

O-220-15

TRADE MARKS ACT 1994

**IN THE MATTER OF THE APPLICATION BY
FOX HOLDINGS LIMITED
UNDER NO 3025784 FOR THE TRADE MARK**



AND

**IN THE MATTER OF OPPOSITION NO. 401993 THERETO
BY FOX HEAD INC.**

THE BACKGROUND AND THE PLEADINGS

1) On 10 October 2013 Fox Holdings Limited (“the Applicant”) filed application no. 3025784 to register the following mark for the goods and services shown in Annex A:



The application was published in the Trade Marks Journal on 10 January 2014.

2) On grounds under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) Fox Head Inc. (“the Opponent”) opposes the registration of the Applicant’s mark for the following goods and services:

Class 18: Leather and imitations of leather; cases, bags, briefcases, laptop cases, pouches, sacks, travel bags, sports bags, carrier bags and shoulder bags; travel pouches; rucksacks and backpacks; purses and wallets; parasols and umbrellas; walking sticks, mountaineering sticks and trekking poles.

Class 25: Clothing, footwear and headgear.

Class 35: Retail services in connection with the sale of cases for watches, leather and imitations of leather, cases, bags, briefcases, laptop cases, pouches, sacks, travel bags, sports bags, carrier bags and shoulder bags, travel pouches, rucksacks and backpacks, purses and wallets, parasols and umbrellas, walking sticks, mountaineering sticks and trekking poles, clothing, footwear, headgear.

On grounds under section 5(3) of the Act the Opponent opposes the registration of the Applicant’s mark for all the goods for which the Applicant seeks registration.

3) The Opponent relies on the following two Community trade marks (“CTMs”):

CTM no. 2421824, filed on 23 October 2001 and registered on 14 December 2005 for the goods shown in Annex B:



CTM no. 2421352, filed on 23 October 2001 and registered on 12 December 2002 for the goods shown in Annex C:



For the purposes of its claims under section 5(2)(b) the Opponent relies on all the goods in classes 18 and 25 of the above registrations. For the purposes of its claim under section 5(3) all the goods of these registrations are relied on. Both marks relied on by the Opponent constitute “earlier trade marks” for the purposes of sections 5(2)(b) and 5(3). The registration process for both was completed more than five years before the publication date of the opposed mark. The proof of use provisions in section 6A of the Act therefore apply in respect of both.

4) The Applicant filed a notice of defence and counterstatement, denying the grounds of opposition, and putting the Opponent to proof of use and reputation in respect of both the marks relied on in the opposition. The period during which genuine use of the marks must be proved (“the relevant period”) is 11 January 2009 to 10 January 2014. The date as at which reputation must be proved (“the relevant date”) is the date of application for the opposed mark: 10 October 2013.

5) During these proceedings the Applicant amended its specification, adding the words “none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists” at the end of each class of its specification containing goods or services opposed. However, the Opponent indicated that it wished to continue to oppose the amended specification.

6) Only the Opponent filed evidence in the form of a witness statement of 4 September 2014 of Ian James Byworth, with appended exhibits. In its submissions in reply the Applicant asserted that Mr Byworth’s witness statement had not been signed or dated, and that its contents were thus unverified. The Applicant accordingly submitted that the statement and its appended exhibits should not be admissible as evidence in the current proceedings; alternatively, if the Opponent had submitted a signed version of the witness statement to the Registry, but had not provided the Applicant with that version, the Applicant requested confirmation that the full set of submissions and evidence it had been sent was correct and precisely corresponded with that submitted in the current proceedings. The copy of the signed and dated witness statement copied to the Applicant with the Opponent’s letter of 16 December 2014 did in fact correspond precisely with that on file with the Registry, and in a letter of 23 January 2014 the parties were advised of this and informed that any error in this regard had now been rectified.

7) Neither side requested a hearing in the substantive opposition proceedings. The Opponent filed submissions in lieu of a hearing. The Applicant filed no further submissions. I therefore give this decision after a careful review of all the papers before me.

THE EVIDENCE

8) In his witness statement Mr Byworth declares: that he is a patent and trade mark attorney employed by Urquhart-Dykes & Lord LLP, who represent the Opponent in these proceedings; that he is authorised to make this statement on behalf of the Opponent; and that the information contained in it has been provided by the Opponent. He states that the Opponent, whose headquarters are in Irvine, California, USA, designs, develops and distributes clothing and accessories to over fifty countries, primarily focusing on the sports of motocross, mountain biking, BMX, surfing and wake boarding, and that it recruits people for what are known as Fox Teams made up of sponsored individuals representing the Opponent's brand in those sports.

9) Mr Byworth attaches as **Exhibit IB2** a document he describes as a questionnaire completed by Mr Javier Martinez, whom he describes as the European Legal Manager of Fox Head Europe based at the European headquarters of the Opponent in Barcelona. Mr Martinez's name does not appear on the document, which is unsigned. I discuss this document further in paragraphs xx to xx.

10) **Exhibit IB3** is a 15-page document headed "SALES INVOICE" issued by Fox Head Europe Limited to "Unit 46, York Designer Outlet Centre" in York, UK on 22 December 2009. The invoice bears on each page the mark registered as CTM no. 2421824. Mr Byworth states that Fox Head Europe Limited uses what he terms the FOX Mark and FOX HEAD Device Mark under the consent of the Opponent, that the invoice was issued to a retail outlet located in York, and that the invoice lists goods sold by cross-reference to the catalogue number of the goods.

11) Mr Byworth describes **Exhibit IB4** as consisting of extracts from a 2009 FOX HEAD catalogue showing some of the goods sold under the invoice in **Exhibit IB3**. **Exhibit IB4** begins and ends with photographs which appear to form the front and back covers of the catalogue. The bottom right-hand corner of the cover bears a representation of the mark registered as CTM 2421352 together with the words "Fall 2009". A model is shown wearing a garment covered with designs; the mark registered as CTM 2421352 appears clearly under the front right-hand shoulder of the garment. The same mark appears across the chest of the garment shown on what appears to be the back page of the catalogue, which bears the address: WWW.FOXHEAD.COM ;18400 SUTTER BOULEVARD, MORGAN HILL, CA 95032. The garments in the catalogue are depicted diagrammatically rather than photographically. A garment identified in the catalogue by the description SMEAR and catalogue number 45886 is shown with the mark as registered in CTM 2421824 emblazoned across its chest, with a slight upward tilt from left to right, against a decorative dark, spiky background. Twenty-four items identified by this name and number (plus other numbers which appear to vary with size and colour) are shown on pages 2-3 of the invoice document in **Exhibit IB3**, together with a respective item price of 17.02. A garment which is identified in the catalogue by the description FLIGHT CREST and catalogue number 45893 bears under its front left-hand shoulder the mark as registered in CTM 2421352, shown against a dark, circular background, in turn surrounded by a decorative circular motif of radiating lines. Seven items identified by this name and number (plus other numbers which appear to vary with size and colour) are shown on page 1 of the invoice document in **Exhibit**

IB3, together with a respective item price of 21.28. Mr Byworth describes this as evidence of sales to a retail outlet of 24 units of the SMEAR garment at a unit price of £17.02 each, totalling £408.48, and 7 units of this pullover at a total cost of £148.96. However, as I have noted above, beyond unit prices, no total prices for items are shown, and the final invoice total is shown as GBP 0.12.

12) Similarly, **Exhibits IB5, IB7 and IB9** consist of invoices issued by Fox Head Europe Ltd, dated from 2010, 2011 and 2012 respectively, and bearing on each page the mark registered as CTM no. 2421824. They are issued to: Ridelow Ltd in Manchester (dated: 05.01.10; invoice total: GBP 715.95), Freestyle Extreme Trading Ltd Clothing in Bristol (dated 11.11.10; last page missing; total carried forward: GBP 7,786.28; dated: 7.10.10; invoice total: GBP 8,959.72), the Internet Fusion Clothing Company in Louth (dated: 01.03.11; invoice total: GBP 8,852.52), Reef Rash Limited of Cleethorpes (dated 15.03.12; last 2 pages missing; total carried forward: GBP 1,579.68). As in **Exhibit IB3**, items are identified by name and number, which can be cross-referenced to names and numbers in catalogue documents for the years 2010, 2011 and 2012, which form **Exhibits IB6, IB8 and IB10 respectively**. These follow basically the same format as described for **Exhibit IB4**.

13) **Exhibit IB11** is an extract from the website www.blue-tomato.com. According to this extract Blue Tomato is one of Europe's largest online board sports retailers, shipping to customers worldwide, its website being available in 14 languages. The exhibit states, amongst other things: that the brand was founded in 1994 when a retail shop was opened under the Blue Tomato brand in Schladming, Austria; that the online version of the shop has existed since 1997 and specialises in four sports: snowboard, free ski, skate and surf; that Blue Tomato now has a flagship store in Vienna with a floor-space of over 1000m² and has opened retail stores in the German cities of Munich, Rosenheim, Hamburg and Stuttgart. Although downloaded in August 2014, the reference to the future in the statement "In fall 2013 another spacious store *will* [italics added] open in Innbruck" dates the text to within the relevant period.

14) **Exhibit IB12** is an extract from the "blue-tomato" snowboard catalogue of 2013/2014, the front cover of which is included and bears the words "WEB-MAILORDER". One of the logos of brands displayed on page 5 as being supplied by "blue-tomato" is the mark registered as CTM 2421824. The word FOX, slightly stylised by the extension of one of the transverse lines of the X, is accompanied at the bottom of page 127 by the mark registered as CTM 2421352. Two models are shown. On the clothes of one of the models it is difficult to make out either of the marks clearly, but the mark registered as CTM 2421352 is prominently displayed across the chest of the hoodie jacket worn by the other model. No other pages are shown. Mr Byworth states that "clothing under the marks is offered for sale in this catalogue".

15) **Exhibit IB13** is described by Mr Byworth as a print-out from the FOX HEAD page of blue-tomato.com dated 27 August 2014. This is 7 months after the end of the relevant period. **Exhibit IB14** is a print-out from the Internet archive web.archive.org of pages from the blue-tomato.com website as it appeared from 4 November 2013 – i.e. within, though towards the end of, the relevant period.

16) Mr Byworth states that **Exhibit IB15** is an extract from the website subscribeonline.co.uk concerning *DIRT* mountain bike magazine. The magazine is described as being over 15 years old and for mountain bike riders. A subscription is offered worldwide and the page mentions sales in either pounds, euros or dollars. The exhibit includes cover pages and extracts from the September, October, November and December 2013 editions of the magazine. Mr Byworth explains that the cover pages are followed by pages taken from inside the relevant issue. He states that on these pages use of the mark in either CTM 2421352 or CTM 2421824 is shown in advertisements or on the clothing and protective wear of mountain bikers featured in articles and photographs in the magazines. I could see that the mark in CTM 2421352 is used in this way, but was unable to spot use of the mark in CTM 2421824.

17) Mr Byworth states that **Exhibit IB16** is an extract from the website mpora.com offering subscriptions to *Moto* magazine, which it describes as the UK's most respected motocross magazine. The exhibit includes cover pages from the January, March, August and September 2013 issues of this magazine, followed by copies of pages taken from each issue. Several pages bear pictures showing use of the mark in CTM 2421352 on the protective clothing worn by the riders but, again, I was unable to spot use of the mark in CTM 2421824.

18) **Exhibit IB17** is an extract from the website subscribeonline.co.uk discussing the magazine *Ride UK BMX Magazine*, together with extracts from the February and June 2013 issues of that magazine, both of which carry an advertisement for clothing and other BMX-related products bearing the mark in CTM 2421352.

19) **Exhibit IB18** is an extract from the website of the magazine *Boardsport Source*, which bears the strapline "European surf, skate and snow business" and is apparently available in English, French and German. Front covers and extracts from both the August/September and October/November 2013 are provided, containing an advertisement and a job advertisement seeking sales representatives for Fox Head Europe, both bearing the mark in CTM 2421352.

20) **Exhibit IB19** is an extract from the website www.auner.at and a google machine translation of the German text of that website into English. According to this, Auner have two Austrian shops, six franchise partner shops in Austria, a branch in Hungary, and dealers in Poland, Romania, Bulgaria, Estonia, Latvia, Slovenia and Croatia. In addition, 510 motorcycle dealers also use Auner's range of branded products, including those of FOX. Their annual spring catalogue has a circulation of 70,000, being sent to 15,000 households in Austria and neighbouring countries. **Exhibit IB20** contains extracts from the 2013 Auner catalogue. Goods bearing variously the mark in CTM 2421824 and the mark in CTM 2421352 are offered for sale in this catalogue, including pullovers and fleeces, t-shirts, belts, protective clothing such as overalls, breast plates, helmets, gloves, knee pads, neck braces and goggles, sunglasses, boots, sandals, trainers, headgear such as baseball caps, wool hats, tanks, undergarments such as socks, boxer shorts and camis, luggage such as gear bags, handbags and backpacks, swimwear, wallets, a raincoat and an umbrella.

PROOF OF USE

21) The earlier marks relied on for both grounds of opposition are subject to the proof of use provisions. I must, therefore, begin by finding for which goods the Opponent has established genuine use of its marks, and then determine a fair specification.

22) The Applicant put the Opponent to proof of use in respect of both the marks relied on in the opposition. Section 6A of the Act provides:

“(1) This section applies where -

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if -

(a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.....

..... (5) In relation to a Community trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

Section 100 of the Act provides:

“100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

23) In *Stichting BDO v BDO Unibank, Inc.*, [2013] F.S.R. 35 (HC), Arnold J. stated as follows:

“51. Genuine use. In *Pasticceria e Confetteria Sant Ambroeus Srl v G & D Restaurant Associates Ltd* (SANT AMBROEUS Trade Mark) [2010] R.P.C. 28 at [42] Anna Carboni sitting as the Appointed Person set out the following helpful summary of the jurisprudence of the CJEU in *Ansul BV v Ajax Brandbeveiliging BV* (C-40/01) [2003] E.C.R. I-2439; [2003] R.P.C. 40 ; *La Mer Technology Inc v Laboratoires Goemar SA* (C-259/02) [2004] E.C.R. I-1159; [2004] F.S.R. 38 and *Silberquelle GmbH v Maselli-Strickmode GmbH* (C-495/07) [2009] E.C.R. I-2759; [2009] E.T.M.R. 28 (to which I have added references to *Sunrider v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (OHIM) (C-416/04 P) [2006] E.C.R. I-4237):

(1) Genuine use means actual use of the mark by the proprietor or third party with authority to use the mark: *Ansul*, [35] and [37].

(2) The use must be more than merely token, which means in this context that it must not serve solely to preserve the rights conferred by the registration: *Ansul*, [36].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin: *Ansul*, [36]; *Sunrider* [70]; *Silberquelle*, [17].

(4) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, i.e. exploitation that is aimed at maintaining or creating an outlet for the goods or services or a share in that market: *Ansul*, [37]-[38]; *Silberquelle*, [18].

(a) Example that meets this criterion: preparations to put goods or services on the market, such as advertising campaigns: *Ansul*, [37].

(b) Examples that do not meet this criterion: (i) internal use by the proprietor: *Ansul*, [37]; (ii) the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle*, [20]-[21].

(5) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including in particular, the nature of the goods or services at issue, the characteristics of the market concerned, the scale and frequency of use of the mark, whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them, and the evidence that the proprietor is able to provide: *Ansul*, [38] and [39]; *La Mer*, [22] -[23]; *Sunrider*, [70]-[71].

(6) Use of the mark need not always be quantitatively significant for it to be deemed genuine. There is no *de minimis* rule. Even minimal use may qualify as genuine use if it is the sort of use that is appropriate in the economic sector concerned for preserving or creating market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor: *Ansul*, [39]; *La Mer*, [21], [24] and [25]; *Sunrider*, [72]”.

Although minimal use may qualify as genuine use, the CJEU stated in Case C-141/13 P, *Reber Holding GmbH & Co. KG v OHIM* (in paragraph 32 of its judgment), that “not every proven commercial use may automatically be deemed to constitute genuine use of the trade mark in question”. The factors identified in point (5) above must therefore be applied in order to assess whether minimal use of the mark qualifies as genuine use.

24) In *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11, the CJEU noted that:

“36.It should, however, be observed that..... the territorial scope of the use is not a separate condition for genuine use but one of the factors determining genuine use, which must be included in the overall analysis and examined at the same time as other such factors. In that regard, the phrase ‘in the Community’ is intended to define the geographical market serving as the reference point for all consideration of whether a Community trade mark has been put to genuine use.”

And

“50. Whilst there is admittedly some justification for thinking that a Community trade mark should – because it enjoys more extensive territorial protection than a national trade mark – be used in a larger area than the territory of a single Member State in order for the use to be regarded as ‘genuine use’, it cannot be ruled out that, in certain circumstances, the market for the goods or services for which a Community trade mark has been registered is in fact restricted to the territory of a single Member State. In such a case, use of the Community trade mark on that territory might satisfy the conditions both for genuine use of a Community trade mark and for genuine use of a national trade mark.”

And

“55. Since the assessment of whether the use of the trade mark is genuine is carried out by reference to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark serves to create or maintain market shares for the goods or services for which it was registered, it is impossible to determine a priori, and in the abstract, what territorial scope should be chosen in order to determine whether the use of the mark is genuine or not. A *de minimis* rule, which would not allow the national court to appraise all the circumstances of the dispute before it, cannot

therefore be laid down (see, by analogy, the order in *La Mer Technology*, paragraphs 25 and 27, and the judgment in *Sunrider v OHIM*, paragraphs 72 and 77).”

The court held that:

“Article 15(1) of Regulation No 207/2009 of 26 February 2009 on the Community trade mark must be interpreted as meaning that the territorial borders of the Member States should be disregarded in the assessment of whether a trade mark has been put to ‘genuine use in the Community’ within the meaning of that provision.

A Community trade mark is put to ‘genuine use’ within the meaning of Article 15(1) of Regulation No 207/2009 when it is used in accordance with its essential function and for the purpose of maintaining or creating market share within the European Community for the goods or services covered by it. It is for the referring court to assess whether the conditions are met in the main proceedings, taking account of all the relevant facts and circumstances, including the characteristics of the market concerned, the nature of the goods or services protected by the trade mark and the territorial extent and the scale of the use as well as its frequency and regularity.”

25) Mr Byworth’s witness statement contains hearsay evidence; certain facts he provides have been told to him by someone else. In accordance with sections 1 and 4 of the Civil Evidence Act 1995 I may give hearsay evidence of this kind such weight as it deserves, assessing each case on its own merits. Accordingly, hearsay evidence will not be discounted simply because it is hearsay. However, it is preferable for evidence of use of a trade mark to be given by a witness with first-hand knowledge¹. If hearsay evidence is to be given, it should clearly identify the source or sources of the information deposed to. I must also look at the documentary evidence exhibited and assess the evidence as a whole.

26) In response to the criticism of the hearsay nature of the evidence made by the Applicant in its submissions in reply, the Opponent argued in its own submissions that time pressure and the fact that “none of the relevant Fox Head employees are based in the UK” had made it necessary to provide evidence in this form. Neither in these submissions nor in Mr Byworth’s witness statement is it adequately explained why the basic and limited information contained in the apparently incomplete and draft document in **Exhibit IB2** could not have been provided more fully, clearly and reliably by Mr Javier Martinez himself in a signed witness statement. He could also have explained from his own knowledge: the nature of his own access as “European Legal Manager” to the relevant information; why his own name was not one of those given on the document as “a person authorised to sign statutory declarations on behalf of the company”; how the information on “the trademark” (singular) is supposed to relate to the two CTMs relied on in these proceedings; and the relationship of the Opponent to Fox Head Europe, SLU., Fox Head Britain Ltd and Fox Head France, SASU.

¹ See the comments of the Appointed Person in *EXTREME O/161/07* at paragraph 9.

27) Having first, in his witness statement, qualified CTM 2421824 as “the FOX Mark” and CTM 2421352 as “the FOX HEAD Device Mark”, Mr Byworth says that “the Opponent states in point 2 that the FOX mark and the FOX HEAD device mark were first used in the United Kingdom in 1992”, but the basis for this assertion and the source of his information is not clear. Point 2 of the document (headed “The approximate date when “the trade mark” was first used in the European Union”) lists the countries of the European Union with a year of first use given for each (11 in the 1990s, 16 in the 2000s), the earliest date given being that for the UK: 1992. However, CTM 2421352 and CTM 2421824 are not explicitly identified in **Exhibit IB2**; the document is headed simply “*TRADE MARK* [in the singular]: *FOX & FOX HEAD DEVICE*”, with no further identification of, or differentiation between, the mark or marks to which this refers, and references throughout the document are to “the trade mark” (singular). “Approximate turnover throughout the European Union since date of first use” is given as EUR 100M. Assuming the figure of EUR100 million to be roughly correct, there is no way of determining how much of it is attributable to what territories and at what times during the various periods since 1992. In fact, “Info NOT available” is entered where breakdown by year and country is required. “TBC (usually 6/7% of revenue)” is given under “Approximate marketing expenditure for advertising goods for sale under the mark” but no breakdown by year or country is given. Particular products with which “the trade mark” has been used in the EU since date of first use are given as: “(MX, BMX, MTB, WAKE BOARD, SURF) gear + Clothing”. Under “Approximate percentage share of UK market”, if known, of goods sold under the mark” there appear the bald figures:

35-40% MX
40-45% MTB
LESS 10% LFS

However, no further explanation of these figures is given, how they are arrived at, how the markets they relate to are defined, or what period they relate to. The document bears no date or signature. No sales figures are given for the UK market(s), nor any indication of the size of the market(s).

28) In *Laboratoire De La Mer Trade Marks* [2002] FSR 51 Jacob J observed:

“In the present cases, use was not proved well. Those concerned with proof of use should read their proposed evidence with a critical eye -- to ensure that use is actually proved -- and for the goods or services of the mark in question. All the t's should be crossed and all the i's dotted.”

I do not think it can be said that the Opponent has crossed all the t's and dotted all the i's with regard to **Exhibit IB2**; the document has the feel of an embryonic and tentative “back-of-an-envelope” rough draft about it, and the person specified in Mr Byworth's witness statement as authenticating the information does not present it directly or even sign or date it. I am able to attach very little weight to this document in itself. However, I must look at all the documentary evidence exhibited and, in doing so, I must not simply consider each item of evidence individually, but step back and consider the evidence as a whole to see what it establishes.

29) **Exhibits IB15 and IB16** both show use of CTM 2421352 on the clothing and protective wear in photographs of riders featured in articles and advertisements in the magazines during 2013. **Exhibit IB17** shows general advertisements for the FOX brand, featuring CTM 2421352, in a publication aimed at BMX followers in 2013. **Exhibit IB18** shows that Fox Head Europe advertised for sales representatives in a publication aimed at a European surf/skate/snowboard readership towards the end of the relevant period. I was unable to spot any use of CTM 2421824 in **Exhibits IB15 to IB18**. I have no circulation figures for the magazines in **Exhibits IB15 to IB18** but I accept that they will have had some kind of UK readership in 2013, i.e. during the relevant period, among followers of the sports respectively covered.

30) The invoices in **Exhibits IB3, IB5, IB7 and IB9** are all issued by Fox Head Europe Ltd. It is not explained – as it should have been – whether this is an affiliated company of the Opponent or, for example, a distributor in independent ownership, nor is it explicitly stated that Fox Head Europe was using the Opponent's marks with the Opponent's consent. However, on the basis of the totality of the evidence, and of the fact of the Opponent's being able to produce these invoices in evidence, I am satisfied that use of the Opponent's marks on these invoices, and on the goods supplied under them, was use with the Opponent's consent. Although the invoices cover a range of goods, including jeans, shorts, beanies, hats, socks, belts, backpacks, trunks and wallets, the respective catalogue extracts in **Exhibits IB4, IB6, IB8 and IB10** relate only to various kinds of tops: hoody pullovers and fleeces, and t-shirts. In respect of these items, however, "STOCK ID" codes and descriptions marked by Mr Byworth in the invoices tally with corresponding catalogue numbers and illustrations marked by Mr Byworth in the respective catalogues. The items variously bear the mark in CTM 2421824 or the mark in CTM 2421352. Prices quoted in the catalogues are in dollars and what appear to be product order tables seem to bear a Canadian flag. The Opponent does not seem to have considered it worthwhile to adapt the catalogues specifically to the European market, which may perhaps reflect on the scale of the Opponent's business in Europe during the periods covered. However, the exhibits do show that a range of hoody pullovers and fleeces, and t-shirts, variously bearing the marks were supplied to 5 different retail outlets in 5 different UK locations between December 2009 and March 2012.

31) It would seem from the account of Blue Tomato given in **Exhibit IB11** that by 2013 it was a substantial retailer of sports equipment and clothing in Austria and Germany, with a strong online presence. One of the array of logos of brands supplied by "blue tomato" displayed on page 5 at the beginning of the "blue-tomato" snowboard catalogue of 2013/ 2014 in **Exhibit IB12**, is the mark registered as CTM 2421824. However only one further page of the catalogue – showing FOX tops, hoodies and casual headgear being modelled, and displaying the mark registered as CTM 2421352 – is provided. The print-out from "the FOX HEAD page of blue-tomato.com" in **Exhibit IB13** is dated 7 months after the end of the relevant period. I cannot accept Mr Byworth's submission that the fact that the "blue tomato" catalogue in **Exhibit 12** was dated during the relevant period "makes it highly likely that all of these goods [i.e. those in **Exhibit IB13**] were offered for sale during the relevant period".

32) The print-out from the Internet archive *waybackmachine web.archive.org* in **Exhibit IB14**, on the other hand, does provide evidence of the situation during the relevant period. The exhibit shows pages from the blue-tomato.com website as they appeared from 4 November 2013 – i.e. towards the end of the relevant period. Goods shown cover items of casual and sports clothing and headgear, such as hoodies, fleeces, shirts, t-shirts, beanies, caps, socks and bikinis, as well as backpacks and wallets. They bear a variety of FOX marks including, on some products, the marks in either CTM 2421352 or CTM 2421824.

33) Although downloaded in September 2014, it can be inferred from the information provided in the Auner website extract in **Exhibit IB19** that in 2013 (i.e. during the relevant period) Auner was a substantial retailer of motorcycle clothing and accessories in Austria, with a branch in Hungary and associated dealers in several EU Member States. FOX goods offered for sale in the 2013 Auner catalogue in **Exhibit IB20** include casual and sports clothing and headgear, such as hoodies, fleeces, shirts, t-shirts, tanks, boxer shorts and camis, raincoats, socks, bikinis, beanies, caps, baseball caps, wool hats, belts, boots, sandals, trainers, protective clothing such as overalls, breast plates, helmets, gloves, knee pads, neck braces and goggles, sunglasses, luggage such as suitcases, gear bags and travelling bags, handbags and backpacks, wallets, and umbrellas. The marks also appear on some catalogue pages.

34) I accept that **Exhibits IB3, IB5, IB7 and IB9** show that a range of hoody pullovers and fleeces, and t-shirts, variously bearing the marks at issue, were supplied to various UK locations between December 2009 and March 2012. Despite the shortcomings I have described in **Exhibit IB2**, viewed in the light of the other evidence I am prepared to accept that the Opponent has sold such items elsewhere in the European Community during the relevant period, though it is not possible to say precisely what goods have been sold where and at exactly what period. However, it is not just sales, but also preparations to put goods on the market, such as advertising campaigns, which can demonstrate genuine use. **Exhibits 15-17** show that readers of specialist magazines for mountain bike and BMX followers were exposed to advertisements and articles showing FOX products, although only CTM 2421352 was apparent. The evidence in **IB11, IB12, IB14, IB19 and IB20** shows that during 2013 two retail concerns with a significant presence in Austria, one also having a significant presence in Germany and the other also having a branch in Hungary and a further presence, through associated dealers, in seven other European Community Member States, offered for sale in their catalogues and online a number of items of the Opponent's sports and leisure clothing and protective sports gear of various kinds in the European Community in the relevant period.

35) The items identified as the Opponent's goods in **Exhibits IB4, IB6, IB8 and IB10**, and in **Exhibits IB12, IB14 and IB20** cover a range of casual and sports clothing, luggage, and protective sports clothing and gear. They variously bear the mark in CTM 2421824 or the mark in CTM 2421352, sometimes both, and sometimes neither where other FOX logos and signs are used. Even though not all the goods shown bear one or other of the marks, a consumer perusing the Auner catalogue in **Exhibit IB20**, for example, will have come across both marks being used variously on the goods identified as those of the Opponent and, accordingly, will have associated both with the Opponent's goods, irrespective of whether

particular items bear one or other of those marks. One or other of the marks also appear on a few catalogue pages. Moreover, the mark registered as CTM 2421824 is shown among the array of logos displayed at the beginning of the “blue-tomato” snowboard catalogue of 2013/ 2014 to advertise to the consumer what brands are supplied by it. In addition, I bear in mind that trade marks are not only used on the market in which goods bearing the mark are sold to consumers and end users². The invoices to the retailers in **Exhibits IB4, IB6, IB8 and IB** displayed the mark registered as CTM 2421824, and the retailers Blue Tomato and *Auner* will have associated both marks with the Opponent’s goods.

36) In the light of the circumstances described above I conclude that there has been real commercial exploitation both of the mark in CTM 2421352 and of the mark registered as CTM 2421824 aimed at maintaining or creating an outlet for the goods or services or a share in the market in the European Community in respect of the following goods identified as the Opponent’s goods in **Exhibits IB4, IB6, IB8 and IB10**, and in **Exhibits IB12, IB14 and IB20**: hoody pullovers and fleeces, t-shirts, belts, protective clothing such as overalls, breast plates, helmets, gloves, knee pads, neck braces and goggles, sunglasses, boots, sandals, trainers, headgear such as baseball caps, wool hats, tanks, undergarments such as socks, boxer shorts and camis, luggage such as gear bags, handbags and backpacks, swimwear, wallets, raincoats and umbrellas.

FAIR SPECIFICATION

37) Mr Justice Arnold (as he now is) in his judgments as The Appointed Person in *Nirvana Trade Mark BL O-262-06* and *Extreme Trade Mark BL O-161-07* comprehensively examined the case law in this area. His conclusion in *Nirvana* was that:

“(1) The tribunal’s first task is to find as a fact what goods or services there has been genuine use of the trade mark in relation to during the relevant period: *Decon v Fred Baker* at [24]; *Thomson v Norwegian* at [30].

(2) Next the tribunal must arrive at a fair specification having regard to the use made: *Decon v Fred Baker* at [23]; *Thomson v Norwegian* at [31].

(3) In arriving at a fair specification, the tribunal is not constrained by the existing wording of the specification of goods or services, and in particular is not constrained to adopt a blue-pencil approach to that wording: *MINERVA* at 738; *Decon v Fred Baker* at [21]; *Thomson v Norwegian* at [29].

(4) In arriving at a fair specification, the tribunal should strike a balance between the respective interests of the proprietor, other traders and the public having regard to the protection afforded by a registered trade mark: *Decon v Fred Baker* at [24]; *Thomson v Norwegian* at [29];

² See the judgment of the Court of Appeal in *Laboratoires Goëmar SA v La Mer Technology Inc* at paragraphs 25, 33 and 34.

ANIMAL at [20].

(5) In order to decide what is a fair specification, the tribunal should inform itself about the relevant trade and then decide how the average consumer would fairly describe the goods or services in relation to which the trade mark has been used: *Thomson v Norwegian* at [31]; *West v Fuller* at [53].

(6) In deciding what is a fair description, the average consumer must be taken to know the purpose of the description: *ANIMAL* at [20].

(7) What is a fair description will depend on the nature of the goods, the circumstances of the trade and the breadth of use proved: *West v Fuller* at [58]; *ANIMAL* at [20].”

38) The General Court (“GC”) in *Reckitt Benckiser (España), SL v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-126/03 (“Aladin”)* held that:

“43. Therefore, the objective pursued by the requirement is not so much to determine precisely the extent of the protection afforded to the earlier trade mark by reference to the actual goods or services using the mark at a given time as to ensure more generally that the earlier mark was actually used for the goods or services in respect of which it was registered.

44. With that in mind, it is necessary to interpret the last sentence of Article 43(2) of Regulation No 40/94 and Article 43(3), which applies Article 43(2) to earlier national marks, as seeking to prevent a trade mark which has been used in relation to part of the goods or services for which it is registered being afforded extensive protection merely because it has been registered for a wide range of goods or services. Thus, when those provisions are applied, it is necessary to take account of the breadth of the categories of goods or services for which the earlier mark was registered, in particular the extent to which the categories concerned are described in general terms for registration purposes, and to do this in the light of the goods or services in respect of which genuine use has, of necessity, actually been established.

45. It follows from the provisions cited above that, if a trade mark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently, proof that the mark has been put to genuine use in relation to a part of those goods or services affords protection, in opposition proceedings, only for the sub-category or subcategories relating to which the goods or services for which the trade mark has actually been used actually belong. However, if a trade mark has been registered for goods or services defined so precisely and narrowly that it is not possible to make any significant sub-divisions within the category concerned, then the proof of genuine use of the mark for the goods or services necessarily covers the entire category for the purposes of the opposition.

46. Although the principle of partial use operates to ensure that trade marks which have not been used for a given category of goods are not rendered unavailable, it must not, however, result in the proprietor of the earlier trade mark being stripped of all protection for goods which, although not strictly identical to those in respect of which he has succeeded in proving genuine use, are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner. The Court observes in that regard that in practice it is impossible for the proprietor of a trade mark to prove that the mark has been used for all conceivable variations of the goods concerned by the registration. Consequently, the concept of 'part of the goods or services' cannot be taken to mean all the commercial variations of similar goods or services but merely goods or services which are sufficiently distinct to constitute coherent categories or sub-categories.

53 First, although the last sentence of Article 43(2) of Regulation No 40/94 is indeed intended to prevent artificial conflicts between an earlier trade mark and a mark for which registration is sought, it must also be observed that the pursuit of that legitimate objective must not result in an unjustified limitation on the scope of the protection conferred by the earlier trade mark where the goods or services to which the registration relates represent, as in this instance, a sufficiently restricted category."

39) In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. as Appointed Person summed up the law as being:

"In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned."

Given the goods in respect of which I have found genuine use of both marks relied on by the Opponent in the relevant period, I consider that the following represents a fair specification of the goods protected in classes 18 and 25 by both earlier marks:

Class 18: *Luggage, backpacks, all purpose sports bags.*

Class 25: *Casual clothing, namely jackets, raincoats, sweatshirts, jerseys, shirts, pants, shorts, hats, caps, gloves, belts, shoes, boots and socks.*

It should be noted that **Class 18** of the specification of CTM 2421352 contains the additional item *umbrellas*, for which I have found genuine use in the relevant period. The fair specification for CTM 2421352 only, therefore, will additionally include *umbrellas*.

SECTION 5(3)

40) It will be convenient at this point to examine the Opponent's claims under section 5(3) of the Act, which provides:

“(3) A trade mark which –

(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a CTM or international trade mark (EC) in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark”.

41) The effect of the CJEU's judgement in Case C-375/97, *General Motors*, [1999] ETMR 950 is that for the purposes of section 5(3):

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

Given that the marks relied on in these proceedings are CTMs, for a claim to succeed under section 5(3) it must first be established that they have a reputation in the European Community. *General Motors* indicates that in order to satisfy the requirement relating to reputation, a registered trade mark must be known by a significant part of the public concerned by the products or services which it covers. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it. In *Pago International GmbH v Tirol Milchregistrierte Genossenschaft mbH* C-301/07 (“*Pago*”) the CJEU held that, in appropriate circumstances, the territory of a single Member State may be considered to constitute a substantial part of the territory of the Community.

42) However, even if the Opponent could establish that its earlier marks had a reputation in the European Community with the relevant section of the public for the goods for which the marks are registered, that is not the end of the matter. In *CCB INTERNATIONAL* O-281-14 the Appointed Person, Mr Iain Purvis, observed (at paragraph 41):

“If the reputation of the earlier mark does not extend to the United Kingdom, it is difficult to see how (at least in the usual case) it could be damaged by use of a mark in the United Kingdom, or that such use could be said to take unfair advantage of the earlier mark. For one thing, the necessary ‘link’ between the marks in the mind of the average consumer which must be established in any case which relies on the extended protection (see *Adidas-Salomon v Fitnessworld* [2004] ETMR 10) would not exist. There is certainly no evidence in the present case which explains how any ‘link’ could be made in the UK absent a reputation here.”

43) I have already assessed in paragraphs 27-28 the shortcomings of the evidence provided in **Exhibit IB2**. While I accept that the magazines in **Exhibits IB15 to IB18** will have had some kind of UK readership in 2013 among followers of the respective sports, I have already pointed out that I have no circulation figures for them. In the light of these considerations it is difficult to assess the degree to which the earlier marks may have been known on the markets for the relevant goods at the relevant date. I am therefore unable to conclude reliably that either of the earlier marks in these proceedings would have been known to a significant proportion of consumers for the relevant goods in the European Community or the UK at the date of application for the mark in suit. The Opponent has therefore failed to prove that at that point either of the earlier marks enjoyed a reputation for the purposes of section 5(3). Accordingly, **the opposition under section 5(3) fails.**

SECTION 5(2)(b)

44) Sections 5(2)(b) of the Act reads as follows:

“5(2) A trade mark shall not be registered if because – [...]

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

I have taken into account the guidance provided by the CJEU in a number of judgments. The following principles are gleaned from the decisions in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably 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, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks

bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) 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;

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of the goods

45) In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services

c) The respective trade channels through which the goods or services reach the market

d) In the case of self serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court stated that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T- 325/06 provides guidance on when goods are to be regarded as complementary:

“It is true that goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking (see, to that effect, Case T-169/03 *Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI)* [2005] ECR II-685, paragraph 60, upheld on appeal in Case C-214/05 *P Rossi v OHIM* [2006] ECR I-7057; Case T-364/05 *Saint-Gobain Pam v OHIM – Propamsa (PAM PLUVIAL)* [2007] ECR II-757, paragraph 94; and Case T-443/05 *El Corte Inglés v OHIM – Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)* [2007] ECR I-0000, paragraph 48).”

46) In *Oakley, Inc v OHIM*, Case T-116/06 (“*Oakley*”), at paragraphs 46-57, the General Court held that although retail services are different in nature, purpose and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree. In *Tony Van Gulck v Wasabi Frog Ltd*, Case BL O/391/14, Mr Geoffrey Hobbs Q.C. as the Appointed Person reviewed the law concerning retail services v goods. He said (at paragraph 9 of his decision) that:

“9. The position with regard to the question of conflict between use of *BOO!* for handbags in Class 18 and shoes for women in Class 25 and use of *MissBoo* for the Listed Services is considerably more complex. There are four main reasons for that: (i) selling and offering to sell goods does not, in itself, amount to providing retail services in Class 35; (ii) an application for

registration of a trade mark for retail services in Class 35 can validly describe the retail services for which protection is requested in general terms; (iii) for the purpose of determining whether such an application is objectionable under Section 5(2)(b), it is necessary to ascertain whether there is a likelihood of confusion with the opponent's earlier trade mark in all the circumstances in which the trade mark applied for might be used if it were to be registered; (iv) the criteria for determining whether, when and to what degree services are 'similar' to goods are not clear cut."

However, on the basis of the European courts' judgments in *Sanco SA v OHIM*³, and *Assembled Investments (Proprietary) Ltd v. OHIM*⁴, upheld on appeal in *Waterford Wedgewood Plc v. Assembled Investments (Proprietary) Ltd*⁵, Mr Hobbs concluded that:

- Goods and services are not similar on the basis that they are complementary if the complementarity between them is insufficiently pronounced that, from the consumer's point of view, they are unlikely to be offered by one and the same undertaking;
- In making a comparison involving a mark registered for goods and a mark proposed to be registered for retail services (or vice versa), it is necessary to envisage the retail services normally associated with the opponent's goods and then to compare the opponent's goods with the retail services covered by the applicant's trade mark;
- It is not permissible to treat a mark registered for 'retail services for goods X' as though the mark was registered for goods X;
- The General Court's findings in *Oakley* did not mean that goods could only be regarded as similar to retail services where the retail services related to exactly the same goods as those for which the other party's trade mark was registered (or proposed to be registered).

47) The Applicant's *rucksacks and backpacks* are identical with the Opponent's *backpacks*. The Applicant's *sports bags* covers the Opponent's *all purpose sports bags*; they are identical. The Applicant's *cases, bags, briefcases, laptop cases, pouches, sacks, travel bags, carrier bags and shoulder bags, and travel pouches* have a high degree of similarity with the Opponent's *luggage*; they are all types of bags, they serve the same purpose, can be produced by the same undertakings, and are sold through the same channels of trade. Although *purses and wallets* are not bags or luggage as such, they share their general container function, for this reason generally being made of the same durable materials by the same manufacturers, and sold in the same retail outlets to users consisting of the general public; they are of medium similarity to the Opponent's *luggage*. *Leather and imitations of leather* describes the materials used in the production of leather and imitation leather goods, not the goods themselves. A very small part of the market for leather and imitations

³ Case C-411/13P

⁴ Case T-105/05, at paragraphs [30] to [35] of the judgment

⁵ Case C-398/07P

of leather may consist of that part of the general public which engages in handicraft hobbies involving the making of goods from these materials; but overwhelmingly the market for them will consist of business users, namely wholesalers of the materials and commercial producers of goods made from them. Users, nature, purpose and channels of trade are all quite different from the luggage, bags and clothing articles of the Opponent's specifications. There is no similarity.

48) I note at this point that none of the goods of the class 25 specification of either earlier mark provide similarity with the applied for *parasols and umbrellas; walking sticks, mountaineering sticks and trekking poles*. Their nature is very different, they serve different purposes and have different channels of trade. Nor are they complementary or in competition in any meaningful way. The Opponent submits: "For the non-luggage goods of the Applicant in class 18, i.e. parasols and umbrellas, walking sticks, mountaineering sticks and trekking poles, these goods are likely to be sold in retail outlets carrying goods for those interested in outdoor activities. The Applicant's range of products is all directed to outdoor active sports and in the particular case of the Applicant's range of products for skiing and snowboarding, there is a strong likelihood that goods such as mountaineering sticks and trekking poles will be sold in ski shops which carry the Opponent's goods". However, my assessment of similarity for the purposes of a claim under section 5(2)(b) must be a notional one; it is the inherent nature of the goods of the specification which I have to consider, rather than current marketing strategy (see *Devinlec Développement Innovation Leclerc SA v OHIM* Case T- 147/03). The goods relied on by the Opponent are consumer goods of wide, general application. *Backpacks* and even *all purpose sports bags* will be used much more widely, and are available through trade channels much wider than those of goods narrowly focused on sports. The fact that there may be some overlap in channels of trade and users between them and the applied for *mountaineering sticks and trekking poles* is not sufficient to create more than a low degree of similarity. Their nature and purpose are quite different. Any finding of greater similarity must therefore depend on comparison with the *umbrellas* of CTM 2421352.

49) The applied for *umbrellas* are covered by the *umbrellas* of the earlier mark CTM 2421352. Although the applied for *parasols* do not strictly serve the same function as *umbrellas*, the same articles are in fact often used for both purposes, are sold through the same channels of trade, and are produced by the same producers for, largely, the same users. They are at least very highly similar. The applied for *walking sticks* are not of the same nature, do not serve the same purpose, and are not in competition with, or complementary to, the earlier mark's *umbrellas*. There may be some overlap in consumers, but I have no information as to trade channels. There is only a low degree of similarity between *walking sticks* and *umbrellas*. The same applies with regard to the applied for *mountaineering sticks and trekking poles*.

50) The Opponent's *casual clothing, namely jackets, raincoats, sweatshirts, jerseys, shirts, pants, shorts, hats, caps, gloves, belts, shoes, boots and socks* all consist of general, casual wear; accordingly, they fall within the ambit of the Applicant's *clothing, footwear and headgear* in class 25, and are therefore identical under the guidance in *Meric*. The exclusion *none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists* added to the specification applied for in class 25 does not change this.

51) On the principles in *Oakley*, as explained above, there is a medium degree of similarity between the applied for *retail services in connection with the sale of cases, bags, briefcases, laptop cases, pouches, sacks, travel bags, sports bags, carrier bags and shoulder bags, travel pouches, rucksacks and backpacks, purses and wallets* and the earlier marks' *luggage, backpacks, all purpose sports bags*. There is a medium degree of similarity between the applied for *retail services in connection with the sale of parasols and umbrellas* and the *umbrellas* of CTM 2421352. Retailing of goods does not share nature, intended purpose or method of use with the goods themselves; however, they are indispensable for the respective retail services; they are complementary to the services and share channels of trade.

52) The same considerations apply to the comparison between the applied for *retail services in connection with the sale of clothing, footwear, headgear* and the earlier marks' *casual clothing, namely jackets, raincoats, sweatshirts, jerseys, shirts, pants, shorts, hats, caps, gloves, belts, shoes, boots and socks*; there is a medium degree of similarity.

53) I have already noted that a very small part of the market for leather and imitations of leather may consist of that part of the general public which engages in handicraft hobbies involving the making of goods from these materials. However, there will be no complementarity between such *retail services in connection with the sale of leather and imitations of leather* and any of the luggage, bags or clothing articles of the Opponent's specifications. There is no similarity. I have already found only a low degree of similarity between the applied for *walking sticks, mountaineering sticks and trekking poles* and the earlier *umbrellas*. I bear in mind that I must envisage the retail services normally associated with the Opponent's goods, and then compare the Opponent's goods with the retail services covered by the Applicant's mark. I find that there cannot be sufficient complementarity between the earlier CTM 2421352 mark's *umbrellas* and the applied for *retail services in connection with the sale of walking sticks, mountaineering sticks and trekking poles* to give rise to anything more than a very low level of similarity. The same applies if the comparison is made with the earlier marks' *luggage, backpacks, all purpose sports bags*; there is a very low level of similarity at best. Similarly, bearing in mind the retail services and channels of trade normally associated with the Opponent's *luggage, backpacks, all purpose sports bags*, there cannot be sufficient complementarity with the applied for *retail services in connection with the sale of cases for watches*; there is not more than a very low level of similarity at best.

The average consumer and the purchasing process

54) The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

55) The average consumer of all the Opponent’s goods in classes 18 and 25 will consist of the general public. Consumers of *all purpose sports bags* will consist of that part of the general public interested in playing sports, and such bags are also in fact often used for general purposes unconnected with sport. Similarly, apart from the special case of *leather and imitations of leather*, the average consumer of all the Applicant’s goods in classes 18 and 25, and of its retail services in Class 35 will consist of the general public. Consumers of *mountaineering sticks and trekking poles* and retail services connected with them will consist of that part of the general public interested in the relevant pursuits. Clothing, footwear and headgear are regular consumer purchases. Items such as bags and luggage, purses and wallets, and umbrellas will also be fairly routine (although not frequent) purchases for any household. The goods concerned are not specialist ones and, although their cost can vary, they are not, generally speaking, highly expensive purchases. Whilst the average consumer of expensive clothing or luggage, for example, will probably pay higher attention to the selection of the goods or an appropriate retailer, the position must also be considered from the perspective of more ordinary clothing or luggage and its retail. Overall, consumers will normally pay a reasonable degree of attention, neither higher nor lower than the norm, when selecting the goods, or an appropriate retail service provider for the goods being retailed. The purchasing of all these goods, or the selection of the retail outlet or online channel through which they are purchased, is a predominantly visual process, so visual aspects of the marks take on more importance; but there may be some scope for aural use of the marks, so aural aspects will not be overlooked in my comparison of the marks.

The distinctiveness of the earlier marks

56 The degree of distinctiveness of the earlier marks must be assessed. This is because the more distinctive the earlier mark (on the basis either of inherent qualities or because of use made), the greater the likelihood of confusion (see *Sabel BV v. Puma AG*, paragraph 24). In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *WindsurfingChiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

57) In its counterstatement the Applicant states that “A very brief search of the UK register reveals that there are at least 150 marks on the register that contain the element FOX and cover goods in classes 18 and 25. It is a rather commonplace element in a trade mark for the goods concerned. It is certainly not an element that could inherently enjoy anything above a low level of distinctive character”. Such material would constitute evidence. In order to be considered in these proceedings it would need to have been filed in proper evidential format. However, even if the list of registrations in question had been admitted as evidence, it would not have assisted the Applicant. This is because this type of “state of the register” evidence does not show whether the marks are being used, or indicate the goods on which there is use, or what agreements may be in place between the parties concerned. It does not, therefore, carry weight as an indicator of whether or not there will be confusion in the market place in relation to the respective trade marks⁶.

58) The Opponent submits that the distinctiveness of the earlier marks has been enhanced through use. In the course of my analysis under section 5(3) I have already examined the evidence of use of the earlier marks and found that the Opponent has failed to prove that either of the earlier marks in these proceedings would have been known to a significant proportion of consumers for the relevant goods in either the European Community or the UK at the date of application for the mark in suit. Given my findings, the distinctiveness of the marks is not enhanced to any material extent. This leaves the question of inherent distinctiveness to be considered. The word FOX has an obvious meaning, but the FOX element is not in any way descriptive or allusive of the goods of either of the earlier marks; their stylisation also makes some contribution to their distinctiveness. They both have a normal degree of distinctiveness in relation to the goods covered by them.

Comparison of the marks

59) It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall




⁶ 5 see Jacob J in *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281 and the General Court in *Zero Industry Srl v Office of Harmonisation in the Internal Market (Trade Marks and Designs)(OHIM)*, Case T-400/06 and *GfK AG v Office of Harmonisation in the Internal Market (trade Marks and Designs)(OHIM)*, Case T-135/04

impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union stated at paragraph 34 of its judgment in Case C-591/12P, Bimbo SA v OHIM, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

It would be wrong, therefore, to dissect the trade marks artificially, although, it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

60) The marks to be compared are shown below.

The opposed mark	CTM 2421824	CTM 2421352
		

The opposed mark consists of the word FOX in block type with, to the right of it, a somewhat stylised but fairly conventional representation of a canine head which, in the light of the accompanying word, will be seen as a fox’s head. The word ACTIVE appears in somewhat smaller block type below. The word ACTIVE has an allusive quality in connection with clothing, luggage, bags, etc., in that it suggests that the goods in question are suitable for use by “active” people – a point I shall consider when making my global assessment of the likelihood of confusion. While ACTIVE does make a contribution to the overall visual impression of the mark, it is the word FOX and the fox head device which are the mark’s dominant and more distinctive elements.

61) The earlier mark CTM 2421824 consists of the letters F and X in serif capitals on either side of a device consisting of a highly stylised representation of a canine head. I am unable to agree with the Applicant’s submission that the mark “would be viewed by the relevant consumer as consisting of the letters “F” and “X” – arguably in relation to a commonplace abbreviation and/or slang for the word “effects – separated by an image of an undecipherable animal or fictitious character or creature”. The shapes both of the letters and of the device are outlined with surrounding borders, and this common outlining motif assists in prompting the viewer to perceive the central device as fulfilling the function of the letter O in the word FOX.

I consider that visual considerations alone will prompt the mind to supply the letter O, rather than A or I, for example. Moreover, the canine head will also give the cue, and the word FOX will in turn confirm perception of the device as a stylised fox's head. The mark's stylisation and outlining motif contribute to its overall visual impression, but it is the word FOX and the central device which are its dominant elements.

62) CTM 2421352 consists of a slightly widened version of the central device from CTM 2421824, which constitutes the sole element of CTM 2421352.

63) Visually, the opposed mark differs from CTM 2421824 in that it contains the extra word ACTIVE, and the words FOX and ACTIVE are written in plain block type, by contrast with the stylised presentation of FOX in the earlier mark. The devices occupy different positions in the two marks. The conventional canine head in the opposed mark, though stylised, is much closer to a naturalistic representation of a fox's head than the much more highly stylised device in CTM 2421824. ACTIVE contributes an element of dissimilarity, but it occupies a subsidiary position in the opposed mark, which is dominated by the word FOX and a device which will be perceived as a fox's head. CTM 2421824 consists of the word FOX combined with a device which will be perceived as a fox's head. Overall, there is a medium degree of visual similarity between the marks.

64) There is a greater visual difference between the opposed mark and CTM 2421352. The word elements are missing completely from CTM 2421352. In particular, the word FOX, which in CTM 2421824 helps to confirm the device as a fox's head, is absent from CTM 2421352. The device in CTM 2421352 is much more highly stylised than that in the opposed mark, having more of the quality of a cartoon character. There is a low degree of visual similarity between the opposed mark and CTM 2421352.

65) The concept represented by the word FOX and its accompanying device in both the opposed mark and CTM 2421824 will be immediately grasped by the average consumer. ACTIVE in the opposed mark will be understood as an allusion to the active qualities of persons using the relevant goods and the retail services relating to them. There is a high degree of conceptual similarity between the opposed mark and CTM 2421824.

66) As I have already observed, the device in CTM 2421352 is more highly stylised than that in the opposed mark and there is no verbal cue to the nature of the creature depicted. Some average consumers may not recognise it as a fox. Some average consumers may recognise the fox-like characteristics of the image in the absence of such a cue, giving some conceptual similarity with the applied for mark, but I think the main impression on the consumer is that of a highly stylised device, which may be intended to represent a fox. There is a reasonable degree of conceptual similarity between the opposed mark and CTM 2421352.

67) CTM 2421824 will be pronounced as FOX. The opposed mark may be pronounced as FOX or FOX ACTIVE. Even when it is pronounced as FOX ACTIVE, there will still be a medium degree of aural similarity between the marks.

68) CTM 2421352 consists of a device only, with no obvious pronunciation.

Likelihood of confusion

69) The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.

CTM 2421824

70) I have found CTM 2421824 to have a normal degree of distinctiveness. I have found a medium degree of visual and aural similarity and a high degree of conceptual similarity between the opposed mark and the earlier mark. I have found that in both marks the combination of the respective device with the word FOX will mean that the device is in both cases perceived as a fox's head. Bearing in mind my findings on the average consumer and the purchasing process, and in particular having regard to the principle of imperfect recollection, I consider that there is a danger of direct confusion in respect of those applied for goods and services which I have found to be of at least average similarity with the goods of the earlier mark; the differences in stylisation and layout and the additional word ACTIVE in the opposed mark are insufficient to counteract confusion of the marks where these goods are concerned. However, if I am wrong about this I consider that, where those goods and services which I have found to be of at least average similarity are concerned, there will be indirect confusion; the consumer will believe that they are marks used by the same or by economically linked undertakings. Both marks consist of a combination of the word FOX with a device which, in the context of the mark, will be perceived as a fox's head. It is this combination on which the average consumer will rely as an indication of origin. I have found that ACTIVE in the opposed mark will be understood as an allusion to the active qualities of persons using the relevant goods and the retail services relating to them; it is the kind of element the average consumer would expect to find in a sub-brand or brand extension. **Accordingly, I find there will be confusion in respect of the following goods and services of the applied for mark:**

Class 18: Cases, bags, briefcases, laptop cases, pouches, sacks, travel bags, sports bags, carrier bags and shoulder bags; travel pouches; rucksacks and backpacks; purses and wallets.

Class 25: Clothing, footwear and headgear.

Class 35: Retail services in connection with the sale of cases, bags, briefcases, laptop cases, pouches, sacks, travel bags, sports bags, carrier bags and shoulder bags, travel pouches, rucksacks and backpacks, purses and wallets, clothing, footwear, headgear.

In respect of the applied for goods and services which I have found to be of low or no similarity with the goods of the earlier mark, I do not consider that there will be

confusion; in these cases the differences in the marks will suffice for the consumer to regard their similarities as a coincidence. **Accordingly, I find there will be no confusion in respect of the following goods and services of the applied for mark:**

Class 18: Leather and imitations of leather; parasols and umbrellas; walking sticks, mountaineering sticks and trekking poles.

Class 35: Retail services in connection with the sale of cases for watches, leather and imitations of leather, parasols and umbrellas, walking sticks, mountaineering sticks and trekking poles

CTM 2421352

71) The specification of CTM 2421352 differs from that of CTM 2421824 only in that it additionally contains *umbrellas* in class 18. My assessment in relation to CTM 2421352 is therefore relevant only to the question of whether use of CTM 2421352 in relation to umbrellas could give rise to a likelihood of confusion in respect of any of the applied for goods or services for which I have found no likelihood of confusion under CTM 2421824.

72) I have found CTM 2421352 to have a normal degree of distinctiveness. I have found a low degree of visual similarity and a reasonable degree of conceptual similarity between the opposed and the earlier mark, and that the earlier mark has no obvious pronunciation. Bearing in mind my findings on the average consumer and purchasing process, and having regard to the principle of imperfect recollection, I do not consider that there will be direct confusion between CTM 2421352 and the opposed mark; the differences are too great. Nor do I consider that there is a likelihood of indirect confusion, even in respect of those goods which I have found to be identical. Some average consumers may not recognize the device in CTM 2421352 as a fox. For them the question of confusion cannot arise. Some average consumers will see it as representing a fox. For these, however, a large part of the distinctive character of the earlier mark will reside in its particular graphic representation. It is not simply a fox, but a highly stylised one with distinctive cartoon-like characteristics. The strong, unambiguous conceptual and aural underpinning which the word FOX provides in CTM 2421824 is lacking in CTM 2421352. In its absence, I am not persuaded that the strongly stylised image in CTM 2421352 will, on its own, create the risk that the average consumer will believe that CTM 2421352 and the applied for mark are used by the same or by economically linked undertakings, even when applied to identical goods or services. **Accordingly, there is no likelihood of either direct or indirect confusion in respect of any of the goods or services of the Applicant's specification.**

73) In view of the broad nature of the terms *clothing, footwear and headgear* in class 25 and *retail services in connection with the sale of clothing, footwear, headgear* in class 35 of the Applicant's specification I have given some thought to whether it is necessary to consider if the applied for specification could be amended so as to avoid confusion. However, the penumbra of protection of the casual clothing in the Opponent's class 25 specification, for example, will extend to most clothing; it is nowadays not unusual to find items of casual and formal clothing supplied under the

same mark. It is conceivable that use of marks on specialised items, such as wedding dresses and their retailing, for example, might not lead to confusion with similar marks used on casual clothing;. However, in the letter issued by the Tribunal to the parties when the proceedings were ready for substantive determination the Applicant was invited to make clear whether it had a fall-back position in the form of a limited specification. No fall-back position was submitted, and nothing in the Applicant's submissions indicates an interest in specific amendments of this kind beyond the limitation already undertaken during the course of the proceedings. Under these circumstances I have concluded that it is not appropriate to offer the applicant the opportunity to offer further limitations aimed at avoiding confusion with the Opponent's mark.

OUTCOME

74) The opposition has succeeded in respect of the following goods and services only, for which the opposed mark may not proceed to registration:

Class 18: Cases, bags, briefcases, laptop cases, pouches, sacks, travel bags, sports bags, carrier bags and shoulder bags; travel pouches; rucksacks and backpacks; purses and wallets; none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists.

Class 25: Clothing, footwear and headgear; none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists.

Class 35: Retail services in connection with the sale of cases, bags, briefcases, laptop cases, pouches, sacks, travel bags, sports bags, carrier bags and shoulder bags, travel pouches, rucksacks and backpacks, purses and wallets, clothing, footwear, headgear; none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists.

75) The opposition has failed in respect of the following goods and services, for which the opposed mark may proceed to registration:

Class 8: Knives; pocket knives; screwdrivers; can openers (non-electric); scissors; files and/or nail files; spanners (tools); screwdrivers; forks (cutlery); forks (hand tools); spoons; can openers; none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists.

Class 9: Compasses; navigational instruments; parts and fittings for all of the aforesaid goods; none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists.

Class 11: Lighting apparatus; torches; electric torches; flashlights; pocket torches; rechargeable torches; head torches; none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists.

Class 14: Clocks; watches; cases for watches; bands for watches; parts and fittings for all of the aforesaid goods; none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists.

Class 18: Leather and imitations of leather; parasols and umbrellas; walking sticks, mountaineering sticks and trekking poles; none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists.

Class 20: Sleeping bags.

Class 21: Bottle openers; cork screws.

Class 22: Ropes, straps, nets, tents and tarpaulins.

Class 35: Retail services in connection with the sale of knives, pocket knives, screwdrivers, can openers (non-electric), scissors, files and/or nail files, spanners (tools), screwdrivers, forks (cutlery), forks (hand tools), spoons, bottle openers, can openers, corkscrews, compasses, navigational instruments, lighting apparatus, torches, electric torches, flashlights, pocket torches, rechargeable torches, clocks, watches, cases for watches, bands for watches, leather and imitations of leather, parasols and umbrellas, walking sticks, mountaineering sticks and trekking poles, sleeping bags, ropes, straps, nets, tents and tarpaulins, head torches; none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists.

COSTS

76) The Opponent has succeeded partially. The Applicant has successfully resisted the opposition in respect of much of its specification. The result might be described as a “score draw”. Neither side will be favoured with an award of costs.

Dated this 19TH day of May 2015

**Martin Boyle
For the Registrar,
The Comptroller-General**

Annex A – Application for UK registration no. 3025784



Class 8: Knives; pocket knives; screwdrivers; can openers (non-electric); scissors; files and/or nail files; spanners (tools); screwdrivers; forks (cutlery); forks (hand tools); spoons; can openers; none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists.

Class 9: Compasses; navigational instruments; parts and fittings for all of the aforesaid goods; none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists.

Class 11: Lighting apparatus; torches; electric torches; flashlights; pocket torches; rechargeable torches; head torches; none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists.

Class 14: Clocks; watches; cases for watches; bands for watches; parts and fittings for all of the aforesaid goods; none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists.

Class 18: Leather and imitations of leather; cases, bags, briefcases, laptop cases, pouches, sacks, travel bags, sports bags, carrier bags and shoulder bags; travel pouches; rucksacks and backpacks; purses and wallets; parasols and umbrellas; walking sticks, mountaineering sticks and trekking poles; none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists.

Class 20: Sleeping bags.

Class 21: Bottle openers; cork screws.

Class 22: Ropes, straps, nets, tents and tarpaulins.

Class 25: Clothing, footwear and headgear; none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists.

Class 35: Retail services in connection with the sale of knives, pocket knives, screwdrivers, can openers (non-electric), scissors, files and/or nail files, spanners (tools), screwdrivers, forks (cutlery), forks (hand tools), spoons, bottle openers, can openers, corkscrews, compasses, navigational instruments, lighting apparatus, torches, electric torches, flashlights, pocket torches, rechargeable torches, clocks, watches, cases for watches, bands for

watches, leather and imitations of leather, cases, bags, briefcases, laptop cases, pouches, sacks, travel bags, sports bags, carrier bags and shoulder bags, travel pouches, rucksacks and backpacks, purses and wallets, parasols and umbrellas, walking sticks, mountaineering sticks and trekking poles, sleeping bags, ropes, straps, nets, tents and tarpaulins, clothing, footwear, headgear and head torches; none of the aforesaid including goods specifically designed and intended for motorcyclists and cyclists.

Annex B – CTM 2421824



Class 9: Pressure air gauges, motorcycle and safety helmets and protective clothing for motorcyclists and cyclists.

Class 16: Decals, stickers, calendars and catalogs relating to motocross sports clothing, protective gear, footwear, casual wear and accessories.

Class 18: Luggage, backpacks, fanny packs, all purpose sports bags, tool packs sold empty.

Class 25: Clothing, namely, jackets, raincoats, sweatshirts, jerseys, shirts, blouses, pants, tights, shorts, hats, caps, sweatbands, headbands, gloves, belts, shoes, boots, socks and aprons.

Annex C – CTM 2421352



Class 9: Pressure air gauges, motorcycle and safety helmets and protective clothing for motorcyclists and cyclists.

Class 16: Decals, stickers, calendars and catalogs relating to motocross sports clothing, protective gear, footwear, casual wear and accessories.

Class 18: Luggage, backpacks, fanny packs, all purpose sports bags, tool packs sold empty and umbrellas.

Class 25: Clothing, namely, jackets, raincoats, sweatshirts, jerseys, shirts, blouses, pants, tights, shorts, hats, caps, sweatbands, headbands, gloves, belts, shoes, boots, socks and aprons.