I joined the profession in 1983, advocacy for Attorneys (called Trade Mark Agents back then) was limited to *ex parte* hearings, and it wasn't something that was taught as a skill. It was basically treated as a sales pitch, and you either had the "gift of the gab" or you didn't. Oppositions and cancellations were more or less the preserve of Counsel. In contrast, nowadays all new Attorneys have at least basic training and know how to assemble and present a case, use skeleton arguments and deploy copious case references. Counsel are used much less. It's even possible for Attorneys to

appear in court, an opportunity seized by only a few so far, but I'm sure we'll see more of that in the future. And written advocacy, which is just as important, has improved in leaps and bounds.

CR: What developments do you see as beneficial or, in contrast, challenging or disruptive?

PH: As a champion of advocacy rights and skills for Attorneys, I view the expansion of the Attorney role into that realm as entirely beneficial. Even for those who choose not to be "on their feet", the skills are valuable in the conduct of daily practice. The biggest challenge is getting people to be brave enough to try it. As a profession, we're squeezed between Barristers and Solicitors, so we should embrace any professional skill that differentiates our offering

from theirs. Further, many firms are acquiring independent litigation teams while using Paralegals to handle routine prosecution. If Attorneys do not embrace the new skills, they may find their roles being increasingly squeezed, and even questioned as to their value.

CR: What advice would you give to IP professionals who are taking their first steps into litigation?

PH: Get a thick skin. And learn about evidence.

CR: What did you find most challenging as you developed your own litigation skills?

PH: Cross-examination is rare in IPO proceedings, but I definitely found that the most challenging skill to master. Having come to advocacy relatively late in my career, I didn't have the chance to hone my skills in the rough and tumble of the criminal or county courts.

CR: What prompted you to apply for the role of Appointed Person?

PH: Originally, it was a logical step from leading ITMA's (as was) campaign to have Trade Mark Attorneys added to the list of professionals eligible for the post. Later, it became of a matter of good old naked ambition,

“ As a profession, we're squeezed between Barristers and Solicitors, so we should embrace any professional skill that differentiates our offering from theirs



RUN RUN RUN

along with a desire to contribute, if possible, to a field that has given me 37 years of enjoyment.

CR: What did you find the most challenging part of the application process?

PH: Without doubt, selection day, when you are put through your paces by the interview panel. It's far more nerve-wracking than a showstopper challenge on *The Great British Bake Off*, I'm sure.

CR: What preparation was most crucial to being successful in the application?

PH: Reading through as many previous AP decisions as possible.

CR: What lessons from your own experience will you apply to your role as AP?

PH: My personal motto is "no plan survives first contact", so I know full well that however I think a case might pan out, I have to be ready for it – and my view – to go in a completely different direction once the advocate starts to present arguments. My qualification as a Barrister should also be an asset.

CR: It has been reported that of the 21 AP decisions published in 2020, only three appeals were successful. Why do you think that was? Does this confirm the strength of the earlier decisions?

PH: Yes, that is essentially the reason. The IPO has greatly improved the quality of first-instance decision-making over the years. Remember, also, that

an appeal is not a rehearing. Even if we disagree with the Hearing Officer's view, we can only uphold an appeal if we are satisfied the original decision contained an error of principle. In practice, very few do.

CR: Do you feel the any pressure being the first Trade Mark Attorney in the role? And what do you hope to contribute?

PH: No. Someone has to be first and I'm used to sticking my head above the parapet. I hope that my experience of being an Attorney at "the sharp end" will have given me insights which will be useful in discharging the role.

CR: How will you deal with possible or perceived conflicts of interest? This might extend from a historical involvement with a party to perhaps having worked with a party's representative.

PH: I'll deal with any conflicts, in a word, transparently. There are well-established rules and principles around this, but the most important thing is that justice is seen to be done. Also, after many years in the profession, you get an innate ethical sense of when it is time to step aside. If taking the case feels "wrong", it almost certainly is. Each case depends on its particular facts, though.

CR: One of the issues with AP decisions can be the time it takes to get from the hearing to the issue of a decision. Do you think that you will be able to affect this in a positive way?

A FEW FACTS ABOUT PHILIP

- Appointed Person for trade marks, HM Courts & Tribunals Service, July 2020.

- He has worked in the field of trade marks and IP for 35 years as a Trade Mark Attorney, a Solicitor and, most recently, a Barrister.

- He specialises in litigation and advocacy before the courts and UK IPO.

- He's a past President of CITMA, a founder member of IPReg and he has been a Tutor/Examiner on Nottingham Trent University's Trade Mark Practice course.

PH: I very much hope so. I believe things have got a lot better recently, with decisions coming through reasonably quickly. The "default" time for issuing a decision is, I understand, three months but – fingers crossed – I hope to beat that wherever possible.

CR: Aside from your professional commitments, you are a member of The Band from County Hell. How have you been able to fit in six albums and UK touring around your legal career?

PH: Everyone in the band has a day job, so we've got very adept at scheduling. And you'd be surprised how much work you can get done with a smartphone from the back of a smelly Transit van.

CR: Are there any parallels you can draw between pleasing an audience at a live show and pleasing the court?

PH: Keep smiling even when you hit a bum note. Make it look like you meant it, and you might get away with it... and, most importantly, know when to get off! ●

LICENSED TO CHILL

Chris McLeod dives into the
world of co-branding ventures
and celebrity collaborations





The co-branded Netflix ice creams launched back in January 2020

The phrase “Netflix and chill” reached its peak some time ago, but Netflix has clearly been enjoying the opportunity it offers for “collaboration”. The streaming giant has been working with Ben & Jerry’s on a range of ice creams, with flavours including Netflix & Chill’d™ and Chip Happens. (While not strictly relevant to this article, readers may note with interest that Chip Happens is described as: “A cold mess of chocolate ice cream with chocolatey chips and crunchy potato chip swirls”. I’m sure it tastes better than it sounds...)

Ben & Jerry’s web page shows the packaging of these products bearing the Netflix logo and the strapline “A Netflix original flavour”. Netflix owns an EU trade mark registration for NETFLIX, covering a wide range of goods and services, including ice cream, which appears to be the basis for this use in the EU, presumably under a written licence.

It’s fair to say that ice cream and binge watching *Tiger King* are

natural couch-fellows, but there are many more examples of brands collaborating in a similar way. Some are more surprising than others. Ben & Jerry’s, for example, has also collaborated with Nike on a “Chunky Dunky” trainer based on Nike’s SB trainer. The non-melting footwear apparently became a cult item, selling for eye-watering prices.

A QUESTION OF TASTE

They say that you either love it or you hate it (personally, I prefer Vegemite), but Marmite spread, a by-product of brewing, seems to be infinitely attractive to other brands.

In 2007, there was a limited edition Guinness Marmite, which was alcohol-free but contained 30 per cent Guinness yeast. At the time of writing, a sealed 250g jar was available on eBay for £24.99. Tempting perhaps, if the review from justhungry.com is anything to go by: “The top note is quite similar to that of Cenovis – a bit beery. The midnote is that of classic Marmite – salty and yeasty without any fishy undertones like in Vegemite. The aftertaste is the most interesting,

“Ice cream and binge watching *Tiger King* may be natural couch-fellows, but there are many more examples of brands collaborating

however. It’s bitter and slightly dark, reminiscent of a good stout. Like Guinness, as a matter of fact.”

At the other end of the price spectrum, an Anya Hindmarch “Marmite sequinned recycled-satin tote bag” was recently available on the MatchesFashion website for £895. And back in more affordable territory, Marks & Spencer last year launched a Marmite butter and a Marmite cream cheese (although, sadly, this was out of stock at the time of writing).

In 2018, food manufacturer Heinz collaborated with the iconic British homewares brand Cath Kidston on a limited edition collection of soups, according to thefoodpeople.co.uk. All proceeds from the soups were donated to food bank charity The Trussell Trust.

SHOES STORY

I can certainly sympathise with those who have an aversion to this omnipresent leisure footwear, but given that fashionistas are regularly seen sporting them, Crocs must be doing something right. However, perhaps the most surprising collaboration here is between Crocs and fast food chain KFC.

The KFC Crocs made their debut at New York Fashion Week 2020



I hate to disappoint those who were considering investing in a pair, but according to the Crocs website, the shoes have now sold out. This does not make further detail superfluous though, because there is much to love about this collaboration, from the exhortation to “Put these on your bucket list” to the fact that “each pair of co-branded footwear comes with two Jibbitz™ charms made to resemble and smell like fried chicken”. A warning is given that the charms are not for human consumption, and the product description includes the promise that “these will make your dreams of wearing a bucket of chicken finally come true”. I am sure all readers can relate to that.

If that hasn't sated your appetite, you may be interested to know that Crocs has undertaken many other collaborations, including with Justin Bieber, heavy metal band Kiss, actor Drew Barrymore and department store Liberty. For many, there is clearly a Croc of gold at the end of the rainbow.

According to the website of the China-Britain Business Council, Karl Lagerfeld collaborated with KFC to celebrate its 80th anniversary in 2020, producing two limited edition bags bearing the KFC and Karl Lagerfeld branding. The price tag alone probably precludes temporary storage of fried chicken in the bags.

BEER. The packaging resembled that of BrewDog's Punk IPA beer, with Brewdog initially stating on social media that it intended to respond by launching a beer under the trade mark YALDI IPA. The companies then agreed that ALDI would sell an ALD IPA beer brewed by BrewDog and that, for each case sold, both companies would donate a tree to a forest being planted by BrewDog. I'll drink to that outcome.

In passing, it would be remiss not to give a mention to another BrewDog beer, Barnard Castle Eye Test, which is certainly not a collaboration with former UK Government adviser Dominic Cummings, but which is described on the BrewDog website as a “short-sighted beer for tall stories”. What's more, the New England, old-school IPA is “locked down and loaded”.

Meanwhile, having been opposed successfully by the estate of Elvis Presley in its bid to register a US-brewed IPA under the name ELVIS JUICE in the UK, BrewDog is currently selling that beer online (at least in the UK), cheekily describing it as: “The absolute King in a world of wannabes”. Presley's estate still has an ongoing opposition against BrewDog's EU trade mark application for BREWDOG ELVIS JUICE.

Without going into too much detail in what is a very crowded sector, some other standout collaborations include:

- Snoop Dogg's partnership with Aussie winemaker



Karl Lagerfeld's KFC collaboration was a hit in China

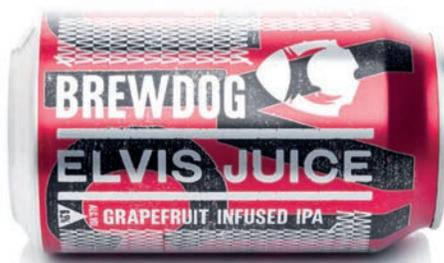
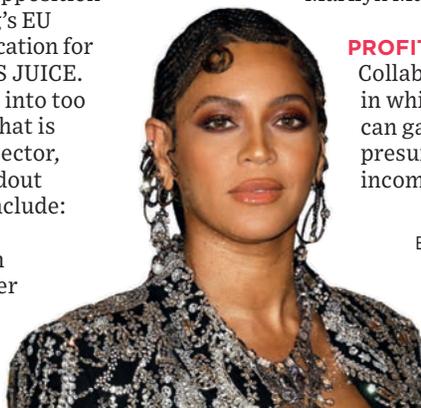
KFC

- 19 Crimes, which has brought out a wine called “Snoop Cali Red”, marketed as a celebration of “True creative defiance”;
- AC/DC wines, produced by the band with the Warburn Estate winery and including Highway to Hell Cabernet Sauvignon, Hells Bells Sauvignon Blanc, and Back in Black Shiraz;
- Heaven's Door, a range of American whiskeys developed in partnership with Bob Dylan (the reference to the iconic Dylan song being crystal clear); and
- Mansinthe, an absinthe created by Swiss distiller Matter Spirits in conjunction with alt-rock vocalist Marilyn Manson.

PROFITABLE PURSUITS

Collaboration is an area in which both parties can gain kudos and, presumably, substantial income. Cynics may

Beyoncé's first Adidas collection sold out online in six minutes



BEERS, WINES AND SPIRITS

Many readers will be aware of the spat in late 2020 between Scottish brewers BrewDog and discount supermarket chain ALDI, as reported in *CITMA Review* Issue 461. In brief, ALDI launched a beer under the trade mark ANTI-ESTABLISHMENT

wonder at the true level of celebrity involvement in some instances, but it is a seam which continues to be mined, apparently profitably.

The Arcadia empire has since fallen on hard times, but a major collaboration between Topshop and Beyoncé in 2016 to create the Ivy Park brand was hugely successful and well publicised until the parties fell out over the #MeToo movement. According to the *Retail Gazette*, Beyoncé then bought out Arcadia's share. Since 2019, Adidas has sold a range under the IVY PARK trade mark, clearly in collaboration with Beyoncé.

Readers will no doubt remember the 2013 UK passing off case involving Topshop and Rihanna, in which the singer succeeded in preventing the continued sale of T-shirts bearing her image without her authorisation. The collaboration with Beyoncé was clearly negotiated through the proper channels, perhaps as a result of this spat.

Speaking of RiRi, Rihanna's FENTY trade mark is owned by her IP holding company, Roraj Trade LLC, but the FENTY fashion clothing, footwear and accessories and the FENTY BEAUTY cosmetics range are part of the LVMH stable. Exact details of ownership are not clear. Interestingly, Rihanna's lingerie brand, SAVAGE X FENTY, is apparently independent of LVMH, so perhaps lingerie is carved out of any agreement with LVMH.

The owner of the YEEZY trade mark is Mascotte Holdings, Inc., Kanye West's IP holding company. It has an ongoing collaboration with Adidas in relation to trainers, which are clearly highly sought after. Would-be owners are required to sign up to a list to be notified when new products are released, always in limited numbers. The Farfetch website has been offering pairs starting at around £70 and rising to more than £2,000.

UNLIKELY COLLABORATORS

In addition to the Marmite collaboration discussed earlier, Anya Hindmarch clearly has a substantial appetite for

collaboration. At the time of writing, her website was offering tote bags branded with Frosties, Fisherman's Friend, Twix, Rolo, Walkers Crisps, Mars, Cadbury Dairy Milk, Heinz Tomato Ketchup, After Eight Mints and Wrigley's Spearmint Gum, as well as clutch bags branded with the logos of Swan Vestas and Ship matches.

A few years ago, Paris-based fashion collective Vetements produced a well-documented, authorised T-shirt in the red and yellow colours of courier company DHL. The T-shirt is no longer available through Vetements, but resellers are still offering

“ At the heart of any such collaboration, you would hope and expect there to be a robust legal agreement in place

them for sale online, in some instances for upwards of \$700.

Vetements has meanwhile continued and expanded its collaboration with DHL, currently offering phone cases and socks. The socks are interesting because they are a rare example of a three-way collaboration, with Reebok in addition to DHL. Yours for just €120 a pair (while stocks last).

Even Church's, a renowned and very traditional footwear brand based in Northampton, is not immune to collaboration. It has produced a collection in conjunction with Japanese fashion designer Kei Ninomiya, best known for

his “noir kei ninomiya” line launched in 2012 under the *Comme des Garçons* brand. The collaboration consists of a range of women's shoes that “reimagine” a Church's classic – the Shannon Derby shoe – by decorating it with studs and safety pins.

AGREEMENT TERMS

At the heart of any such collaboration, you would hope and expect there to be a robust legal agreement in place to protect the rights of both parties. Considering the well-publicised falls from grace of celebrities such as Lance Armstrong and Tiger Woods, it is clearly highly advisable to include in any agreement not only standard terms relating to ownership of the relevant intellectual property, jurisdictions and financial issues, but also conduct with regard to possible damage to the brand in question. Just consider, for example, the partnership agreed in the late '90s between David Beckham and Brylcreem, the manufacturer of a range of hair products. Beckham then decided to shave his head. Time, no doubt, for some awkward conversations and a probable termination of the agreement.

Despite the potential for such fallings out, the appetite for co-branding, collaborations and celebrity products shows no sign of abating, and it is often the least obvious collaborations which are the most inventive. It seems safe to conclude that we will continue to see such collaborations for many years to come. ●



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A collective failure

The Hearing Officer neglected to consider a crucial distinction, explains Emilia Petrossian

Babel Sajt Kft (the Applicant) applied to register the mark shown opposite in class 29 for milk, dairy and cheese products. The application was opposed by the Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi (the Foundation) based on s5(2)(b) and 5(3) of the Trade Marks Act 1994. The Foundation relied on its earlier EU collective mark HALLOUMI for cheese, which was registered in 2000.

The opposition failed as the Hearing Officer (HO) concluded that, although the products were identical, the visual similarity of the marks was low because the Applicant's mark contained two words and caused no direct or indirect confusion when taken as a whole. Further, the HO considered that there would have been a greater likelihood of confusion had the earlier mark been highly distinctive. The distinctive element in the

opposed mark is “Hajdú”, which would be perceived by the average consumer as the producer of the cheese. The HO disagreed with the Foundation’s claim that the average consumer could also be a cheese trader and held that the average consumer was the general public. The Foundation then filed an appeal.

GROUNDS FOR SUCCESS

The Foundation appealed, and succeeded, on a number of grounds.

First, it argued that the HO was wrong to consider the average consumer to be the general public only. The Foundation claimed that cheese traders should have also been included in the average consumer group. It further argued that there was no requirement in law to identify the largest group of purchasers and that confusion can be assessed on the basis of any substantial proportion of the relevant public; in this case, cheese traders.

The Foundation then argued that the HO ought to have held that, even if the general public would not be confused, cheese traders would be because they are familiar with the proprietor’s marketing. The Board of Appeal (BoA) agreed and held that the HO failed to take into account the mark being a collective mark and therefore failed to recognise that there were two groups of average consumers. Although the general public may not be confused, the cheese traders could be.

Second, it argued that the HO failed to take into account that the earlier mark was a collective mark so had a minimal degree of inherent distinctiveness.

However, the BoA then noted that there is a danger in assessing marks to have a minimal degree of distinctiveness and that marks should only be assessed as either having or not having distinctiveness. Further, given that the earlier mark is a registration, the BoA found that there was no need to assess distinctiveness of that mark during the opposition proceedings, as “it is impermissible to assert, in opposition proceedings, an absolute ground for refusing to register the earlier mark”.

Third, the BoA decided that the HO was wrong to find that the average consumer (being the general public) would understand the mark to be a type of cheese, suggesting that the Foundation’s mark was generic. The BoA recognised that consumers would not know that the mark is a collective mark but pointed out that the term “Halloumi” can designate cheese produced by a member of the Foundation or having characteristics of cheese produced by a member.

“ *Confusion can be assessed on the basis of any substantial proportion of the relevant public; in this case, cheese traders* ”

Lastly, the BoA decided that the HO misapplied the test of distinctiveness and confusion by applying the wrong test for collective marks. Although the HO rightly held that the elements “Hajdú” and “Halloumi” each had an independent distinctive character, she failed to factor this into her assessment of what level of distinctiveness they enjoyed. Further, in response to the HO’s statement that “I find that the distinctiveness of the mark [HALLOUMI] is inherently weak”, the Foundation argued that she had not taken into consideration that even marks with a weak distinctive character may lead to a likelihood of confusion.

The BoA agreed and found that although the HO did rightly assess the opposed mark as a whole, she failed to consider the fact that the Foundation’s mark HALLOUMI was a separate element of the opposed mark. In relation to the HO’s conclusion that the earlier mark HALLOUMI was inherently weak, the BoA found that her conclusion was not a reasoned one.

INCORRECT IDENTIFICATION

In conclusion, the HO in the opposition proceeding failed to assess the mark as a collective mark, which would have played a significant role in the correct identification of the average consumer group. A collective mark, by its nature, will not point to one single designation of origin but rather to the fact that the producer belongs to a particular association.

Further, the HO had failed to correctly assess the marks, having failed to consider that the second element of the opposed mark, “Halloumi”, was actually the whole of the Foundation’s mark. This could, therefore, have led to a higher degree of confusion among cheese traders.

KEY POINTS

- + Collective marks designate the origin of the particular association and not just one undertaking
- + Average consumers can be more than just one group of consumers
- + It is important not to overlook an earlier mark being fully amalgamated in a later mark

MARK

THE APPLICANT’S MARK



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Important finding for fashionistas

The law has developed notably with regards to passing off, writes Khemi Salhan

In this decision, Deputy Judge David Stone handed down a decisive victory for the Claimant. The decision was the first in the UK to find post-sale confusion under passing off. This gives hope to brand owners, particularly those in the fashion industry, that there may be more tools at their disposal for tackling copycat products.

Freddy SpA designed a unique pair of trousers designed to lift and separate the buttocks (the WR.UP pants). The trousers are made of a knitted fabric, have unique seam shapes and feature distinctive branding indicia specifically created to highlight the shape created and catch consumers' eyes.

Freddy SpA designed a unique pair of trousers designed to lift and separate the buttocks (the WR.UP pants). The trousers are made of a knitted fabric, have unique seam shapes and feature distinctive branding indicia specifically created to highlight the shape created and catch consumers' eyes.

Hugz was manufacturing a pair of trousers that were virtually identical to the WR.UP pants. After an initial settlement and sell-through period, Hugz then released a second version of its trousers. This second version featured only minor variations on the original design.

Freddy successfully claimed infringement of its patent and UK unregistered design rights, passing off and breach of the settlement agreement. While the decision has importance in the area of designs, this article focuses on passing off, where the law has developed notably.

UNIQUE ELEMENTS

Freddy relied on a combination of the branding elements it had used to market the WR.UP jeans. These elements included a cameo-inspired badge pinned to the rear false pocket, the curved seams of the pockets, a diagonal belt loop and a scalloped rear yoke (together, the "Freddy get-up"). Freddy claimed all of the elements of the Freddy get-up were present on the Hugz product.

Hugz denied passing off, contending that because its jeans were sold under the Hugz name there could be no misrepresentation.

Nevertheless, Freddy claimed Hugz's use of a similar get-up amounted to passing off for two reasons. First, Hugz wanted consumers

to think the two brands were connected in some way. Second, and in the alternative, even where a consumer may understand that Hugz's product is not the Freddy product, the buyer of the Hugz product wants others to think they are wearing the Freddy product.

Deputy Judge Stone found passing off both in the conventional sense and on the basis of post-sale confusion.

CONVENTIONAL PASSING OFF

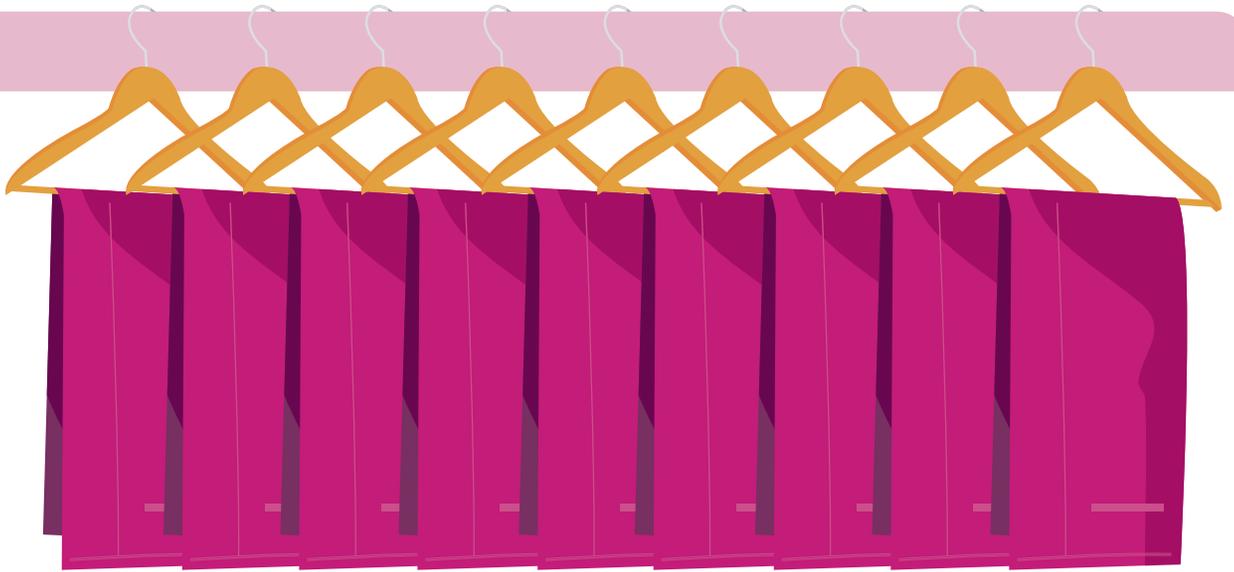
The Hugz jeans were not sold under the Freddy name or the WR.UP brand. Arguably, this might have been sufficient to rebut any suggestion of misrepresentation.

However, the judge held that Freddy's goodwill in its get-up was particularly strong, and that consumers would recognise it as an indication of the origin of the products. Given that the Hugz jeans were "an obvious rip-off", the judge ruled that Hugz had clearly intended to misrepresent, in suggesting that Hugz was in some way connected to Freddy.

This finding is a helpful reminder that brand protection and get-up go beyond names and logos, even for passing off. Freddy had invested in teaching consumers about its branding elements and ensuring that the features of the Freddy get-up were instantly recognisable, even from a distance. Brand owners should consider the distinctive elements of their products and take steps to draw these to the consumer's attention prior to any purchase. For products sold in packaging, this could be redressed through online presentation and sale.

POST-SALE CONFUSION

The judge also found that there was post-sale passing off – for example, on the grounds that consumers would continue to be deceived as to the origin of the product after purchase.



“ To rely on post-sale confusion, brand owners will need to show evidence of goodwill

Historically, post-sale confusion was not considered sufficient as evidence of misrepresentation. In *Bostik v Sellotape*¹, Bostik was unable to rely on the blue colour of its Blu-Tac as evidence of passing off. In that case, the judge held that the customer had not been deceived as to the origin of the product at the point of sale, as Blu-Tac was clearly sold in Blu-Tac branded packaging and the relevant Sellotape product was sold under its own brand.

In *Arsenal v Reed*², the Honourable Mr Justice Laddie held that where consumers had knowingly purchased unofficial merchandise, there could not be passing off. Clear disclaimers that the product was not official and the differing prices were sufficient to dispel any claims of misrepresentation. The Court of Appeal suggested this might not be right, but passing off had not been appealed.

These decisions were thought to have effectively prevented any claims for post-sale confusion. However, in *Levi Strauss v Kimbyr*³, the High Court of New Zealand found that there could be passing off even where the consumer was not deceived at the point of sale. The judge in that case found that the purpose of clothing branding was to “maintain the connection between the goods and the proprietor during the life of the garment after sale”. As both cases related to the branding on the back of jeans, the Freddy case drew a striking parallel with the facts of the Levi Strauss decision.

As Deputy Judge Stone noted, post-sale confusion is already a well-established basis for bringing a claim of trade mark infringement

(as in the case of *Datacard Corporation v Eagle Technologies Ltd*⁴).

EXCITING DEVELOPMENT

Deputy Judge Stone found the Levi Strauss and Datacard cases persuasive and held that there could indeed be post-sale confusion in passing off. Mirroring the finding in Levi Strauss, he noted that there was no reason why the owner of goodwill in a product should have this goodwill protected only up to the point of sale and not throughout the lifetime of the product.

This development is exciting and welcome for brand owners, particularly those in the fashion industry. In fashion, brand owners specifically use distinctive indicia so that consumers can continue to recognise the products as coming from a particular source after the point of sale. Get-up extends much further than a single trade name, brand or logo used in relation to a specific product.

To rely on post-sale confusion, brand owners will need to show clear evidence of goodwill in the get-up and brand indicia. This could be through targeted marketing to educate customers, and/or evidence that the types of indicia are recognised by the relevant industry as indicators of origin.

Gowling WLG acted for Freddy SpA in this case.

1 [1994] RPC 556
2 [2001] EWHC 440
3 [1994] FSR 335
4 [2011] EWHC 244 (Pat)

KEY POINTS

- Brand owners may be able to rely on passing off where the infringing article is sold under a different brand name and the infringer has clearly sought to benefit from the brand owner's goodwill and reputation
- Brand owners may be able to rely on post-sale confusion to support a passing off case where it is evident that the brand will continue to accrue goodwill post-sale
- The case provides an interesting commentary on the scope of UK unregistered design right protection



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Searching questions remain

Cameron Malone-Brown looks at how the UK's exit from the EU may affect future adjudication on online advertising

Here, Amanda Michaels, sitting as a Deputy Judge in the IPEC, confirmed that use of a registered trade mark on the Google Dynamic Ad Service to attract consumers to a website might not be trade mark infringement, even where the consumers landing on the site are offered and purchase a competing product. The decision raises interesting considerations around so-called “bait and switch” advertising strategies. It also adds to the growing body of UK case law around online advertising, which may be an area ripe for divergence following the conclusion of the Brexit transition period.

THE DECISION

iKoustic Ltd (the Defendant) is a retailer of sound-proofing materials and enjoyed a successful stint as a non-exclusive distributor of products for Pliteq Inc (the Claimant). The goods in question were clips and mats for sound proofing, named the GENIEMAT and GENIECLIP (both registered trade marks). After several years of sales, the supply

relationship concluded and iKoustic began trading its own versions of the clips and mats under its branding (“Mutemats” and “Muteclips”). iKoustic tried to sell the remaining branded goods back to the Claimant but was refused. As it still had a number of the branded GENIEMAT and GENIECLIP to sell through, iKoustic sold both the Claimant's goods and its own through its website.

This dispute relates to a period of around a year during which the Defendant sold branded GENIEMAT and GENIECLIP products alongside its own competing products, without the consent of the Claimant. The Claimant's key argument was that the Defendant used the Google Dynamic Ad Service to target consumers seeking GENIEMAT or GENIECLIP products to attract them to its website, only to then sell them the Defendant's own goods (a “classic bait and switch”). The Google Dynamic Ad Service essentially scans its customers' websites and advertises them when certain key words or phrases from the sites are



Search: **GENIE**

searched. As the Defendant's site featured the Claimant's goods, a search for these trade marks would bring up an advert for the Defendant's site. As such, the Defendant used the Claimant's registered trade marks to sell its own goods and, in the eyes of the Claimant, this ought to be an actionable infringement.

Amanda Michaels provides a useful summary of the case law around bait and switch advertising, centred on the Honourable Mr Justice Arnold's discussion in *Och Ziff*.¹ The key issue with bait and switch as a basis for infringement or passing off is that it likely only constitutes initial interest confusion; that is to say, the behaviour of the would-be infringer may well cause confusion when initially generating interest, but at the point of sale there is no confusion as to the origin of the goods. In this case, both parties agreed that there was no confusion at the point of sale of the goods. Instead, the Claimant argued that the bait and switch advertising strategy had a negative impact on the functions of its earlier trade marks and took unfair advantage.

In finding against the Claimant, Ms Michaels held that the use of the earlier marks did indeed relate to the actual branded goods themselves, for which the Claimant's rights were exhausted due to their prior sale within the EEA. There was also no reason why the Claimant might have opposed further commercialisation of the relevant

goods by the Defendant, so the defence of exhaustion was not undermined.

IMPACTS COMPARED

With commerce increasingly taking place online, courts need to respond quickly to the growing number of trade mark infringement cases in which various new and unfamiliar advertising methods are utilised to target an increasingly tech-savvy consumer. As noted in the *Och Ziff* decision, the efficiency of the act of online purchasing means that a consumer can very quickly leave a site and go elsewhere if the goods are not sufficiently desirable. With a physical shop, however, it may be more difficult for a consumer to go elsewhere once lured in (perhaps due to time constraints, location, the availability of similar shops and so on). Bait and switch advertising may therefore have a different impact on online consumer behaviour than on those attending brick-and-mortar stores.

In *Google France*², misuse of ad words was held to be actionable where the online advertisements would prevent the consumer from ascertaining the correct origin of the goods or services or would create sufficient difficulty in doing so. This was readily applied in cases such as *LUSH*³, where ad words were used to indicate to the consumer that certain goods were available at a site, but where the goods offered at that site were not from the brand advertised. Where the potential



infringer uses a mark in order to attract interest in its own goods but makes insufficient effort to avoid confusion or to highlight the disparity to consumers, Google France appears to apply neatly.

Where there is a genuine reason for the use of the registered mark alongside similar goods, as was the case here, a more nuanced approach is required. In the present case, the Defendant sold through its old stock and generated traffic to its website by referencing the registered mark. This use of the registered mark (through the Google Dynamic Ad Service) was seemingly legitimate. At several points during the period of interest, the Defendant did not have a sufficient volume of goods to fulfil orders made for the goods bearing the registered trade mark, so it substituted its own goods. This substitution appears to have been made clear to the consumer, and a refund issued to address the variation in cost.

PROBLEMATIC PRECEDENT?

As the Claimant noted, this may result in a problematic precedent. One might conceivably stock a small number of products in order to show a legitimate interest in using a registered trade mark in advertising. This number of goods may not be sufficient to fulfil an order, as was the case here. Nonetheless, the use of the registered mark will generate traffic to the website and potentially increase sales relating to similar goods. It is unclear when keeping a stock of branded goods might be considered token for the purpose of enabling the seller to legitimately engage in bait and switch advertising.

In this case, a single roll of branded insulating material (almost certainly not enough to fulfil an order) did not indicate illegitimate or token use, despite iKoustic using the registered mark in advertising. There was corroborating evidence indicating that the Defendant took steps to legitimately sell through its old stock, as well as to highlight to consumers that its stock was in short supply. As such, the risk of online traders hiding behind a token stock of branded goods was not discussed in detail but may well arise again in the near future.

DIVERGENCE LIKELY

With the end of UK's Brexit transition period, new EU law no longer directly binds the UK. As such, it is likely that the treatment of intellectual property in the UK will diverge from the EU. This may happen relatively quickly: the UK is a common law jurisdiction, with IP specialist judges at every stage of

“ Increased opportunity for the UK courts to rule on online trade mark infringement disputes could result in more divergence from the EU as the UK develops its own case law

appeal and specialist IP courts, so there is scope for judicial creativity.

As retail moves increasingly online, it seems likely that online infringement disputes will also become more commonplace. Increased opportunity for UK courts to rule on online trade mark infringement disputes could result in greater divergence from the EU as the UK develops its own case law.

Many online retailers welcomed the UK Government's decision not to implement the “Copyright Directive” (EU Directive 2019/790). A key element of the Directive that has faced much scrutiny is the so-called “upload filter”, whereby intermediary websites hosting third-party content may face liability for copyright infringements, potentially requiring them to screen copyright abuses at the point of upload. Some fear that this may create barriers to trade, especially for new entrants to the online market. As such, the UK might provide preferable market conditions for online traders, stimulating competition and, presumably, IP litigation. Judicial discussion of new online tactics and strategies may allow the UK to diverge from the EU even more dramatically.

When considering ad words, the UK courts have typically focused on the origin function of trade marks, which is not affected by bait and switch advertising. As new market conditions arise, we look forward to seeing how the UK courts address the nuances of online trade, especially in instances that do not turn on the more traditional origin function of marks.

¹ [2010] EWHC 2599 (Ch)

² [2010] C-236/08

³ [2014] EWHC 1316 (Ch)

KEY POINTS

- + There is still a way to go in clarifying what constitutes legitimate use of ad words
- + “Bait and switch” advertising must go beyond initial interest confusion to constitute infringement
- + The enforcement of trade marks online may become an area of considerable divergence from the EU



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It's never easy

Charlene Nelson outlines why this invalidation proved impossible

The UK IPO has rejected a claim for invalidation by easyGroup Ltd (the Applicant) against a UK trade mark application by Cong Ty Co Phan Thuc Pham Thian Huong (Thien Huong Food JSC, the Holder) for EASY PHO as shown below (the Registered Mark). The Registered Mark covered “instant noodles; instant porridge; soft instant noodles and instant noodle with seasoned and saute beef” in class 30.

The invalidation was based on s5(2)(b) and 5(3) of the Trade Marks Act 1994. The Applicant relied on four earlier EU registrations for EASYGROUP, EASYJET, EASYFOODSTORE and EASYPIZZA. The Applicant claimed the EASYJET mark had a reputation in relation to class 39 services, including transport and airline services.

LIKELIHOOD OF CONFUSION

The Hearing Officer (HO) found that the goods covered by the Registered Mark fall within the categories of “snack foods” and “prepared meals” included in the specifications of some of the Applicant’s earlier marks. The Applicant filed no evidence to show the enhanced distinctiveness of its marks for the goods and services in issue. The HO therefore found that the earlier marks had between a low and medium degree of inherent distinctive character.

Comparing the marks, the HO found that they had a low to medium degree of visual similarity and a medium degree of aural similarity. In a conceptual comparison, the HO stated that the word “pho” may be recognised by some average consumers as a type of Vietnamese dish but would more likely be viewed as a foreign-language word with no meaning and was therefore conceptually neutral. Given that “easy” was seen as descriptive of the nature of the goods and services offered, any conceptual similarity between the marks was found to be low at best.

The HO found that there was no likelihood of confusion (direct or indirect) given that the visual and aural differences between the marks are sufficient to ensure

that they will not be misremembered or mistakenly recalled as each other.

REPUTATION

Evidence of longevity of use of the EASYJET mark alongside significant turnover and passenger figures led the HO to conclude that there was a strong reputation for the mark in relation to airline services. Nonetheless, in light of the low level of distinctiveness of the “easy” element of the marks and the significant distance between the food goods of the Registered Mark and airline services, the relevant public is unlikely to make a link between the parties’ marks. The Applicant’s “family of marks” argument was dismissed, as only one mark had been relied upon.

The HO went on to confirm that even if the finding that consumers would not make a link between the marks was incorrect, the s5(3) ground would also fail on the basis that no unfair advantage would be gained by the Holder, as it would be unusual for a provider of airline services to expand into the field of instant noodles. What’s more, given the weakness of the “easy” element of the mark, the coincidence of both marks containing this would not result in a change in the economic behaviour of the Applicant’s customers.

KEY POINTS

- + Enforcing trade marks that are low in distinctiveness may be problematic if enhanced distinctiveness cannot be shown
- + A family of marks argument requires evidence of a group of marks

MARK

THE REGISTERED MARK



AN EARLIER EASYJET REGISTRATION



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Resale value recognised

This preliminary ruling clarifies genuine use principles, says Aaron Hetherington

This case arose from non-use revocation actions against Ferrari SpA's German registrations for the stylised TESTAROSSA mark shown opposite, covering vehicles and their parts in class 12.

The Testarossa (which translates from Italian as “red-head”) was one of Ferrari's iconic sports cars. It had previously featured in the television show *Miami Vice*, and it was also the car of choice for a long list of celebrities in the 1980s and '90s. However, production of Testarossa cars ceased in 1996.

Nevertheless, Ferrari submitted evidence that it had used the mark in the relevant period in respect of replacement parts, accessories and maintenance services, for “high-priced luxury sports cars” (in the referring court's words). Those cars had originally been sold under the TESTAROSSA mark. Ferrari also asserted that it had resold used Testarossa cars that bore the mark.

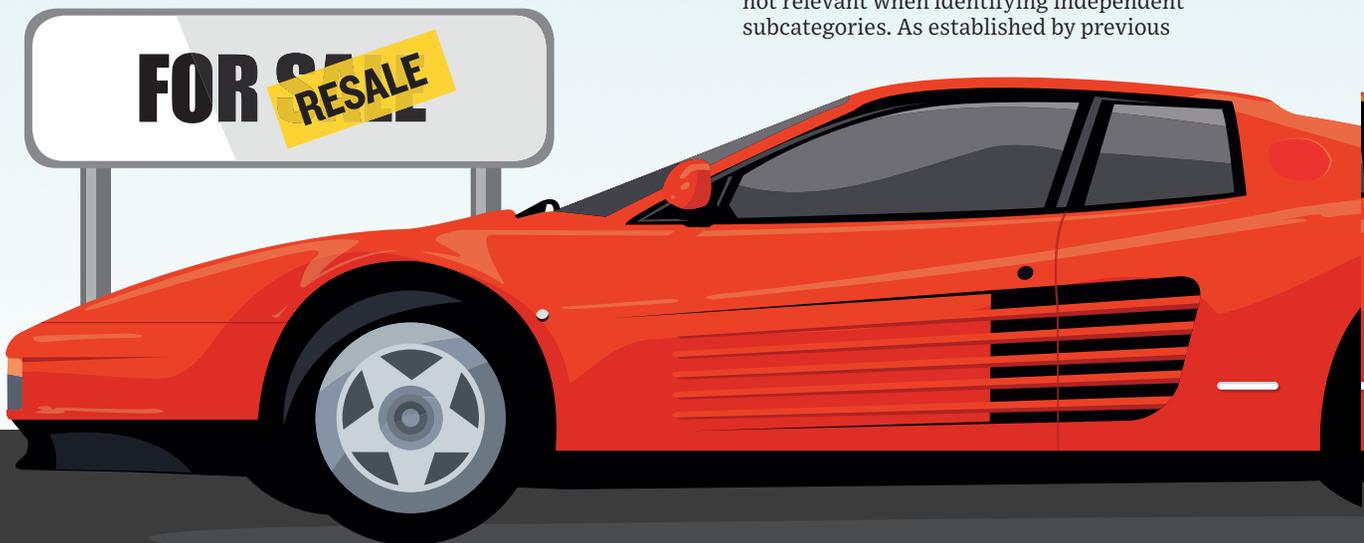
The German Regional Court revoked both registrations in their entirety at first

instance. Ferrari then appealed to the Higher Regional Court in Germany in a bid to retain its registered rights. The appeal court referred various questions to the CJEU.

The CJEU first addressed the question of whether a mark was considered to have been put to genuine use for all registered goods falling within a given category (eg, motor cars) where it had only been used in respect of some of those goods (eg, high-priced luxury sports cars) or replacement parts thereof. This brought up the concept of “independent subcategories”, as explored in previous case law.

INDEPENDENT SUBCATEGORIES

The referring court stated that high-priced luxury sports cars fell within a “particular market segment”. This suggested they should be treated as an independent subcategory of motor cars, meaning that Ferrari's evidence could only save the registrations to that narrower extent. However, the CJEU was quick to reiterate that market segment was not relevant when identifying independent subcategories. As established by previous



case law, the intended use and purpose of the goods was the essential criterion.

Consequently, the fact that Ferrari's evidence related to cars sold at a high price, which may have belonged to a specific market segment, was irrelevant as to whether the goods formed an independent subcategory. The CJEU confirmed that what was relevant was whether consumers perceived the goods shown in evidence as an independent subcategory of the category of goods; this was the correct interpretation of the law to avoid excessively limiting the legitimate interests of trade mark proprietors. The answer to the referring court's question was therefore yes, unless the public perceived the goods as falling within independent subcategories.

PROPER CRITERION

With the proper criterion in mind, the CJEU then analysed the remaining language used by the referring court in relation to Ferrari's evidence – that is, that it showed use in relation to “luxury sports cars”, which was not held to be an independent subcategory of “motor cars”. It is helpful to contrast this with a recent decision of the General Court in *Polfarmex SA v EUIPO*.¹

In *Polfarmex*, “racing cars” were found to have a purpose that differed from other cars (*inter alia*, they are not driven on public roads) and so formed their own subcategory within the broader category “motor cars”. By contrast, in the Ferrari case, “sports cars” were considered to have multiple purposes (for instance, they could be used in motor sports, or they could be used for transporting people like most other cars), so this term was not a specific enough carve-out of the registered goods. Further, the fact that the cars shown in Ferrari's evidence were described as “luxury” cars was also not

“ *The CJEU was quick to reiterate that market segment was not relevant when identifying independent subcategories* ”

sufficient to isolate them from the broader category since many types of cars could be described as such.

EXTENT OF USE

Although it was irrelevant to the question of independent subcategories, the fact that the evidence showed use in relation to high-priced cars was relevant when assessing whether the threshold for genuine use had been satisfied. Since the market for high-priced cars was small, the relatively low number of spare parts sold under the mark was likely to be sufficient.

The CJEU held that Ferrari's use of TESTAROSSA in relation to the resale of the old cars was sufficient to constitute use. It is important to distinguish situations where products are resold by an unrelated third party, which of course does not constitute use by the trade mark owner, and circumstances where the proprietor uses the mark to resell one of its own products, which does constitute use. The CJEU found this was supported by a proper interpretation of the exhaustion rules.

The CJEU also reiterated the established principle that providing services directly connected with goods previously sold under a mark, intended to meet the needs of customers of those goods, is sufficient to constitute genuine use. As expected, this came with the proviso that the services must also be provided under the mark.

The final decision on the merits of the non-use claim was for the German court, although the CJEU had given a clear view that Ferrari had demonstrated genuine use for all the registered goods. The decision has positive implications for brand owners in the context of proving use, particularly those trading in high-end or luxury products.

KEY POINTS

- Trade mark proprietors might be able to show genuine use for a category of goods even where use has only been made in relation to a small part of that category
- The context of the relevant market is important in determining whether there has been sufficient use
- A trade mark owner may “use” its mark through the resale of a product, provided the product is resold under the mark

MARK

testarossa

1 [2020] T-677/19



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Kicked to the kerb

Johanna Robertson reports on an unexpected analysis of similarity in relation to sporting marks

In a case featuring a football legend, the Fourth Board of Appeal (BoA) overturned a decision by the Opposition Division (OD) based on an unexpected analysis of similarity regarding figurative marks purporting to depict the same sport.

BACKGROUND

Former footballer Jürgen Klinsmann (the Applicant) obtained an International Registration designating the EU for a black and white figurative mark (shown opposite). The Applicant said that this mark depicted him performing an overhead kick that scored a celebrated goal in 1987.

Renowned sticker and trading card company Panini SpA (the Opponent) opposed the mark based on a number of earlier marks:

“ *Conceptual similarity alone has never resulted in a finding of likelihood of confusion* ”

- a) Italian mark no. 1539690 in class 41. A drawing of a footballer kicking a football. The kick itself aims towards the right with the ball above his right foot;
- b) IR no. 1282870 designating the EU in class 32. Similar to mark (a) but more detailed and in colour;
- c) Italian trade mark no. 1561953 in classes 16 and 25. The same image as (a);
- d) Italian trade mark no. 1063937 in classes 16 and 25. No representation provided;
- e) EUTM no. 4244273 in class 16. Same image as for (a) and (c); and
- f) EUTM no. 4244265 in class 1. A version of the footballer entirely in black.

The OD found in favour of the Opponent due to the visual and conceptual similarity of the marks, the similarity of the contested goods and the likelihood of confusion.

The Applicant then appealed on the following grounds:

- Missing translations and incomplete substantiation of the earlier marks;

- The designs being visually and conceptually dissimilar;
- The OD incorrectly disregarding the circle element of the contested mark; and
- Avoidance of a monopoly over the image of a person playing football (the “need to keep free” argument).

The Fourth BoA annulled the decision of the OD, finding the opposition unsuccessful in relation to all of Panini’s marks.

CONCEPTUAL SIMILARITY

The BoA took a more abstract approach, contradicting the OD’s opinions on the concept of Klinsmann’s overhead kick device. Specifically, it considered it a stretch that Klinsmann’s mark depicts a footballer, based on the silhouette nature of the image making it difficult to discern and that, while a ball is visible near the top of the mark, the nature of the ball is unclear. The BoA mused that the mark could be depicting a gymnast, handball player or footballer, if it represents a human at all. The BoA was of the opinion that the contested mark possessed no clear concept and therefore there could be no conceptual similarity between the contested and earlier marks. The BoA was also of the opinion that whether the marks represent a footballer in action or not was purely for conceptual analysis and should not make up part of the visual similarity analysis.

This poses a quandary for sports brands as to whether the concept of a mark rendered in silhouette is clear.

VISUAL SIMILARITY

The BoA noted that the marks were all visually figurative, and that this was where the findings of similarity ended for the most part. The earlier marks (a) to (c) consist of a sketched but naturalistic image of a footballer mid-game, kicking a stereotypical football, with horizontal movement and direction. On the other hand, the contested sign: is a sketch in black on a neutral background, with no

features or contours within the sign itself, and with a circle surrounding the “sketchy” element; flows in a vertical direction; and is in a different position to the earlier mark.

Being entirely black with no contours, mark (f) was found to have a slight visual similarity to the contested mark. However, the Opponent failed to prove genuine use of this mark in class 16, rendering the opposition on this basis unfounded.

Additionally, judging from recent case law and the BoA’s analysis of visual similarities between Klinsmann’s mark and earlier marks (a) to (c), the direction



of the marks would have come into play as a significant difference between the marks.

The BoA examined the marks as they were, as opposed to what the holders intended them to depict. It could not find any visual elements in common and stated that the circle element of the contested mark needed consideration within the visual similarity analysis.

CASE LAW CITED

The BoA highlighted that conceptual similarity alone has never resulted in a finding of likelihood of confusion, citing a number of cases including the typically relevant GOLDEN BALLS case.¹ What’s more, the BoA added that sponsorship of football is a common practice, meaning that the average consumer would not consider football or other sports imagery to belong to any one trader.

Interestingly, the BoA specifically carved this out from arguments of a “need to keep free”, instead considering that consumers would not see the marks as a reference to football players or football, since the average consumer would see the marks “as they are”. The BoA, following the CJEU in *Adidas v Marca*², opted to “expressly set aside” the “need to keep free” argument, cementing the idea that monopoly avoidance is a non-starter.

DANGER ZONE

The Opponent failed to file evidence of use of mark (f) in a timely manner and belatedly filed documents not proving use or sales of the silhouette mark in class 16. The evidence was mainly related to Panini’s reputation for sticker albums and football trading cards.

On the strength of the appeal, Klinsmann successfully filed a cancellation against mark (f), a decision that is now itself under appeal. This highlights to trade mark lawyers and brand owners alike the dangers of relying on vulnerable marks as a basis for opposition actions, as well as the need to have relevant evidence of use, in case a request is made to produce it.

1 [2013] T-437/11
2 [2008] C-102/07

KEY POINTS

- + Global appreciation means that no part of a figurative mark should be overlooked, even an element as simple as a circle around the main element
- + What the holder considers as the concept of the mark may not be the concept perceived by the court and/or the average consumer
- + When asked to prove use, provide evidence of actual use in the relevant classes, including appropriate sales figures

MARKS

THE APPLICANT’S MARK



ITALIAN MARK
No. 1539690



IR No. 1282870



EUTM No. 4244265



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Watch and learn

Leanne Gulliver rounds up the lessons from an unsuccessful appeal on behalf of a famous F1 name



Seven-time F1 champion Lewis Hamilton may have had much to celebrate on the track in 2020, but the company holding his IP rights, 44IP Ltd (the Appellant), has had less success before the Board of Appeal (BoA). The BoA upheld the EUIPO Cancellation Division's decision to dismiss the Appellant's declaration of invalidity filed against the Swiss luxury watchmaker Hamilton International AG's (the EUTM Proprietor) EU trade mark No. 13496013 for HAMILTON (the Registration) in classes 9 and 14.

CASE HISTORY

The EUTM Proprietor obtained an EU trade mark registration for the word mark HAMILTON for goods in classes 9 and 14 (including electronic devices and watches) in May 2015. In July 2015, the Appellant applied to register the word mark LEWIS HAMILTON under EUTM No. 014365837 (the Application) for goods and services in classes 14 and 35 (including watches and the retail services of them). The EUTM Proprietor is also the owner of EUTM No. 103200 for the identical mark HAMILTON for a broader range of class 14 goods (the Earlier Registration), registered in June 1998.

The EUTM Proprietor opposed the Application in December 2015. The Appellant then counterclaimed by filing a declaration of invalidity against all goods in the Registration on the grounds that the Registration: (i) had been filed in bad faith, offending Article 59(1) (b) EUTMR; and (ii) the contested mark was contrary to public policy and offended Articles 59(1)(a) and 7(1)(f) EUTMR. The Appellant argued that owning both marks was an attempt "to extend the grace period for non-use" of the Earlier Registration for the goods covered by the Registration, which demonstrated that the Registration had been filed in bad faith, and as such, the Registration was made contrary to public policy and "improperly impedes fair competition and the free movement of goods" in the EU.

The Cancellation Division rejected the application for a declaration of invalidity

“ *The allegation that the Registration was filed with the aim of ‘extending’ the grace period within which the mark must be put to genuine use had no factual basis* ”

in its entirety, prompting 44IP Ltd to appeal the decision.

BOA DISMISSAL

The BoA dismissed that appeal, confirming the rejection of the declaration of the invalidity in its entirety.

In relation to bad faith, the BoA referred to LINDT GOLDHASE¹, a decision which held that to determine whether the applicant is acting in bad faith within the meaning of Article 59(1)(b) EUTMR, all the relevant factors specific to the particular case have to be taken into consideration. In the present case, the BoA recalled that the Appellant explicitly and repeatedly admitted that the Earlier Registration and Registration were used by the EUTM Proprietor. The EUTM Proprietor also provided ample evidence that the mark HAMILTON was genuinely used for watches. Therefore, the allegation that the Registration is a repeat filing of the Earlier Registration filed with the aim of “extending” the grace period within which the mark must be put to genuine use had no factual basis.

The BoA reiterated that an EUTM applicant does not have to give legitimate reasons for the filing of an application or to justify his actions or omissions. Therefore, all of the grounds of appeal and arguments obliging the EUTM Proprietor to show use or an intention to use, or to explain why the specification differs from the Earlier Registration, were set aside. Since there was a commercial logic to the filing of the Registration, there is no dishonest intention on the part of the EUTM Proprietor. Further, it was not for the Appellant to comment on the marketing strategy or business decisions of the EUTM Proprietor (for example, whether or not it produced only traditional wrist watches or regularly updated its product portfolio).

ARTICLE 60(2)

The Appellant had argued that the contested mark HAMILTON was the surname of the racing driver Lewis Hamilton, demonstrating the EUTM Proprietor’s dishonest intention. The BoA dismissed this argument for six reasons. First, the Registration consists of one word, “Hamilton”, and not “Lewis Hamilton”. Second, Hamilton is a fairly common surname in English-speaking countries. Third, there is no “natural right” for a person to have his or her name registered as a trade mark when that would infringe third parties’ rights.² Fourth, a prior right to a personal name is not a right that could be a basis for invalidation proceedings. Fifth, the Appellant accepted that the Registration had been used since 1892, long before the birth of the F1 driver. And finally, the Appellant is the legal entity

44IP Ltd and the reference to the natural person Lewis Hamilton is unsubstantiated; it is unclear how a company could invoke personality rights for an individual person.

The appeal under Article 7(1)(f) EUTMR, which prohibits the registration of trade marks that are contrary to public policy or accepted principles of morality, failed on the grounds that the Registration is neither offensive nor insulting.

TEACHABLE MOMENT

This decision is a stark reminder that being famous does not guarantee being able to successfully register your name as a trade mark, or enforce it against a third party using the same or a similar name, particularly when that third party used the mark beforehand. It is therefore vital that celebrities, sportspersons and the like seek professional commercial and legal advice as to how and when to protect their own name, or other IP.

Consideration should be given to what they are actually seeking to protect. Is it a trade mark for their name (eg, VICTORIA BECKHAM, EUTM No. 002543320), a trade mark for their autograph (eg, “David Beckham”, EUTM No. 001801968), a song title or lyric (eg, Taylor Swift’s LOVER, EUTM No. 018055608 and “Can you just not step on our gowns”, EUTM No. 018081572), a phrase or number associated with the person (eg, Lewis Hamilton’s HAMMERTIME, EUTM No. 01436594 and “44”, EUTM No. 014365944), or a gesture (eg, Gareth Bale’s hand-shaped heart, UKTM No. 2657917)? If the element is figurative, would it be better protected by a registered design or reliance on copyright?

In addition, should the IP rights be held by a corporate entity? And if so, are adequate licences in place for the relevant partners to exploit the IP, and is it clear who should enforce those rights against third parties?

This case also provides some clarity on the practice of “ever-greening”, confirming that refiling a trade mark with an identical sign and identical goods/services does not automatically amount to bad faith if that sign is actually in use for those goods/services.

¹ [2009] C-529/07

² [2019] R 406/2018-4, ARRIGO CIPRIANI, s63

KEY POINTS

- +
- This decision highlights that a repeat filing of a sign does not amount to bad faith if the sign is in use for the goods/services
- +
- This case is a useful reminder that personality rights are often held by corporate entities. It is therefore important that the ownership and authority to use and exploit those rights are clear, to enable enforcement



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Appeal settles monster clash

A difference over assessment resulted in a partial annulment, explains Gavin Stenton

The EUIPO's Second Board of Appeal (BoA) has ruled on an opposition between US beverage company Monster Energy (the Opponent) and Zweirad-Einkaufs-Genossenschaft eG (the Applicant), a German bicycle dealer, over the Applicant's EU/IR designation for MONSTER BULLS. The classes concerned were: 9 (including batteries, especially for electric bicycles, helmets, spectacles and sunglasses); 12 (including bicycles and various bicycle parts and accessories); and 28 (including various games and sporting articles).

At first instance, Monster Energy sought to invoke two earlier EU trade mark registrations and one earlier UK trade mark registration, together with unregistered UK rights for the mark MONSTER ENERGY. However, having withdrawn one and failed to substantiate the other of its EU trade marks (by failing to provide extracts from the originating trade mark register), focus turned to the UK marks. The opposition succeeded at first instance in respect of the vast majority of the Applicant's core cycling-related goods on the basis of a likelihood of confusion with the Opponent's UK trade mark for MONSTER ENERGY (the Earlier Mark) in classes 9 (helmets, protective clothing for sports, protective gloves for sports), 16 (stickers, posters), 18 (bags, duffle bags, book bags, backpacks, sport bags and handbags) and 25 (clothing and headwear) under Article 8(1)(b) EUTMR.

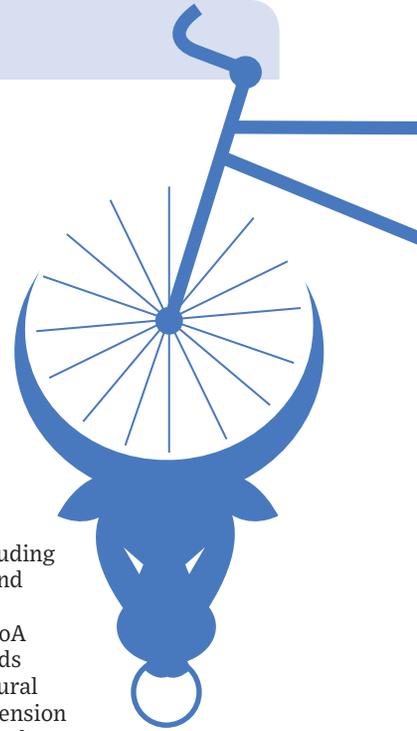
On 4th February 2020, the Applicant filed an appeal against that decision and also requested a suspension of the proceedings until the end of the Brexit transition period

and an oral hearing, with the aim of excluding the Earlier Mark from the proceedings and thereby overturning the decision.

In the absence of a cross-appeal, the BoA proceeded to hear the Applicant's grounds of appeal and, in considering the procedural matters, rejected the requests for a suspension and an oral hearing, holding that, in accordance with the terms of the UK/EU Withdrawal Agreement, "all proceedings before the Office that involve earlier rights originating from the UK are in force as they were previously, until the end of the transition period" and that "the degree of complexity of the case does not require a hearing of the parties or any witnesses or experts".

On the substantive ground of appeal regarding Article 8(1)(b) EUTMR, the BoA held that the Opposition Division had correctly found the marks to be visually and aurally similar to an average degree, but had wrongly found the marks to be conceptually similar to an average degree. It concluded instead that they were merely conceptually similar to a low degree, on the basis that "the relevant consumer will perceive the word 'Monster' as a qualifier of the second word". Certain goods were also held to be dissimilar rather than similar to a low degree.

This difference in interpretation ultimately had a significant impact on the assessment of likelihood of confusion, such that, contrary to the initial decision, a likelihood of confusion was only deemed to exist in respect of identical goods (not any similar goods). This meant that, with the notable exception of helmets in class 9, the Applicant's core cycling-related goods were allowed to proceed to registration.



KEY POINTS

- +

This case presents some useful procedural reminders regarding the substantiation of earlier rights, Brexit-related suspensions and requests for oral hearings before the EUIPO
- +

The case also highlights how minor differences in interpretation can significantly impact the assessment of likelihood of confusion and the ultimate outcome of a case



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As part of our packed programme, Jade MacIntyre of Allen & Overy will once again address our Spring Conference on 25th-26th March. Register at citma.org.uk/events



Calendar

Our upcoming events for members

DATE	EVENT	LOCATION	CPD HOURS
24th February	CITMA Paralegal Webinar Searching and clearance	Online	1
25th February	CITMA Online Quiz	Online	
3rd-4th March	CITMA Design Seminar	Online	4
8th March	CITMA Webinar International Women's Day	Online	1
9th March	CITMA Webinar Insolvency: When is it OK to transfer trade marks?	Online	1
25th-26th March	CITMA Spring Conference	Online	7
20th April	CITMA Paralegal Webinar How to make your soft skills work hard for you	Online	1
22nd April	CITMA Webinar Unjustified threats	Online	1
28th April	CITMA Webinar There's more to law than IP	Online	1
19th May	CITMA Webinar Parallel imports and customs enforcement	Online	1
10th June	CITMA Paralegal Webinar Transactions and recording	Online	1
15th June	CITMA Webinar Domain name disputes	Online	1
22nd June	CITMA Webinar Celebrating Pride	Online	1
15th July	CITMA Webinar Brexit and designs	Online	1
8th September	CITMA Webinar Ethical considerations in advising clients	Online	1
22nd September	CITMA Paralegal Webinar Oppositions and disputes	Online	1

YOUR INPUT IS WELCOME

We have an excellent team of volunteers who organise our programme of events. However, we are always eager to hear from people who want to speak at a CITMA event, particularly overseas members, or to host one. We would also like your suggestions for event topics. Please contact us at sarah@citma.org.uk with your ideas.

THE TRADE MARK 20

Q&A



Daniel Bailey

is hoping for a return to normality

I work as... an Associate in the commercial and technology team at Taylor Vinters.

Before this role, I was... a Chartered Trade Mark Attorney at Marks & Clerk in London.

My current state of mind is... hopeful that 2021 will bring a return to normality (and that I won't be regretting this answer by the time it's published).

I became interested in IP when... I left university and landed an internship at a boutique trade mark practice in London. At the time, we were putting together an online brand enforcement offering. It's amazing how much technology has changed this space over the years.

I am most inspired by... the creativity of individuals and businesses. One of the many things the current situation has shown us is how quickly industries can react and adapt when it is necessary.

In my role, I most enjoy... working with innovative, high-growth clients, particularly getting involved in the early stages. It's great to see a client grow and have the opportunity to add value by putting the right strategy in place from the beginning.

In my role, I most dislike... anything to do with Excel.



“

It's great to add value by putting the right strategy in place

On my desk is... my computer, headphones and a selection of toys to distract my dog while I work.

My favourite mug says... "On your bike".

My favourite place to visit on business is... anywhere outside of my home office would be a welcome destination at the moment.

If I were a brand, I would be... Jaguar, because innovation and reliability are necessary attributes for any IP professional.

The biggest challenge for IP is... keeping up with technological advancements and harnessing them to improve the service offering.

The talent I wish I had is... an ear for languages. Despite numerous attempts, I've always failed to grasp a second language.

I can't live without... Spotify. Whether it's music or a podcast, it's great to have something on in the background.

My ideal day would include... a leisurely morning, a run, good food and a craft beer or two.

In my pocket is... my phone and some broken dog treats.

The best piece of advice I've been given is... add value.

When I want to relax I... try to take advantage of the many green spaces in Cambridge by getting outdoors and exercising.

In the next five years I hope to... continue to learn and develop professionally. Personally, I'd like to take part in a triathlon, if I can stay injury-free.

The best thing about being a member of CITMA is... the events, the webinars – and the *CITMA Review*, of course.

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IP

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