

ISSUE 01 | SUMMER 2020

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The more limited you are, the more creative you have to be. Lockdown has certainly brought constraints. However disruption, strategy, collaboration and innovation have combined to create our new Boultbites. Enjoy.

Covid-19 may still be a major issue, but we love a challenge and it's business as usual for the firm. Many of you will have read **CITMA's article** reporting that last year UK trade mark registrations increased by 16.7%. Interestingly, since the UK's lockdown we have been fortunate not to see a decline in TM matters and in fact we may even be seeing a continuation of last year's upward trend. We have adapted and are learning to live in this increasingly digital world with remote working. Part of this managed change has been to embrace **webinars** instead of our usual seminars, round tables and presentations. They have been a roaring success and I wholeheartedly recommend you catch up on those you have missed. We are all looking for a welcome distraction during this stressful time, so, turn the mobile to vibrate, close the laptop, sit back with a cuppa and enjoy our revamped Boultbites TM. We are pleased with the changes to the newsletter and would welcome your feedback, good or bad! – events@boults.com

John Wallace
Head of Trade Mark and
Domain Names practice

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Opinion

Trade Marks in a post Covid-19 world



The lockdown and associated restrictions imposed since March have forced many companies to adapt their product ranges, to delay product launch, and, in some cases, to unfortunately close their businesses. As we begin to ease out of lockdown in the UK and Europe, it will be interesting to see which businesses have survived, and how those businesses emerge into a COVID-19 world. This article considers the implications of COVID-19 on business restraints and adaptations in the context of trade mark use.

What adaptations have businesses made?

When grocery stores ran low on supplies or it was considered unsafe to physically shop in brick-and-mortar-stores, customers looked to companies like Crosstown Doughnuts to deliver food boxes containing essential items such as bread, milk and vegetables (and also the “essential” sweet treat: doughnuts!). Secret Cinema became Secret Sofa, offering an at-home immersive cinema experience via streaming, billing itself as “virtually the best film club in the world” and pairing up with Häagen-Dazs ice cream to offer an ice cream flavour of the week (sweet treats seem to be a running theme here). As customers were unable to visit a Patty&Bun restaurant, a “lockdown burger kit” became available to make one at home. On a more serious note, Dyson began making ventilators for the NHS.

However, sadly, some businesses were unable to stay open or adapt, and some high street stalwarts went into administration. Other businesses, such as hairdressers, spas and beauty salons are likely to remain closed for some time due to the difficulties around reopening posed by social distancing.

Non-use claims

If you aren’t able to trade, then you probably aren’t using your trade marks. In the UK and at the EUIPO, a mark may be removed from the register if it has not been put to use in the five years after registration, or for any uninterrupted period of five years, and there are no proper reasons for non-use (Section 46(1)(a)(b) of the Trade Marks Act 1994 and Article 58(1)(a) of the European Union Trade Mark Regulations (EU) 2017/1001).

What happens if you registered your trade mark some time ago, and you were prevented from launching this brand because of lockdown?

Or, what if your business was closed down as it was not deemed to be an “essential” business and you anticipate it taking some time for it to get back up and running again?

As a result of government restrictions, problems may arise in the development, manufacture, approval, supply, and marketing of goods and delivery of services. So what happens if someone challenges your registration for non-use, and the period they cite includes that affected by lockdown?

Firstly, this can only happen to UK and EUTM registrations that are **older than five years**. If you have a registration in the UK or EU that is younger than five years, then you do not need to show use yet, if challenged. Secondly, an **uninterrupted** period of five years is needed to be successful. Therefore, at this point in time, the risks are greatest for businesses right at the end of the five-year period, who have not yet launched the brand the subject of their trade mark registration. It could

If your business is fortunate enough to have stayed open during the pandemic due to an adapted business model, then you may now offer a different service or sell different goods under an existing brand.

become an issue for other traders in the future if a recession occurs, as this may stifle commercial trading further. Also, during recessions, stronger companies often buy up their prior competitors to bolster their position as market leader, and this may mean that rights acquired by these third parties may not have been used. However, resumption of use by the new company would cure the potential non-use, as long as the third party was not on notice of another party's intention to file a non-use action.

If you do therefore find yourself in a situation where you are vulnerable to attack, would the lockdown period and complications arising out of the resumption of business count as a proper reason for non-use?

Whilst there are no exhaustive lists of reasons one can rely on to claim proper reasons for non-use, case law suggests that non-use can be excused where there are reasons outside of the trade mark owner's control. In order to rely on the lockdown and/or any period after it, trade mark owners will need to provide evidence that COVID-19 complications prevented use of their trade mark. We would recommend documenting issues in order to evidence the obstacles to use in the future if necessary. It is unlikely that a sustained period of non-use once we go back to "normal" will be considered as justifiable, so we would recommend launching or recommencing use as soon as possible. However, every case is unique and it will be interesting to see if anyone relies upon this defence in the future.

New uses of existing trade marks

If your business is fortunate enough to have stayed open during the pandemic due to an adapted business model, then you may now offer a different service or sell different goods under an existing brand.

If you are planning on maintaining this adapted business model, then this can pose issues for non-use if the trade mark is no longer used for the goods and services you have covered by your registration.

Further, it is important to ensure that if use has changed significantly you are adequately covered by any trade mark protection you have in place. We would also recommend considering additional searches to ensure that you are not infringing third parties and/or able to continue with the amended use.



Author: Naomi Jenkins, Trade Mark Attorney

Headline articles

Case in question

The border between 3d shape trade marks and designs

3D shapes are protectable both as trade marks and registered designs, provided the usual requirements for each kind of protection are met. However, it can be difficult to understand the border between 3-D trade marks and designs.

The EUIPO Cancellation Decision No. 20063C Skullduggery Rum Limited ("Skulduggery") against Globefill Incorporated helps us understand this.

Skulduggery filed an application for a declaration of invalidity against EUTM no. 15736 622 for a 3D shape mark consisting of a skull-shaped bottle in the name of Globefill Incorporated. Skullduggery considered that the EUTM should be revoked because

it consists exclusively of the shape, or another characteristic, which gives substantial value to the goods (Article 7(1)(e)(iii) EUTMR).

In deciding the case, the Cancellation Division considered a leading case on the application of Article 7(1)(e)(iii): the judgment of 06/10/2011, T-508/08, Loudspeaker, EU:T:2011:575. The case suggests that the following questions need to be answered in the affirmative when deciding whether an EUTM falls foul of Article 7(1)(e)(iii):

- Is the design of the EUTM a very important element in the consumers' choice?
- Is the EUTM's design very specific?
- Is the design of the EUTM an essential element of the branding policy of the proprietor and does this increase the appeal (the value) of the product?
- Are the aesthetic qualities of the EUTM emphasised first by the proprietor when promoting its product?
- Is the EUTM perceived as a pure and timeless sculpture?



Author: Dr. Isabel Blanco, PhD and Lawyer

Headline articles



Brexit news

Brexit talks hit the headlines but it remains business as usual at Boulton Wade Tennant

With Brexit talks once again in the news, it remains business as usual at Boulton Wade Tennant, with the intellectual property (IP) position staying unchanged. In this regard, the UK remains in a transition period until 31 December 2020 and nothing will change in relation to all IP until this date.

EU trade marks (EUTMs) and International trade marks designating the EU that have registered before 31 December 2020 will be cloned onto the UK Register through the creation of "comparable rights" at the UKIPO. There will be no official fees or additional charges. Thus, any cloned UK rights will retain the same filing and priority dates as the EUTMs, but will exist as independent UK trade marks following the end of the transition period.

For any EUTM applications, or EU designations of International Registrations, which have not yet registered and are still pending on 31 December 2020, their owners will have a nine-month "special priority period", if they wish to file a UK trade mark application as-of that earlier EUTM's date. Despite the UK no longer being a Member of the EU, we can assure our new and existing clients that instructions will be carried out before the EUIPO as normal. Further information regarding the implications of Brexit can be found on our [website](#) and our recent [webinar](#).



Author: Emily Scott, Trade Mark Attorney



Brand trends

Bentley: A lost game of "Grandmother's footsteps"

Bentley Motors (the famous car company) has lost a UK High Court trade mark battle with a Manchester-based family-run clothing business, Bentley Clothing.

Bentley Clothing was established in 1962. The issue in this case arose from clothing merchandise manufactured and sold by Bentley Motors since 1987.

In finding Bentley Motors liable for trade mark infringement, Judge Hacon spoke of their "steady encroachment" on the trade mark rights of the clothing firm, stamping down on what was deemed an attempt to "extinguish" the IP rights of a much smaller business.

The ruling provides important lessons.

Background

Bentley Motors had tried, unsuccessfully, to cancel Bentley Clothing's UK registrations in Class 25, being a mix of the plain word BENTLEY and stylised versions (example below), some registered since 1982.



Following this, Bentley Clothing commenced its High Court claim, alleging that Bentley Motors had infringed its marks by using a combination of the famous "B-in-Wings" symbol and the word "BENTLEY" (*the Combination Sign* seen below) on clothing.



Until October 1994, Bentley Motors had sold jackets, silk ties, caps and scarves under a range called "THE BENTLEY SELECTION". Judge Hacon ruled that this was use of the sign BENTLEY in the course of trade in clothing.

Judge Hacon described these actions as a “policy of ‘grandmother’s footsteps’”, in which Bentley Motors intended to gradually encroach onto Bentley Clothing.

However, at that time, Bentley Clothing only had marks registered in respect of “knitted clothing, shirts and waistcoats”. There was a lack of overlap under the UK’s 1938 Trade Mark Act.

Transitional provisions from the 1938 to 1994 Acts applied here: use of “THE BENTLEY SELECTION” for those specific goods was not an infringement.

Bentley Motors had, however, used its *Combination Sign* on clothing at large since 2000. So a different mark on a broader range of goods - and this time use fell under the 1994 Act.

Bentley Motors argued its *Combination Sign* was one mark that could not infringe Bentley Clothing’s earlier registrations under Section 10(1) – use of an identical sign on identical goods.

In any event, Bentley Clothing had also claimed infringement under Section 10(2) – use of a similar sign on similar or identical goods – however, the Court’s ruling on Section 10(1) is interesting.

Judge Hacon found that the *Combination Sign* was **two distinct signs** and there was no reason that consumers would not perceive it as two signs being used together as they had been used “extensively and separately for a long time”. Bentley Motors’ own fame came back to bite it: the fame of ‘Bentley’ meant that its *Combination Sign* could be divided into two marks.

Bentley Motors’ use of the *Combination Sign* was infringement under section 10(1) of the 1994 Act.

No usual defences were available to Bentley Motors. “Honest concurrent use” could not apply because the *Combination Sign* was not in use when Bentley Clothing originally filed its UK marks. There was no “honest use” because Bentley Motors had been aware of the clothing company as early as 1998, had expanded its clothing range since then, and continued to use its

Combination Sign after being unsuccessful in cancelling Bentley Clothing’s earlier marks.

Judge Hacon described these actions as a “policy of ‘grandmother’s footsteps’”, in which Bentley Motors intended to gradually encroach onto Bentley Clothing.

Where next?

Judge Hacon’s decision restricts Bentley Motors’ use of the word BENTLEY to clothing goods that they used prior to 1994: jackets, silk ties, caps and scarves. They cannot use BENTLEY on any other clothing and such goods bearing their *Combination Sign* will likely need to be destroyed.

The ruling reminds well-established brands not to assume that their fame, or registered rights, render them free to use their mark in other areas, if even the smallest of companies has already registered and is using a similar mark in that field. This is particularly important in relation to merchandising.

The decision also means that heavy-handedness or policies of “grandmother’s footsteps” encroachment into another company’s area of goods/service will, very likely, be strongly disciplined by the UK Courts.

It is also a reminder to companies of any size that they should keep an eye on what third parties and competitors are doing on trade mark registers. Trade mark watching services are so useful for this. Do ask your usual advisor about them.



Author: Luke Portnow, Trade Mark Attorney

Case study

EUTMs vs German Trade Marks: Which is the better choice in infringement proceedings?

In principle, EUTMs have the same effect in Germany as national trade marks, but some minor, potentially crucial details differ when it comes to enforcing these rights against a potential trade mark infringement before a German court.

The advantage of an EUTM is obvious: it's protected in all EU member states and a decision enjoining an infringement could be valid and enforceable in all member states. Conversely, national rights enjoy protection within the territory of the respective state only, such that 27 applications have to be filed, but also 27 judgements have to be reached to receive the same scope of protection. It, therefore, appears to be a "no brainer" that an EUTM is the smart bet in this scenario.

Filing an EUTM is also more cost efficient: the filing fee (EUR 850 in one class) covers 27 countries, while the DPMA's EUR 290 (in three classes) covers Germany only.

Under these circumstances, why would one even consider filing an additional German mark next to an EUTM?

Well, from a procedural point of view, there are certain strengths in a German mark over an EUTM when enforcing an infringement claim.

Incontestability of German marks ten years after registration

When it comes to infringement claims that are based on weak trade marks and invoking absolute grounds for refusal as a defence against them, a German mark becomes incontestable 10 years after registration, such that even descriptive trade marks cannot be attacked on absolute grounds. Registered EUTMs, however, may be cancelled at any point in time on absolute grounds.

EUTMs are vulnerable to counterattack before a German court by the filing of a counterclaim based on absolute grounds within the same proceeding.

Filing a counter claim against an infringement action based on an EUTM

Further, EUTMs are vulnerable to counterattack before a German court by the filing of a counterclaim based on absolute grounds within the same proceeding. Alternatively, an application for revocation or invalidity could be filed at the EUIPO. In both cases, the German court handling the infringement action will suspend the proceedings until the claim for cancellation has been decided.

This does not apply when the initial claim is based on a German mark. German courts are bound by the registration of a German mark and, therefore, it cannot be attacked by filing a counterclaim within infringement proceedings. Even if the party allegedly infringing a German mark files an application for cancellation with the DPMA, the German court concerned is very unlikely to suspend the proceedings, as this can only be done in cases where the invalidity of the trade mark subject to the cancellation action is obvious.

Hence, a party who receives a cease and desist letter regarding an infringement of an EUTM in Germany could immediately file an application for cancellation of that EUTM at the EUIPO at little cost while the sender of the letter awaits a reply. This could then substantially delay any decision in a potential infringement proceeding before the German court, as the infringement proceedings would be suspended while the cancellation action against the EUTM is pending. This does not, however, apply to interim injunctions; these could be granted irrespective of the pending cancellation action. Conversely, if the initial infringement claim is based on a German mark, no suspension

would apply, even if the trade mark which acts as the basis of the claim is under attack.

Additionally, when it comes to establishing the competent court, a German mark can be advantageous.

IRs based on German marks

German-based right holders may additionally find that a German mark is a better choice for an IR base than an EUTM. A German mark only faces challenge from older rights in one state instead of 27 during the first five years of dependency on the base registration. Also, the DPMA's handling fee for an IR application is only EUR 180 compared to EUR 300 at the EUIPO (which is a significant portion of the filing fee for the additional German mark).

Take home points

An EUTM is the most efficient choice if enforcing EU-wide infringement claims. For Germany, an additional German mark can be advantageous to avoid delay (or even loss of the mark) to the proceedings caused by counterattacks, in particular against weak trade marks.



Author: Alexander Stolz, German Solicitor

Case study

SkyKick – What you need to know

Background

Sky brought proceedings against SkyKick Inc., an IT company in the field of cloud migration software, alleging trade mark infringement and passing off in connection with SkyKick's use of SKY-formative marks.

Sky relied on a number of its earlier UK trade mark registrations for “SKY”, which covered far-ranging terms.

SkyKick counterclaimed that those registrations relied upon by Sky were invalidly registered on the grounds that (i) the specifications of goods and services lacked clarity and precision, and (ii) the applications were made in bad faith.

The UK High Court referred questions to the Court of Justice of the European Union, seeking guidance on those points counterclaimed by SkyKick. As a basic summary, the CJEU ruled:

- A trade mark cannot be cancelled (wholly or partially) on the ground that its specification terms lack clarity and/or precision.
- An applicant for a trade mark will only have acted in bad faith in this respect if their application was made with *“the intention either of undermining... the interests of third parties, or of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark.”*

What did the High Court do?

The Court held that Sky's registrations could not be invalid just because some of their goods/services terms either lacked clarity or precision.

The Court addressed SkyKick's counterclaim of “bad faith” and concluded that Sky had applied for its trade marks in bad faith in three ways:

1. the specifications covered goods and services for which Sky had no intention to use the Trade Marks at all;
2. Sky's specifications covered categories of goods and services so broad that it could not, and did not, intend to use the trade marks for the entire category of goods falling under those terms; and
3. the specifications were intended to cover all of the goods and services in relevant classes.

It was held that Sky *“had a strategy of seeking very broad protection of the Trade Marks regardless of whether it was commercially justified”*. This was deemed to be an intention to obtain an

Want more information about this case? Visit our website and read the bulletin

exclusive right for purposes other than those falling within the functions of a trade mark.

The Court looked to what a “fair specification” was for Sky.

This is important because SkyKick did not initially allege that Sky’s marks had been filed in bad faith in respect of the broad terms “computer software” and “telecommunications services” – just that they were unclear or imprecise.

Lord Justice Arnold amended the terms, so that they related to Sky’s business of provision of audiovideo content and related areas.

What does this mean?

Filing a trade mark application in the UK or EU claiming a ‘broad term’ such as “computer software” is not bad faith of itself.

A single broad term cannot simply be written-off because it covers a vast range of things or uses.

However, such broad terms might be amended by the Courts, if challenged in invalidity proceedings, to something focused on each trade mark proprietor’s actual commercial circumstances and activities.

What do we do now?

- Specification terms so obscure will be disregarded when trying to be enforced.

- Consider using specific terms as well as broad ones in the specifications of applications.
- If not, be prepared that if only a broad term is claimed, the Court may amend it for you and you will not be able to control this.
- Consider excluding very broad terms, to discourage third parties from challenging on bad faith, and possibly avoid potential oppositions by providing context in specifications on how the goods/services are to be used.
- Be careful when drafting specifications with futureproofing in mind – if challenged on bad faith, the Courts could look at the entire specification of a registration and determine whether everything claimed by the owner was commercially justifiable when considering what it may wish to offer under the mark in the future.

Did SkyKick win?

No. Even though the Court’s decision pared back certain terms in the specifications of Sky’s earlier registrations, they remain validly registered for terms such as “electronic mail services”, which the Court found SkyKick had infringed in relation to its email migration service.



Authors: Felicity Hide, Partner and Luke Portnow, Trade Mark Attorney

News from our German team

A new book to watch out for



In September 2020, C. H. Beck, a well-known publishing company in Germany, will release *Hildebrandt / Sosnitzer Unionsmarkenverordnung: UMV*, a commentary on regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark.

The book is written by internationally recognised practitioners and experts in the trade mark field and is an essential reference for any practitioner who wants to get a comprehensive picture of all areas of EU trade mark law. The commentary is a significant work of over 800 pages. It explains the EU trade mark regulation in a practical and comprehensive manner. All EU trade mark provisions are reviewed, taking into account the case law of the European Court of Justice, the decision-making practice of the Boards of Appeal of the European Union Intellectual Property Office (EUIPO), as well the administrative practice of the EUIPO.

The book particularly focuses on the topics of *Absolute grounds for refusal* (Art. 7 EUTMR), *Relative grounds for refusal* (Art. 8 EUTMR), *Effects of an EU trade mark* (Art. 9 EUTMR) and *Use of an EU trade mark* (Art. 18). Furthermore, it covers various aspects related to opposition procedures, revocation actions, transfer of EU trade marks, insolvency issues, licenses and conversions of an EU trade marks, amongst others. Due to its clear structure and presentation, the book will allow practitioners to quickly find answers to particular problems, including relevant case law, and facilitate the decision-making process in their daily practice.

We are pleased to announce that Michael C. Maier, Partner at Boulton Wade Tennant, is one of the co-authors of the book, providing a chapter covering one of the essential topics on Art. 7 EUTMR.

Author: Michael C. Maier, Partner, German Lawyer

News from our Spanish team

Isabel in focus

B-lawyer school

We are delighted to announce that Isabel Blanco will collaborate as a lecturer at B-Lawyer School, a new project of the Spanish company, B-Lawyer, which provides innovative training for lawyers and international companies. Isabel will work alongside experts from international and national law firms and the big four accounting firms in Spain. She will provide lectures on the most relevant matters in Intellectual Property in relation to Spanish and European trade marks. Please click [here](#) for more information.

Association of experts in fashion law (AEDM)/EOB editorial/treaty of fashion law

Isabel is a member of the Association of Experts in Fashion Law (AEDM), which provides legal advice to the Retail and Luxury Associations and companies in Spain and Portugal, and she collaborates with the online editorial, EOB Editorial, which specialises in fashion, luxury and retail. Isabel will also author a chapter in the second edition of the first treaty of Fashion Law in Spanish, called Fashion Law (Derecho de la Moda).



Author: Isabel Blanco, Spanish Lawyer, Boulton Wade S.L.



Stay connected

Webinar series

The firm is hosting a series of webinars on hot topics that will be of interest to any brand owner or IP professional



Watch our webinars

The firm is hosting a series of webinars on hot topics that will be of interest to any brand owner or IP professional. They are only 30 minutes long so will not intrude in your busy day and can be sandwiched between work and childcare! Come and join us for our next session and catch up on those you have missed.

UKIPO and EUIPO TM Appeal procedures – a practical guide

The webinar will guide you through the various stages of the proceedings before the UKIPO and EUIPO in trademark matters. **Aug 5, 2020 03:00 PM**



John Wallace, Partner



Michael C. Maier, Partner, German Lawyer

Covid and the UK IP professions

Externally hosted and organised by Institute of Brand and Innovation Law, UCL University. Partner, **Catherine Wolfe** took part in the webinar.



Catherine Wolfe, Partner

Sky v SkyKick – Trade Mark specifications: What do you need to do now?

Hosted by Partners, **Felicity Hide** and **Rachel Conroy**.



Felicity Hide, Partner



Rachel Conroy, Partner

Navigating UK Trade Mark oppositions post-Brexit

Hosted by Partner, **John Wallace** and Trade Mark Attorney, **Anusha Arunasalam**.



John Wallace, Partner



Anusha Arunasalam, Trade Mark Attorney

Brexit from an IP perspective: What it means for you and your business

Hosted by Partners, **Catherine Wolfe** and **John Wallace**



Catherine Wolfe, Partner



John Wallace, Partner

Staff portrait

The wedding cake I baked with my mum



How did you get into IP?

I studied it as part of my LLB and enjoyed it the most of all the modules. The commercial application to real life and that the case law concerned brands I knew and recognised made it feel much more real and current than some of the other modules I studied.

How would your family and friends describe you??

Loyal and honest, I think. And inquisitive: during his speech at our wedding, my husband referred to me as Columbo (the television detective) to much laughter, including from me because I see that in myself!



What's your top tip for working from home?

Take regular breaks. It's very easy to stay glued to your screen thinking, "I'll just do this", and before you know it, hours have gone by. There aren't so many natural distractions working from home and so it's important to step away from the screen regularly.



Trade Mark Partner

Rachel Conroy Discusses her inspirations and interests

What do you enjoy most and least about your job?

I love the variety and the people. Working with so many different clients in different industries means that one day I can be working on trade marks relating to antibodies and the next cosmetics, and I get to meet and build relationships with people from all over the world. My least favourite aspect of the job is the time recordal. Constantly being mindful of the clock adds an extra layer of pressure that I would love to be free of!

What's the biggest thing you have learnt during lockdown?

That I don't always have to be busy or doing something. How nice it is to just sit and relax (not that I get to do a great deal of that with two young children).

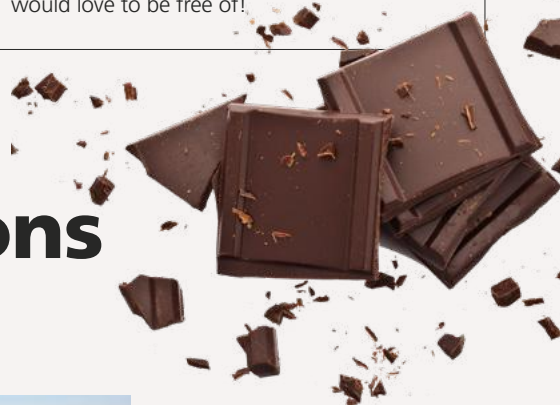


Favourite work memory?

Ooh that's a good question! Can I say meeting my now husband who also used to work at Boulton as a patent attorney? I think that counts as a work memory.

What's the one thing you couldn't live without?

Ooh that's chocolate - anyone who knows me knows that I have a strong love for chocolate. If I'm being less superficial, then my family, of course (I've given you two answers there!)



Contributors

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Emma is a partner in the Trade Mark Group in the London office. Emma is renowned for her responsiveness, and her pragmatic and commercial approach to solving often complex problems for clients.



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