

D YOUNG & CO TRADE MARK NEWSLETTER *no.136*

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Climate-neutral Katjes fruit gums? German Court of Justice sets strict requirements for climate-neutral claims



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Editorial



Over the summer months we have remained as busy and industrious as ever and were delighted to celebrate the inclusion of members of the team in three recent IP surveys, including Leaders League, Who's Who Legal IP, and WIPR Leaders. We are grateful for such fantastic feedback. You can catch up on all the good news on our website (www.dyoung.com/news).

We look forward to catching up with colleagues across the world at various IP events in coming months (do get in touch if you are attending any of the events listed below), and in the meantime we hope you enjoy our September newsletter.

Richard Burton,
Partner, Trade Mark Attorney

Events



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

Jackie Johnson will be attending this event.

MARQUES 38th Annual Conference Stockholm, Sweden, 24-17 September 2024

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

PTMG Autumn Conference Malta, 16-19 October 2024

Yvonne Stone will be attending this conference.

INTA Leadership Meeting 2024 New Orleans, USA, 12-15 November 2024

Jana Bogatz and Anna Reid will be attending this meeting.

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Green claims

Climate-neutral Katjes fruit gums? German Court of Justice sets strict requirements for climate-neutral claims

Environmental policy and a sustainable image are becoming increasingly important for companies. Companies therefore often advertise their products as environmentally friendly, or in particular "climate neutral".

However, when advertising with such a vague term (which includes both the avoidance of CO² emissions and CO² compensation) it must be explained in the advert itself which specific meaning is relevant, the German Federal Court of Justice (BGH) has now ruled in the case of sweets manufacturer Katjes.

In light of conflicting lower court decisions in Germany, the decision on the advertising of Katjes' fruit gummies with the claim "climate-neutral" was eagerly awaited. In its decision (I ZR 98/23) of 27 June 2024 the BGH set out strict requirements companies must meet to promote their products with the term "climate neutral".

Since the term is too vague it requires specific and clearly visible information in the advert itself on how the claimed climate neutrality is achieved and what measures have been taken by the advertiser to verify the claim. The BGH decided both that reduction measures take precedence over mere compensation of CO² emissions, which needs to be made transparent to the consumer and that the risk of consumer deception is particularly high when it comes to so called "green claims".

Background

In July 2023, the Higher Regional Court of Düsseldorf (OLG Düsseldorf) was asked to define the requirements for advertising with climate-neutrality claims in two proceedings. While the claim by the sweets company

Katjes was deemed compliant, a jam manufacturer was found to be in violation of German Unfair Competition Law.

In its decisions, the OLG Düsseldorf explained that climate neutrality is not in itself a false claim and thus misleading advertising. However, the advertiser is obliged to provide information on how the climate neutrality of the advertised product is achieved and what compensation measures are in place, whether by the product's own savings (reduction of greenhouse gas emissions in the production process) or compensation measures (such as purchasing CO² certificates or supporting third-party climate projects).

As neither the print advertisement nor the product packaging itself provided any explanatory information, the advertising of the jam manufacturer was deemed insufficient.

In contrast, the claim of climate neutrality in both the advertisement and the packaging of Katjes' fruit gummies was accompanied by a QR code and reference to the website of its certification partner, which met the obligation to provide supporting information.

The Wettbewerbszentrale (Centre for Combating Unfair Competition), claimant in both cases, appealed the latter decision.

BGH sets strict requirements

On appeal, the BGH determined Katjes' advertising to be misleading and overturned the ruling of the OLG Düsseldorf.

The BGH is clear that environmental claims are of significant importance in a consumer's purchasing decision. Therefore, the same strict standards have to be applied to environmental adverts as for health-related adverts in terms of their accuracy, unambiguity and clarity.

👉 **Case details at a glance**

*Jurisdiction: Germany
Decision level: BGH
Date: 27 June 2024
Citation: I ZR 98/23
Decision (German): dycip.com/bgh-i-zr-98-23*

*Jurisdiction: Germany
Decision level: OLG Düsseldorf
Date: 06 July 2024
Citation: 20-U-72-22
Decision (German): dycip.com/20-U-72-22*

👉 **Useful links & related article**

*EU Commission Green Claims Directive:
dycip.com/directive-green-claims-proposal*

*EU directive to empower consumers for environmental change through better protection against unfair practices and better information:
dycip.com/directive-eu-2024-825*

*“Advertising climate neutrality: German courts establish divergent requirements”, 11 September 2023:
dycip.com/climate-neutrality-german-courts*

Companies often advertise their products as environmentally friendly and climate neutral



Companies will have to obtain approval of their green-marketing claims from an independent verifier before they can be used in advertising.

Another is the recently adopted Directive to empower consumers for environmental change through better protection against unfair practices and better information, which has to be transposed by EU member states by March 2026. It aims to better protect consumers from misleading advertising with regard to deceptive, unclear, or poorly-substantiated environmental claims (greenwashing). It contains a non-exhaustive list of banned commercial practices regarding the use of generic environmental claims, which include any message or representation, such as labels, brand names, company names or product names. It furthermore stipulates that the advertising of products as “climate neutral” or “CO² reduced” may no longer be based on offsetting measures.

This prohibition on adverts that claim products are climate neutral, where the product’s neutral CO² footprint is achieved by offsetting emissions and not due to reductions in the production process or supply of a product, is of particular significance and will force companies to reconsider their approach.

In this regard the 2026 EU directive appears to impose even stricter requirements on companies that make climate-neutral claims in their advertising than the BGH’s recent decision.

Author:
Gabriele Engels



In both cases the risk of being misled is particularly high, requiring an increased need to inform and protect the public.

The term “climate neutral” is a vague term (as it can relate to reduction or compensation of CO² emissions, which are not equivalent measures) and therefore clarification is required in the advert itself as to its meaning to avoid deception; mere reference to further information being available either via a QR code or a link is inadequate information.

The BGH is clear that reduction of CO² emissions takes precedence over compensation measures.

Outlook

The BGH’s long awaited decision will significantly impact advertising with the term “climate-neutral” in Germany, but will also affect other environmental-friendly claims, which may be deemed to be unclear.

The practice of referring to a website for further information due to spatial restrictions, as the OLG Düsseldorf deemed sufficient, will no longer be possible. Instead, all relevant information must be provided in the advert or on the product packaging. The BGH is clear and stricter than most of the Higher Regional courts in various cases, and in particular than the OLG Düsseldorf as previous instance.

This judgment is in line with the EU’s increased efforts to impose strict requirements for companies that make environmental claims (green claims) in their adverts to avoid claims that may mislead or deceive EU consumers. One of the instruments is the Green Claims Directive, which was introduced by the EU Commission in March 2023, and recently adopted by the EU Council, but is still in the legislative process. The directive includes the prohibition of environmental advertising claims (green claims) and labels that may mislead or deceive EU consumers by establishing several minimum criteria for transparency and credibility.

In short

While it remains to be seen how the regulations will be transposed and interpreted by the courts, companies will need to carefully consider the basis of their environmentally-friendly and in particular climate-neutral claims.

CHIQUITA, tell me what's wrong EUIPO errs in distinctiveness and similarity findings

Case details at a glance

Jurisdiction: European Union

Decision level: General Court

Parties: Chiquita Brands LLC v EUIPO

Date: 29 May 2024

Citation: T-79/23

Decision: dycip.com/chiquita-euiipo-may24

The General Court has annulled the EU Intellectual Property Office's (EUIPO) decisions concerning oppositions to the mark CHIQUITA QUEEN.

Background

Chiquita Brands LLC filed for the EU trade mark CHIQUITA QUEEN covering fresh fruits in class 31. The company Jara 2000 SL opposed the mark on the basis of its figurative RED QUEEN mark which covered identical goods (the "earlier mark", shown below):



EUIPO decisions

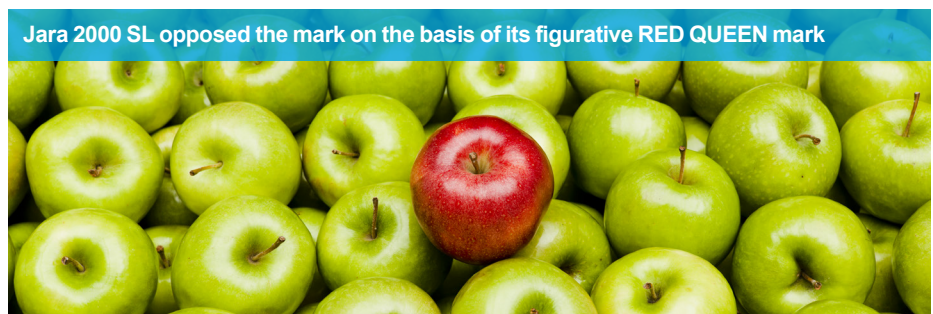
After being able to show genuine use of the earlier mark in relation to fresh fruits, Jara 2000 SL's initial opposition was successful.

Chiquita Brands LLC appealed the first instance decision, but this was rejected by the Board of Appeal in its entirety. Considering that both marks covered identical goods, that the marks shared an average level of visual, phonetic and conceptual similarity, and that the relevant public would pay at most only an average amount of attention to the branding when purchasing these goods, the Board of Appeal deemed that registration of the earlier mark would create a likelihood of confusion on the part of the public.

Chiquita Brands LLC then contested this decision at the General Court, requesting it be annulled and costs awarded in its favour.

Reputation and distinctiveness

In its decision, the Board of Appeal had found the word element QUEEN to be the distinctive element of each mark. However, disagreeing with this, the General Court viewed the word QUEEN as having laudatory connotations, indicating the quality of the goods provided under the marks. As this is part of the basic English language it would be understood even by the general Spanish public, and therefore does not play a significantly distinctive role within the earlier mark.



Jara 2000 SL opposed the mark on the basis of its figurative RED QUEEN mark

Additionally, the General Court found the CHIQUITA term enjoys a reputation in Spain for fresh fruits. Interestingly this finding was unsubstantiated. This led to the conclusion that CHIQUITA had greater distinctiveness than QUEEN.

Similarity

When addressing the issue of visual similarity, the General Court highlighted the differences in the figurative elements incorporated in the earlier mark as being an appreciable difference between the marks. Furthermore, considering the finding of CHIQUITA as being the more distinctive feature of Chiquita Brands LLC's mark, this term being significantly longer than the RED element of the earlier mark, led the General Court to find only a weak level of visual similarity.

Again considering that the QUEEN element of both marks plays a more minor role, greater emphasis was placed on the phonetic nature of the CHIQUITA and RED elements, which, given the clear differences between their pronunciation, led to a lowering of the phonetic similarities from average to low.

Finally, in carrying out a conceptual review of the marks, the General Court found the earlier mark to mean a red-coloured queen, while the term CHIQUITA refers to a little girl in Spanish. Given the low distinctiveness of the word QUEEN, and more dominant element CHIQUITA, the Board of Appeal had erred in finding an average degree of conceptual similarity. This was deemed to be, at most, low.

Likelihood of confusion

While agreeing that the relevant public paid an average level of attention to the goods at issue, considering the lesser role played by the

term QUEEN and the low levels of similarities between the two marks, the General Court found there was no likelihood of confusion. Consequently, the decision was annulled and the EUIPO ordered to bear costs.

This decision is a good reminder of how difficult it can be to assess similarity, and how many different ways there are of looking at everyday words. The Board of Appeal and General Court took an entirely different approach to the assessment of both the word QUEEN and the word CHIQUITA.

Authors:

Peter Byrd & Laurie Ford



In short

The General Court found that the reputation of CHIQUITA in Spain must be taken into account in the comparison of the marks. The judges distinguished between (1) distinctiveness as a whole, which is relevant for the likelihood of confusion assessment only, and (2) distinctiveness of parts, which is relevant for the assessment of the similarity of the signs. This is arguably a subtle departure from common practice, and it is a shame that further explanation was not provided. Time will tell whether the EUIPO will follow this reasoning in the future.

Minuty SaS v Miura Brands Earlier mark wins the gold

Case details at a glance

Jurisdiction: European Union

Decision level: EUIPO

Parties: Minuty SaS v Miura Brands SL

Date: 19 July 2024

Citation: B 3 200 255

Decision: dycip.com/minuty-sas-miura-brands

A mutually shared distinctive element between two marks is enough to cause confusion. The EU Intellectual Property Office (EUIPO) found a likelihood of confusion between ROSE ET OR and OR ONLYROSE.

The applicant, Miura Brands SL, applied for European Union trade mark (EUTM) no. 18848996 for OR ONLYROSE in class 33 (the application). The opponent, Minuty SAS, opposed the application on the basis of a likelihood of confusion with its earlier international registration designating the EU no. 1531007 for ROSE ET OR in class 33 (the “earlier mark”).

Proof of use

An applicant may request that the proprietor of an earlier EUTM who opposes an application, should provide proof of use of that mark during the five-year period preceding the date of filing of the opposed application. Such a request can only be made when an earlier mark has been registered for more than five years at the filing/priority date of the application.

In this case, the filing date of the application was 15 March 2023. Miura Brands requested proof of use of the earlier mark, but, since the earlier mark had not been registered for five years at the relevant date, that request was inadmissible.

Likelihood of confusion

Dealing first with the comparison of the goods, the EUIPO concluded that the application’s

alcoholic beverages and cider goods were identical/similar to a low degree to the earlier mark’s wines. In contrast, the application’s remaining goods, namely “alcoholic essences and extracts; alcoholic preparations for making beverages; preparations for making alcoholic beverages”, were considered dissimilar as they are not a finished product for consumers.

The EUIPO considered that the relevant public was the same and that they would have an average degree of attention for the particular goods. The likelihood of confusion assessment focused on the French and Italian speaking part of the public.

Turning to the comparison of the marks, the EUIPO noted that the marks shared the common elements of OR and ROSE. The ROSE element will be understood as indicating the colour and type of wine and so it is non-distinctive for the relevant goods. In contrast, the OR element will be understood as meaning gold and so it is distinctive for the relevant goods.

The differing element of ET in the earlier mark will be understood in French and Italian as a conjunction, so it only has a low degree of distinctiveness (if any), while the application’s ONLY element is meaningless to the relevant public so was held to be distinctive.

The fact that the marks have different beginnings had limited impact on the comparison. As OR was placed at the beginning of the application consumers would pay greater attention to it, and while

OR is placed at the end of the earlier mark, as the only distinctive element, consumers would also pay greater attention to it. Given that the only distinctive element of the earlier mark was fully reproduced in the application, the EUIPO concluded that visually and aurally the marks were similar to an average degree. Conceptually, the marks were similar to a high degree as both would be associated with gold and rose.

When assessing the overall likelihood of confusion, the EUIPO concluded that while there are some differences between the marks a likelihood of confusion still existed, as the coinciding element OR played an independent distinctive role in both marks. As it plays a key role in the overall impression, and in how consumers will memorise and recollect the marks, it follows that consumers may be unable to differentiate the marks, particularly given the identity/similarity of the goods and the common element of ROSE.

The application was rejected in relation to “Alcoholic beverages (except beer); cider” and allowed to proceed in relation to the remaining goods.

Author:

Kamila Geremek



In short

Even if marks share only a singular element, if that is considered to be distinctive in comparison to the remaining elements, it may be enough to lead to a finding of a likelihood of confusion, particularly in cases where the goods are identical/similar. The case is also a reminder to carefully consider the relevant dates for proof of use, particularly when in relation to international registrations.

The EUIPO noted that the marks shared the common elements of OR and ROSE



EU Board of Appeal overturns refusal

Distinctiveness of a position mark

Case details at a glance

Jurisdiction: European Union

Decision level: EUIPO Board of Appeal

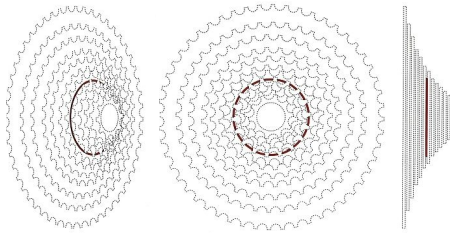
Applicant: SRAM LLC

Date: 10 June 2024

Citation: R 79/2024-5

Decision: dycip.com/SRAM-euipo-jun24

The application (EU designation of IR No. 1729330) was a position mark filed by SRAM LLC seeking protection in respect of the following class 12 goods: “bicycles parts, namely cassettes, sprockets and sprocket wheels”. SRAM described the position mark as follows: “the trade mark claims protection for a ring like red element between the sixth and seventh sprocket (gear) and in the colour red.” For ease, we will refer to the mark, shown below, as the “the element”.



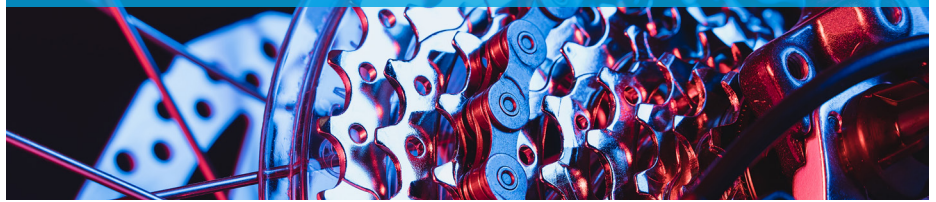
At first instance, the examiner held that the mark was non-distinctive, serving as a decoration of the goods. The examiner further stated that a red ring inserted between bike sprockets, in the absence of other distinctive elements, cannot be perceived as a trade mark because red components on bicycles are common. Examples of red components were referenced in the decision.

SRAM's observations

- The element is applied uniformly, as an extra element occupying a stable position.
- The colour red creates a striking contrast against metallic cassettes and would be sufficiently eye catching to average consumers.
- The examples identified by the examiner were not comparable as there are no similar products on the market.
- SRAM owns the mark SRAM RED and has sold red bike components over many years, enabling consumers of class 12 products to identify the element as originating from SRAM.

The examiner upheld the refusal stating that the type of sign applied for influences the perception of the relevant public; signs that are indistinguishable from the

At first, the examiner held that the mark was non-distinctive, serving as decoration



appearance of the product will not normally be seen as indications of origin. In this case, the sign is not distinguishable from being a part of the goods. It would only be distinctive if consumers were able to recognise the sign as distinguishing the international registration holder's sprocket from those of other undertakings, it should also depart significantly from the customs of the sector.

The examiner also noted that there is nothing complex or eye catching in the mark allowing consumers to immediately perceive the sign as an indication of origin; the sign merely combines a basic geometric shape with a colour.

Finally, the examiner found that SRAM's submissions regarding its use of the colour red were irrelevant: assessing distinctiveness cannot be linked to the international registration's holder's identity or professional activity.

SRAM appealed.

Findings of the EUIPO Board of Appeal

The Board of Appeal found that distinctiveness must be assessed by reference to the goods followed by the relevant public's perception of the sign.

The relevant goods target the public at large and specialised public with knowledge in the cycling sector. The relevant public generally pays particular interest to the goods in contention owing to their technical characteristics. The relevant public's level of attention must be higher than average.

The element would be viewed as eye catching and distinctive because of its unusual, uniform position and lack of functional purpose. The element does not contribute to the mechanical workings, performance, or durability of the cassette, distinguishing it

from the functional components surrounding it. Placement of the element between the sprockets is unconventional and would draw immediate attention from consumers.

Introduction of a brightly coloured ring to a cassette would stand out, signaling to consumers that it serves a unique purpose, which will likely be perceived as an identifier of origin.

The Board of Appeal was unpersuaded that the sign would only be perceived as a decorative element; rather, in an environment where functional efficiency is paramount, a non-functional element stands out as a deliberate/ meaningful addition. Consequently, relevant consumers familiar with the technical nature of bike components will recognise the sign as a distinctive feature.

The appeal was therefore well-founded and the contested decision was annulled in its entirety.

Author:

Rachel Pellatt



In short

A clear assessment of the mark with reference to the goods/services and the relevant public's perception is crucial.

Ensure position marks and the goods/services applied for are specific.

While this case is industry specific, it provides a good authority on position marks generally.

EasyGroup v Beauty Perfectionists

The troubles of enforcing a not so-distinctive trade mark

🕒 Case details at a glance

Jurisdiction: England and Wales

Decision level: High Court

Parties: easyGroup Limited v Beauty Perfectionists Limited, et al

Date: 13 June 2024

Citation: [2024] EWHC 1441 (Ch)

Decision: dycip.com/easygroup-beauty

EasyGroup Limited's infringement claim against Beauty Perfectionists Limited's use of signs containing "easyCOSMETIC" was dismissed by the UK High Court.

In summary, easyGroup claimed that Beauty Perfectionists' use of "easyCOSMETIC" infringed its easyJet word marks on the grounds of a likelihood of confusion and reputation. Despite being able to rely on the existence of a family of marks (which was found to attribute a level of distinctiveness to the term "easy" used in a particular font and colour), and some consumer emails noting the similarities between the marks at issue, easyGroup was unsuccessful in its infringement claim.

The decision highlights that even if a trade mark with a low degree of inherent distinctiveness becomes popular, rights in that mark are likely to be limited and difficult to enforce against ostensibly similar signs, particularly where there has been coexistence in the marketplace. Moreover, it highlights the courts' strict approach with regard to evidence of confusion.

Likelihood of confusion

Marks: With regard to the similarity of the marks, the court found that the marks had some visual and conceptual similarities due to them both starting with the term "easy" and the thick font and orange colouring used. However, the fact that "easy" was a "common descriptive adjective" used by other traders was noted. This impacted the effect of principles such as the tendency of consumers to focus on the start of a mark.

Services: In its consideration of the similarity of the services the court found that the inflight retail of cosmetics was similar to the online retail of cosmetics.

Family of marks: Where it is shown that a claimant has used a "family" of trade marks with a common feature, and a disputed sign shares that common feature, this may support the existence of a likelihood of confusion or a link.

easyGroup claimed Beauty Perfectionist's signs infringed its eastJet word marks



In assessing EasyGroup's family of marks the court did not accept that use of the term EASY was understood as indicative of easyGroup. However, easyGroup could rely on its family's reputation, resting in the term "easy" in combination with the common font and colourings used, when considering the enhanced distinctiveness of the easyJet mark.

Context of use: It was noted that there was nothing on Beauty Perfectionists' website to indicate any connection with the easyJet airline businesses. Moreover, the use of orange design elements on Beauty Perfectionists' website was considered too far remote from the easyCOSMETIC signs to have any impact.

Evidence of confusion: In its evidence of confusion easyGroup relied on various emails from consumers including some that stated it initially believed Beauty Perfectionists' services were from an easyGroup brand. However, the court did not regard these as instances of "actual confusion", but only initial confusion or "questions" as to whether there was a link.

Overall, the court found that any similarities between the marks were offset by the visual and conceptual differences and context of Beauty Perfectionists' use.

This finding was reinforced by the fact that, after many years of parallel trading, no instance of actual confusion had been identified.

Reputation

In relation to reputation claim, it was found that only the sign that contained orange and black stylisation could arguably be seen to create a link to the easyJet trade mark.

However, it was subsequently found that there would be no detriment to the distinctive character of easyJet. EasyGroup had claimed there would be damage to the strength of the "easy" family. However, these claims were found to be based on speculation and, in any event, the court commented that the question is not whether there is detriment to the family reputation but detriment to the distinctive character of the easyJet mark relied upon.

EasyGroup's claim also failed on the basis of unfair advantage, as no reasoning was provided as to why the strength of its reputation in the easyJet trade mark, which related to an airline, could be used to benefit the retail of cosmetics. EasyGroup's best argument related to the assertion that the formation of a link allowed for Beauty Perfectionists to "trade on the trust that people have in the easy family of brands", however, no evidence of this was provided.

As a result, the infringement claim failed in its entirety. Therefore, the court did not deem it necessary to consider Beauty Perfectionists' defence that the signs complained of were descriptive and non-distinctive.

Author:

Sophie Rann



D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

UKIPO practice update

Tribunal Practice Notice 1/2024 UKIPO tightens the reins on trade mark limitations

In response to an increase in problematic limitation requests, the UK Intellectual Property Office (UKIPO) has issued Tribunal Practice Notice 1/2024, providing guidelines for filing such requests.

Ensure limitations are clear and precise

Limitations that involve multiple layers of restrictions are likely to be deemed unclear. Similarly, the use of vague language may be considered imprecise.

Focus on sub-categories, not characteristics

Limitations should clearly define sub-categories of goods and services, rather than their qualities, traits, or marketing methods, as these will be viewed as characteristics.

Maintain consistency within the specification

Limitations must be logical and consistent with the existing terms of the specification. Any contradictions may lead to refusal.

Additional guidance

Timely responses are crucial: submitting a limitation request is not the same as filing a defence. If you are facing a statutory deadline ensure it is met while proceedings are still ongoing.

Rejected limitations: if your limitation request is rejected do not expect the UKIPO to provide alternative wording.

Suspensions of proceedings: if you need time to develop new wording the UKIPO may agree to suspend contentious proceedings for a limited period. Suspension requests that include evidence of efforts to resolve the objection are more favourably considered.

Comment

While the Tribunal Practice Notice does not introduce novel concepts, it is a timely reminder that limitation requests should be sensible and logical.

The UKIPO will likely now be scrutinising limitation requests more rigorously in line with this guidance, with general limitations placed at the end of specifications, for example, now being closely examined against each term.

And if you're not working with the other side in seeking a workable resolution? Don't count on the UKIPO to hit the pause button. It is likely to be less generous with suspensions if collaboration is lacking.

Author:

Bonnie Brooks



Useful link

UKIPO Tribunal Practice Notice 1/2024 of 17 July 2024:

dycip.com/tpn-1-2024-jul24

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Contributors

Trade Mark Assistant

Bonnie Brooks
bab@dyoung.com
www.dyoung.com/bonniebrooks



Partner, Trade Mark Attorney

Richard Burton
rpb@dyoung.com
www.dyoung.com/richardburton



Senior Associate, Solicitor

Peter Byrd
pdb@dyoung.com
www.dyoung.com/peterbyrd



Partner, Rechtsanwältin

Gabriele Engels
gae@dyoung.com
www.dyoung.com/gabrieleengels



Legal Manager

Laurie Ford
lcf@dyoung.com
www.dyoung.com/laurieford



Solicitor

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



Associate, Trade Mark Attorney

Rachel Pellatt
rjp@dyoung.com
www.dyoung.com/rachelpellatt



Trade Mark Assistant

Sophie Rann
sar@dyoung.com
www.dyoung.com/sophierann



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Contact details

London
Munich
Southampton

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

mail@dyoung.com
www.dyoung.com