

O-398-10

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2493268
BY JINJIANG QINGYANG WANLIDA SHOE INDUSTRY CO., LTD
TO REGISTER A TRADE MARK IN CLASS 25**

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 98825 BY H&M HENNES & MAURITZ AB**

BACKGROUND

1. On 21 July 2008, Jinjiang Qingyang Wanlida Shoe Industry Co., Ltd (“Shoe”) applied to register the following as a trade mark:



The application was accepted and published for opposition purposes on 5 December 2008 in Trade Marks Journal No.6764 for a specification of goods in class 25 which reads:

Neckties; leather belts (clothing); clothing; football boots; layettes (clothing); shoes; hosiery; gloves (clothing); hats; swimsuits.

2. On 5 March 2009, H&M Hennes & Mauritz AB (“HM”) filed a notice of opposition. This consisted of grounds based upon sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (as amended) (the Act). HM indicate that the opposition is directed against all of the goods in the application for registration. Under sections 5(2)(b) and 5(3) of the Act HM rely upon one earlier International trade mark registration:

Trade Mark	No.	Date of Designation	Date Protection Conferred	Goods and services relied upon
COS	M917994	11/1/07 IC date of 2/8/06 claimed from Sweden	30/5/08	25 - Clothing, footwear, headgear. 35 - Retail services , consumer counselling services, all of the above connected with soaps, perfumes, essential oils, cosmetics, hair care products, dentifrices, precious metals and their alloys and goods in precious metals or coated therewith, jewellery, precious stones, horological and chronometric instruments, leather and imitations of leather (and goods made of these materials), animal skins, hides, trunks and travelling bags, umbrellas, parasols, walking sticks, clothing, footwear and headgear.

3. In their Statement of Grounds HM say, in relation to the ground based upon section 5(2)(b):

“The marks COS and COC Aiku are highly similar. The Opponent submits that the word COC is the most distinctive part of the opposed application. The words COS and COC are highly similar because they comprise the same letters only varying in the last consonant and the last consonant can be easily slurred in pronunciation or be overlooked by consumers since it is the beginning of marks that is more easily remembered by the public. The word Aiku is given much less prominence in the application’s representation than the word COC and as a consequence of that the mark is likely to be shortened by consumers to COC. The goods in class 25 are identical and the services covered by the opponent’s registration in class 35 are highly similar to the class 25 goods of this application.”

4. In relation to the ground based on section 5(3) of the Act HM say:

“The COS mark has been used in the UK since March 2007 as a new fashion concept of the opponent.... Since its inception the COS mark has been the subject of extensive use, high sales, high advertisement expenditure and has received continuous attention from the specialised press as it is a brand linked with high quality of materials and design. The use of a similar mark like the earlier application will take unfair advantage of the opponent’s mark and/or be detrimental to the distinctive character of the opponent’s mark.”

5. Finally, in relation to the ground based on section 5(4)(a) of the Act HM say that they have used both the trade mark the subject of their registration and the trade mark COS in the United Kingdom since March 2007 in relation to clothing, footwear, headgear and retail services in relation to the above. They add that the use of Shoe’s trade mark will:

“create a misrepresentation to the market place which is likely to damage the opponent’s business and trade mark.”

6. On 22 May 2009 Shoe filed a counterstatement. In their counterstatement Shoe state, inter alia:

“1.1...The applicant mainly engages in the manufacture and sales of footwear and clothing.

1.2 The subject mark has an earlier form. The earlier form of the subject mark was devised in 2000 by Zhuang Qingxiang, an officer of the applicant. The creative concept of the earlier form of the subject mark was originated from the idea of being “cool” and so the two Chinese characters [representations provided] meaning “be fond of” and “excellent” and pronouncing as AI and KU respectively and the transliteration “AIKU” of the two Chinese characters were adopted to form the verbal elements of the mark. As shoes are the key products of the applicant, a device was created to symbolise a shoelace being fastened into a ribbon, and the device was added to form an important visual element of the mark...

1.3 The subject mark was subsequently devised in 2008...To improve the discrete impression of the earlier form of the subject mark, the subject mark was designed to form an oval shape with the verbal element “Aiku” on the right side and the visual element “ribbon device” on the left side and altogether forming one integral mark.

2.3 To the members of the trade and the public, the verbal element of the subject mark is obviously “Aiku”. The “ribbon device” of the subject mark is clearly a visual element. It is highly unlikely for any member of the trade or the public not to call a mark by a clearly aural element of the mark and instead to name a mark by identifying the possible letters of the alphabet as represented from a relatively abstract device of the mark.

2.4. The verbal element “Aiku” is on the right side of the subject mark and stands out clearly from its dark background. The applicant refutes that the verbal element “Aiku” is given much less prominence in the representation of the subject mark as suggested by the opponent.

2.5. The applicant refutes that the “ribbon device” of the subject mark is the most distinctive part of the subject mark as suggested by the opponent. In general, verbal elements are more distinctive than non-verbal elements in a mark. Therefore, the verbal element “Aiku” should be regarded as more distinctive than the “ribbon device”.

2.6 The applicant refutes that the “ribbon device” of the subject mark is perceived as COC as suggested by the opponent. To the applicant, it is a ribbon device symbolising a shoelace being fastened into a ribbon, and does not represent any letters of the alphabet. To the members of the trade and the public, it does not represent the letters COC as suggested by the opponent. Owing to the abstract design of the “ribbon device”, if the opponent says it stands for COC, arguably to others it may stand for “OOO” or “O” or “CO”, and there should be no consensus on this as different people may have different impressions on the “ribbon device”.

2.7 Further, even if the “ribbon device” is taken as “COC”, “COC” will not be confusingly similar to “COS” because to an average member of the public “COS” is clearly pronounced as “kos” while “COC” is obviously an abbreviation pronounced as “C-O-C”. The usual practice of slurring the ends of words in pronunciation does not apply in a case like this with these two particular 3-letters. And, the impact of losing recall of the ends of words does not function in short words such as these 3-letter words.

2.8 Besides, marks should not be dissected into parts for comparison and should be compared as wholes. Comparing the subject mark with the earlier trade marks as wholes, the subject mark is a composite mark and the earlier trade marks each is a three-letter mark. With the combination of the verbal element “Aiku”, the

“ribbon device” and the oval device holding the two one on each side, the subject mark is conceptually, visually and aurally very different from each of the earlier trade marks...”

In relation to the competing goods and services at issue Shoe say:

“2.9. The applicant submits that the subject mark is not identical with or similar to any of the earlier trade marks and there is no point in considering whether the goods of the subject mark and the goods and services of the earlier trade mark are identical or similar.”

7. Only HM filed evidence. Neither party asked to be heard, HM filed written submissions; I will refer to these submissions as necessary below.

EVIDENCE

HM’s evidence

8. This consists of a witness statement, dated 19 February 2010, from Björn Norberg who has been HM’s Legal Counsel for ten years. He confirms that the information in his statement comes from either his own knowledge or from company records. The main facts to emerge from Mr Norberg’s statement are, in my view, as follows:

- HM’s business is in retail services and branded fashion products for women, men, teenagers and children;
- HM’s main brand is H&M but they also operate under a range of other brands such as COS;
- HM’s product range includes clothing of all kinds, footwear, headwear, belts, bags, jewellery, sunglasses, cosmetics, toiletries and fashion accessories;
- HM’s first store opened in Sweden in 1947;
- HM now operates more than 1700 stores in 33 countries and employs some 73,000 people;
- The first H&M store in the United Kingdom opened in 1976;
- By 1997 HM had 21 stores in the United Kingdom at 11 locations, some 400 employees and a turnover of approximately £48m;
- In 2008 HM had more than 130 stores in the United Kingdom, 4,200 employees and net sales of approximately £529m;

- In 2007 a new fashion concept was launched under the COS brand; COS stands for “Collection of Style” and combines “the quality of ready to wear design with affordable pricing”;
- COS products are promoted through a wide variety of different media and via fashion shows;
- COS offers two main collections per year; Spring/Summer and Autumn/Winter;
- COS collections are sold exclusively at COS stores. Exhibit BN1 consists of three photographs of the interiors of COS stores;
- The COS brand was launched in the United Kingdom in March 2007. Gross sales in the years 2007 and 2008 amounted to £4.1m and £6.2m respectively. Exhibit BN2 consists of photographs of carrier bags bearing the COS trade mark in a range of presentations;
- The COS brand appears on packaging, point of sale material, labels and swing tags. Exhibits BN3 and BN4 consist of photographs of packaging bearing the COS trade mark (in a range of presentations) on labels and on swing tags;
- The opening of the COS flagship store in Regent Street, London in March 2007 (which coincided with the first COS fashion show) attracted a “good deal of press attention”;
- Exhibits BN5, BN6 and BN7 consists of copies of HM’s Annual Reports from 2007 and 2008 and their full year report for the period 1 December 2008 to 30 November 2009 in which the COS brand is mentioned;
- HM have six COS branded stores in the United Kingdom located at: Covent Garden, Regent Street, High Street Kensington, the Westfield shopping centre and a concession in Selfridges (all in London) and at the Bullring shopping centre in Birmingham. Exhibit BN8 consists of, inter alia, a photograph of the exterior of the Regent Street store;
- The COS brand is promoted in a number of different ways including advertising or promotional articles appearing in publications such as: Elle, Harper Bazaar, Grazia and Vogue UK. Examples of editorials or advertisements for the COS brand which appeared in the above publications is provided as exhibit BN9. Expenditure on promoting the COS brand in the United Kingdom amounted to £300k in 2007 and £920k in 2008;

- The COS Collections have been shown in fashion shows held in London in March 2007 (at the Royal Academy of Arts) and February 2008 (at the Royal Horticultural Halls). Exhibit BN10 consists of photographs taken at the 2008 show (said to have been held on 15 September 2008);
- The website www.cosstores.com receives 55,000 unique visitors per month, 13,000 of which are from the United Kingdom. Exhibit BN11 consist of extracts taken from HM's current United Kingdom COS website which, says Mr Norberg, would be very similar to their website during the period 2007/08.

9. The remainder of Mr Norberg's statement consists of submissions rather than evidence. I do not intend to summarise these submissions here but will bear them in mind when making my decision.

10. That concludes my summary of the evidence filed by HM to the extent that I consider it necessary.

DECISION

The objection based upon section 5(2)(b)

11. The first ground of opposition is based upon section 5(2)(b) of the Act which reads as follows:

"5. - (2) A trade mark shall not be registered if because -

(a)....

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, or

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark."

12. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

"6.-(1) In this Act an "earlier trade mark" means -

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

13. HM’s trade mark is an earlier trade mark and is not subject to proof of use, as per The Trade Marks (Proof of Use, etc) Regulations 2004, as it had not been protected for five years at the time of the publication of Shoe’s trade mark application.

Section 5(2)(b) – case law

14. In reaching a decision I must take into account the guidance provided by the European Court of Justice (ECJ) in a number of judgments. The principal cases are: *Sabel BV v. Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* [1999] R.P.C. 117, *Lloyd Schuhfabrik Mayer & Co. GmbH v. Klijsen Handel B.V* [2000] F.S.R. 77 and *Marca Mode CV v. Adidas AG + Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG V Thomson multimedia Sales Germany & Austria GmbH* (Case C-120/04) and *Shaker di L. Laudato & Co. Sas* (C-334/05),

It is clear from all these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all the relevant factors: *Sabel BV v. Puma AG*, paragraph 22;

(b) the matter must be judged through the eyes of the average consumer of the good/services in question; *Sabel BV v. Puma AG*, paragraph 23, who is deemed to be reasonably well informed and circumspect and observant – but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v. Puma AG*, paragraph 23;

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v. Puma AG*, paragraph 23;

(e) when considering composite marks, it is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element; *Shaker di L. Laudato & Co. Sas* (C-334/05), paragraph 42;

(f) an element of a mark may play an independent distinctive role within it without necessarily constituting the dominant element; *Medion AG V Thomson multimedia Sales Germany & Austria GmbH*, paragraph 30;

(g) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17;

(h) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v. Puma AG*, paragraph 24;

(i) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v. Puma AG*, paragraph 26;

(j) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV v. Adidas AG + Adidas Benelux BV*, paragraph 41;

(k) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 29.

The average consumer and the nature of the purchasing process

15. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services; I must then determine the manner in which these goods and services are likely to be selected by the average consumer in the course of trade. The goods and services at issue are items of clothing, footwear and headgear and retail services in relation to these goods. In their written submissions HM say:

“8. The average consumer in this case is the ordinary consumer purchasing clothing in the high street or elsewhere given that the goods are ordinary consumer items.”

16. I agree that these are the sorts of goods and services which will be bought and utilised by the general public; they then are the average consumer for such goods and services.

17. The selection of clothing, footwear and headgear is most likely to consist of a visual act made on the basis of self selection in either a retail environment, from a catalogue or on-line (see the comments of the Appointed Person in *React Trade Mark* [2000] RPC 285).

18. In *New Look Ltd v Office for the Harmonization in the Internal Market (Trade Marks and Designs)* Joined cases T-117/03 to T-119/03 and T-171/03, the General Court considered the level of attention taken in purchasing goods in the clothing sector:

“43 It should be noted in this regard that the average consumer’s level of attention may vary according to the category of goods or services in question (see, by analogy, Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 26). As OHIM rightly pointed out, an applicant cannot simply assert that in a particular sector the consumer is particularly attentive to trade marks without supporting that claim with facts or evidence. As regards the clothing sector, the Court finds that it comprises goods which vary widely in quality and price. Whilst it is possible that the consumer is more attentive to the choice of mark where he or she buys a particularly expensive item of clothing, such an approach on the part of the consumer cannot be presumed without evidence with regard to all goods in that sector. It follows that that argument must be rejected.”

Comparison of goods

19. Shoe have applied for registration in respect of “Neckties; leather belts (clothing); clothing; football boots; layettes (clothing); shoes; hosiery; gloves (clothing); hats; swimsuits” all of which would be covered by the terms “clothing, footwear and headgear” appearing in the class 25 element of HM’s registration; the respective goods are, therefore, identical.

Comparison of trade marks

20. For the sake of convenience, the trade marks to be compared are as follows:

HM’s trade mark	Shoe’s trade mark
	

21. The average consumer is considered to be reasonably well informed, circumspect and observant but perceives trade marks as wholes and does not pause to analyse their various details. In addition, he rarely has the chance to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has kept in his mind. In reaching a conclusion on similarity I must identify what I consider to be the distinctive and dominant elements of the respective trade marks and, with that conclusion in mind, I must then go on and compare the respective trade marks from the visual, aural and conceptual perspectives.

Distinctive and dominant components

22. HM’s trade mark consists of the letters COS presented in upper case in a commonplace typeface; none of the letters are highlighted or accentuated in any way.

Consequently, there is, in my view, no distinctive and dominant element within HM's trade mark; the distinctiveness lies in the totality.

23. Shoe's trade mark consists of a number of elements. The parties disagree on how the first element of the trade mark (presented in black against a white background) will be perceived. Insofar as this element is concerned, I accept that it may be construed in different ways. However, there is nothing to suggest that any of these potential interpretations either describe or even allude to the goods for which registration is sought. While Shoe's own view of this element of their trade mark is explained above, I doubt that this is how it would be construed by the average consumer; regardless, it is a distinctive element of their trade mark. There is no dispute that Shoe's trade mark also contains the word Aiku presented in white on a black background or that there is a device element (which one might describe as an incomplete oval). As the word Aiku neither describes nor alludes to the goods, it too is a distinctive element. I am less convinced that the incomplete oval device would be considered distinctive, particularly given that the presence of the elements appearing in it relegates it to performing a background role. In summary, the first element of Shoe's trade mark and the word Aiku are distinctive elements and neither is, in my view, more dominant than the other.

Visual similarity

24. The oval device and the word Aiku appearing in Shoe's trade mark are alien to the trade mark of HM. As to the first element of Shoe's trade mark I have the parties' competing submissions on how this element would be construed (HM say it will be seen as the word COC whereas Shoe describe it as a ribbon device) but no evidence has been provided by either party which indicates how the average consumer is likely to construe this element. As the first two characters i.e. CO can be read, it is possible that the average consumer will try and make sense of the third character (the reversed letter C) and in so doing it is possible that they will see this element of Shoe's trade mark as either the word COC or letters C-O-C. If that is the case, the first element of Shoe's trade mark will contain the same first two letters as HM's trade mark. However, when compared as totalities they will differ not only in respect of the third letter, but also in respect of the other elements in Shoe's trade mark which are not to be found in the trade mark of HM. Considered overall, there is, in my view, a very low level of visual similarity between the respective trade marks.

Aural similarity

25. In their counterstatement Shoe said:

"2.3 "To the members of the trade and the public, the verbal element of the subject mark is obviously "Aiku". The "ribbon device" of the subject mark is clearly a visual element. It is highly unlikely for any member of the trade or the public not to call a mark by a clearly aural element of the mark and instead to name a mark by identifying the possible letters of the alphabet as represented from a relatively abstract device of the mark.

2.7 Further, even if the “ribbon device” is taken as “COC”, “COC” will not be confusingly similar to “COS” because to an average member of the public “COS” is clearly pronounced as “kos” while “COC” is obviously an abbreviation pronounced as “C-O-C”. The usual practice of slurring the ends of words in pronunciation does not apply in case like this with these two particular 3-letters. And, the impact of losing recall of the ends of words does not function in short words such as these 3-letter words.”

26. In their written submissions HM say:

“13. It is also accepted that consumers have a habit of shortening product names....There is a likelihood that that the contested mark will be seen and referred to as COC rather than COC Aiku...”

27. The written submissions ask me to compare a different trade mark to that applied for with the COS trade mark. There is no basis for this claim. It is necessary for me to compare the trade marks in their entireties. There is no reason that the Aiku element would be dismissed by the average consumer. Indeed, as it is clearly a word element the opposite is likely to be the case. The Aiku element of Shoe’s trade mark will be pronounced as a two syllable word i.e. a-ku or i-ku (where the ku element would be pronounced as “coup” as in “coup d’état). HM’s trade mark will, I think, be pronounced as a single syllable word in the manner Shoe suggests. If the first element of Shoe’s trade mark is pronounced as a word, orthographic habit and practice is likely to lead it to be pronounced with a hard C, so it will be pronounced as “cock”. The trade mark of HM, again based upon orthographic habit and practice, will be pronounced with a sibilant sound as in cos lettuce. The hard C will be emphasised and noticed, and makes a clear differentiation with COS. There is (at best) only a very low level of aural similarity between the competing trade marks.

Conceptual similarity

28. In *Phillips-Van Heusen Corp., v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (Case T-292/01) the Court of First Instance (now the General Court) said:

“Next, it must be held that the conceptual differences which distinguish the marks at issue are such as to counteract to a large extent the visual and aural similarities pointed out in paragraphs 49 and 51 above. For there to be such a counteraction, at least one of the marks at issue must have, from the point of view of the relevant public, a clear and specific meaning so that the public is capable of grasping it immediately.”

29. While the word COS may have a degree of familiarity as a variety of lettuce, I think it most unlikely that this meaning will be created in the mind of the average consumer when they consider the word in the context of the goods and services upon which HM

rely in these proceedings, more likely it will be treated as an invented word. Insofar as Shoe's trade mark is concerned, as neither of the distinctive elements (nor the totality) is likely to create any clear conceptual image in the mind of the average consumer, it too is likely to be taken as an invented combination. There is neither conceptual similarity nor conceptual dissonance.

Distinctive character of HM's earlier trade mark

30. I must also assess the distinctive character of HM's trade mark. The distinctive character of a trade mark must be appraised first by reference to the goods and services in respect of which it has been registered and, second, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods and services for which it has been registered as coming from a particular undertaking and thus to distinguish those goods and services from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585. In their written submissions (albeit in relation to the objection based on section 5(3) of the Act) HM say:

“17...it is submitted that COS is a highly distinctive mark. Due weight must also be given to the substantial use made by the opponent and the breadth of use of the COS mark in class 25 goods by the opponent.”

31. As far as I am aware HM's trade mark has no meaning for the goods and services upon which they rely in these proceedings; consequently, I agree that their COS trade mark is inherently highly distinctive. However, insofar as their use of their COS trade mark is concerned, the material date at which the matter must be considered is the date of Shoe's application i.e. 21 July 2008. At that point in time HM would have been using their COS trade mark for a little over 16 months. Gross sales in the period 2007-2008 (of which only sales up to 21 July 2008 are relevant) amounted to some £10.3m with promotional spend in the same period amounting to some £1.2m. While I note the locations of the COS stores and that the trade mark has been advertised/featured in a range of magazines, at fashion shows and on their website, given the obvious size of the clothing market in the United Kingdom I find it difficult to accept that their use of their COS trade mark up to the date of Shoe's application would have improved upon its inherent distinctive character to any significant extent. That said, I reiterate that HM's trade mark is, in my view, possessed of a high level of inherent distinctive character. As the goods are identical and the earlier trade mark has a high level of distinctive character, reputation would not assist in the global appreciation.

Likelihood of confusion

32. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of

similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of HM's trade mark, as the more distinctive this trade mark is the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods and services, the nature of the purchasing process and that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind. I have concluded that the respective goods are identical, that there is a very low level of visual and aural similarity and that the conceptual position is neutral. Applying the global approach advocated to those findings, I have absolutely no hesitation concluding that the average consumer will neither mistake one trade mark for the other (i.e. there will be no direct confusion) nor will they assume that Shoe's goods come from an undertaking economically linked to HM (i.e. there will be no indirect confusion). The ground of opposition under section 5(2)(b) fails accordingly.

The objections based upon sections 5(3) and 5(4)(a)

33. These objections (the case law for which is well established) can be dealt with fairly briefly. Even if I assume that HM's use of their COS trade mark is sufficient to establish a *Chevy* reputation for the purposes of section 5(3) of the Act and goodwill for the purposes of section 5(4)(a) of the Act, the differences between the respective trade marks are, in my view, so great that the "link" required for section 5(3) purposes would never be established nor for the purposes of section 5(4)(a) would there be any misrepresentation. In reaching the conclusion I have under section 5(4)(a) of the Act, I have not overlooked the following comment which appeared in Mr Norberg's statement:

"22. Even when clearly seen the mark COC can easily be taken as COS. This is because the font and look of the COC part of the contested application is very similar to the font and look of our trade mark COS in use. A review of the various exhibits submitted with my evidence shows our typical use where the O of COS is represented in broken form."

34. I have two short points in response to the above. HM relied upon two different versions of their trade mark under section 5(4)(a) i.e. the word in block capital letters and the word in the following format:

The image shows the word "COS" in a very bold, blocky, and pixelated font. Each letter is composed of a grid of small squares, giving it a digital or retro aesthetic. The letters are dark grey or black against a white background.

which is the same format claimed by them under section 5(2)(b) of the Act). They did not rely on the trade mark in the format mentioned by Mr Norberg (an example of which is shown below):



35. However, even if HM had relied upon this version of their trade mark (in which I note that not only the O is represented in broken form but also the letters C and S), this would have done nothing to close the considerable gap between the competing trade marks which in turn would have led to a finding of misrepresentation.

36. The objections based on sections 5(3) and 5(4)(a) of the Act are dismissed.

Costs

37. As Shoe have been successful they are entitled to a contribution towards their costs. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 4 of 2007. Using that TPN as a guide, I award costs to Shoe on the following basis:

Preparing a statement and considering the other side's statement:	£300
Considering the other side's evidence:	£500
Total:	£800

38. I order H&M Hennes & Mauritz AB to pay to Jinjiang Qingyang Wanlida Shoe Industry Co., Ltd the sum of £800. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 17 day of November 2010

C J BOWEN
For the Registrar
The Comptroller-General