

As the court was prepared to grant summary judgment to JLR on its claim for “double identity” infringement, it was unnecessary to go on to consider the other infringement claims. BPR did not seek permission to appeal.

## Conclusion

The decision is a helpful one for trade mark applicants and owners in that it provides clear first-instance judicial authority in the UK that an overly broad EU trade mark specification will not be invalid for bad faith as long as the trade mark applicant/owner intends to use the mark in relation to some of the goods/services specified. It also provides helpful guidance in relation to pleading such an argument on any future challenge to this position. The decision leaves open the question whether the position in relation to EU trade marks is right in principle (an issue which would need to be agitated in the Court of Justice); and it leaves undecided the question whether bad faith is available in relation to an EU trade mark specification where the trade mark applicant/owner had no intention of using the mark in relation any of the specified goods/services at the time of filing.

# Duran some Interesting Arguments with a View to Reclaim, but Le Bon et al. Come Undone in an Ordinary World: No Rio-version of US Copyright

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☞ Assignment; Breach of contract; Copyright; Derogation from grant; Music publishing; Songs; Termination notices; United States

*In Gloucester Place Music Ltd v Simon Le Bon & Ors,<sup>1</sup> the defendants sought to terminate the assignment to the claimant of US copyright in some of the band’s most famous musical works, by taking advantage of the termination right under s.203 of the US Copyright Act 1976. The English High Court held that such purported termination was in breach of the various relevant music publishing agreements. The court did not have the benefit of expert evidence on US law, so the dispute focused primarily on contractual interpretation. The relevant*

*agreements contained broad assignment provisions and warranties which the court construed as excluding the defendants from exercising the s.203 right.*

## Background

Section 203 of the US Copyright Act 1976 gives the author of any work other than a work for hire the right to terminate any exclusive or non-exclusive transfer or licence of copyright in such work. The effective date of exercise of this right must be between 35 and 40 years from the date of grant; prior written notice of the termination must be given no fewer than 2 and no more than 10 years before the effective date. Section 203(5) makes clear that the right to terminate a grant of copyright may be effected notwithstanding any agreement to the contrary.

Although this so-called “reversionary right” may be arcane to non-US lawyers, it has become intimately familiar to persons as diverse as the former lead singer of The Village People, Sir Paul McCartney, Bob Dylan, Tom Waits, the estate of Ray Charles, and the members of Duran Duran. As explained by the relevant House of Representatives Report,<sup>2</sup> the aim behind s.203 is to protect authors from the negative consequence of assigning US copyright in a work before the commercial value of such work becomes clear. The work may be much more valuable than first thought, in which case the assignee receives a disproportionate share of revenues relative to the artist. This problem occurs most frequently where under a recording contract, in exchange for royalties and/or an advance, a recording artist (typically early in their career) assigns their rights in present and future works for the entire term of copyright. Of course, the business model of record companies depends on making back many times the initial investment in relation to some artists, to compensate for the risks taken (1) on that artist; and (2) on other budding artists that do not pan out. So s.203 seeks to achieve a balance: the assignee gets at least 35 years of exploitation, before the copyright assignment/licence is revoked. There is no equivalent provision under English law.

## Relevant facts

On 28 July 1980, the five original members of Duran Duran entered into a music publishing agreement with the claimant, which contained a worldwide assignment of copyright in musical works written or composed by band members throughout the agreement’s term, in exchange for a monetary advance and royalties. On 1 June 1983, this agreement was terminated and replaced by new agreements with UK service companies established by the band members (together with comfort letters from the band members). These service companies, together with the band members, comprise the defendants. It was common ground that the terms of all relevant

<sup>1</sup> *Gloucester Place Music Ltd v Simon Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27.

<sup>2</sup> House of Representatives Report No.94-1476 (3 September 1976), p.124.

agreements were materially identical.<sup>3</sup> The agreements specified English law and jurisdiction (and the validity and enforceability of these choices was not in dispute).<sup>4</sup>

Some of Duran Duran's most successful songs, including "Girls on Film", "Rio", "Hungry Like the Wolf" and "Is There Something I Should Know?" were written during the term of the relevant agreements. On 11 March and 24 June 2014, representatives of the defendants served s.203 notices on the claimant, specifying various effective dates of termination of the assignment of US copyright in 37 songs, including those already mentioned. In response, the claimant started an action for declaratory relief in the English High Court; specifically, for a declaration that the notices were in breach of the various publishing agreements.

The parties agreed that the various agreements were materially identical. The following provisions were identified as having particular relevance (emphasis added)<sup>5</sup>:

- "The Writer as beneficial owner (and by way of assignment of future copyright and rights where appropriate) hereby assigns to the Publishers all the copyrights and all other rights whatsoever and howsoever now or hereafter known ... in all musical compositions and/or lyrics and/or original arrangements of musical works ... throughout the world and the right to renew and extend such copyrights and other rights and the ownership of such renewed and extended copyrights and other rights as may now or hereafter be conferred by the laws of any territory *so that the entire copyrights and all other rights in the said works shall be vested in the Publishers absolutely...*" (cl.3(a));
- "[T]he Publishers shall have the right to make and publish and to authorise others to make and publish [the works] ... so that the entire copyrights and all other rights whatsoever and howsoever throughout the world ... *shall be vested in the Publishers absolutely for the full term thereof* and all renewals and extensions thereof ..." (cl.4);
- "The Writer hereby warrants and agrees that he is or will be the sole owner ... of the copyright and of all other rights ... in the said works and that he has not previously granted transferred to [sic]

assigned and *will not grant transfer or assign any interest in the copyright ...*" (cl.6(b));

- "I hereby warrant and guarantee to you that the Companies ... are the *absolute owners of copyright and any other rights in the said works throughout the world for the full period of copyright* and all renewals and extensions thereof whether now or hereafter possible." (para(b) of the comfort letters).

The parties agreed that the effect of cl.3(a) was, in substance, to transfer US copyrights in the relevant works to the claimant.<sup>6</sup>

In relation to s.203, the parties agreed that (1) the relevant US copyrights were in principle assignable for their full term; (2) such assignment would be effective for their full term unless the author served notice of termination in accordance with s.203; and (3) the notices served by the defendants were valid and effective as a matter of US law.<sup>7</sup> The claimant contended that, apart from these background facts, US law had no relevance to the dispute.<sup>8</sup> The defendants sought to adduce evidence on US law by way of a witness statement given by their solicitor. The key point made by this witness statement was that a US court would not allow a breach of contract claim for service of a s.203 notice because this statutory right trumps any contractual agreement; it does not matter whether the relevant contract is governed by English or US law.<sup>9</sup>

The claimant argued that the above contractual provisions, by virtue of their breadth, should be interpreted as assigning the full term of US copyright to the claimant, thereby precluding the defendants from serving notice under s.203.<sup>10</sup> The opposite interpretation would lead to an unlawful derogation from grant (i.e. the doctrine of non-derogation of grant should prevent the defendants from "taking away with one hand what [they] have given with another").<sup>11</sup>

The defendants, meanwhile, argued first that any term of the agreements prohibiting the exercise of the defendants' rights under s.203 would be unenforceable as a matter of English public policy.<sup>12</sup> Secondly, on the basis of "pure" contractual interpretation, the parties would have had in mind the effect of s.203 when entering into the relevant publishing agreements, and the extent of the grant of rights to the claimant should be interpreted accordingly. The above clauses were purely concerned with the transfer of copyright, and not with restricting any of the group members' rights following transfer.<sup>13</sup> Thirdly, the doctrine of non-derogation of grant would

<sup>3</sup> *Gloucester Place Music v Le Bon* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [5].

<sup>4</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [10] and [14].

<sup>5</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [5]–[11] and [36]–[41].

<sup>6</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [33].

<sup>7</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [18].

<sup>8</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [19].

<sup>9</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [20].

<sup>10</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [36]–[39].

<sup>11</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [39].

<sup>12</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [24].

<sup>13</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [40].

not assist the claimant. Either the agreements on their true construction prohibited the group members from exercising their s.203 rights, or the agreements did not prohibit this, in which case the doctrine added nothing.<sup>14</sup>

The parties agreed that commercial certainty was important. The claimant would have entered into agreements with third parties (such as sub-publishing agreements) on the footing that it owned US copyright for the full term. However, the parties disagreed as to whether this would assist the claimant's case.<sup>15</sup>

Mr Justice Arnold heard the case on 14 and 15 November 2016, and handed down judgment on 2 December 2016.

## Decision

Mr Justice Arnold made findings on five key topics: (1) the law applicable to the dispute; (2) the relevance of US copyright law; (3) public policy considerations; (4) the proper interpretation of the agreements; and (5) the doctrine of non-derogation from grant.

### Applicable law

This dispute engaged two strands of private international law: the law applicable to the interpretation of, and the parties' obligations under, the relevant agreements; and the law recognising and governing the assignability of US copyright.

As noted, the parties' choice of law was English law. The English court (given exclusive jurisdiction to hear the dispute) is required to give effect to this choice by virtue of art.3 of the Rome Convention,<sup>16</sup> which in turn is given force of law in the UK by s.2 of the Contracts (Applicable Law) Act 1990. Therefore, pursuant to arts 8(1), 10(1)(a) and 10(1)(b) of the Rome Convention, issues of material validity, interpretation and performance of the contract will be determined in accordance with English law. Further, art.7(1) of the Rome Convention does not have force of law in the UK, so the English court is *not* required to give effect to the mandatory laws of another country with which the situation is closely connected.<sup>17</sup> There did not appear to be much controversy here.

The Berne Convention<sup>18</sup> is the primary source of law governing cross-border copyright for these purposes. Article 5 provides that once a work passes through the "gateway" for protection in the country of origin (i.e.

where copyright first "fixes"), reciprocal copyright will be granted in Convention states. The scope of such protection (as well as the means provided to protect the author's rights) will be governed by the laws of the country where the protection is claimed. This is the *lex loci protectionis*, and in this case means that US law governs the assignability of copyright.<sup>19</sup> The judge's statements in this regard reflect prior authority (e.g. *Campbell Connelly & Co Ltd v Noble*<sup>20</sup>).

Finally, Arnold J noted that

"if and to the extent that title is assignable under the *lex loci protectionis*, the question of whether, and to what extent, title has in fact been assigned by an agreement governed by English law depends on the effect of the agreement applying English law, and in particular English principles of contractual interpretation".<sup>21</sup>

### Relevance of US copyright law

As mentioned, three key aspects of US law were agreed between the parties. Of particular importance, it was common ground that the US copyrights in the works were assignable.<sup>22</sup> The defendants, however, sought to go further, submitting evidence that the statutory termination right supersedes any contractual right, irrelevant of whether the contract is governed by English or US law.<sup>23</sup>

The judge rejected this evidence for five reasons: (1) this was a Pt 8 claim on the basis that there was no dispute as to fact, but foreign law is a question of fact; (2) the defendants neither sought nor obtained permission to adduce expert evidence on US law; (3) the defendants' solicitor was not an expert on US law; (4) he also gave no basis for the relevant statement; and (5) the evidence dealt only with the current position under US law, and not the position at the relevant time (1980 to 1983).<sup>24</sup>

### Public policy considerations

Arnold J relied on the principle established in *In re Missouri Steamship Co*,<sup>25</sup> stating that English courts will enforce a contract even if it would be unenforceable as contrary to public policy in another country with which the contract has a connection. The judge noted that the court would not enforce a contract the performance of which would be unlawful in the place of performance, but the defendants did not invoke this principle.<sup>26</sup>

<sup>14</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [40].

<sup>15</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [43].

<sup>16</sup> Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, as recast as Regulation 593/2008 of 17 June 2008.

<sup>17</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [14]–[15].

<sup>18</sup> Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886.

<sup>19</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [16].

<sup>20</sup> *Campbell Connelly & Co Ltd v Noble* [1963] 1 W.L.R. 252 Ch D at 255 (Wilberforce J).

<sup>21</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [17], citing Neuberger J in *Peer International Corp v Termidor Music Publishers Ltd* [2002] EWHC 2675 (Ch); [2003] E.C.D.R. 22 at [24].

<sup>22</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [18].

<sup>23</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [20].

<sup>24</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [21].

<sup>25</sup> *In re Missouri Steamship Co* (1889) 42 Ch. D. 321 CA at 335–337 (Lord Halsbury LC).

<sup>26</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [24]–[25].

## Contractual interpretation

In the absence of any admissible evidence on US law, the main basis for Arnold J's decision was interpretation of the relevant agreements. The usual rules applied: contractual interpretation is an objective exercise; the court must ascertain the meaning that the document would convey to a reasonable person with all the background knowledge which would have reasonably been available to the parties at the time, and in the circumstances, of the formation of the contract. Such knowledge can include knowledge of the relevant law (e.g. in the case of *Oxonica Energy Ltd v Neuftec Ltd*,<sup>27</sup> of international patent law). It was common ground that, when entering the relevant agreements, the parties would have been generally aware of the effects of s.203. The judge made no further findings on this point.

The judge considered the language of cl.3(a) to be wide and general. Particularly when read together with cl.4, this would have conveyed to a reasonable person (having the relevant background knowledge) that the parties intended that the "entire copyrights" in the works should vest, and remain vested, for their "full term".<sup>28</sup> Arnold J held that this was sufficient to exclude implicitly the defendants from exercising rights under US law that would result in termination of the claimant's ownership of copyrights prior to their expiry. This interpretation was reinforced by cl.6(b), which prohibited assignment to any person other than the claimant: the judge held that a reversion of copyright would effectively be an assignment by the group members to themselves, which would be in breach of this provision.<sup>29</sup>

## Non-derogation from grant

The judge quoted Mr Justice Neuberger's (as he then was) summary of the law from *Platt v London Underground Ltd*.<sup>30</sup> In essence, the doctrine seeks to regulate the reservation of rights in connection with the grant of a property or other right, by limiting reserved matters to those that can fairly be regarded as necessarily implicit in the circumstances. The terms of the transaction must have the "minimum efficacy and value which upon any view ... it must have been [the parties'] common intention that it should have". In other words, the grantor cannot give with one hand and take away with the other.<sup>31</sup> The classic example is covenants under a lease, but it was common ground between the parties that the doctrine can apply to property other than real property.<sup>32</sup> The judge

noted that the doctrine had been applied to copyright in *British Leyland Motor Corp Ltd v Armstrong Patents Co Ltd*.<sup>33</sup>

Arnold J noted that there is some debate concerning whether the doctrine is an independent rule of law, or an aspect of the law on implied terms.<sup>34</sup> Although he did not conclude explicitly on this point, implicitly the judge seemed to prefer the latter option, because he held later in the judgment that the doctrine did not provide the claimant with an independent route to support its arguments. In any event, the judge felt that the doctrine supported the claimant's position.<sup>35</sup>

The judge also dealt briefly with the issue of commercial certainty: he held that this was a neutral factor.

## Conclusion

Mr Justice Arnold, "not without hesitation", found the claimant's arguments more convincing, and ruled that the notice letters were in breach of the various publishing agreements.<sup>36</sup>

## Comment

On the face of it, this seems exactly the kind of factual situation which s.203 was designed for. The ages of the members of Duran Duran ranged between 18 and 22 when they first signed a record deal with the claimant. At the time, it would have been difficult to predict that the band would go on to the great success that it ultimately enjoyed. The necessary period had elapsed since the relevant copyrights were assigned, so in theory it should have been a simple matter for the defendants to reclaim their US copyrights.

Section 203 is of course expressed as an inalienable right. Some US commentators have suggested that its effect is better thought of not as an "option" that can be exercised by the grantor, but rather a statutory limitation of the extent of assignment of any US copyright. In other words, under US law, it was never possible for the defendants to assign irrevocably the full term of US copyright. The wording of art.5(2) of the Berne Convention indicates that the English court is obliged to give effect to US law in this respect, because the effect of s.203 pertains to the extent of protection afforded to the author for copyright purposes. This is to be distinguished from the contractual aspects of a copyright assignment: it is only once the potential extent of transfer is determined that one can move on to consider whether

<sup>27</sup> *Oxonica Energy Ltd v Neuftec Ltd* [2008] EWHC 2127 (Pat) at [11] (Peter Prescott QC sitting as a Deputy High Court Judge).

<sup>28</sup> The author notes for clarity that although the claimant also cited wording regarding renewals and extensions, this does not appear to be relevant: the term of US copyright is the same irrelevant of whether the reversionary right is exercised, and no renewal or extension of term was applicable or necessary for the term of copyright to continue in the absence of service of a s.203 notice.

<sup>29</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [44].

<sup>30</sup> *Platt v London Underground Ltd* [2001] 2 E.G.L.R. Ch D at [122].

<sup>31</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [29].

<sup>32</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [30].

<sup>33</sup> *Leyland Motor Corp Ltd v Armstrong Patents Co Ltd* [1986] A.C. 577.

<sup>34</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [31].

<sup>35</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [44].

<sup>36</sup> *Gloucester Place Music v Le Bon & Ors* [2016] EWHC 3091 (Ch); [2017] F.S.R. 27 at [45].

the relevant assignment document in fact effects the contemplated transfer (up to, but no further than, the maximum possible extent of the assignment). Assuming the foregoing interpretation of s.203 is correct, the governing law of the original assignment (whether English law, US law or otherwise) should not matter. It also should not matter whether the case is heard before the English court, a US court or elsewhere.

In this case, however, the court was asked to decide the claim on the basis of a narrow point of contractual interpretation, and on the basis of substantially agreed facts: e.g. the defendants accepted that the US copyrights were assignable to the extent argued by the claimant. (The judge did not have the benefit of expert evidence on US law, which might have changed the outcome). As Arnold J's judgment itself suggests, s.203 is not a purely contractual issue, but one which pertains to the nature of US copyright itself.<sup>37</sup> However, the judge had little choice but to consider the case almost exclusively through the lens of private domestic law, and private international law elements did not feature in the operative part of the judgment.

It is difficult to fault the judge's reasoning in response to the task he was given. The arguments did appear finely poised, but the breadth of the grant of rights (and the lack of explicit reservation) won the day, bearing in mind that the court found that the parties would only have been generally aware of the effects of s.203. This aspect of the decision might well have gone in the opposite direction had the relevant copyright assignment been made more recently. It is reasonable to speculate that as more artists have taken advantage of s.203, and have done so quite publicly, it has become better known over time. Arguably, this means that more explicit contractual wording would be required to exclude the s.203 right.

If instead the judge had been able to conclude that s.203 does indeed place a limit on the possible extent of an assignment of US copyright, a related question is whether the defendants would be in technical breach of the terms of the various publishing agreements by purporting to assign the full term of the US copyrights in the works. There are two main ways in which a court could get around this potential headache. First, the court may imply in a term that the defendants may lawfully terminate the assignment of US copyright by way of a s.203 notice (and a s.203 notice alone) on the basis that this is necessary to give business efficacy to the relevant agreements (and/or in the context of the relevant background knowledge of the parties, the inclusion of such an implied term is so obvious that it goes without saying). A subsidiary aspect of this route would be that such an implied term must be held a lawful derogation from grant. Secondly, it is possible that with stronger evidence on the true nature of s.203, the court would find differently on the public policy

aspect of the dispute. The court would be likely to require US law expert evidence regarding the precise status of an assignment of US copyright which purports to exclude the assignee's s.203 rights: namely, would this be *unlawful* in the US?

As confirmed by a press release on the Duran Duran website, the defendants were granted leave to appeal by the trial judge.<sup>38</sup> The appeal hearing is currently listed for 8 or 9 May 2018. It will however be challenging for the defendants to adduce on appeal the much-needed expert evidence on US law. It is difficult to see how the high *Ladd v Marshall* standard will be reached, given that the defendants will struggle to argue they *could not* with reasonable diligence have obtained the relevant evidence for the first instance trial.<sup>39</sup>

Although this decision may be received with shock by those involved in the creative arts, its precedential value should not be overstated. The outcome seems to owe as much to the particular question and facts before the court as it does to the substantive legal position. On 30 June this year, the opposite outcome was reached (by way of settlement) in a dispute between Sir Paul McCartney and Sony/ATV Music Publishing regarding copyrights in The Beatles' back catalogue. In response to the *Duran Duran* judgment, Sir Paul had started a claim for declaratory relief in the US District Court of Manhattan, in advance of the first potential reversion dates in the latter half of 2018.

Finally, as noted, there is no equivalent to s.203 in the UK, so the Duran Duran debate focused only on ownership of US copyright. It is, however, worth noting that the outcome of the dispute potentially could affect other jurisdictions with similar or related rights (e.g. Slovakia, or Germany with its "look back" right).

## Calculation of Damages for Copyright Infringement in Italy: *Flou SpA v Chateau d'Ax SpA*<sup>1</sup>

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✉ Copyright; Furniture; Infringement; Italy; Measure of damages

<sup>37</sup> See further P. Torremans, and C. Otero García-Castrillón, "Reversionary Copyright: A Ghost of the Past or a Current Trap to Assignments of Copyright" (2012) 2 I.P.Q. 77.

<sup>38</sup> See <http://www.duranduran.com/wordpress/2017/duran-duran-granted-leave-to-appeal-copyright-judgment/> [Accessed 28 November 2017].

<sup>39</sup> *Ladd v Marshall* [1954] EWCA Civ 1; [1954] 1 W.L.R. 1489 (Lord Denning).

<sup>1</sup> *Flou SpA v Chateau d'Ax SpA*, Court of Milan, judgment No.8066/17 issued and rendered public on 18 July 2017.