

D YOUNG & CO TRADE MARK NEWSLETTER *no.69*

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Interflora v Marks & Spencer Google Adwords Trade Mark Infringement



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Welcome to the July 2013 edition of our newsletter. Our trade mark team have had a very busy few months, which included meeting with friends and colleagues at the recent INTA conference in Dallas and promoting the opening of our Dubai office.

As mentioned in our May newsletter, our Dubai office trade mark team, lead by Mark Bone-Knell and Kate Symons, is able to offer clients a comprehensive, swift and reliable service in the prosecution, registration and enforcement of trade marks and designs in the region. As we publish this newsletter, we also go to print with a reference guide to trade mark regulation and protection in each of the GCC States. If you are interested in receiving a copy, please email our Marketing Communications Manager Rachel Daniels at rjd@dyoung.com with your address details, or contact your usual D Young & Co IP advisor.

This month's newsletter contains some interesting and noteworthy decisions for you, including the decision from the INTERFLORA Google Adwords case. You may also be aware that Croatia joined the European Union on 1 July 2013 - see our 'Stop Press' article on page eight for further information.

Enough work! We would like to wish all our readers a relaxing and happy summer holiday.

Editor:
Helen Cawley



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Article 01

Interflora v Marks & Spencer Google Adwords Trade Mark Infringement

Returning to a case which we first reported back in March of 2011 (concerning an Advocate General's opinion) and again in September of the same year (that time relating to a preliminary ruling of the Court of Justice of the European Union), we provide our readers with a further update, here regarding the decision of the High Court of England and Wales in the now famous litigation between Interflora and Marks & Spencer (M&S).

Background

To recap, Interflora sued M&S for trade mark infringement on the basis that M&S' selection of the term INTERFLORA as a Google AdWord was liable to create confusion amongst Internet users. Interflora argued that this was so, as such users might find it difficult to determine whether the goods/services displayed in the M&S 'advert' originated from the proprietor of the trade mark (Interflora) or from a third party (M&S).

For those who may be less familiar with the intricacies of Google's AdWords facility, Google allows parties to bid on certain keywords or terms which, when entered into Google's search engine by a user, provide that user with a list of results including a sponsored link to the successful bidder's website and some brief wording (constituting the 'advert'). These sponsored links appear at the top of the page and therefore have a preferable position.

Turning to the decision of the High Court of England and Wales (handed down on 21 May 2013), Mr Justice Arnold determined that M&S' use of the term INTERFLORA did infringe Interflora's trade mark rights and he provided particularly detailed reasons for his decision.

First, it was acknowledged that in order to infringe a proprietor's trade mark rights, use of the mark by a third party must offend one or more of the functions of a trade mark which, principally, include the function of indicating origin (at its most basic level, allowing the relevant user to determine who provides the goods/services).

In order to determine whether the function of indicating origin had been offended by M&S' selection and use of the INTERFLORA mark, Arnold J determined that a number of factors needed to be considered:

1. Whether the relevant user is deemed to be aware (on the basis of their own general knowledge of the market) that M&S is separate from (and in competition with) Interflora's network;
2. Whether M&S' 'adverts' enable the relevant user to tell that they are not part of Interflora's network (the onus being on M&S to ensure that the user can distinguish between the two undertakings); and
3. The nature of Interflora's commercial network.

Reminding the parties that 'initial interest' confusion is sufficient for the purposes of assessing confusion as part of a successful trade mark infringement action, Arnold J held that, in relation to point one above, he was not satisfied that it was generally known to the 'reasonably well-informed user' (either at the time of the initial infringement in 2008 or even now) that M&S' flower delivery service is separate from that of Interflora's.

Furthermore, in relation to point two, Arnold J was similarly unconvinced that M&S' advert did itself enable the 'reasonably well-informed Internet user' to tell that M&S' flower delivery service is separate from Interflora. On point three, Arnold J also considered that, given the unique distribution system operated by Interflora (Interflora having a large network of independent entities and involving tie-ups and commercial arrangements with a number of companies across the world), it is particularly difficult for the 'reasonably well-informed user' to tell whether the service offered by M&S is separate from the service offered by Interflora.

For those reasons, the origin function of

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Would the 'reasonably well-informed user' know whether M&S is separate from Interflora's delivery network?



considered on its merits), Arnold J did say that it would be interesting to see whether it could be successful in future cases.

Of perhaps more interest are Arnold J's findings that even today, a significant number of Internet users do not know that sponsored links are triggered by someone having paid for them and that 'initial interest confusion' may be sufficient for a finding of trade mark infringement.

Comment

This case (which is likely to go to appeal) has only resolved some of the uncertainties surrounding trade mark infringement in Google AdWords cases and a number of questions still require answers.

What this case does suggest is that competitors who use Google AdWords need to be very careful in their approach.

Author:
Scott Gardiner



Useful links:

Full decision of INTERFLORA, INC. INTERFLORA BRITISH UNIT Claimants and MARKS AND SPENCER PLC FLOWERS DIRECT ONLINE LIMITED:

<http://dycip.com/interflora2013>

D Young & Co article, September 2011, 'Interflora v Marks & Spencer - CJEU Issues Ruling in Online Keywords Dispute', author Scott Gardiner:

<http://dycip.com/interflora2011>

D Young & Co article, March 2011, 'Advocate General's Opinion Issues in Interflora v Marks & Spencer', author Angela Thornton-Jackson:

<http://dycip.com/interflorasep2011>

Interflora's trade mark was deemed to have been offended by M&S' selection and use of the INTERFLORA mark.

Having established infringement on the basis of identical infringement, Arnold J did not go on to consider at great length, the issue of infringement under Article 5(2) (taking unfair advantage of a mark 'without due cause') although the Court of Justice did say that use of a mark as a Google AdWord could indeed be use 'without due cause' – it would have been interesting to hear his views on the same.

Commercial implications

Whilst at face value, the decision may appear to be bad news for companies who may be using third party trade marks as Google AdWords (and indeed for Google itself!), the circumstances in this particular case are such that the outcome of the decision may not be transferrable to other cases and its value consequently weakened. Arnold J recognised that the particularly sophisticated and unusual network operated

by Interflora is such that it does not allow the 'informed user' to easily distinguish its services from those of its competitors. Such a finding may not have been made in relation to other companies in direct competition, who may for example have much more basic commercial structures. Perhaps then in this case, M&S was just unfortunate to have an opponent who operates such a unique system? Hopefully future decisions in this area will provide some clarity.

What this decision suggests is that, if you use Google AdWords, you must make clear in your 'advert' that there is no room for any confusion with the trade mark owner if you are selling competing goods or services.

Finally, of potential interest to clients who may be worried by the decision in this case, Arnold J made a (brief) reference to the potential use of a comparative advertising defence (within the meaning of Article 4 of the Misleading and Comparative Advertising Directive). Whilst this defence was not raised in the case (and so could not be

Composite Marks Colloseum v Levi Strauss

- Levi Strauss' IP heritage
 - Levi Strauss and Jacob Davis patented the process of riveting trousers in 1873. Their first jeans were simply called "XX", an industry term meaning 'highest quality'.
 - The red tab was first placed onto the right back pocket of the overalls in 1936 with the word "LEVI'S®" stitched upon it in white in capital letters.
 - Further information about the history of Levi Strauss can be found at www.levistrauss.com/about/heritage

This case concerns the question as to whether use of a trade mark would be considered genuine and sufficient to maintain a registration of that mark if the mark was only used with another mark, where the first mark is registered alone and separately, in combination with the second mark.

Levi Strauss owns a number of marks for the device of a back pocket with a red tag and for the trade mark LEVI'S. The principal registrations of interest in this case are shown below:



Levi Strauss took action in Germany against Colloseum because Colloseum was producing trousers with a small rectangular red fabric tag on the seam of the back pocket. Colloseum in its defence alleged that Levi Strauss had not used the trade mark consisting of the back pocket with the blank red tag. The question was therefore whether or not the second mark (figure 2) had been genuinely used.

It was found that Levi Strauss had used the first trade mark (figure 1), the one with the word LEVI'S within it. The first mark (figure 1) encompasses the second mark (figure 2) and the Federal Court of Justice in Germany put the following questions to the Court of Justice of the European Union (CJ), to establish whether use of the first mark could be considered sufficient to preserve the rights of the second mark:

Levi Strauss & Co's products retail in 110 countries worldwide, with reported fiscal 2012 net revenues of \$4.6 billion



1. "Is Article 15(1) of Regulation no. 40/94 to be interpreted as meaning that: a trade mark which is part of a composite mark and has become distinctive only as a result of the use of the composite mark can be used in such a way as to preserve the rights attached to it if a composite mark alone is used?"
2. "A trade mark is being used in such a way as to preserve the rights attached to it if it is used only together with another mark, the public sees independent signs in the two marks and, in addition, both marks are registered together as a trade mark?"

Decision

Reference was made in the court's decision to the Nestlé HAVE A BREAK case (C-353/03) which had confirmed that distinctive character could result "both from the use, as part of a registered trade mark, of a component thereof and from the use of a separate trade mark in conjunction with a registered trade mark". The fundamental condition is that the public will connect the goods or services with

a particular undertaking. The answer to the question referred was that "the condition of genuine use of a trade mark may be satisfied where a registered trade mark, which has become distinctive as a result of the use of another composite mark of which it constitutes one of the elements, is used only through that other composite mark, or where it is used only in conjunction with another mark, and the combination of those two marks is, furthermore, itself registered as a trade mark". An important factor is that the trade mark is distinctive and communicates the origin of the goods to the public, so this decision could not be relied upon if the mark at issue was unused or formed an insignificant element of the composite mark such that the public would not be able to identify origin from that mark.

Comment

This decision has helpfully clarified the position and it seems likely that it will be relied upon regularly in the future.

Author:
Jackie Johnson



Hurrah for Chez Gerrard The Right Evidence at the Right Time

➤ Further information

Published judgment of the General Court, 20 March 2013, Community trade mark opposition proceedings - application for Community word mark CLUB GOURMET: <http://dycip.com/chezgerrard>

The General Court (GC) has confirmed that when objecting to a Community trade mark (CTM) application, an opponent needs to plead their case with care and file appropriate evidence at the correct time – particularly when relying on an aspect of a member state’s national law (as opposed to European Union (EU) law).

In May 2004, Chez Gerrard applied for the mark CLUB GOURMET in various classes including classes 29, 30, 32 and 33. El Corte Inglés SA opposed the mark in its entirety under Article 8(1)(b) (likelihood of confusion) and 8(5) (mark with a reputation), based on a number of earlier registrations, only one of which was ultimately relied on: a Spanish national registration for the figurative mark (figure 1, below) in class 35. The class 35 specification of the earlier mark reads: “An advertising sentence.”



The Board of Appeal (BoA) held that the description of services of the earlier mark was “an advertising sentence”, which designates neither goods nor a service, and therefore couldn’t be compared with the goods/services of the CTM applied for. Even if the mark were deemed to cover “advertising services” (which was not permitted by the BoA), these were held to be dissimilar. The marks were also deemed to be sufficiently dissimilar to avoid confusion.

The opponent maintained that under Spanish registry practice until 1997, ‘slogan marks’ were protected not only for services in class 35, but also for all goods/services designated by one or more ‘basic marks’. The earlier mark had been applied for in 1994 (registered in 1996): hence, the opponent maintained, its

Facts referring to Spanish national law brought to the GC that had not been submitted to OHIM or the BoA could not be relied upon in a further appeal under EU law.



mark should be deemed to cover all goods/services covered by the marks referred to in the specification (ie, the mark should essentially be deemed to cover goods/services in classes 29, 30, 31, 32, 33 and 42).

The Board of Appeal disagreed, maintaining that the opponent could not extend the scope of protection of the earlier mark to goods/services protected by other rights which have not been relied upon in the context of the opposition.

Decision

The GC held that it was not apparent from the wording of the specification (ie, “an advertising sentence”) that the earlier mark was supposed to designate all goods/services covered by the marks subsequently stated in the specification.

Perhaps most importantly, the court noted that facts brought before it for the first time and not before OHIM or the BoA cannot subsequently be relied on in a further appeal. The opponent had only brought up the Spanish registry’s pre-1997 procedure concerning ‘slogan marks’ before the GC.

Despite the refusal by OHIM to take into account the goods/services in other classes, the opponent still did not address the issue before the BoA, where it referred to ‘advertising’ services being covered (albeit in relation to goods/services in additional classes), and

also to an alleged complementarity between class 35 advertising services and the goods covered by the application being opposed.

As regards whether OHIM should have taken into account the fact that under Spanish national law the earlier mark extended to cover goods/services in other classes, the court held that this was a matter of establishing facts, not applying the law. The only law applied by EU Institutions (such as the General Court) is EU law. Any national law relied on must be demonstrated by adducing evidence. It was for the opponent to show the extent of protection of the marks relied on, and what goods/services they covered.

Overall, the GC held that it was not apparent from either the wording of the specification of the earlier mark (nor from the opponent’s submissions) that the scope of protection of the earlier mark went beyond the strict wording of the specification as drafted.

Comment

The case shows the importance of submitting the correct evidence at the correct time in CTM opposition proceedings, particular when seeking to rely on an aspect of national law that does not form part of EU law more widely (and in fact may be completely alien to it).

Author:
Matthew Dick



Extended Passing Off FAGE UK v Chobani

The term “Greek yoghurt” creates “pulling power” to the yoghurt buying public



The High Court has allowed a claim for extended passing off brought by FAGE UK Limited and another (FAGE), the makers of “Total Greek Yoghurt”, against Chobani UK Ltd and another (Chobani), the manufacturers of yoghurt which is produced in the US, but sold in the UK as Greek yoghurt.

FAGE claimed that only yoghurt manufactured in Greece could refer to itself as Greek yoghurt, whereas Chobani argued that Greek yoghurt is defined by a specific manufacturing process, and not by reference to its place of origin.

The facts

The yoghurt of FAGE and that of Chobani were both described as being “thick and creamy” in comparison with ordinary yoghurt, and were thickened by a process known as ‘straining’, rather than by the use of thickening agents. FAGE claimed that an industry labelling convention in the UK meant that thick and creamy yoghurt should only be labelled as “Greek yoghurt” if it both came from Greece and was thickened by straining. It argued that in the UK, the phrase “Greek yoghurt” had come to have significant reputation and goodwill as meaning a distinctive type of yoghurt made in Greece, so that the use of the same phrase

to describe yoghurt not made in Greece would involve a damaging misrepresentation sufficient to support a claim in passing off.

Chobani argued that a description of “Greek yoghurt” denoted no distinctive class in the mind of the yoghurt buying public and that alternatively, Greek yoghurt defined a type of yoghurt by reference to its mode of manufacture. Further, Chobani argued that even if a significant proportion of the yoghurt buying public in the UK believed that Greek yoghurt came from Greece, this was not a matter of any significance to them, and signified no special prestige or other feature leading to reputation or goodwill of the type protected by the law of passing off.

Decision

The judge held that a substantial proportion of those who purchased Greek yoghurt in the UK had it in mind that it was made in Greece, and that was what mattered to them, even if that group of consumers constituted only a modest proportion of yoghurt eaters as a whole. The established labelling convention with respect to Greece being the place of manufacture was relevant to consumers, and has been uniformly observed by yoghurt producers in the UK market for over 25 years.

The court held that FAGE had succeeded in demonstrating that substantial goodwill had become attached to the use of the term “Greek yoghurt”, which created “pulling power”, rather than merely denoting a geographical origin to which buyers are indifferent.

As a significant amount of goodwill had been shown to be attached to the phrase “Greek yoghurt” then it followed that the use of the term “Greek yoghurt” to describe yoghurt not made in Greece involved a material misrepresentation. The fact that Chobani had used very small print on the rear of their yoghurt pots to designate that it was manufactured in the US was not sufficient to enlighten the consumer that it was in fact not made in Greece.

In relation to damage, the judge held that the introduction to the market of Chobani’s yoghurt would obviously be detrimental to the distinctiveness of the phrase “Greek yoghurt”, because once a consumer had discovered that the Chobani yoghurt had in fact been made in the US, no one reading the phrase Greek yoghurt on yoghurt pots in the future would be able to safely assume, without checking the small print, that the product had been made in Greece.

Consequently, FAGE was awarded a permanent injunction restraining Chobani from passing off its US made yoghurt in the UK under the name “Greek yoghurt”.

Chobani has appealed the decision.

Comment

This case further clarifies the law of extended passing off, and outlines the protection that will be awarded to traders who rely on an industry labelling convention to protect the goodwill in their trade names. It is interesting that when establishing that the name or phrase distinguishes a particular class of goods, what matters is what the relevant section of the public has in their minds, rather than what is in the mind of the whole, or even a majority of the public, for a claim to passing off to be made out.

Author:
Claudia Rabbits



With or Without Due Cause? THE BULLDOG v RED BULL

The principle of due cause is currently being considered by the Court of Justice of the European Union (CJ) in the case of *Leidseplein Beheer BV and Hendrikus Jacobus Marinus De Vries v Red Bull GmbH and Red Bull Nederland BV* (C-65/12).

THE BULLDOG

Leidseplein Beheer and Mr De Vries manufacture an energy drink under the name THE BULLDOG. They have been using the sign THE BULLDOG in respect of commercial activities such as coffee shops, cafes and hotels since 1975. On 14 July 1983, Mr De Vries filed a trade mark application for the words THE BULLDOG in conjunction with an image of a bulldog in respect of 'alcohol free drinks' in class 32. In 1997, Leidseplein Beheer and Mr De Vries began using the sign THE BULLDOG for an energy drink.

RED BULL

Red Bull produces energy drinks under the trade mark RED BULL and had obtained a trade mark registration for the words RED BULL KRATING-DAENG in respect of 'alcohol free drinks' in class 32 on 1 July 1983. For some time, Red Bull have been trying to prevent Mr De Vries from selling his THE BULLDOG energy drink.

Referral to the CJ

The Dutch Supreme Court were faced with deciding whether or not use of THE BULLDOG infringed the RED BULL trade mark. The RED BULL trade mark was filed 14 days before THE BULLDOG trade mark, but Mr De Vries had been using THE BULLDOG sign from a date prior to Red Bull's adoption of the RED BULL trade mark, albeit for goods and services other than those in question. One of the issues for the court to decide therefore, was whether Mr De Vries had due cause to use THE BULLDOG sign for energy drinks. To obtain guidance on this point, the court asked the CJ whether there can be due cause within the meaning of Article 5(2) of Directive 89/104 EEC, where the sign being used that is identical or similar to the trade mark with a reputation, was already being used in good faith by the third party concerned, before the earlier registered trade mark was filed?

Opinion of the Advocate General

The Advocate General suggested that in assessing due cause, the fact that the third party has been using the sign in good faith for other goods and services to those at issue in the current proceedings, prior to the date of the earlier registered trade mark or to that trade mark acquiring its reputation upon which the owner of the earlier registered right relies, is a factor which should be taken into account and favour the third party.

Article 5(2)

In issuing this opinion, the Advocate General recognised the difficulties with the implementations of Article 5(2) in different languages of the European Union. In her view:

- English, French and German versions of Article 5(2) indicated that due cause may arise if the use of the third party sign equated to a legitimate interest which may outweigh the trade mark holder's interest.
- By contrast, the Dutch version of Article 5(2) refers to due cause as having a valid reason to use the sign.

On consideration, the Advocate General believed the earlier use of a sign could form the basis of a legitimate interest which could outweigh the right of the trade mark holder.

Against that context then, the Advocate General revisited the other elements of Article 5(2) and restated the established principle that the greater the distinctive character of the earlier registered trade mark and its reputation, the easier it will be to make a finding of detriment and unfair advantage arising out of use of the later sign. Furthermore, where identical goods are involved, it is more likely that consumers will make an association with the goods of the earlier registered mark with a reputation.

The Advocate General noted that unfair advantage occurs where the third party attempts to ride on the coat tails of the trade mark with a reputation and to exploit that trade mark holder's marketing efforts (expended to create and maintain the image of the trade mark), without paying any financial compensation or making any efforts of its own.



It was noted that:

- The signs THE BULLDOG and RED BULL are not identical and only coincide in the word BULL.
- THE BULLDOG registration was only filed 14 days after registration of RED BULL, so it would be difficult for Red Bull to claim that RED BULL was well known at the time Mr De Vries filed his trade mark.

The Advocate General wondered whether Mr De Vries could rely on the European Union principle of protected acquired rights in order to justify his use of THE BULLDOG trade mark for energy drinks. However, she felt that the use of the signs by both parties cannot be ignored and the current use could also be a way of establishing the origin of a particular trade mark or sign. Given Red Bull's use, the Advocate General's view was that Dutch consumers would still possibly associate THE BULLDOG with Red Bull, more than they would with De Vries or Leidseplein. Therefore, unfair advantage cannot be ruled out. Further, the fact that Mr De Vries only began using THE BULLDOG for energy drinks after Red Bull had acquired a reputation in RED BULL, did not neutralise Mr De Vries' legitimate interest claim to use the sign.

Comment

The opinion provides a helpful guide to the meaning of due cause, a principle which is important to infringement claims, but one which is rarely litigated upon. However, we will need to wait to see whether the CJ follows the Advocate General's opinion and agrees with the assessment provided.

Author:
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D YOUNG & CO INTELLECTUAL PROPERTY

Stop Press Croatia Joins European Union



Croatia joined the European Union (EU) on 1 July 2013, bringing the number of member countries to 28.

Existing Community trade marks will automatically extend to Croatia from this date. General points to note are:

1. It will not be possible to claim that an existing Community trade mark (CTM) is invalid on the basis that the mark is descriptive in Croatia.
2. The holder of an earlier right in Croatia will be able to prohibit use of an extended CTM in Croatia assuming that the earlier Croatian right was obtained before the date of accession and that the right was obtained in good faith.



3. The holder of an earlier Croatian national mark will only be able to oppose CTM applications filed after 1 January 2013. This is known as the exceptional 'opposition right' and applies in the six month period before the country joins.

If you have any queries concerning the Community trade mark system, please contact your usual D Young & Co advisor.

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Useful link

Full list of EU members:

<http://dycip.com/europeanmembers>

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