

O-643-17

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3196124 BY
DEFINE GROUP LIMITED
TO REGISTER:**

Define by Ashley Yeater

AS A TRADE MARK IN CLASSES 25, 28 & 41

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 408420 BY BOI TRADING COMPANY LTD**

BACKGROUND & PLEADINGS

1. On 10 November 2016, Define Group Limited (“the applicant”) applied to register **Define by Ashley Yeater** as a trade mark for goods and services in classes 25, 28 and 41. The application was published for opposition purposes on 2 December 2016.
2. On 1 February 2017, the application was opposed by Boi Trading Company Ltd (“the opponent”); the opposition is only directed against the goods in class 25 of the application i.e. “Clothing, footwear and headgear; gymwear; exercise wear; sportswear.” The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), with the opponent relying upon European Union Trade Mark (“EUTM”) no. 4557278 for the trade mark **DEFINED** which was applied for on 19 July 2005 (claiming an International Convention priority date of 21 March 2005 from an earlier filing in Turkey) and registered on 5 July 2007. The opponent indicates that it relies upon “clothing” and “headgear” in class 25 of its registration.
3. The applicant filed a counterstatement in which it denies the basis of the opposition.
4. In these proceedings, the opponent is represented by Novagraaf UK and the applicant by RevoMark. The opponent filed evidence and submissions. Neither party asked to be heard or elected to file written submission in lieu of attendance at a hearing.

DECISION

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

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

(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.”

6. An earlier trade mark is defined in section 6 of the Act, which states:

“6. - (1) In this Act an “earlier trade mark” means –

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

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

7. In these proceedings, the opponent is relying upon the EUTM registration shown in paragraph 2 above, which qualifies as an earlier trade mark under the above provisions. As this earlier trade mark had been registered for more than five years at the date the application was published, it is subject to the proof of use provisions contained in section 6A of the Act. Although in its counterstatement the applicant asked the opponent to provide proof of use in relation to “Clothing, footwear, headgear” i.e. all the goods for which the trade mark is registered in class 25, as the tribunal pointed out in its letter of 14 March 2017, as the opponent only relies upon clothing and headgear, it is only necessary for it to provide proof of use in relation to those named goods.

8. The relevant sections of the Act read as follows:

“6A Raising of relative grounds in opposition proceedings in case of non-use

(1) This section applies where –

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

(b) there is an earlier trade mark 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.

(4) For these purposes –

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5) In relation to a Community trade mark, 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.

(7) Nothing in this section affects –

(a) the refusal of registration on the grounds mentioned in section 3 (absolute grounds for refusal) or section 5(4) (relative grounds of refusal on the basis of an earlier right), or

(b) the making of an application for a declaration of invalidity under section 47(2) (application on relative grounds where no consent to registration).”

9. Section 100 of the Act is also relevant and reads:

“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.”

The Proof of use assessment

10. In reaching a conclusion, I must apply the same factors as I would if I were determining an application for revocation of a trade mark registration based on grounds of non-use; the relevant period for present purposes is the five year period ending with the date of the publication of the application for registration i.e. 3 December 2011 to 2 December 2016. In *The London Taxi Corporation Limited v Frazer-Nash Research*

Limited & Ecotive Limited, [2016] EWHC 52, Arnold J. summarised the case law on genuine use of trade marks. He stated:

“217. *The law with respect to genuine use.* In *Stichting BDO v BDO Unibank Inc* [2013] EWHC 418 (Ch), [2013] FSR 35 I set out at [51] a helpful summary by Anna Carboni sitting as the Appointed Person in *SANT AMBROEUS Trade Mark* [2010] RPC 28 at [42] of the jurisprudence of the CJEU in Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439 , Case C-259/02 *La Mer Technology Inc v Laboratoires Goemar SA* [2004] ECR I-1159 and Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759 (to which I added references to Case C-416/04 *P Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237). I also referred at [52] to the judgment of the CJEU in Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16 on the question of the territorial extent of the use. Since then the CJEU has issued a reasoned Order in Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and that Order has been persuasively analysed by Professor Ruth Annand sitting as the Appointed Person in *SdS InvestCorp AG v Memory Opticians Ltd* (O/528/15).

218. An important preliminary point to which Prof Annand draws attention in her decision is that, whereas the English versions of Articles 10(1) and 12(1) of the Directive and Articles 15(1) and 51(1)(a) of the Regulation use the word “genuine”, other language versions use words which convey a somewhat different connotation: for example, “ernsthaft” (German), “efectivo” (Spanish), “sérieux” (French), “effettivo” (Italian), “normaal” (Dutch) and “sério/séria” (Portuguese). As the Court of Justice noted in *Ansul* at [35], there is a similar difference in language in what is now recital (9) of the Directive.

219. I would now summarise the principles for the assessment of whether there has been genuine use of a trade mark established by the case law of the Court of Justice, which also includes Case C-442/07 *Verein Radetsky-Order v Bunderversammlung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223 and Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR 7, as follows:

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

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29].

(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 to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with

the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving 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. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

11. As the opponent's earlier trade mark is a EUTM, the comments of the Court of Justice of the European Union (“CJEU”) in *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11 are relevant, where it noted:

“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:

“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.”

12. In *The London Taxi Corporation Limited* case mentioned above, Arnold J. reviewed the case law since *Leno* and concluded as follows:

“228. Since the decision of the Court of Justice in *Leno* there have been a number of decisions of OHIM Boards of Appeal, the General Court and national courts with respect to the question of the geographical extent of the use required for genuine use in the Community. It does not seem to me that a clear picture has yet emerged as to how the broad principles laid down in *Leno* are to be applied. It is sufficient for present purposes to refer by way of illustration to two cases which I am aware have attracted comment.

229. In Case T-278/13 *Now Wireless Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* the General Court upheld at [47] the

finding of the Board of Appeal that there had been genuine use of the contested mark in relation to the services in issues in London and the Thames Valley. On that basis, the General Court dismissed the applicant's challenge to the Board of Appeal's conclusion that there had been genuine use of the mark in the Community. At first blush, this appears to be a decision to the effect that use in rather less than the whole of one Member State is sufficient to constitute genuine use in the Community. On closer examination, however, it appears that the applicant's argument was not that use within London and the Thames Valley was not sufficient to constitute genuine use in the Community, but rather that the Board of Appeal was wrong to find that the mark had been used in those areas, and that it should have found that the mark had only been used in parts of London: see [42] and [54]-[58]. This stance may have been due to the fact that the applicant was based in Guildford, and thus a finding which still left open the possibility of conversion of the Community trade mark to a national trade mark may not have sufficed for its purposes.

230. In *The Sofa Workshop Ltd v Sofaworks Ltd* [2015] EWHC 1773 (IPEC), [2015] ETMR 37 at [25] His Honour Judge Hacon interpreted *Leno* as establishing that "genuine use in the Community will in general require use in more than one Member State" but "an exception to that general requirement arises where the market for the relevant goods or services is restricted to the territory of a single Member State". On this basis, he went on to hold at [33]-[40] that extensive use of the trade mark in the UK, and one sale in Denmark, was not sufficient to amount to genuine use in the Community. As I understand it, this decision is presently under appeal and it would therefore be inappropriate for me to comment on the merits of the decision. All I will say is that, while I find the thrust of Judge Hacon's analysis of *Leno* persuasive, I would not myself express the applicable principles in terms of a general rule and an exception to that general rule. Rather, I would prefer to say that the assessment is a multi-factorial one which includes the geographical extent of the use."

13. The General Court (“GC”) restated its interpretation of *Leno Marken* in Case T-398/13, *TVR Automotive Ltd v OHIM* (see paragraph 57 of the judgment). This case concerned national (rather than local) use of what was then known as a Community trade mark (now a European Union trade mark). Consequently, in trade mark opposition and cancellation proceedings the registrar continues to entertain the possibility that use of a EUTM in an area of the Union corresponding to the territory of one Member State may be sufficient to constitute genuine use of a EUTM. This applies even where there are no special factors, such as the market for the goods/services being limited to that area of the Union.

14. Whether the use shown is sufficient for this purpose will depend on whether there has been real commercial exploitation of the EUTM, in the course of trade, sufficient to create or maintain a market for the goods at issue in the Union during the relevant 5 year period. In making the required assessment I am required to consider all relevant factors, including:

- i) The scale and frequency of the use shown
- ii) The nature of the use shown
- iii) The goods for which use has been shown
- iv) The nature of those goods and the market(s) for them
- iv) The geographical extent of the use shown.

The opponent’s evidence

15. This consists of a witness statement from David Hilton. Mr Hilton is the opponent’s Design Manager, a position he has held since 2001. He explains that the opponent is “one of the leading fashion businesses in the UK” and “specialises in casual fashion for the young male and female clothing sectors”.

16. He states that the DEFINED trade mark was first used by the opponent “in respect of its fashion business in the United Kingdom and elsewhere in the EU in March 2005”,

adding that it “has been in continuous use in the UK and elsewhere in the EU for clothing items in class 25 since that date.” The DEFINED trade mark has, he further states, been used in respect of “men’s clothing, namely t-shirts, sweatshirts, knitwear, shirts, jackets and jeans” in the following countries: the United Kingdom, Ireland, Netherlands, Italy, France, Sweden, Greece, Finland and Germany.

17. Mr Hilton explains that the opponent “does not advertise its clothing brands (including DEFINED) as all of its goods are sold directly to the fashion buyers of our retail customers.” As a consequence, the opponent does not “have examples of its own advertising material for goods sold under the DEFINED mark.” He further explains that “we do not produce brochures nor do we advertise in the trade press or elsewhere.”

18. Accompanying Mr Hilton’s statement are two exhibits. Exhibit DH1 consists of fifteen invoices (pages 13 to 27) issued by the opponent between 9 January 2012 and 9 February 2016 (i.e. all with the relevant period), all but one of which was issued to undertakings based in the United Kingdom. The only exception is the invoice of 28 October 2012 issued to Dunnes Stores in Dublin (page 18).

19. Exhibit DH2 consists of what Mr Hilton describes as “Examples of [the opponent’s] clothing designs and swing tags for the DEFINED brand between 2011 and 2015.” He explains that:

“10...Each garment style is given an internal product name for easy reference. For instance, DF2D100991AA2STK MENS L/S/TEE FRAMED 2. The two letters at the beginning of code, namely “DF”, is shorthand for DEFINED; 2D100991AA2STK is the style number; MEDS L/S TEE means “mens long sleeved t-shirt”; and FRAMED 2 is the name given to the particular garment style.”

20. Turning first to the invoices, I note that there are seven from 2012 (between 9 January and 1 December), one from September 2013, one from July 2014, five from

2015 (between 20 January and 22 October) and 1 from February 2016. The first invoice provided, dated 9 January 2012, is addressed to an undertaking based in Co. Armagh and is in the amount of £1125 (excluding VAT). It is in respect of the following:

“DF2H102150AA2STK – MENS SS SHIRT BENNETT”.

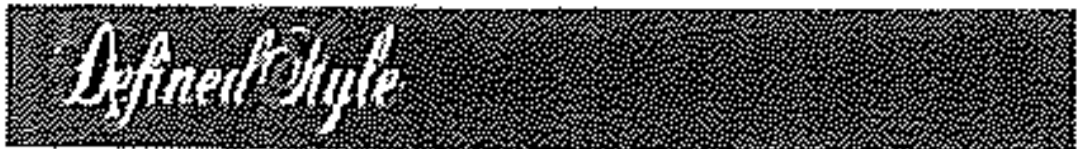
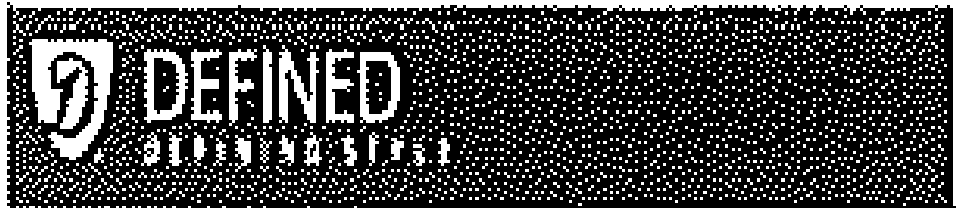
21. Based on Mr Hilton’s explanation above, I understand this invoice to be in respect of BENNETT styled mens’ short sleeve shirts. Proceeding on that basis, I note that while a number of the invoices include references to product codes beginning “DF”, a number of the invoices do not (those that do not can be found at the following pages of the exhibit: 18, 19, 20, 24, and 26). As to the invoices which do contain “DF” codes, these are in respect of: MENS SS SHIRT BENNETT (£1125) page 13, MENS SS SHIRT BENNETT (£1125) page 14, MENS S/S POLO BRUTE (£3300) page 15, MENS SS SHIRT DWIGHT (£11,250) page 16, MENS L/S V NECK STOPPER (£1554) page 17, Men’s tee CYRUS (£1800) page 21, HYDRON CREW NECK SWEAT (£1716.96) page 22, Mens t-shirt DANDRE (£1548) and Mens tee ERNESTO (£1417.50) page 23, PENWITH PRINTED CREW NK S (£1601.60) and Mens v neck WYATT (£792) page 25 and FLETCHER 5341 PNEL/PKT ZI (£864), page 27. Thus if my understanding of the invoices is correct, those that have been provided which relate to DEFINED branded goods amount to a little over £28k (excluding VAT).

22. Turning to exhibit DH2, the pages provided show the opponent using its DEFINED trade mark (in relation to, inter alia, the goods mentioned by Mr Hilton in his statement) in a wide range of formats. Although it is possible to find what may be use of the word DEFINED alone, it is fair to say that the vast majority of the pages provided show the word DEFINED being used with other matter. Examples are as follows:

From 2011/12:

DEFINED

REG NO: 2230972



From 2012/13:



From 2013/14:



From 2014/15:



23. In assessing the opponent's evidence, I begin by reminding myself of the comments of the Appointed Persons in the cases shown below. In *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Mr Daniel Alexander Q.C. stated:

"22. The burden lies on the registered proprietor to prove use..... However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public."

24. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL O/404/13, Mr Geoffrey Hobbs Q.C. stated:

"21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed in *Matsushita Electric Industrial Co. v. Comptroller- General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the

decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘*show*’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use.”

25. Mr Hilton states that the DEFINED trade mark has been used in a number of European countries other than the United Kingdom. However, with the exception of the invoice addressed to Dunnes Stores in Dublin in the amount of £24,090.00 (which doesn’t appear to relate to any goods bearing the “DF” code), all the sales appear to be to undertakings based in the United Kingdom. In addition, although the opponent initially indicated it was relying upon use in relation to clothing and headgear, Mr Hilton does not mention headgear in his statement and as far as I can tell, there is no evidence that the trade mark has been used upon headgear.

26. The opponent’s unchallenged evidence is that it has used its DEFINED trade mark since 2005 in relation to t-shirts, sweatshirts, knitwear, shirts, jackets and jeans for men. The invoices and clothing designs provided appear to support this statement. Although

Mr Hilton explains that the opponent's goods are "sold directly to the fashion buyers of our retail customers", that does not prevent the opponent's use being regarded as genuine for the reasons explained by the Court of Appeal in *In Laboratoire de la Mer Trade Mark* [2006] FSR 5. In that case, Neuberger L.J. (as he then was) stated:

"48. I turn to the suggestion, which appears to have found favour with the judge, that in order to be "genuine", the use of the mark has to be such as to be communicated to the ultimate consumers of the goods to which it is used. Although it has some attraction, I can see no warrant for such a requirement, whether in the words of the directive, the jurisprudence of the European Court, or in principle. Of course, the more limited the use of the mark in terms of the person or persons to whom it is communicated, the more doubtful any tribunal may be as to whether the use is genuine as opposed to token. However, once the mark is communicated to a third party in such a way as can be said to be "consistent with the essential function of a trademark" as explained in [36] and [37] of the judgment in *Ansul* , it appears to me that genuine use for the purpose of the directive will be established.

49. A wholesale purchaser of goods bearing a particular trademark will, at least on the face of it, be relying upon the mark as a badge of origin just as much as a consumer who purchases such goods from a wholesaler. The fact that the wholesaler may be attracted by the mark because he believes that the consumer will be attracted by the mark does not call into question the fact that the mark is performing its essential function as between the producer and the wholesaler."

See also the judgment of the GC in *Fruit of the Loom v EUIPO*, Case T-431/15 at paragraphs 48 – 50 of the judgment.

27. As to the various formats in which the opponent's trade mark has been used, in *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, the CJEU found that:

“31. It is true that the ‘use’ through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas ‘genuine use’, within the meaning of Article 15(1) of that regulation, relates to a five-year period following registration and, accordingly, ‘use’ within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish ‘use’ within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in *Nestlé*, the ‘use’ of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition by a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35 Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that

use to be covered by the term ‘genuine use’ within the meaning of Article 15(1)’.
(emphasis added)

28. As to the form in which the opponent has used its trade mark, I am satisfied that the examples of the use the opponent has provided (shown above) qualify on the basis of the principles outlined in *Colloseum*.

29. Insofar as the geographical extent of the use demonstrated is concerned, as the above case law makes clear, this tribunal will consider the possibility that use of a EUTM in an area of the European Union corresponding to the territory of one Member State may be sufficient to constitute genuine use. Although limited to use in the United Kingdom, the opponent’s trade has been with undertakings based in Co. Armagh (Northern Ireland), West Bromwich (West Midlands), London, Manchester (Lancashire) Glasgow (Scotland), Oldham (Lancashire), Benfleet (Essex), Burnley (Lancashire) and Watford (Hertfordshire). Although the size of the market for the goods at issue must be considerable, it is, in my view, more likely than not that the invoices provided by the opponent are illustrative only. Proceeding on that basis and in the absence of any challenge by the applicant to any aspect of the opponent’s evidence, I am, just, satisfied that the use the opponent has made of its DEFINED trade mark as evidenced by Mr Hilton’s statement and the associated exhibits constitutes genuine use. Having reached that conclusion, I must no go on and decide what constitutes a fair specification based upon the use shown.

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

“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.”

31. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows.

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) ("Thomas Pink") at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut

down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46.”

32. The opponent has used its DEFINED trade mark in relation to to t-shirts, sweatshirts, knitwear, shirts, jackets and jeans for men. Faced with those facts, the average consumer (of which I am one), would, in my view, describe the opponent as conducting a trade in clothing for men. That, in my view, is a fair specification and it is on the basis of that specification I shall proceed. I shall, however, return to this issue at various points below.

Section 5(2)(b) – case law

33. The following principles are gleaned from the decisions of the courts of the European Union 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.

The principles:

- (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 greater 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 goods

34. Following my proof of use assessment, the comparison is as follows:

The opponent's goods	The applicant's goods in class 25
Class 25 – Clothing for men	Clothing, footwear and headgear; gymwear; exercise wear; sportswear

35. In the judgment of the CJEU in *Canon*, Case C-39/97, the Court stated at paragraph 23 of its judgment:

“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 enquiry 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 *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criteria capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the GC stated that “complementary” means:

“...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”.

In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* case T-133/05, the GC stated:

“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 the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275,

paragraphs 43 and 44; and Case T- 10/03 Koubi v OHIM – Flabesa (CONFORFLEX) [2004] ECR II-719, paragraphs 41 and 42).”

36. As “clothing”, “gymwear”, “exercise wear” and “sportswear” in the applicant’s specification are all broad terms which would include the opponent’s goods i.e. “clothing for men”, such goods are to be regarded as identical on the principle outlined in *Meric*. As for the applicant’s “footwear” and “headgear”, given the likely overlap in the nature, intended purpose, method of use and trade channels of such goods and the complementary relationship that exists between such goods and those of the opponent, they are, in my view, at the very least similar to the opponent’s goods to a high degree. In its submissions, the opponent states:

“17...we submit that the specific goods for which use has been demonstrated would nevertheless be perceived as highly similar to the [applicant’s goods].”

37. This is, in effect, the opponent’s fall-back position were I not to accept that it was entitled to rely upon a specification of “clothing” and “headgear” at large (which I have not). Nonetheless, if what I consider to be a fair specification is regarded as being too generous, even if I had limited the opponent’s specification to the actual goods upon which it has used its earlier trade mark i.e. t-shirts, sweatshirts, knitwear, shirts, jackets and jeans for men, the same conclusions would apply.

The average consumer and the nature of the purchasing act

38. As the case law above indicates, it is necessary for me to determine who the average consumer is for the goods at issue; I must then determine the manner in which these goods are likely to be selected by the average consumer in the course of trade. 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.”

39. In its submissions, the opponent argues that the goods at issue “will be sold to specialist fashion buyers and to end consumers” (paragraph 10). As to how such goods will be selected, in *New Look Limited v OHIM*, joined cases T-117/03 to T-119/03 and T-171/03 the GC stated:

“50. The applicant has not mentioned any particular conditions under which the goods are marketed. Generally in clothes shops customers can themselves either choose the clothes they wish to buy or be assisted by the sales staff. Whilst oral communication in respect of the product and the trade mark is not excluded, the choice of the item of clothing is generally made visually. Therefore, the visual perception of the marks in question will generally take place prior to purchase. Accordingly the visual aspect plays a greater role in the global assessment of the likelihood of confusion.”

40. I agree with the opponent that the average consumer of the goods at issue is a member of the general public or a business user buying on behalf of a commercial undertaking. As a member of the general public will, for the most part, self-select the goods from the shelves of a bricks and mortar retail outlet or from the equivalent pages of a website or catalogue, visual considerations are likely to dominate the selection process. That said, as such goods may also be the subject of, for example, word-of-mouth recommendations or oral requests to sales assistants, aural considerations must not be forgotten. I see no reason why a business user would not select the goods in

much the same way, with intermediaries such as the opponent and trade-focused sales representatives also likely to feature in the process.

41. As to the degree of care the average consumer will display when selecting such goods, in its submissions the opponent submits that the average consumer will “only take a normal degree of care and attention” (paragraph 11) during the selection process. The cost of the goods can vary considerably. However, as the average consumer will be alive to factors such as cost, size, colour, material and compatibility with other items of clothing, a member of the public will pay at least a normal degree of attention to their selection. Considered overall, I think a business user selecting for commercial purposes where, for example, larger sums may be in play and contracts may be negotiated over a period of time, is likely to pay a somewhat higher degree of attention when selecting the goods at issue.

Comparison of trade marks

42. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The CJEU 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.”

43. It would be wrong, therefore, artificially to dissect the trade marks, although it is necessary to take into account their distinctive and dominant components and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions they create. The trade marks to be compared are:

Opponent's trade mark	Applicant's trade mark
DEFINED	Define by Ashley Yeater

44. In reaching the conclusions which follow, I have taken into account (but do not intend to record here) all the opponent's submissions on this aspect of the case.

45. In its counterstatement, the applicant "denies that the respective marks are confusingly similar". It does not, however, explain on what basis it reached this conclusion.

46. The opponent's trade mark consists of the well-known English language word "DEFINED" presented in block capital letters. That is the overall impression it conveys and where its distinctiveness lies.

47. Although the applicant's trade mark consists of four words presented in normal typeface (three of which are presented in title case and the word "by" in lower case), it breaks down into what I consider be two components. The first component consists of the verb "Define", the meaning of which will be well-known to the average consumer. As to the word "Ashley", this is likely, in my view, to be known to the average consumer as either a male or female forename. Although I have no evidence to assist me, I think it more likely than not that the presence of the forename "Ashely" will lead the average consumer to assume that the word "Yeater" is a surname. As a consequence, the second component consists of the words "Ashley Yeater" which creates a "unit" identifying a specific individual (with the word "by" likely to indicate that it is this individual who, for example, designed the goods at issue). Although the word "Define" appears first, the unit created by the words "Ashley Yeater" are, in my view, equally

important resulting in both components making a roughly equal contribution to both the overall impression the applicant's trade mark conveys and its distinctiveness.

48. I will now compare the competing trade marks with the above conclusions in mind. The opponent's trade mark and the first word in the applicant's trade mark are seven and six letters long respectively; they differ only by the addition of the letter "D" at the end of the opponent's trade mark. That said, the words "by Ashely Yeater" in the applicants' trade mark are completely alien to the opponent's trade mark. Balancing the similarities and differences, but bearing in mind the positioning of the component in conflict, results, in my view, in at least a medium degree of visual similarity between them.

49. As to the aural comparison, with the possible exception of the word "Yeater" in the application, the pronunciation of all the other words in the competing trade marks is entirely predictable i.e. the two syllable words "DE-FINED" and "De-fine", one syllable word "by", two syllable word "Ash-ley" and what in, my view, will be a two syllable combination which will be pronounced as "Yee-ter". Thus the opponent's trade mark will consist of two syllables and the applicant's trade mark of seven syllables. Notwithstanding the aural differences which arise when the words "by Ash-ley Yee-ter" in the applicant's trade mark are articulated, the fact that the word "De-fine" will be articulated first and the obvious aural similarity of this word to the opponent's trade mark, still results in at least a medium degree of aural similarity between the competing trade marks.

50. Finally, the conceptual comparison. The high degree of conceptual similarity between "Define" and "DEFINED" (present and past tense of the well-known verb) is self-evident. As the presence of the words "by Ashley Yeater" i.e. a name of an individual do nothing to modify the meaning of the word "Define" or create a new conceptual image, the competing trade marks are conceptually similar to a high degree.

Distinctive character of the earlier trade mark

51. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

52. In its submissions, the opponent argues that its earlier trade mark has “no specific meaning in relation to the goods at issue and must be judged as having at least a reasonable degree of distinctiveness” (paragraph 33). As I mentioned earlier, the word DEFINED and its meaning will be well-known to the average consumer. Considered in the context of the goods at issue, it is, in my view, suggestive of, for example, clothing which will assist the average consumer to improve the outline of his or her body shape. As a consequence, it is, in my view, possessed of a moderate degree of inherent distinctive character. Although the opponent has filed evidence showing use of its trade mark (evidence which I held was sufficient to satisfy the proof of use requirements), that evidence is not sufficient for me to conclude that the trade mark’s inherent credential has been built upon, at least not to any material extent.

Likelihood of confusion

53. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent’s trade mark

as the more distinctive it is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind.

54. Having concluded that the opponent had made genuine use of its earlier trade mark in relation to clothing for men, I went on to hold that:

- the competing goods are either identical or similar to a high degree;
- the average consumer is either a member of the general public or a business user;
- whilst not forgetting aural considerations, such consumers are likely to select the goods at issue by predominately visual means paying at least a normal degree of attention whilst doing so;
- having assessed the trade marks distinctive and dominant components, I found that the competing trade marks are visually and aurally similar to at least a medium degree and conceptually similar to a high degree;
- the opponent's trade mark is possessed of a moderate degree of inherent distinctive character which, on the basis of the evidence provided, I am unable to conclude has been enhanced to any material extent.

55. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and goods down to the responsible undertakings being the same or related.

56. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), Arnold J. considered the impact of the CJEU's judgment in *Bimbo*, Case C591/12P, on the court's earlier judgment in *Medion v Thomson*. He stated:

“18 The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19 The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20 The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21 The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it

does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

57. Although the words “Ashley Yeater” form a unit, the word “Define” plays an independent and distinctive role within the applicant’s trade mark. Having carried out the global assessment required and notwithstanding the only moderate degree of distinctive character the opponent’s trade mark enjoys, I think a consumer paying at least an average degree of attention whilst selecting the identical and, at least, highly similar goods at issue, is most likely to interpret the applicant’s trade mark as “Define” branded goods from an individual called “Ashley Yeater”. Thus even if the presence of the name “Ashely Yeater” is considered sufficient to avoid direct confusion (which, in my view, is arguable), it will, in my view, at the very least lead to a likelihood of indirect confusion and the opposition to the application in class 25 succeeds accordingly.

58. For the sake of completeness, I should add that I would have reached the same conclusion even if I had characterised the degree of attention paid during the selection process as high (making the average consumer less prone to imperfect recollection) or, as I mentioned earlier, had I considered it appropriate to limit the opponent’s specification following the proof of use assessment to “t-shirts, sweatshirts, knitwear, shirts, jackets and jeans for men.”

Conclusion

59. The opposition has succeeded in relation to the goods in class 25 and, subject to any successful appeal, the application will be refused in class 25. The application may, in due course, proceed to registration in relation to the unopposed goods and services in classes 28 and 41.

Costs

60. As the opponent has been successful, it is entitled to a contribution towards its costs. Awards of costs in proceedings commenced after 1 July 2016 are governed by Annex A of Tribunal Practice Notice (“TPN”) 2 of 2016. Using the TPN mentioned as a guide, I award costs to the opponent on the following basis:

Preparing a Notice of Opposition and reviewing the counterstatement:	£200
Preparing evidence:	£500
Written submissions:	£200
Official fee:	£100
Total:	£1000

61. I order Define Group Limited to pay to Boi Trading Company Ltd the sum of £1000. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 13th day of December 2017

C J BOWEN
For the Registrar