

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 3191775  
AND THE REQUEST BY POGO INTERNATIONAL LTD  
TO REGISTER THE TRADE MARK**

**POGO**

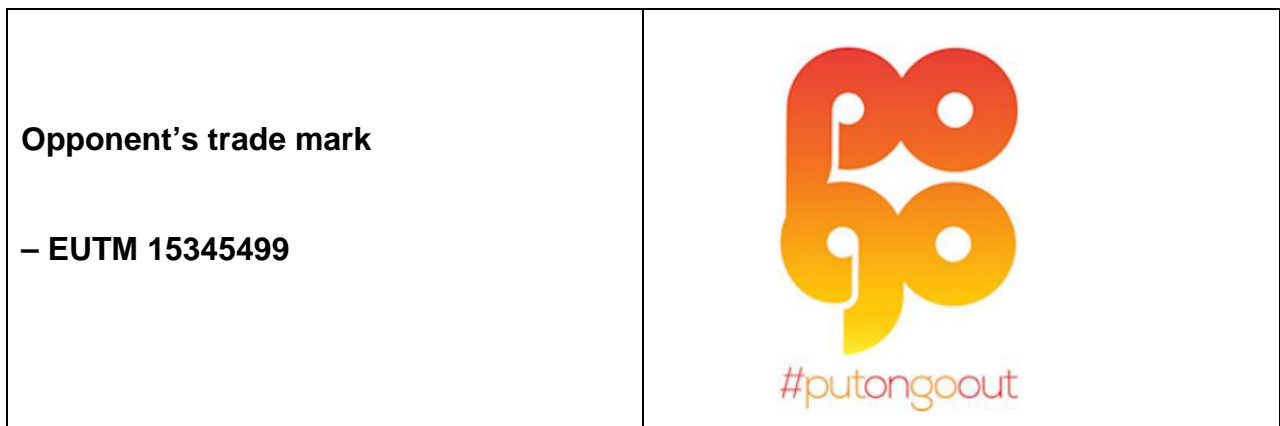
**IN CLASSES 3, 14 and 26**

**AND**

**THE OPPOSITION THERETO UNDER NO. 408415  
BY INTEL PLASTICS, INC.**

## BACKGROUND AND PLEADINGS

1. On 18 October 2016 Pogo International Ltd (“the Applicant”) applied to register the word “POGO” as a trade mark in relation to the goods in classes 3, 14 and 26.
2. The application was published for opposition purposes in the Trade Marks Journal on 4 November 2016 and is opposed by Intel Plastics, Inc. (“the Opponent”). The Opponent owns the EU trade mark (EUTM) registration for the figurative trade mark shown below:



3. The Opponent applied for its trade mark on 15 April 2016 and it was registered by the EU Intellectual Property Office on 5 August 2016 in respect of the following goods:  
**Class 3** - *Cosmetics; balms (non-medicated); lip balm; skin balm*  
**Class 5** - *Medicated balms; medicated lip balms; medicated skin balms.*
4. The opposition is based on section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The Opponent relies on all goods covered by its registration to oppose only the Applicant’s goods in class 3, namely: *Perfumery; essential oils; cosmetics; make-up; eye make-up; eyeliners; blushers; lipsticks; hair lotions; soaps.*
5. The Opponent’s EU trade mark has a date of application for registration earlier than that of the Applicant’s trade mark and is therefore an earlier trade mark as defined in section 6(1)(a) of the Act. Since the Opponent’s earlier trade mark had not been registered for five years or more when the Applicant’s mark was published for opposition it is not subject to the proof of use provisions under section 6A of the Act.

6. The Opponent claims that the mark applied for is similar to the Opponent's trade mark and covers goods in class 3 that are identical with and/or similar to those under the Opponent's earlier mark, such that there would be a likelihood of confusion on the part of the relevant UK public as to the origin of the goods in question, including a likelihood of association.
7. The Applicant filed a counterstatement denying the claims and provided short written submissions in lieu of an oral hearing. The Opponent filed evidence, which I summarise below. The Opponent also filed written submissions in lieu of an oral hearing. I will refer to points made by the parties where appropriate.
8. The Opponent is represented in these proceedings by Marks & Clerk LLP and the Applicant represents itself. Since neither party requested a hearing, I take this decision on the basis of the papers filed.

### **The Opponent's evidence**

9. The Opponent's evidence comprises an affidavit, dated 6 July 2017, sworn in the name of Ken Paquet of Toronto, Canada, together with six exhibits labelled **Exhibit KP1 – KP6**. Mr Paquet is the founder, proprietor and manager of Intel Plastics Inc., a position held since the business was started in 1995 and incorporated in 2007.
10. Mr Paquet states that his company owns the above identified EUTM as well as trade marks for "POGO" in class 3 filed in Canada and the USA in 2015. **Exhibit KP1** shows extracts from the EU, Canadian and US Trade Marks Offices giving details of those trade mark applications and registrations.
11. Mr Paquet states that his company uses the POGO trade mark in relation to a range of lip balm products sold in innovative packaging. **Exhibit KP2** shows images of the products bearing the word POGO (stylised in the manner as the mark on which the Opponent relies in this case).

12. Mr Paquet states that the products have attracted widespread international attention as a result of their innovative packaging<sup>1</sup>. For example, **Exhibit KP3** shows that the “Pogo™ Lip Balm” won the Health and Beauty Category in the 2017 WorldStar Packaging Awards. **Exhibit KP4** shows an extract from an article regarding the Opponent’s products and awards they have received, referencing the products’ environmentally conscious credentials. The article is dated 6 January 2017 and is said to be from Packaging World magazine, which Mr Paquet states is the best read worldwide publication for professionals who use, recommend and purchase packaging equipment and materials.
13. The witness statement explains that the Opponent has not yet launched its POGO products within the United Kingdom, since it has not yet appointed a UK distributor, but that its products are available to UK customers through the website of its North American distributor, Eco Lips Inc. **Exhibit KP5** is said to be an extract from the website of Eco Lips offering the Opponent’s products for sale. The exhibit shows POGO lip balms for sale, priced in dollars. **Exhibit KP6** is said to be an extract from [www.pogobalm.com](http://www.pogobalm.com), the dedicated website developed by Eco Lips for promotion of the Opponent’s products. The witness states that the Opponent receives enquiries from potential customers in Europe and is actively seeking distributors in Europe and has sent samples to contacts in the UK who have expressed interest in distributing the Opponent’s products.

## DECISION

14. The Opponent’s claim is based solely on section 5(2)(b) of the Act, which states:

*“... 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,*

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<sup>1</sup> The exhibit mentions that “Pogo is an international patent pending.”

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

15. The following decisions of the EU courts provide the principles to be borne in mind when considering section 5(2)(b) of the Act:

*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 are that:

- (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 might 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**

16. The opposition challenges only the Applicant's goods in class 3, so the goods to be compared are:

Opponent's goods	Applicant's goods
<p><b>Class 3:</b> <i>Cosmetics; balms (non-medicated); lip balm; skin balm</i></p> <p><b>Class 5:</b> <i>Medicated balms; medicated lip balms; medicated skin balms.</i></p>	<p><b>Class 3:</b> <i>Perfumery; essential oils; cosmetics; make-up; eye make-up; eyeliners; blushers; lipsticks; hair lotions; soaps</i></p>

17. The term “cosmetics” appears in both parties’ specifications and such goods are clearly identical.

18. In *Gérard Meric v Office for Harmonisation in the Internal Market*<sup>2</sup> the General Court stated that:

“29. ... goods can be considered as identical when ... the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

19. *Make-up; eye make-up; eyeliners; blushers; lipsticks* are plainly goods that fall within the more general term “cosmetics” in the Opponent’s specification and therefore, under the principle expressed in *Meric*, may be considered identical.

20. As I assess the similarity between the other goods at issue I bear in mind other principles from case law. In *YouView TV Ltd v Total Ltd*,<sup>3</sup> Floyd J. (as he then was) stated that:

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise .... Nevertheless the principle should not be taken too far .... Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the

<sup>2</sup> Case T- 133/05

<sup>3</sup> [2012] EWHC 3158 (Ch)

*language unnaturally so as to produce a narrow meaning which does not cover the goods in question."*

21. I also take account of the factors identified by the Court of Justice of the European Union ("the CJEU") in *Canon*<sup>4</sup> where it states that:

*"In assessing the similarity of the goods .... all the relevant factors relating to those goods .. 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".*

22. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case<sup>5</sup> 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.

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<sup>4</sup> Case C-39/97, at paragraph 23.

<sup>5</sup> *British Sugar PLC v James Robertson & Sons Ltd*[1996] R.P.C. 281



23. I note too that in *Boston Scientific*<sup>6</sup>, the General Court described “complementary” in the following terms:

“...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”.

24. The Opponent submits that “*hair lotions*” encompass products for application to the hair for the purpose of conditioning or strengthening the hair. The Opponent submits that “*balms*” within the Opponent’s earlier mark encompasses hair balms, which are also products for application to the hair for the purpose of conditioning or strengthening the hair. The Opponent submits that “*hair lotions*” are consequently identical goods to the “*balms*” of the Opponent’s earlier mark. It submits in the alternative that those goods are highly similar to the Opponent’s goods, being of the same nature, serving the same purpose, being directed to the same customers, and being competitive with and substitutable for each other.

25. I note that definitions of a “balm” from different dictionary sources<sup>7</sup> refer variously to a fragrant ointment for healing, anointing, soothing pain. There is sometimes mention of a cream or liquid used to heal or soothe the skin. One of those dictionary sources (online) advises that synonyms include “ointment, lotion, cream, salve, gel, emollient, balsam, moisturiser”. Although I note that some definitions refer to balms being for skin, I find far from outlandish the notion of a ‘hair balm’. I find therefore that hair lotions may be considered identical to balms, or else may be considered similar to at least a medium degree on the basis that they share a common nature and purpose and may be mutually competitive. Even if I wrong about that, I still find similarity between the parties’ goods, since I note that the General Court has endorsed a finding that hair lotions and “cosmetics” are “very similar” (see *La Mer v OHIM* below).

26. The remaining goods of the Applicant are *perfumery; essential oils; soaps*.

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<sup>6</sup> *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

<sup>7</sup> See Concise Oxford; Cambridge.org online; Chambers Twentieth Century Dictionary

27. I note that in *La Mer v OHIM*<sup>8</sup> the General Court stated as follows:

*“110 As regards the assessment of the similarity of the goods in question, it must be stated, as the Board of Appeal correctly noted in paragraph 33 of the contested decision, that ‘cosmetics’ in the Community trade mark application include ‘cosmetics of a marine product base’, so that they are identical.*

*111 So far as concerns ‘soaps, perfumery, essential oils, hair lotions, dentifrices, toiletries’ in the Community trade mark application, it should be stated that they share hygiene and cosmetic properties. The cosmetic products of the earlier mark may also be used for hygiene purposes. As was stated in paragraphs 77 to 84 above, soaps and bath additives are used not only for cleaning the skin but also for making the skin more beautiful and claim therefore to have cosmetic properties. On that point, in paragraph 33 of the contested decision the Board of Appeal correctly noted that beautification is not obtained only by the use of traditional means, such as make-up or other cosmetics, but also through the use of products which, although they may be hygienic, serve beauty purposes as well: for example, soap that is composed in a manner whereby there is only a minimum of skin dehydration, thus leading to a more beautiful skin ...*

*112 Moreover, those products may be sold in the same sales outlets and be directed at an identical category of consumers. In addition, quite often the manufacturers of those products are the same.*

...

*114 The Board of Appeal was therefore right to take the view, in paragraph 33 of the contested decision, that ‘soaps, perfumery, essential oils, hair lotions, dentifrices, toiletries’ under the Community trade mark and ‘cosmetics of a marine product base’ under the earlier mark are very similar.”*

28. The Opponent makes submissions going to its contention of similarity between *perfumery; essential oils; soaps* and goods covered by the Opponent’s earlier mark, for example on the basis of shared channels of trade. In light of the findings of the General

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<sup>8</sup> Case T-418/03, *La Mer Technology, Inc. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, 27 September 2007, Judgement of the Court of First Instance (Fifth Chamber)

Court in *La Mer v OHIM*, I find in the present case that there is a medium degree of similarity between the Opponent's *cosmetics* and the Applicant's *perfumery; essential oils; soaps* (and indeed *hair lotions*).

### **The average consumer and the purchasing process**

29. It is necessary to determine who the average consumer is for the respective goods and services and the manner in which they are likely to be selected. In *Hearst Holdings Inc*,<sup>9</sup> 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 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 word "average" denotes that the person is typical... [it] does not denote some form of numerical mean, mode or median."*

30. I consider that the average consumer for the goods at issue will be a member of the general public. The class 3 goods are more or less everyday purchases, and I would expect the average consumer to pay no more than a medium level of attention when selecting them, but sufficient perhaps to check ingredients and other considerations of personal suitability. Insofar as the Opponent's goods in class 5 are medicated balms, the level of attention may be higher, but not much above average. Visual considerations will feature particularly significantly in the purchasing act because such goods are likely to be selected visually after perusal of racks/shelves in retail outlets, or from images on websites or in catalogues. However, aural considerations may also play a part, such as on the basis of word of mouth recommendations.

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<sup>9</sup> *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),

### Comparison of the marks

31. In *Sabel*,<sup>10</sup> the CJEU stated that the global appreciation of the visual, aural or conceptual similarity of the marks in question must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components. It would therefore be wrong to artificially dissect the marks, although it is necessary to take into account their distinctive and dominant components and to give due weight to any other features that are not negligible<sup>11</sup> and therefore contribute to the overall impressions created by the marks.

32. The trade marks to be compared are shown below:

<p>POGO</p>	
<p><b>Applicant's contested trade mark</b></p>	<p><b>Opponent's earlier trade mark</b></p>

33. The trade mark applied for consists solely of the word POGO, which therefore holds the whole of its overall impression.

34. The Opponent's mark is figurative and its overall impression arises mainly from the two rows of interconnected coloured shapes that make up the great majority of the mark. I find it likely that at least a substantial proportion of the average consumer will recognise that those shapes are intended to be letters, and despite the significant degree of stylisation and interconnection<sup>12</sup>, will readily discern those letters as p o g o. The

<sup>10</sup> *Sabel BV v Puma AG*, Case C-251/95

<sup>11</sup> *Matratzen Concord v OHIM* [2003] E.T.M.R. 31 GC at para.33; *Calvin Klein Trademark Trust v OHIM* [2011] E.T.M.R. 5 CJEU at para.56

<sup>12</sup> (described in the words the Applicant as "blurring and blending")

average consumer will also notice the red, orange and yellow colouring deployed in the mark.

35. Beneath the large 'p o g o' component, is a much smaller hashtag slogan, where the component words 'put on go out' are discernible, helped by the contrasting colours that separate the words. The hashtag component is not negligible, but its position and much smaller size contribute to its being significantly less striking in the overall impression of the mark.

### **Visual similarity**

36. The trade mark applied for is simply the word "POGO". A word mark protects the word itself<sup>13</sup> and allows for use with moderate presentational variations such as uppercase and lower case and in font and single colours.
37. The Opponent's mark is a figurative mark, most of which is comprised of the letters 'p o g o', which, reading left to right and line by line, give rise to the same word that is the Applicant's mark. However, the 'p o g o' component in the Opponent's mark is rendered in a way that is very highly stylised and elaborated. The mark also includes a striking colour scheme and a hashtag slogan which are further points of visual difference from the Applicant's mark. I find between the marks a degree of visual similarity, but to a low degree.

### **Aural similarity**

38. I have found that at least a substantial proportion of the average consumer will readily discern within the larger part of the Opponent's mark, the letters 'p o g o'. The average consumer will read left to right and line by line, and will thereby perceive the single word 'pogo', or, less likely, simply two syllables 'po' and 'go'. In either case, the voicing of those letters presented in that order would be identical to the way the notional consumer would say the Applicant's mark. The average consumer would generally be unlikely to

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<sup>13</sup> *Groupement Des Cartes Bancaires v China Construction Bank Corporation*, case BL O/281/14, Mr Iain Purvis QC, sitting as the Appointed Person

voice the smaller textual aspects of the hashtag. Much more likely the mark would be articulated as “POGO.” I therefore find the marks to be aurally identical.

39. If I am wrong about the consumer not vocally expressing the supplementary text, to the extent that the mark may be spoken as six syllables “PO-GO/PUT-ON-GO-OUT” (or even eight syllables “PO-GO/HASH-TAG-PUT-ON-GO-OUT”), I find, in that alternative, the Applicant’s mark to be aurally similar to the Opponent’s mark to a medium degree. This latter assessment takes into account: (i) that the overall impression of the Applicant’s mark derives solely from the word POGO, and that the more distinctive portion of the Opponent’s mark involves the verbal component “p o g o”; (ii) that that verbal component would be pronounced first, which as a rule of thumb is more striking to the average consumer, and (iii) that the average consumer would perceive the #putongout component to be secondary to the dominant part of the Opponent’s mark.

#### **Conceptual similarity**

40. Pogo may not be an everyday word, but it does appear in the English dictionary and the average consumer is likely to have encountered the word in the context of a toy for jumping about on, consisting of a long, spring-loaded pole with a handle at the top and rests for a person's feet near the bottom, or may even have met it in the context of the verb indicating the act of jumping up and down as a form of dancing, especially to punk rock music. Nonetheless, I allow for the possibility that a significant portion of the average consumer may include people who have no understanding of the word.
41. The Applicant claims that the trade mark applied for is conceptually different from the Opponent’s earlier trade mark, on the basis that the ordinary meaning of the word ‘pogo’ within the Opponent’s trade mark is altered by the text appearing beneath the word (i.e. by the “#putongout”).
42. The Opponent submits that whilst the mark may be seen as an acronym of the strapline “put on go out”, this is not immediately apparent from the mark and requires careful consideration and analysis to reach this conclusion. The Opponent submits that it is unlikely that the average consumer of cosmetics and balms would pay such attention to the meaning of the mark; rather the average consumer would perceive the Opponent’s

mark as the word 'POGO' and would apply the ordinary meaning of the word to the mark. As such, the trade mark applied for conveys the same meaning and concept as the Opponent's earlier trade mark.

43. I find that the hashtag component overall is not strongly distinctive and that the message of the phrase is allusive in relation to the Opponent's cosmetics and balms. I also find that a significant part of the average consumer may well conclude that the phrase has an acronymic relationship to the dominant verbal component 'pogo'. For those who identify that the four letters of the word correlate to the first letters of the four words "put-on-go-out", I find it likely that they may hold that interpretation in mind alongside any understanding they may have as to the ordinary meaning(s) of the word, rather than to the exclusion of those meanings. In that respect I find the marks to be conceptually identical or else highly similar.

#### **Distinctive character of earlier trade mark**

44. The distinctive character of the earlier mark must be considered. The more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion (*Sabel*). In *Lloyd Schuhfabrik*<sup>14</sup> 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 .....*

*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 ..."*

45. The discernible word 'pogo' within the Opponent's earlier trade mark does not describe the Opponent's goods and is inherently distinctive to at least an average degree, despite the oblique reference that may be discerned when read in conjunction with the

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<sup>14</sup> *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97

hashtag slogan. The significant stylisation, colouring and elaboration contribute to the distinctiveness of the figurative mark.

46. The Opponent submits that although its goods “have not yet been officially launched in the UK”, they have “attracted considerable media attention”, and claims that its evidence shows that its promotional activities have enhanced the distinctive character of the mark. I note the points presented in evidence, including the packaging award, that the product may be purchased on-line, and the claim that samples have been sent to the UK. However I do not consider this to be evidence of use of the mark on the United Kingdom market, certainly not sufficient to enhance its distinctive character.

### **Conclusion as to likelihood of confusion**

47. I now turn to reach a conclusion as to the likelihood of confusion between the two marks if they were used in relation to the goods specified. In making this global assessment of likelihood of confusion I take stock of my findings set out in the foregoing sections of this decision and take account of the case-law principles enumerated at paragraph 15 above.

48. I have found that the relevant average consumer for the goods in question will be the public at large, who when purchasing the class 3 goods in question would pay no more than a medium level of attention, and when buying goods in class 5, level of attention not much above average. Visual considerations predominate, but aural considerations also feature in the purchasing process.

49. Comparing the goods at issue, I have found most goods to be identical and none to be similar to less than a medium degree.

50. In comparing the marks I have found that they are visually similar to a low degree, aurally identical or similar to a medium degree and that the average consumer will find the marks share the same or highly similar concept(s).

51. In *Bimbo SA v OHIM*,<sup>15</sup> the CJEU stated at paragraph 34 of its judgment that:

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<sup>15</sup> Case C-591/12P



*“.....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.”*

52. The perception of the marks by the average consumer of the goods or services in question plays a decisive role in the global assessment of that likelihood of confusion. In this regard, the average consumer normally perceives a mark as a whole and does not engage in an analysis of its various details.
53. In the present case, there are, as I have noted, striking differences between the marks, but I have also found that at least a substantial proportion of the average consumer will readily discern in the earlier mark the letters p o g o, which correspond to the Applicant’s word mark. As I consider the processes by which the marks at issue would be remembered, recognised and recalled I conclude that the respective marks will be considered as ‘pogo’ marks.
54. The average consumer will assume that the trade mark applied for is associated in some way with the Opponent’s earlier mark, which I have found has at least an average degree of distinctive character. In particular, the average consumer may perceive the trade mark applied for as being the plain-text, non-stylised version of the Opponent’s earlier mark. I find that the average consumer will tend to see “#putongout” as a promotional strapline and perceive the word POGO as being the signifier of trade origin.
55. On a global comparison, taking into account all factors, including the interdependency principle<sup>16</sup> that a lesser degree of similarity between the respective goods may be offset by a greater degree of similarity between the respective marks (and vice versa), I find there is a likelihood of confusion in this case since the public might believe that the respective goods come from the same or economically-linked undertakings. The opposition under section 5(2)(b) succeeds in full.

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<sup>16</sup> *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*

Costs

56. The Opponent has been successful and is entitled to a contribution towards its costs, which I assess based on the guidance in Tribunal Practice Notice 2/2016. In the circumstances I award the Opponent the sum of £1100 (one thousand one hundred pounds) as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Reimbursement of the official fee for Notice of Opposition and Statement of Grounds:	£100
Preparing a statement of grounds and considering the other side's statement:	£200
Preparing evidence:	£500
Preparing submissions:	£300
<b>Total:</b>	<b>£1100</b>

57. I therefore order Pogo International Ltd to pay Intel Plastics, Inc. the sum of £1100 (one thousand one hundred pounds) 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 29<sup>th</sup> day of January 2018**

**Matthew Williams**

**For the Registrar,  
the Comptroller-General**

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