

D YOUNG & CO TRADE MARK NEWSLETTER *no.135*

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Half way through the year now, we welcome you to our newsletter with further good news for our team. Munich team partners Gabriele Engels and Yvonne Stone feature in Best Lawyers in Germany™ and Best Lawyers: Ones to Watch in Germany™ and London team partners Tamsin Holman and Matthew Dick are featured in Best Lawyers UK™. Moreover, Matthew Dick is highlighted in the top 50 UK trade mark private practitioners listed in WTR's Global Leaders 2024, and Jana Bogatz, Matthew Dick, Tamsin Holman, Gemma Kirkland and Anna Reid feature as IPSTARS 2024. Thank you for all your support. Busy times are coming up and please get in touch if you are attending any of the events noted below; we welcome the opportunity to see you.

Jackie Johnson,
Partner, Trade Mark Attorney

Events



CITMA Summer Reception London, UK, 02 July 2024

Bonnie Brooks, Richard Burton, Peter Byrd, Sophia Karim and Sophie Rann will be attending this Chartered Institute of Trade Mark Attorneys networking event.

CITMA Paralegal Conference London, UK, 11 September 2024

Kate Cheney will be attending and speaking at this conference.

IPO Annual Meeting 2024 Chicago, USA, 22-24 September 2024

Trade Mark Attorney Jackie Johnson will be attending this event.

MARQUES 38th Annual Conference Stockholm, Sweden, 24-27 September 2024

Jana Bogatz, Matthew Dick, Gabriele Engels and Anna Reid will be attending this conference.

PTMG Autumn Conference Malta, 16-19 October 2024

Yvonne Stone will be attending the Pharmaceutical Trade Marks Group's Autumn Conference.

www.dyoung.com/events

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Passing off / goodwill / evidence

Evidence bites back Ex “Slaughter and The Dogs” band members contest goodwill in a band name

After “unusually lengthy” and “emotionally charged” proceedings that were “be-set with procedural issues”, the UK Intellectual Property Office (UKIPO) concluded that goodwill in the band name of an English punk rock band from the 1970s resided with the “last men standing”.

Wayne Barrett McGrath, original member of Slaughter and The Dogs, applied for UK trade mark no. 3333426 “Slaughter and the Dogs” in his own name on 22 August 2018, which was registered on 16 November 2018, for goods in class 9 relating to music.

Howards Bates, an original member of the band alongside Wayne Barrett McGrath, applied to invalidate the trade mark on the basis of passing off. Mick Rossi, another original band member, claimed that the name “Slaughter and The Dogs” had been used throughout the UK since 1975, had acquired its own goodwill, and that each band member acquired an undivided share in that goodwill.

Chronology of events

- Slaughter and The Dogs was formed in Manchester in 1975. The original line-up was Howard Bates (bass), Wayne Barrett McGrath (singer), Mick Rossi (lead guitar) and Brian Grantham (drummer).
- Slaughter and The Dogs released their first album “Do It Dog Style” in 1978.
- Slaughter and The Dogs ceased to exist briefly at the end of 1978 and reformed in 1979 with Philip Rowland replacing Brian Grantham.
- Wayne Barrett McGrath left the band sometime after a new recording contract was signed in 1979. Ed Garrity replaced him.
- Howard Bates, Mick Rossi, Ed Garrity, and Philip Rowland released an album in 1980 under the name “Slaughter” titled “Bite Back”.
- There was some activity from the band between 1980 and 2015, although evidence for this period was scant.

- In 2015 and 2016 the original band members (Barrett McGrath, Rossi, Bates and Grantham) performed together at a gig in Manchester and at the Rebellion Festival in Blackpool.

Evidence pitfalls

Neither side was represented by legally qualified representatives (save that Howard Bates was represented by counsel at the final hearing). As a result, the proceedings were beset by procedural issues, and involved three case management conferences and several case direction letters. In particular, large parts of Wayne Barrett McGrath's evidence was not considered by the hearing officer when making the decision. It is also worth noting that neither side elected to cross-examine the other.

First, Wayne Barrett McGrath did not follow the rules for the evidence phase and submitted pieces of evidence outside of the evidence deadline, via email, and not under the cover of a witness statement.

Further, Wayne Barrett McGrath's evidence attacked the credibility of witness statement evidence submitted by Howard Bates. In particular, in response to a witness statement from Maurice Murray, the band's promoter between 2002 and 2016, Wayne Barrett McGrath claimed that Maurice Murray “makes up stories” and had “defamed himself and his wife”. The hearing officer found that these claims were baseless and noted that defamation is not dealt with by the tribunal. Wayne Barrett McGrath also made numerous submissions pertaining to Howard Bates' involvement in businesses other than the band. The hearing officer did not consider this relevant and found no reason why Howard Bates could not be involved in another company and be in the band at the same time.

Much of the evidence submitted by Howard Bates contradicted some of the statements made by Wayne Barrett McGrath. For instance, Wayne Barrett McGrath claimed that merchandise created for gigs in 2015 and 2016 was “not approved” and “considered illegal merchandise”. However, the hearing

Bands should consider ownership of band assets early on to avoid later disputes



officer was presented with evidence of Wayne Barrett McGrath wearing the merchandise, as well as attending a stand at which the band's official merchandise was being sold in order to sign autographs.

Overall, these evidence pitfalls did not help Wayne Barrett McGrath's case, and certainly did not assist when it came to costs.

Decision

Turning to the passing off assessment, the hearing officer found that goodwill had been created by the band, and would have likely been revived by the gigs performed in 2015 and 2016. The crux of the dispute, however, was the ownership of the goodwill. From the evidence, it appeared that the band had three different line-ups up until 1980 when the first phase of the band ceased to exist:

1. Wayne Barrett McGrath, Howard Bates, Mick Rossi and Brian Grantham: first recording contract and first album (1978).
2. Wayne Barrett McGrath, Howard Bates, Mick Rossi and Philip Rowland: second recording contract (1979).
3. Howard Bates, Mick Rossi, Philip Rowland and Ed Garrity: second album after departure of Wayne Barrett McGrath (late 1979-1980).

As established in earlier case law (*The Animals* O/369/13 and *Saxon Trade Mark* [2003] FSR 39), in the absence of an

agreement members of a band or group who perform for consideration are likely to constitute a partnership-at-will. This means that the assets of the band or group, including its goodwill and therefore rights to its name, are partnership assets to which each member is normally entitled to an undivided share. The hearing officer concluded that each of the band line-ups would have acquired their own goodwill independently of each other.

The goodwill generated for Slaughter and The Dogs should be taken to have been owned by the last men standing in 1980, namely Howard Bates, Mick Rossi, Ed Garrity and Philip Rowland. Clearly, there had been other iterations of the band in the 1990s until the first reunion concert in 2015, however, at no point did any of the last men standing abandon their rights. Whichever iteration of the band is considered to represent the last men standing Howard Bates was part of it, and so he had an undivided share of the goodwill.

Having established goodwill and its ownership the hearing officer briefly dealt with misrepresentation and damage. It was inevitable that the relevant public would believe that the goods are those of the band and damage was easily foreseeable. The fact that Wayne Barrett McGrath was one of the original members did not entitle him to lay claim individually to the whole of the benefit of the goodwill

by registering the trade mark for himself. Therefore, Howard Bates succeeded in his invalidation claim.

Costs

The hearing officer found that Wayne Barrett McGrath's conduct was unacceptable and said that "Mr Bates has been extremely patient throughout these proceedings both in respect of the way he has been addressed by [Mr Barrett McGrath] and in his responses to the many delays in getting this case to a hearing." Taking all of this into account, the hearing officer awarded Howard Bates all of his costs request, plus the official fees and further awards for his professional representation at the hearing (a total of £4,430).

Author:
Kamila Geremek



In short

This decision is a stark reminder for bands to register their names sooner rather than later, and to consider the ownership of band assets early on to avoid costly and lengthy disputes.

This case also highlights the pitfalls of facing a dispute without any legal representation and having to navigate the procedural complexities of evidence and hearings. If involved in a trade mark dispute one should avoid making allegations that are not supported by evidence, and focus should instead be on matters that are key to the issues at hand. Legal representation will help you stay focused and put your best foot forward in any dispute.

UKIPO opposition decision Stihl got it!

Case details at a glance

Jurisdiction: England & Wales

Decision level: UKIPO

Parties: Stiga AB v Andreas Stihl AG & Co KG

Citation: O-0461-24

Date: 22 May 2024

Decision: dycip.com/stiga-stihl

In a recent decision from the UKIPO, Andreas Stihl AG & Co KG successfully opposed an application for the trade mark (shown below) of STIGA AB for lawn mowers in class 7 and related goods and services in classes 9 and 37, based on earlier registrations for STIHL covering similar goods and services.



The basis of the opposition was Sections 5(2)(b), 5(3) and 5(4) of the Trade Marks Act 1994. The determining factor in the case was the extent of the reputation Stihl enjoys in its STIHL mark in relation to “gardening equipment, machines and power-operated equipment for use in agriculture and forestry, not including lawnmowers” and the very high degree of enhanced distinctiveness this has created in the mark.

Decision

What is so interesting about this case is that Stihl failed on Sections 5(2)(b) and 5(4) and succeeded only in relation to Section 5(3). The opposition failed on Section 5(2)(b) owing to the marks themselves not being similar enough to create a likelihood of confusion (direct or indirect) to satisfy the threshold on this ground. The opposition also failed under Section 5(4) because the marks were again held not to be similar enough for any misrepresentation to occur, and without misrepresentation there is no damage and therefore no passing off under Section 5(4). However Stihl’s opposition succeeded on the grounds of Section 5(3) for the following reasons.

Reputation

The STIHL mark enjoys a strong reputation for “gardening equipment, machines and power-operated equipment for use in agriculture and forestry, not including lawn mowers”. Sales of these STIHL branded products are over £100 million per year in the UK (including turnover of over £3 million per year for lawn mowers). The average annual marketing budget for the UK is around £5 million.

STIGA AB applied for a trade mark for lawn mowers and related goods and services



Link

Although the marks are visually similar only to a below medium degree, aurally similar to a low degree, and the conceptual position is neutral, the earlier mark is highly distinctive and enjoys a strong reputation in relation to goods which are similar to at least a medium or low degree to the contested goods and services and the relevant public will be the same. Weighing all of these factors, the hearing officer found that the earlier mark is likely to be brought to mind by the relevant public when encountering the contested mark on all of the goods and services at issue.

Damage

The evidence satisfied the hearing officer that Stihl has a long-standing and strong reputation for various high quality gardening machines and power tools (not including lawn mowers). It was found that there is a non-hypothetical risk that, for those goods and services where a link is made between the contested mark and the earlier mark, this is likely to result in the reputation of high quality gardening machinery, associated with the earlier mark, transferring to the later mark. This association is likely to make STIGAAB’s job of marketing its goods and services easier and make them more attractive to the relevant public, thereby giving STIGAAB more custom than it otherwise would have enjoyed had that association not been made. Stihl has spent an enormous sum of money year-on-year promoting its mark. As the association made in the consumer’s mind with the earlier mark would come without paying any compensation to Stihl, and without STIGAAB expending the money necessary to create that own image for its goods and services, it was found that this constitutes unfair advantage.

Due cause

The applicant did not submit their defence based on due cause in time and in any event this late filed defence had no weight even if had been pleaded in a timely manner.

Ground succeeds

Due to the extent of the reputation enjoyed by the opponent and the very high distinctive character of the earlier mark, the hearing officer found the requisite link between the marks, and subsequent damage through unfair advantage, despite the low similarity of the marks themselves.

Author:

Kate Cheney



In short

This decision highlights the importance of filing evidence of reputation where it is available, and to rely on all relevant grounds of opposition, as it is not always possible to predict which of these may be successful. This is certainly a positive decision for rights holders that enjoy a substantial reputation, as the necessary link was established despite only a low degree of similarity being found between the trade marks themselves.

Charming! LORO PIANA fails in EU position mark application

➤ Case details at a glance

Jurisdiction: European Union

Decision level: EUIPO

Applicant: Loro Piana S.p.A.

Case number: 018895734

Date: 26 April 2024

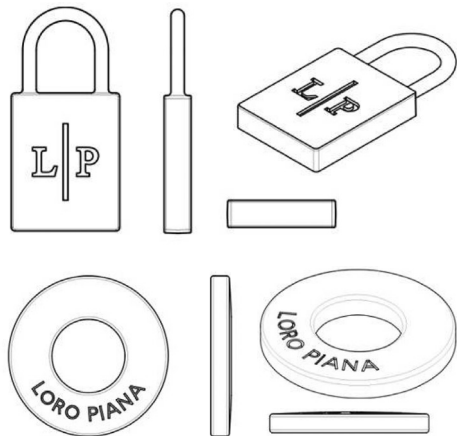
Decision (Italian): dycip.com/loro-piana

The failed LORO PIANA application for a position mark for footwear demonstrates how consumer expectations and the norms of the market influence the test of distinctiveness.

pia-pia-PIANA

LORO PIANA is an Italian luxury brand. Those who know, **know**, supposedly, and that is why LORO PIANA goes big on subtlety and small on branding.

For those who don't know, some kind of distinguishing feature that sets the brand apart may be useful! Fortunately, LORO PIANA incorporates "charms" into some of its products as a distinguishing feature. These charms are in the form of a padlock and a ring and, when sold to customers, have the famous LORO PIANA branding engraved on them.



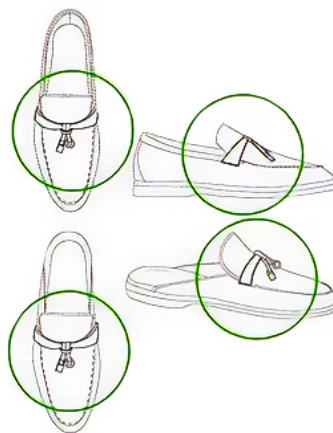
Keeping it plain: position mark applications

LORO PIANA uses these charms on its luxury footwear range. To protect the use of these charms, LORO PIANA applied to register a position mark in the EU.

A position mark is a type of trade mark right that protects **specific** and **distinctive** elements that are placed **consistently** on a specific area of a product.

For LORO PIANA the specific and distinctive elements were the charms (the padlock and ring), and the consistent placement

of those elements was "closer to the tongue than to the toe of the shoe". This is shown below (highlights added).



Importantly, however, the charms in the position mark application were plain (they did not contain the LORO PIANA branding) and there was no claim to the LORO PIANA branding in the description for the position mark.

Position marks: same but different?

The test for whether a trade mark is distinctive is, on paper, **the same** across all trade mark categories: a word mark, a figurative mark or a more esoteric trade mark category such as a position mark. However, what is **different** is that the public generally recognises that word marks (a brand name), and figurative marks (a logo) can be relied on to show that a particular product comes from a particular company.

There is much less recognition amongst the public that a position mark (such as the placement of a plain padlock and plain ring closer to the tongue than to the toe of the shoe) can also have that function, particularly in the absence of words and/or logos. In order for a position mark to overcome the distinctiveness hurdle it needs to deviate significantly from the customs and norms of the sector, or have high consumer recognition through advertising and sales, such that consumers recognise that feature (without the addition of words/logos) as showing a particular product comes from a particular company.

Hurdle too high for LORO PIANA

The position mark application was rejected by the EUIPO on the basis that it was **decorative** and **non-distinctive**. Consumers would not recognise that shoes with a plain padlock and plain ring placed closer to the tongue than to the toe of a shoe were LORO PIANA shoes.

Other factors played into the failure of the LORO PIANA position mark application:

- The shoe market is saturated with decorative elements, and so the placement of the plain charms did not deviate significantly from the customs and norms of the sector.
- LORO PIANA could not show, via sales or other market indicators, that the placement of the charms, absent the LORO PIANA branding, was recognised by consumers (that it had inherent or acquired distinctiveness).
- Even if use of charms is a known practice in the luxury shoe market and consumers in that sector have a high degree of attention to these types of features, the charms were still decorative and non-distinctive.
- The existence of counterfeiters using the features of the position mark again pointed to the charms being decorative rather than distinctive.

Author:

Phil Leonard



In short

Are position marks possible? It is not impossible to register position marks. We have been successful in registering position marks for clients in jurisdictions around the world. However, as this case shows, a lot obviously depends on the design of the mark itself and the market concerned.

A joyous decision

General Court provides guidance on evidence of reputation

➤ Case details at a glance

Jurisdiction: EU

Decision Level: General Court

Parties: Kneipp GmbH v EUIPO & Jean Patou

Citation: T-157/23

Date 24 April 2024

Decision: dycip.com/kneipp-euipo-patou

The General Court has confirmed that the Board of Appeal was correct in its assessment that Jean Patou, a French fashion house, had a reputation for the mark JOY, despite its evidence indicating a downward trend of sales prior to the filing date of the European Union trade mark (EUTM) application it had challenged.

Background

In November 2019 Kneipp GmbH, a German manufacturer of natural healing products, filed an EUTM for JOYFUL BY NATURE, which included protection for cosmetics.

Patou opposed the application based on likelihood of confusion and reputation in relation to a number of earlier rights, including an EUTM for JOY, which included protection for class 3 cosmetics. Patou's opposition was successful in light of the reputation of its JOY mark.

Kneipp appealed and the Board of Appeal partially annulled the decision in respect of services primarily related to marketing and advertising, but dismissed the appeal in respect of the other goods and services protected by the JOYFUL BY NATURE application on the basis of the strong reputation of the earlier mark, JOY. Kneipp appealed to the General Court.

General Court appeal

Kneipp criticised the Board of Appeal's assessment that the mark JOY had a reputation at the filing date of its application (the relevant date).

Kneipp argued that the evidence filed by Patou did not demonstrate evidence of the earlier mark's reputation in France, and that the perfume Joy by Patou is only sold by selected luxury retailers, which are not visited by a significant part of the relevant public. It argued that the low sales figures filed by Patou did not prove that the earlier mark was known to a significant part of the relevant public in France, particularly given the earlier mark had generated a low turnover of sales in France in 2016, 2017 and 2018, and turnover had declined since 2016.

Jean Patou evidenced a downward trend of sales prior to the relevant date



The General Court noted that in order for an earlier mark to satisfy the requirement of reputation, the earlier mark must be known to a significant part of the public in relation to the goods and services protected by the mark. The relevant facts of the case must be taken into consideration, in particular, the market share held by the mark, the intensity, geographical extent and duration of use of the mark and size of the investment of the owner in promoting it. However, there is no requirement for the earlier mark to be known by a specific percentage of the relevant public or for the reputation to cover all the territory concerned, provided the reputation exists in a significant part of the territory.

While the earlier mark's reputation must be established at the relevant date, documents created after this date should be taken into consideration if they allow conclusions to be drawn as to the situation at the relevant date. A document dated some time before the relevant date can be useful given that a reputation of a trade mark is acquired progressively and lost gradually.

Patou had filed a large amount of evidence from 2013 to 2017, including awards, articles and invoices and documents from the late 1990s, which demonstrated the historical reputation of the JOY mark. The General Court held that although sales of JOY perfumes appeared to be decreasing from 2016, and Patou had not produced evidence of significant market share as at the relevant date, this did not mean that

the reputation which had accrued to the JOY mark prior to the relevant date would have vanished immediately, but instead it would have survived at the relevant date.

The General Court dismissed Kneipp's other arguments that the Board of Appeal had erred in its assessment in relation to the remaining cumulative conditions which are required for an opposition to succeed under Article 8(5) and the grounds of reputation and dismissed the appeal.

Author:

Sarah Brooks



In short

This decision is likely to be welcome news for brand owners of a famous mark who might have encountered a downward trend in sales figures over a period. When collating evidence of reputation of an earlier mark, it is worth including historical evidence of a strong reputation in the past if available, alongside more recent evidence, even if the historical evidence dates back some years before the relevant date.

BVG jingle does not ring a bell

Sound mark strategies

In a recent decision from the EU Intellectual Property Office (EUIPO) the Board of Appeal confirmed the examiner's refusal to register a short jingle for services in the transportation sector.

Background

As part of its acoustic brand identity, Berliner Verkehrsbetriebe (BVG), a public transport provider in Berlin, sought trade mark protection for several jingles used in connection with announcements.

While most marks were registered, the EUIPO objected to a two second long sound on the grounds of lack of distinctiveness (Article 7(1)(b) of the EU Trade Mark Regulations). European Union trade mark (EUTM) number 018849003 was applied for in relation to class 39 (transportation; passenger transport; wrapping and packaging services; storage; arranging of transportation for travel tours).

Registrability of sound marks

In general, the criteria for the assessment of distinctive character are the same for different categories of marks, that is, the registrability test for word marks is the same as for sound marks. Yet, the public's perception may differ in relation to each of those categories, and it could therefore prove more difficult to establish distinctiveness in relation to marks of certain categories.

In order to be registrable a sound must have a certain resonance, on the basis of which the consumer can recognise it and identify it as a trade mark, and not merely as a functional component (for example, an alarm) or as an indicator without intrinsic characteristics.

Two categories are usually not registrable: extremely short, banal sounds, and entire songs or symphonic movements.

Case details at a glance

Jurisdiction: EU

Decision level: EUIPO

Parties: Berliner Verkehrsbetriebe v EUIPO

Date: 02 April 2024

Citation: R 2220/2023-5

Decision: dycip.com/bvg-sound-mark

Useful links

The BVG acoustic brand identity strategy: dycip.com/berliner-verkehrsbetriebe

BVG EUTM no. 018849003 (sound): dycip.com/eutm-018849003

BVG EUTM no. 018848948 (graphic representation): dycip.com/eutm-018848948

Deutsche Bahn EUTM no. 18800487 (sound): dycip.com/deutsche-bahn-sound-mark

Munich Airport EUTM no. 17396102 (sound): dycip.com/munich-airport-sound-mark

BVG sought trade mark protection for several jingles used for announcements



A sound mark can be registered in musical notations or audio files.

The Board of Appeal's decision

The Board of Appeal confirmed the preceding examiner's decision and found that the jingle was not capable of indicating a commercial origin.

The Board of Appeal gave up some of the examiner's arguments against the mark, who held that sounds were not generally used as a means of identification in the relevant market sector, and that the more jingles there are on the market, the more the new application would have to stand out from them.

Although not deemed a prerequisite, the Board of Appeal did find that the BVG jingle was distinguishable from other relevant jingles, namely Deutsche Bahn's (a German railway company) EUTM number 18800487, and Munich Airport's EUTM number 17396102. However, this was not enough to find distinctiveness. The jingle was too short, not sufficiently memorable, and rather monotonous and banal.

BVG had argued that the sound was complex as had a polyphonic nature (tones that are played by various voices simultaneously) and 18 pitches. The artificially-created sound of a bell would further contribute

to distinctiveness. The artistic concept and genesis would represent the open-mindedness and diversity of Berlin.

This did not convince the Board of Appeal, which perceived only four different sounds. Also, because sound sequences in the relevant sector usually preface announcements, the public would simply perceive it as a functional signal. The public would not analyse it and ask what it might mean or stand for. The public's attention would primarily be geared to the subsequent statement.

Practical take-aways

Apparently, the parallel BVG application number 018848948, which represents the same sound in musical notations, did strike a chord with the EUIPO. It was registered without objection.

The current decision may imply that it is easier to get sound marks registered when represented in musical notations rather than in audio files. On the other hand, the enforceability of the depicted sound mark will be difficult if the audio equivalent is not perceived as an indication of origin, which is a requirement for trade mark infringement.

Author:
Jacqueline Feigl



And finally...

Artificial intelligence

UK High Court AI technology infringement challenges Getty Images v Stability AI

Getty Images alleged Stability AI scraped virtual assets from its websites without consent



Getty Images alleged that Stability AI scraped millions of visual assets from its websites, without consent, to train and develop its AI platform, Stable Diffusion. Stability AI's reverse summary judgment/strike out application argued that Getty Images's claim must fail because:

1. the training/development activities took place outside the UK, and
2. secondary infringement under sections 22, 23 and 27 of the Copyright, Designs and Patents Act 1988 (CDPA) only includes dealings with tangible articles (not, for example, making software available on a website).

The High Court noted that evidence concerning the location of Stability AI's technical and human resources (which Getty Images likely did not have access to) would become available following disclosure.

The High Court declined to decide on the point of law regarding the meaning of "article" in sections 22, 23 and 27 of the CDPA, noting that there are good policy reasons why "articles" might include tangibles and intangibles, but that this ought to be decided by a trial judge upon full, comprehensive arguments from both sides.

On a related note, the House of Lords recently urged the UK Government to take action, as current UK legislation is ill-equipped to deal with generative AI infringement issues.

Author:

Agnieszka Stephenson



Case details at a glance

Jurisdiction: United Kingdom

Decision level: High Court

Parties: Getty Images (US) Inc & Ors

v Stability AI Ltd

Citation: [2023] EWHC 3090 (Ch)

Date: 01 December 2023

Decision: dycip.com/getty-stabilityai

Contact details

**London
Munich
Southampton**

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

**mail@dyoung.com
www.dyoung.com**

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Contributors

Senior Associate, Trade Mark Attorney
Sarah Brooks
spb@dyoung.com
www.dyoung.com/team/sarahbrooks



Senior Associate, Trade Mark Attorney
Kate Cheney
klc@dyoung.com
www.dyoung.com/team/katecheney



Rechtsanwältin
Jacqueline Feigl
jmf@dyoung.com
www.dyoung.com/jacquelinefeigl



Solicitor
Kamila Geremek
kag@dyoung.com
www.dyoung.com/kamilageremek



Partner, Trade Mark Attorney
Jackie Johnson
jhj@dyoung.com
www.dyoung.com/jackiejohnson



Associate, Solicitor
Phil Leonard
pel@dyoung.com
www.dyoung.com/philleonard



Solicitor
Agnieszka Stephenson
aas@dyoung.com
www.dyoung.com/agnieszkastephenson



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