

# Bird & Bird & Reports of Trade Mark Cases for CIPA Journal

April 2020



# Trade mark decisions

## Decisions of the General Court (GC) and Court of Justice (CJ)

Ref no.	Application (and where applicable, earlier mark)	Comment
GC <b>T-658/18</b> <i>Hästens Sängar AB v EUIPO</i>  3 December 2019 Reg 2017/1001  Reported by: <i>Adeena Wells</i>	 <ul style="list-style-type: none"><li>- furniture, including beds, bed frames and bedroom furniture; mattresses, spring mattresses, overlay mattress; pillows and down pillows (20)</li><li>- woven textiles, textile products, not included in other classes; bed linen; down quilts (24)</li><li>- clothing; footwear; headgear (25)</li><li>- marketing, commercial information related to furniture, home furnishings and interior decoration products, textile products, bed linen, bed covers, clothing, footwear and headgear and toys (35)</li></ul>	The GC upheld the BoA's decision that the mark was devoid of distinctive character under article 7(1)(b).  The GC confirmed the BoA's finding that the mark applied for was a representation of a fabric pattern which could have been placed on the surface of all of the goods covered by the application, meaning that the relevant public would have perceived the mark as an attractive design feature rather than as an indicator of commercial origin.  The GC agreed with the BoA that the mark did not differ significantly from the norms and customs of the textiles sector because the colours served only an aesthetic purpose and the representation of squares were commonplace.
GC <b>T-44/19</b> <i>Globalia Corporación Empresarial SA v EUIPO; Touring Club Italiano</i>  5 February 2020 Reg 2017/1001  Reported by: <i>Mark Day</i>	  <b>TOURING CLUB ITALIANO</b> <ul style="list-style-type: none"><li>- travel agency (39)</li></ul>    <b>(Earlier EUTM)</b>  <b>(Earlier Mark as used)</b>	The GC upheld the BoA's decision that there was a likelihood of confusion under article 8(1)(b).  The BoA had been correct to find that the figurative elements of the mark used did not alter the distinctive character of the earlier mark. Therefore, the evidence submitted featuring the figurative mark was sufficient to prove use of the earlier mark.  The BoA had been justified in focusing its assessment on the perception of the Italian part of the relevant public. However, it had been wrong to hold that that public had a higher than average degree of attention when purchasing travel services. This finding was inconsistent with earlier decisions of the Court that held that the public had an average level of attention with regard to those services.  The GC upheld the decision that there was a likelihood of confusion. A public that displayed a lower level of attention was more prone to confusion than a public displaying a higher level of attention.

Ref no.	Application (and where applicable, earlier mark)	Comment
GC <b>T-387/18</b> <i>Delta-Sport Handelskontor GmbH v EUIPO; Delta Enterprise Corp</i> 13 February 2020 Reg 2017/1001	 <ul style="list-style-type: none"> <li>- furniture, mirrors, picture frames; goods, not included in other classes, of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-pearl, meerschaum and substitutes for all these materials, or of plastics, namely flower stands, baskets, tables (20)</li> <li>- games and playthings (28)</li> </ul>  <ul style="list-style-type: none"> <li>- baby strollers and baby carriages, children's car seats (12)</li> <li>- children's easels (16)</li> <li>- mirrors; furniture toy boxes; toy chests; mattresses for cribs and cradles; crib bumpers (20)</li> <li>- vinyl place mats and cloth wash cloths; pillow cases (24)</li> </ul> <p><b>COLCHON DELTA</b></p> <ul style="list-style-type: none"> <li>- mattresses and pillows (20)</li> </ul> <p><b>(EUTM and Spanish mark)</b></p>	<p>The GC upheld the BoA's decision that there was a likelihood of confusion under article 8(1)(b).</p> <p>The GC held that the BoA had been correct in finding that the goods applied for were identical or similar to certain of the goods protected by the earlier marks. The BoA had also been correct to find similarity between the marks at issue because they all contained the inherently distinctive word element 'delta'. The additional elements did not preclude a finding of similarity. The GC found that the BoA had erred in finding an average degree of phonetic similarity between the mark applied for and the earlier Spanish mark. The GC found the phonetic similarity to be weak. However, the overall finding that there was a likelihood of conclusion was not affected.</p>

Ref no.	Application (and where applicable, earlier mark)	Comment
GC <b>T-80/19</b> <i>Dekoback GmbH v EUIPO; DecoPac, Inc.</i> 5 March 2020 Regulation 207/2009	<p><b>DECOPAC</b></p> <ul style="list-style-type: none"> <li>- edible and inedible decorations for cakes and pastries (30)</li> </ul>	<p>The GC upheld the BoA's decision not to revoke the mark in its entirety for lack of genuine use pursuant to article 51(1)(a). The GC rejected the argument that applicant's right to be heard was infringed. The confidential evidence had been notified to the applicant in its entirety, and the applicant had not specified which passages of the contested decision the complaint related to or explained in what way that confidential treatment was detrimental to it. Further, while the applicant did not have the opportunity to reply to certain observations, it had not shown that, if it had been given an opportunity to make observations in response, it would have been better able to have influenced the BoA's final assessment.</p> <p>The GC also upheld the BoA's decision that genuine use of the mark had been proven in connection with the goods. It was sufficient that the 'outward use' of the mark was aimed at professional users, not just end consumers.</p>

Ref no.	Application (and where applicable, earlier mark)	Comment
GC  <b>T-296/19</b> <i>Sumol + Compal Marcas, SA ("Sumol + Compal") v EUIPO; Heretat Mont-Rubi, SA ("Heretat Mont-Rubi")</i>  12 March 2020 Reg 2017/1001  <b>Reported by:</b> <i>Theo Cooper</i>	<p><b>SUMO11</b></p> <ul style="list-style-type: none"> <li>- business management in the food industry and beverages; retailing of foodstuffs; procurement, for others, of foodstuffs; e-commerce services, namely providing of information about foodstuffs and beverages via telecommunications networks for advertising and sales purposes; sales promotion (35)</li> <li>- arranging and conducting of tours, routes, excursions and visits for tourists, in particular relating to gastronomy and cultural and architectural heritage; tour guide services; escorting of travellers and sightseeing (tourism); tour reservation services; packaging and packing of beverages (39)</li> </ul>  <ul style="list-style-type: none"> <li>- beverages based on chocolate, cocoa, coffee, tea, coffee substitutes and other cereals (30)</li> <li>- non-alcoholic drinks; beers; soft drinks; syrups for beverages, concentrates, powders and other preparations for making beverages (32)</li> <li>- alcoholic beverages (except beer); alcoholic beverages containing fruit juices (33)</li> </ul> <p><b>SUMOL</b></p> <ul style="list-style-type: none"> <li>- non-alcoholic drinks and fruit juices (32)</li> </ul> <p><b>(EUTM and Portuguese mark)</b></p>	<p>The GC upheld the BoA's decision that the services remaining in the contested application were not similar to the goods covered by the earlier mark, so there was no likelihood of confusion under article 8(1)(b).</p> <p>The GC noted that the services applied for were not all specifically related to beverages, and where they did relate to beverages, Sumol + Compal had failed to establish that the contested services were complementary to, in the sense that they were indispensable or important for the use of, the goods covered by the earlier marks or vice versa.</p> <p>In addition, the GC held that it was irrelevant that Heretat Mont-Rubi operated exclusively in the wine sector, as the comparison of the goods and services had to be based on the list of services covered by the application, rather than the goods and services actually marketed or intended to be marketed under the mark.</p>

Ref no.	Application (and where applicable, earlier mark)	Comment
GC  <b>T-312/19</b> <i>Wilhelm Sihl jr. GmbH &amp; Co. KG v EUIPO; Golden Frog GmbH</i>  26 March 2020 Reg 2017/1001  <b>Reported by:</b> <i>Bryony Gold</i>	<p><b>CHAMELEON</b></p> <ul style="list-style-type: none"> <li>- computer software for VPNs (virtual private networks); computer programs for enabling access to, and to protect the security of, computer networks; none of the aforesaid being for the purpose of cable television transmitters or receivers, head ends for cable networks, television receivers, decoders or signal amplifiers or analogue converters (9)</li> <li>- VPN services; information transmission services via digital networks; electronic transmission of encrypted data, information and communications; none of the</li> </ul>	<p>The GC upheld the BoA's decision that the goods and services at issue were dissimilar so there was no likelihood of confusion between the marks under article 8(1)(b).</p> <p>The GC held that the goods covered by the earlier mark did not include software which was necessary for the use of 'head ends for cable networks'. In particular, such software did not fall under 'parts' or 'accessories'.</p> <p>While 'head ends for cable networks' could be used to establish a VPN, they were not indispensable in order to establish such a network, so the goods</p>

aforesaid relating to cable television or satellite television broadcasting or transmission services (38)

#### CHAMELEON

- head ends for cable networks, namely apparatus for receiving, processing, converting, amplifying and transmitting signals; parts and accessories for the aforesaid goods, as far as included in this class (9)

#### (German mark and EUTM designation)

and services were not complementary. The GC also held that the relevant publics for the goods and services were different. Insofar as these publics could overlap, namely if companies that operated cable networks also wanted to provide their employees or members secure remote access to their private networks, the GC considered that this would be a specialised public which would understand that the goods and services came from different undertakings.

Ref no.	Application (and where applicable, earlier mark)	Comment
GC <b>T-653/18</b> <b>T-654/18</b>		<p>The GC upheld the BoA's decisions that there was a likelihood of confusion between the marks under article 8(1)(b).</p> <p>The GC held that the registration of the term 'retail sales services' covered by the earlier mark was not vague, and covered the retail sale of any goods. In particular it included 'retail sales services in relation to handbags, purses and wallets made from leather, ready-made clothing and footwear' for which proof of genuine use had been furnished.</p>
26 March 2020 Reg 2017/1001	<ul style="list-style-type: none"> <li>- handbags; travel baggage; wallets; leather document briefcases; cosmetic bags; backpacks; athletics bags; cases and boxes made of leather (18)</li> <li>- various clothing; footwear; hats and caps (25)</li> </ul>	<p>The GC upheld the BoA's finding that the goods in classes 18 and 25 of the marks applied for were important for the provision of retail sales services in class 35, such that the goods and services were complementary.</p> <p>In both cases the GC found that the 'le sac' element was the most important to the overall impression created by the mark applied for. Due to the coincidence of the 'le sac' word element in each mark, the GC upheld the BoA's finding that the two marks were visually and phonetically similar to an average degree for the first mark and visually similar to an above average degree, and phonetically similar to a high degree for the second mark.</p> <p>The BoA had been correct to find they were not conceptually similar since they had no meaning to the relevant public, being the Spanish public.</p>
<b>Reported by:</b> <i>Katie Tyndall</i>	 <ul style="list-style-type: none"> <li>- retail sales services (35)</li> </ul> <p><b>(Spanish mark)</b></p>	

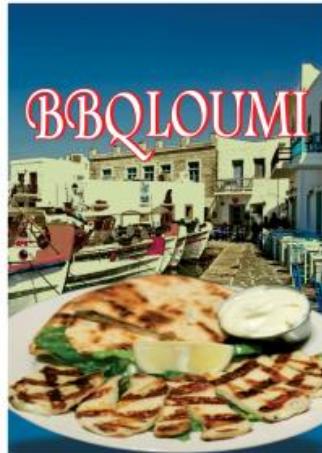
## Global assessment considerations for geographical collective trade marks

### *Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi (the "Foundation") v EUIPO (CJ; C-766/18 P; 05 March 2020)*

*The CJEU held that the GC failed to examine whether the low degree of similarity between the marks could be offset by the higher degree of similarity between the goods. As a result, the CJEU set aside the GC's judgment and referred it back to the GC to carry out a proper 'global assessment' of the likelihood of confusion. Robert Milligan reports.*

## Background

The Bulgarian based company, M. J. Dairies EOOD, filed an EUTM application to register a figurative mark containing the word element "BBQLOUMI" (as depicted below) for 'dairy products, cheeses, sandwiches and restaurant services' in classes 29, 30 and 43.



At the time of filing this application, the procedure to obtain a Protected Designation of Origin for Cyprus' 'halloumi' cheese had not been completed; and it presently remains unresolved. As a result, when the Foundation filed a notice of opposition against this application it had to rely on its EU collective mark registration for HALLOUMI for 'cheese' goods in class 29 instead.

The Foundation's opposition was brought on the grounds of articles 8(1)(b) and 8(5). After the opposition was rejected by the Opposition Division, the Foundation unsuccessfully appealed to the BoA and GC. The BoA and GC rejected the appeals on the basis that there was no likelihood of confusion because the distinctive character of the EUTM registration for HALLOUMI was low (as it merely described a well-known Cypriot cheese) and there was only a low degree of visual similarity between the marks.

## Decision

Endorsing the opinion of the AG (reported in *CIPA Journal*, January 2020), the CJEU held that, even if the mark HALLOUMI implicitly referred to the Cypriot geographical origin of the goods, a geographical collective trade mark still had to fulfil its essential function, namely, to distinguish the collective commercial origin of goods and services from those of other undertakings.

The CJEU agreed with the GC and AG in finding that the mark HALLOUMI was of weak distinctive character as it was restricted to a particular product (i.e. a type of cheese produced according to a specific recipe), and that the marks were similar to a low degree.

However, the CJEU held that the GC erred in failing to examine whether the low degree of similarity between the marks could be offset by the higher degree of similarity between the goods applied for and those covered by the Foundation's registration. As a result, the CJEU set aside the GC's judgment and referred it back to the GC to carry out a proper 'global assessment' of the likelihood of confusion.

(\*Correction\* Please note that the report of the AG's opinion in the January *CIPA journal* erroneously referred, in some instances, to the AG's opinion as that of the CJEU.)

## Distinguishing the three stages for the application of article 8(1)(b)

### **EUIPO v Equivalenza Manufactory SL ("Equivalenza") (CJ; C-328/18 P; 4 March 2020)**

*The CJEU concluded that the GC had erred in its application of article 8(1)(b) by taking into account the marketing circumstances of the goods as part of the comparison of the marks and not carrying out a global assessment of the likelihood of confusion. Ciara Hughes reports.*

Equivalenza applied to register the figurative sign below at the EUIPO for 'perfumery' in class 3.



ITM Enterprises opposed Equivalenza's application on the grounds of a likelihood of confusion under article 8(1)(b), based, *inter alia*, on an international registration, designating various EU member states, for the earlier figurative mark below covering identical goods in class 3.



The EUIPO upheld the opposition in full based on a likelihood of confusion on the part of the relevant public in the Czech Republic, Hungary, Poland and Slovenia. The BoA rejected Equivalenza's appeal. The BoA considered that the signs had an average degree of visual and aural similarity although they were conceptually dissimilar. Given the identity of the goods and similarity between the marks, the BoA concluded that there was a likelihood of confusion.

The GC overturned the BoA's decision. Whilst agreeing that the signs had an average degree of aural similarity and were conceptually different, the GC held that the signs conveyed different overall visual impressions, due to the additional words 'black' and the 'by equivalenza' element in the mark applied for. The GC concluded that the signs were not similar, based on their visual and conceptual differences and considering the circumstances in which the goods in question were marketed. Given that the first of the cumulative conditions for the application of article 8(1)(b) was not satisfied, the GC held that the BoA had erred in finding that there was a likelihood of confusion.

#### **The EUIPO's appeal to the CJEU**

The CJEU observed that in confirming the BoA's finding that the signs had the five letters 'l', 'a', 'b', 'e' and 'l' in common and that the 'black label' and 'labell' elements of each sign were both written in white capital letters, the GC implied that the signs were at least similar to a low degree. Therefore, by finding that the signs conveyed different overall visual impressions, despite those similarities, and ruling out any finding of similarity, the GC vitiated its assessment by contradictory reasoning.

Acknowledging the divergence in the case-law on whether it was possible to take account of marketing circumstances at the stage of comparing the signs, as expounded in AG Saugmandsgaard Øe's opinion (reported in *CIPA Journal* January 2020), the CJEU emphasised that although marketing circumstances were a relevant factor in the application of article 8(1)(b) they should be taken into account as part of the global assessment of the likelihood of confusion and not at the stage of assessing the similarity of the signs. Accordingly the GC erred in law by taking into account the marketing circumstances at the stage of comparing the signs and by attaching greater importance, as a result, to the visual differences between the signs over their phonetic similarity.

Further, the CJEU noted that it was possible for conceptual differences to counteract phonetic and visual similarities and that the assessment of the conditions of such a counteraction formed part of the assessment of the similarity of the signs rather than the global assessment of the likelihood of confusion. However, such a counteraction was only possible if at least one of the signs at issue had a clear and specific meaning which could be grasped immediately by the relevant public. The global assessment of the likelihood of confusion could therefore only be dispensed with if the resulting conceptual difference between the signs produced a different overall impression despite the existence of any visual and aural similarities.

Proceeding to give final judgment on the matter, the CJEU upheld the BoA's findings that the signs were visually and aurally similar to an average degree and that the signs were conceptually different. Based on the identity of the goods at issue, the average degree of distinctiveness of the earlier mark and the average degree

of attention of the relevant public, the CJEU held that the BoA was correct to conclude that there was a likelihood of confusion between the signs.

## Subcategories within a trade mark classification

### **ACTC GmBH ("ACTC") v EUIPO (Opinion of AG Sharpston; C-714/18 P; 10 December 2019)**

*AG Sharpston was of the view that the intended use and purpose of goods should be considered when defining independent subcategories within a trade mark classification, thus providing clarification on the rules in the context of whether an earlier mark had been put to genuine use. Jonathan Edwards reports.*

#### **Background**

ACTC sought to register TIGHA in relation to clothing in class 25. Taiga AB, the proprietor of the earlier mark, TAIGA, registered for clothing in class 25, opposed ACTC's application. The GC upheld the BoA's decision that Taiga had provided sufficient evidence to prove genuine use of its earlier mark and found there to be a likelihood of confusion under article 8(1)(b). ACTC appealed to the CJEU.

#### **Subcategories of goods within a trade mark classification**

AG Sharpston confirmed the rules for defining a subcategory of goods or services as those set out in *Reckitt Benckiser (España) v OHIM (T-126/03)* and *Mundipharma v OHIM (T-256/04)*.

When assessing whether an earlier mark had been put to genuine use for the purposes of article 42(2), it was possible that there could have been use in relation to distinct subcategories of goods within a trade mark classification. The GC had identified two situations.

Firstly, where an earlier mark had been registered for goods or services defined precisely and narrowly forming a homogenous category, the GC considered that it was not possible to make any further subdivisions. The AG agreed: it was justified and adequate to prove genuine use of the mark in relation to a part of the goods in such a category. This approach would protect the commercial interests of the proprietor of the earlier mark by not unduly limiting his exclusive rights to extend his range of goods within that homogenous category by requiring excessive proof of genuine use.

Secondly, the position was different where an earlier mark had been registered for a broad heterogeneous category of goods or services. In such circumstances, it would be possible to identify a number of subcategories capable of being viewed independently provided that those subcategories were coherent. Thus, as the GC pointed out, proof of use of the mark had to be provided in relation to each subcategory. Again the AG agreed: not only would there be a lower risk of confusion, but also less justification for protecting the commercial interests of the proprietor of the earlier mark. This approach would ensure that a mark was available for other goods or services on the basis that they were 'sufficiently distinct' and fell within another subcategory.

When deciding whether a distinct subcategory existed, the AG also agreed with the GC. The intended use or purpose of the goods was the key criterion; other criteria such as the nature and characteristics of the product, the target market and its distribution chain were irrelevant. Taking consideration of such criteria in addition to the intended purpose would be too limiting on the material scope of the right of the proprietor of the earlier mark, in particular the right to develop and extend the range of goods for which the mark was registered.

Taiga AB had proved genuine use of the earlier mark in relation to weatherproof clothing and those goods were not, in essence, different to goods in the more general category of clothing. Therefore, the AG proposed that the CJEU reject this ground of appeal. Further, the GC had been right not to distinguish between the uses consisting of 'protecting' the human body, 'adorning' it, or 'concealing' it and 'covering' it. Far from being mutually exclusive, those different uses were combined for the purpose of putting clothing goods on the market. Finally, it was right not to consider that weatherproof clothing was sold in different outlets to some other clothing. Distribution chains were not, as a general rule, relevant for defining subcategories of goods.

#### **Likelihood of confusion**

ACTC maintained that the GC had wrongly concluded that there was a likelihood of confusion between the marks. In particular, ACTC criticised the GC's analysis in which it concluded that the conceptual differences

between the mark applied for and the earlier mark had not been established in the territory of the EU as a whole, so that they could not offset the visual and phonetic similarities between the marks.

When determining whether a conceptual association of an earlier mark was capable of offsetting visual and phonetic similarities with another mark, the AG opined that the meaning of a word had to be assessed with regard to the way in which it was understood by the relevant public as a whole, and not limited only to those in one part of the relevant territory.

The AG agreed with the decision in the PANINI case (*Eckes-Granini v OHIM* (T-487/12)), where the GC found that it was not sufficient to establish a conceptual association where only one section of the relevant public, such as those in two or three member states, would make such a connection with the term in question.

The term "taiga" was known by some consumers in the northern and eastern parts of the EU as a boreal forest. The AG considered that consumers in southern and western states would not make the same connection. The AG agreed with the GC's application of the PANINI case, opining that the meaning of the term "taiga", as a boreal forest, could not be used to offset the visual and phonetic similarities between the marks.

## Trade mark infringement

**Red Bull GmbH v Big Horn UK Ltd & Ots\*** (Kelyn Bacon QC; [2020] EWHC 124 (Ch); 30 January 2020)

Kelyn Bacon QC (sitting as a Deputy Judge of the High Court) found that the use by Big Horn of the disputed signs infringed Red Bull's marks under article 9(2)(c). Hilary Atherton reports.

Red Bull was the owner of various EU trade marks registered in class 32 and used on, in particular, energy drinks, bottled water and other non-alcoholic beverages. It brought proceedings against Big Horn and its director, Mr Lyubomir Enchev, for infringement of three of its marks by using signs similar to the Red Bull marks on energy drinks and bottled water. It was not disputed that Big Horn had imported and sold Big Horn energy drinks in the UK. The relevant Red Bull marks and the allegedly infringing signs are shown below:

EU Trade Mark No. and Class	Mark and description	Disputed Big Horn signs
3629342 Class 32: Non- alcoholic beverages including energy drinks	Double Bull	  
52746 Class 32: Non- alcoholic drinks	Blue/Silver Parallelogram with Sun Device	 
1564301 Class 32: Non- alcoholic drinks, in particular refreshment drinks, energy drinks	Single Bull	 

### Article 9(2)(c)

The Deputy Judge found that the use of the Big Horn signs infringed Red Bull's marks under article 9(2)(c). She considered that Big Horn's double ram sign was visually and conceptually similar to the Red Bull double

bull mark because both signs contained two silhouetted hoofed and horned aggressive animals, charging, in combat; the positions of the animals' legs were similar; and both were captured just before the moment of impact. In both cases the animals were depicted as charging in front of a background of a circle which would be understood as a sun. The Deputy Judge also found that there was visual and conceptual similarity between Big Horn's blue/silver geometric device and Red Bull's blue/silver parallelogram device, and between the parties' single animal devices.

It was not disputed that the Red Bull marks had a global reputation, were highly distinctive, and that the Big Horn signs were being used for precisely the same products as those for which the Red Bull marks were registered and sold. The Big Horn product was sold in cans of identical shape and size to Red Bull cans and through the same retail outlets. Indeed, Big Horn's Facebook advertising had included numerous pictures of Big Horn cans placed directly next to Red Bull products in retail outlets. On this basis the Deputy Judge found that the Big Horn signs would be likely to cause the average consumer to link those signs with the Red Bull trade marks, and that the use by Big Horn of those signs took unfair advantage of the distinctive character and reputation of Red Bull's marks. She was of the view that it was quite evident that Big Horn's signs had been designed so as to enable Big Horn to free-ride on the reputation of Red Bull, and to benefit from the very considerable marketing efforts of Red Bull to create a particular image associated with its trade marks.

#### **Article 9(2)(b)**

In the circumstances, it was not necessary for the Deputy Judge to consider whether there was also infringement under article 9(2)(b). Had it been necessary to consider that issue, however, the Deputy Judge said that she would not have been persuaded that the Big Horn signs gave rise to a likelihood of confusion on the part of the average consumer.

#### **Joint tortfeasorship**

The Deputy Judge went on to find that Mr Enchev was jointly liable with Big Horn for infringement of Red Bull's marks. She found that there was no doubt that his actions met the test set out in *Fish & Fish v Sea Shepherd* [2015] UKSC 10 as he not only assisted with but entirely controlled Big Horn's actions in importing, marketing and advertising the infringing products.

The reported cases marked \* can be found at <http://www.bailii.org> and the CJ and GC decisions can be found at [http://curia.europa.eu/jcms/jcms/j\\_6/hom](http://curia.europa.eu/jcms/jcms/j_6/hom)

# Editorial team

**Katharine Stephens**

**Partner, IP**

Tel: +44 020 7415 6104  
katharine.stephens@twobirds.com



**Thomas Pugh**

**Associate, IP**

Tel: +44 020 3017 6873  
thomas.pugh@twobirds.com



**Aaron Hetherington**

**Trainee Trademark Attorney**

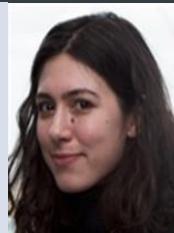
Tel: +44 207 415 6183  
aaron.hetherington@twobirds.com



**Ciara Hughes**

**Trainee Trademark Attorney**

Tel: +44 207 415 6193  
ciara.hughes@twobirds.com



## Reporters

*Adeena Wells; Bryony Gold; Daniel Anti; Hilary Atherton; Jonathan Edwards; Katie Tyndall; Mark Day; Robert Milligan; Theo Cooper; William Wortley.*

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