



Taking the biscuit – KitKat and Distinctiveness?
Kim Barker, University of Wolverhampton

The recent litigation surrounding the 'KitKat' trademark application, raises a number of questions concerning the extent of protection under the European trademarks regime, and the Trademarks Act 1994 respectively. This recent decision in respect of whether or not the shape of a chocolate bar can benefit from registered trademark protection is the latest in a series of battles between Cadbury and Nestle in respect of their products. The earlier battle between Cadbury and Nestle concerned colour trademarks in respect of packaging – another of the controversial and problematic areas in the ever-expanding scope of trademark protection.

This paper will explore the 'KitKat' decision in *Case C-215/14 Societe des Produits Nestlé SA v Cadbury UK Ltd*, and consider whether or not this latest 'chocolate trademark' further challenges the existing protective requirements under the trademark legislation. It will also query whether the decision may have differed under the trademark reforms – due for introduction shortly – before questioning the scope of those reforms themselves – should the reforms have gone further?

This paper will critically consider the decisions in respect of trademarks between Cadbury and Nestle from 2010 onwards, assessing whether or not there is a convincing argument for significant and cohesive reform at a European level to address the trademark requirements. It will seek to assess whether more regulation is required in light of the distinctiveness requirement? This paper will also consider associated issues including: should better regulation be the ultimate aim for valuable intellectual properties such as trademarks? In light of the reforms, what is the future of trademark protection within the European Union? What do decisions such as 'KitKat' and 'Cadbury Purple' mean for the trademark requirements, especially in the context of problematic categories not envisaged by the original requirements?