

O/243/18

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3225647  
BY DARA LAMBUELLA KNOX-HOOKE  
TO REGISTER AS A SERIES OF TWO TRADE MARKS:

THE ARMOUR

AND

THE ARMOUR

FOR GOODS IN CLASSES 18 AND 25

AND

IN THE MATTER OF THE OPPOSITION THERETO UNDER NO. 409903  
BY UNDER ARMOUR, INC.

## BACKGROUND AND PLEADINGS

1. On 19 April 2017, Dara Lambuella Knox-Hooke ("the Applicant") applied to register as a series of two figurative UK trade marks the words "THE ARMOUR" as shown on the front page of this decision, in respect of the following goods in Classes 18 and 25:

<b>Class</b>	<b>Wording</b>
<b>18</b>	Leather handbags, clutch bag, back pack, totes, carry-all; Belt bags; Leather shoulder belts; Belts (Leather shoulder -); Fitted belts for luggage; Belt bags and hip bags.
<b>25</b>	Clothes; Footwear; Footwear for men and women; Casual footwear; Light-reflecting coats; Dust coats; Duffel coats; Evening coats; Sheepskin coats; Fur coats; Fur coats and jackets; Morning coats; Tail coats; Men's and women's jackets, coats, trousers, vests; Coats (Top -); Top coats; Coats of denim; Denim coats; Pea coats; Coats; Wind coats; Trench coats; Rain coats; Winter coats; Suit coats; Coats for women; Coats for men; Heavy coats; Frock coats; Leather coats; Cotton coats; Coats made of cotton; Belts made from imitation leather; Belts [clothing]; Belts of textile; Fabric belts; Belts for clothing; Leather belts [clothing]; Belts made of leather; Belts made out of cloth; Belts (Money -) [clothing]; Fabric belts [clothing]; Garter belts.

2. The application was published for opposition purposes on 28 April 2017. On 21 June 2017 Under Armour Inc. ("the Opponent") notified the Applicant of its intention to file an opposition. The Opponent filed a Form TM7 notice of opposition on 28 July 2017, which the Registry served on 3 August 2017. The opposition, directed against the entirety of the application, was based originally on sub-sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 ("the Act"), the claims being, in essence, that:
  - (i) the mark applied for was confusingly similar to the Opponent's earlier European Union Trade Mark (EUTM) registrations that are detailed below, and so objectionable under s.5(2)(b);

- (ii) the Opponent's earlier registrations have a reputation in the UK, and that use of the mark applied for would without due cause take unfair advantage of and / or be detrimental to that reputation - objectionable under s.5(3); and
  - (iii) the Opponent has goodwill in the business conducted under its various earlier marks, and use of the mark applied for would cause a misrepresentation damaging that goodwill - objectionable under s. 5(4)(a) of the Act.
3. On 14 August 2017, the Applicant filed a Form TM8 Notice of defence and counterstatement denying all grounds, which the Registry acknowledged by an official letter dated 31 August 2017. The Registry's letter noted that in its Form TM8, the Applicant had requested that the Opponent provide proof of use in relation to one (only) of the trade marks relied on in the opposition – namely the EUTM registered under number 11978764 in respect of goods in classes 18 and 25. The Registry's letter pointed out that since EUTM No. 11978764 had not been registered for a period of five years at the time that the Applicant's mark was published for opposition, the Opponent was not required to file proof of use evidence for that mark.
  4. The Opponent filed no evidence in support of its claims in this case. Consequently, in its letter of 27 October 2017, the Registry struck out the claims under sub-sections 5(3) and 5(4)(a) of the Act, since those grounds required evidence to show the reputation and goodwill claimed by the Opponent. The Registry's letter of 27 October 2017 appeared also to strike out the claim under s. 5(2)(b) of the Act with regard to the Opponent's earlier registration No. 11978764. However, that EUTM was registered on 14 January 2016 and, as the Opponent has pointed out as part of its written submissions in lieu of an oral hearing, does not therefore need to be validated by the filing of proof of use in order to be relied upon in this opposition. The Opponent submits that since the Applicant's request for proof of use had no merit the Registry made an error in striking out the claim under section 5(2)(b) of the Act with regard to the Opponent's earlier registration No. 11978764 and requested the reinstatement of that claim. I agree with and accede to that submission.
  5. The sole remaining ground of opposition is section 5(2)(b) of the Act and the Opponent claims to rely on all its earlier registrations as follows:

## Marks relied on by the Opponent

**EUTM No. 011978764**                      **ARMOUR**      (Word mark)

**Filed:** 12 July 2013

**Registered:** 14 January 2016

**Relying on goods in classes 18 and 25:**

**Class 18:** *Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery; small leather goods (leatherware); bags including all purpose sport bags, all-purpose athletic bags, all-purpose carrying bags, sports bags, duffle bags, backpacks, tote bags.*

**Class 25:** *Clothing; footwear; headgear; excluding golf clothing, golf footwear and golf headgear.*

**EUTM No. 11916889**                      **ARMOUR39**      (Word mark)

**Filed:** 20 June 2013

**Registered:** 13 November 2013

**Relying only on goods registered in class 25:** *Clothing; athletic footwear; athletic shirts; bras; footwear; long-sleeved shirts; moisture-wicking sports; shirts; short-sleeved shirts; sports bras; tank tops; tops; headgear*

**EUTM No: 12321642**                      **ARMOURVENT**      (Word mark)

**Filed:** 18 November 2013

**Registered:** 17 April 2014

**Relying only on goods registered in class 25:**

*Clothing, Footwear, Headgear; Athletic footwear; Athletic shirts; Athletic shorts; Baselayer bottoms; Capri pants; Capris; Caps; Collared shirts; Compression garments for athletic or other non-medical use, namely, shirts, shorts; Footwear; Golf shirts; Hats; Headwear; Jackets; Jerseys; Leggings; Long-sleeved shirts; Polo shirts; Shirts; Short-sleeved shirts; Shorts; Singlets; Socks; Sports jerseys; Sports shirts; T-shirts; Tank tops; Tops; Track jackets; Vests; Volleyball jerseys; parts and fittings for all the aforesaid goods.*

**EUTM No: 6474051**

**UNDER ARMOUR** (Word mark)

**Filed:** 29 November 2007

**Registered:** 10 October 2008

**Relying only on goods registered in class 25:** *Clothing, footwear and headgear; socks; sweatbands*

**EUTM No: 4703799**

**UNDER ARMOUR** (Word mark)

**Filed:** 25 October 2005

**Registered:** 4 July 2007

**Relying only on goods registered in class 18:** *Toiletry kits, sold empty; sports bags, travel bags, duffel bags, backpacks, sack packs, and reservoir backpacks*

*Papers filed and representation*

6. As I have mentioned, the Opponent filed no evidence but filed written submissions in lieu of an oral hearing. I shall refer to points submitted by the Opponent, in its statement of grounds or elsewhere, so far as I consider appropriate in this decision. The Applicant too filed no evidence but filed written submissions in lieu of an oral hearing. I shall refer to points submitted by the Applicant, whether in its counterstatement or elsewhere, so far as I consider appropriate in this decision.
7. The Applicant is self-represented in these proceedings and Gill Jennings & Every LLP acts as the Opponent's representative. Neither party requested an oral hearing and I take this decision based on a careful reading of the papers filed.

**DECISION**

8. Section 5(2)(b) of the Act 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,*

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

9. Section 6(1)(a) of the Act defines an “earlier trade mark”, as including “*a European Union trade mark ... which has a date of application for registration earlier than that of the trade mark in question ...*”. As detailed above, all five of the EUTM registrations relied on by the Opponent for its section 5(2)(b) claim were filed on dates earlier than the Applicant’s mark and are clearly earlier trade marks under the Act.
10. Three of the marks relied on – ARMOUR (EUTM No. 011978764), ARMOUR39 (EUTM No. 11916889), ARMOURVENT (EUTM No: 12321642) – had not been registered for five years or more when the Applicant’s mark was published for opposition. Those three earlier marks are therefore not subject to the proof of use provisions under section 6A of the Act, and consequently, for the purposes of its section 5(2)(b) claim, there is no obligation on the Opponent to show that it has used those marks at all.
11. Two of the marks relied on - both UNDER ARMOUR, EUTM Nos. 6474051 and 4703799 - had been registered for more than five years when the Applicant’s mark was published for opposition. Both those earlier marks are therefore subject to the proof of use provisions under section 6A of the Act. The Opponent ticked boxes in its Form TM7 Notice of Opposition confirming (at question 2) that the registration process for those two earlier trade marks was completed five years or more before the publication date of the opposed application, and stating (at question 3) that both those marks have been used. Although the Opponent provided a statement of use, the Applicant indicated in its Form TM8 that it required the Opponent to provide proof of use only in relation to ARMOUR (EUTM No. 011978764), which was not in fact subject to proof of use. The Applicant did not put the Opponent to proof of use in relation to any other of its earlier marks. The Opponent is therefore able to rely on all registrations in this opposition without having to prove use.
12. 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.

13. 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 great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
- (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

### ***My approach to this decision***

14. Since the common component between the parties' trade marks is the word "Armour" I will in this decision focus first on the Opponent's claim under section 5(2)(b) relying on EUTM No. 011978764, which is simply the word ARMOUR, and which is closest to the applied-for mark in terms of the marks themselves.

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

15. It is necessary to determine who is the average consumer for the respective goods and how the consumer is likely to select the goods. It must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods in question<sup>1</sup>. In *Hearst Holdings Inc*,<sup>2</sup> Birss J. described the average consumer in these terms:

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<sup>1</sup> *Lloyd Schuhfabrik Meyer*, Case C-342/97

<sup>2</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),



“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.”

16. I note that the Applicant states that the intention is to use the applied-for mark to target a specific Christian market. However, marketing plans are not a relevant consideration in an opposition decision, which views matters from the perspective of a notional average consumer for the goods specified. The average consumer in this case – for clothing, bags and so on - is the general public, who will purchase the goods in shops or via the internet. They will see the marks used on the goods as labelling or branding or in advertising, where a consumer will peruse shelves and browse the internet to select the goods. Therefore, I consider the purchase to be a primarily visual one<sup>3</sup>, but aural considerations may also play a part, such as on the basis of word of mouth recommendations, so I also take into account the aural impact of the marks in the assessment.
17. I find that the level of attention of the average consumer in buying the goods specified in this case will be of a medium or average level.

**Comparison of the goods**

18. The goods to be compared are:

<p align="center"><b>Opponent’s goods under EUTM No. 011978764</b></p>	<p align="center"><b>Applicant’s goods</b></p>
<p><b>Class 18:</b></p> <p><i>Leather and imitations of leather, and goods made of these materials and not</i></p>	<p><b>Class 18:</b></p> <p><i>Leather handbags, clutch bag, back pack, totes, carry-all; Belt bags; Leather shoulder</i></p>

<sup>3</sup> See paragraphs 49 and 50 of the judgment of the General Court in *New Look Limited v OHIM*, joined cases T-117/03 to T-119/03 and T-171/03.

<p><i>included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery; small leather goods (leatherware); bags including all purpose sport bags, all-purpose athletic bags, all-purpose carrying bags, sports bags, duffle bags, backpacks, tote bags.</i></p>	<p><i>belts; Belts (Leather shoulder -); Fitted belts for luggage; Belt bags and hip bags.</i></p>
<p><b>Class 25:</b></p> <p><i>Clothing; footwear; headgear; excluding golf clothing, golf footwear and golf headgear.</i></p>	<p><b>Class 25:</b></p> <p><i>Clothes; Footwear; Footwear for men and women; Casual footwear; Light-reflecting coats; Dust coats; Duffel coats; Evening coats; Sheepskin coats; Fur coats; Fur coats and jackets; Morning coats; Tail coats; Men's and women's jackets, coats, trousers, vests; Coats (Top -); Top coats; Coats of denim; Denim coats; Pea coats; Coats; Wind coats; Trench coats; Rain coats; Winter coats; Suit coats; Coats for women; Coats for men; Heavy coats; Frock coats; Leather coats; Cotton coats; Coats made of cotton; Belts made from imitation leather; Belts [clothing]; Belts of textile; Fabric belts; Belts for clothing; Leather belts [clothing]; Belts made of leather; Belts made out of cloth; Belts (Money -) [clothing]; Fabric belts [clothing]; Garter belts.</i></p>

19. The parties' specifications include some identical terms. Moreover, it is clear from case law such as *Meric*<sup>4</sup> that 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 or vice versa.
20. Comparing first with the respective goods in class 18: the Opponent's "*travelling bags; bags including all purpose sport bags, all-purpose athletic bags, all-purpose carrying bags, sports bags, duffle bags, backpacks, tote bags*" are identical to the Applicant's "*Leather handbags, clutch bag, back pack, totes, carry-all; Belt bags and hip bags.*" The Opponent's "*Leather and imitations of leather, and goods made of these materials and not included in other classes*" and "*small leather goods (leatherware)*" cover the Applicant's "*Leather shoulder belts; Belts (Leather shoulder -)*" so those goods too are identical.
21. The Applicant's "*fitted belts for luggage*" may be made of leather or imitations of leather, so those goods too may be considered as identical. The Opponent submits that if "*fitted belts for luggage*" are not considered identical because they may not be made of leather / imitation leather, then "*they must be considered to be highly similar goods on the basis that they are closely associated with the opponent's registered goods.*" In considering the extent to which there may be similarity between goods, I take account of the factors identified by the Court of Justice of the European Union ("the CJEU") in *Canon*<sup>5</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. In *Boston Scientific*<sup>6</sup>, the General Court described goods as "complementary" in circumstances where "*... there is a close connection between [the goods], 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*". I also take note

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<sup>4</sup> See paragraph 29 of the judgment of the General Court in *Gérard Meric v Office for Harmonisation in the Internal Market (OHIM)*, Case T- 133/05

<sup>5</sup> Case C-39/97, at paragraph 23.

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

that in *Kurt Hesse v OHIM*<sup>7</sup>, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods.

23. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case<sup>8</sup> for assessing similarity were:
- (a) The respective uses of the respective goods or services;
  - (b) The respective users of the respective goods or services;
  - (c) The physical nature of the goods or acts of service;
  - (d) The respective trade channels through which the goods or services reach the market;
  - (e) 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;
  - (f) The extent to which the respective goods or services are competitive.
24. Taking account of all of the above considerations, if “*fitted belts for luggage*” are not considered identical because they may not be made of leather / imitation leather, then I find that there is at least a medium degree of similarity between the Applicant’s “*fitted belts for luggage*” and the Opponent’s “*travelling bags; bags including all purpose sport bags, all-purpose athletic bags, all-purpose carrying bags, backpacks*”. Those goods have the same respective users, may be sold through the same trade channels and are complementary to one another in the sense described in case law.
25. Moving on to compare the respective goods in class 25: the Opponent’s “*Clothing; footwear; excluding golf clothing and golf footwear*” are plainly identical to the Applicant’s “*Clothes; Footwear; Footwear for men and women; Casual footwear*”. And in line with the principle in *Meric*, the Applicant’s “*Light-reflecting coats; Dust coats; Duffel coats; Evening coats;*

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<sup>7</sup> Case C-50/15 P

<sup>8</sup> British Sugar PLC v James Robertson & Sons Ltd [1996] R.P.C. 281

*Sheepskin coats; Fur coats; Fur coats and jackets; Morning coats; Tail coats; Men's and women's jackets, coats, trousers, vests; Coats (Top -); Top coats; Coats of denim; Denim coats; Pea coats; Coats; Wind coats; Trench coats; Rain coats; Winter coats; Suit coats; Coats for women; Coats for men; Heavy coats; Frock coats; Leather coats; Cotton coats; Coats made of cotton*” are identical goods to the Opponent’s “*Clothing, excluding golf clothing*”.

26. The Applicant’s “*Belts [clothing]; Leather belts [clothing]; Belts (Money -) [clothing]; Fabric belts [clothing];*” are expressed in terms that suggest those goods are identical to the Opponent’s “*clothing; excluding golf clothing*”. Alternatively, if they are not identical, I find that various of the Applicant’s belts are anyway similar to the Opponent’s “*clothing; excluding golf clothing*” as follows. The Applicant’s “*Belts made from imitation leather; Belts [clothing]; Belts of textile; Fabric belts; Belts for clothing; Leather belts [clothing]; Belts made of leather; Belts made out of cloth; Fabric belts [clothing]; Garter belts*” and the Opponent’s “*clothing; excluding golf clothing*” are goods that are mutually important and complementary in that they are worn together on the body serving functional and/or aesthetic purposes - belts holding up clothing like trousers and skirts, or overlaid on dresses or shirts, and garter belts being worn on the leg in conjunction with undergarments. The goods therefore have a common broad intended purpose and method of use. They also have the same respective users and are sold in the same retail outlets. I find those respective goods to be similar to at least a medium degree.

27. I have already identified that the Applicant’s “*Belts (Money -) [clothing]*” are goods expressed as being clothing, so may be considered identical to the Opponent’s “*clothing; excluding golf clothing*”. However, if money belts are not identical to clothing, I find alternatively that they are similar to a medium degree to the Opponent’s “*travelling bags*” in class 18, since they have broadly the same purpose of enabling one to carry stuff about when travelling, they have the same users and may be sold in the same outlets catering for travellers.

## Comparison of the marks

28. It is clear from *Sabel*<sup>9</sup> that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo* 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.”
29. It would therefore be wrong to dissect the trade marks artificially, but it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features that are not negligible and therefore contribute to the overall impressions created by the marks. The marks to be compared are shown below:

<b>Opponent's earlier registered trade mark:</b>	ARMOUR
<b>Applicant's contested trade mark:</b>	THE ARMOUR AND THE ARMOUR

30. The Opponent's mark consists only of the word “ARMOUR” so the overall impression of the Opponent's mark comes solely from that ordinary English-language word. The Applicant's mark is the same word, preceded by “THE”. The marks are applied for as figurative marks

<sup>9</sup> *Sabel BV v Puma AG*, Case C-251/95

and are presented in upper case, one of the marks presented in black, the other in a colour that I would describe as a light greyish pink. The additional word is certainly not negligible, but since it is simply the definite article it is relatively non-distinctive. Nor are the presentational aspects necessarily negligible – the font and the pinkish colour - but the most striking aspect of both of the Applicant’s marks, making by far the greatest contribution to their overall impression is the word “ARMOUR”.

#### Visual similarity

31. The Opponent submits that the respective marks are visually highly similar as they share the word ARMOUR, which it describes as the “distinctive and defining element of the marks”. The Applicant submits that “the degree of care exercised by the consumer when purchasing and the difference in visuals (design style, logo, fonts, marketing structure ... negates the Opponent’s claims)”.
32. I find the marks to be visually similar to a high degree, since the same distinctive word “ARMOUR” that is the whole of the Opponent’s mark is replicated and makes by far the greatest overall impression in the Applicant’s marks. It may be discernible that the Applicant has chosen a particular upper-case font for its marks, but it is not one that is especially striking. Nor will the pinkish colour of one of the Applicant’s marks effectively erode the visual similarity between the parties’ marks.

#### Aural similarity

33. The Opponent submits that the distinctive and defining element of the Applicant’s marks is the shared word “ARMOUR”, which “*will be pronounced with strongest emphasis by the public.*” I agree. I find that the marks are aurally similar to a high degree.

#### Conceptual similarity

34. The word “armour” is an ordinary word in the English language and will be familiar to the average consumer who will understand it to signify a covering worn as a defence against weapons. The Applicant includes in its submissions the anchor scripture from which its marks derive: “Put on **the** whole **armour** of God, that you may be able to stand against the

wiles of the devil.” Ephesians 6:11. However, I find that the public at large would not be aware of that Biblical reference. Nor has any evidence been filed to indicate that a substantial proportion of the public would make such a connection. Notwithstanding the inclusion of the definite article in the series of marks applied-for, I find that the average consumer would understand the concept of armour in the same way for both parties’ marks. I find therefore that the respective marks are at least conceptually similar to a very high degree.

35. I find the Opponent’s ARMOUR mark to be highly similar overall to the Applicant’s series of marks.

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

36. 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>10</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; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”*

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10 *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97



37. The Opponent's registration under EUTM No. 011978764 "ARMOUR" is not an invented word, but nor is it descriptive of the goods for which it is registered and has a normal or average level of distinctiveness (in the sense that it is clearly able to distinguish those goods as originating from a particular source).
38. The level of inherent distinctiveness of a trade mark may be enhanced through use in the UK, but since the Opponent has in this case filed no evidence of use, there is no possibility of considering an enhanced level of distinctiveness in the perception of the UK consumer.

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

39. I now turn to reach a conclusion as to the likelihood of confusion between the marks ARMOUR and THE ARMOUR or THE ARMOUR if they were used in relation to the registered goods I have considered in classes 18 and 25. Deciding whether there is a likelihood of confusion is not scientific; it is a matter of weighing up the combined effect of all relevant factors in accordance with the authorities I have set out in this decision.

40. My findings have included:

- the average consumer in this case is a member of the public at large, who would pay an average level of attention when buying the goods at issue, in which process visual considerations of the mark predominate, and aural considerations also feature;
- the Opponent's ARMOUR mark is inherently distinctive to a medium degree.
- the concept of "armour" is distinctive for the goods at issue, is dominant in the overall impression of both parties' marks, and the concept is not materially changed by the additional presence of the definite article in the Applicant's series of marks;
- the marks are conceptually similar to a very high degree, and visually and aurally similar to a high degree, leading to a high degree of similarity overall;
- most of the goods are identical and where goods are not identical, they are similar to no lower than a medium degree.

41. The Applicant states in its submissions its intention to use the applied-for trade mark "to establish it as a Christian faith based women's/men's ready to wear brand excluding athletic, gym, golf, football, running, active wear or any specialist sporting or tech assisted attire." I

have explained that this is not a pertinent issue since that I am required to decide this opposition on a notional assessment based on the mark applied for and the mark as registered. In *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06, the CJEU stated at paragraph 66 of its judgment that when assessing the likelihood of confusion under section 5(2) it is necessary to consider all the circumstances in which the mark applied for might be used if it were registered. In *Oakley v OHIM* (Case T-116/06) it is made clear that consideration of likelihood of confusion is prospective and not to be restricted to the current marketing or trading patterns of the parties:

*“...Since the particular circumstances in which the goods covered by the marks are marketed may vary in time, and depending on the wishes of the proprietors of the trade marks, the prospective analysis of the likelihood of confusion between two marks, ... cannot be dependent on the commercial intentions, whether carried out or not – and which are naturally subjective – of the trade mark proprietors ...”*

42. The average consumer is deemed reasonably well informed and reasonably circumspect and observant, but s/he rarely has the chance to make direct comparisons between marks and must instead rely on the imperfect picture of them s/he has kept in their mind. Since I find the Opponent's ARMOUR mark to be highly similar overall to the Applicant's series of marks, I conclude that the average consumer, paying a medium or average level of attention, seeing or hearing the marks used on goods that are identical or similar to a degree in no instance lower medium, may well directly confuse the two, mistaking one for the other.
43. **Consequently, the opposition succeeds on the basis of section 5(2)(b) of the Act.** The Opponent has succeeded in full on the basis of its ARMOUR mark and would be in no better a position in respect of its other earlier marks. In the circumstances, I do not consider it proportionate or necessary to consider the Opponent's claim in relation to those marks.

## Costs

44. The Opponent has been successful in its opposition based on section 5(2)(b) of the Act and is entitled to a contribution towards its costs. My assessment of a contribution towards the cost of the proceedings is based on the guidance in Tribunal Practice Notice 2/2016 and I award the Opponent the sum of £600. The sum is calculated as follows:

Reimbursement of the official fee <sup>11</sup> for Notice of Opposition and Statement of Grounds:	£100
Preparing a statement of grounds and considering the other side's statement:	£200
Preparing submissions in lieu of a hearing:	£300
<b>Total:</b>	<b>£600</b>

45. I therefore order Dara Lambuella Knox-Hooke to pay Under Armour, Inc the sum of £600 (six 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 18th day of April 2018**

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

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<sup>11</sup> The fee for filing a claim on section 5(1) and/or 5(2) grounds only is £100; the reimbursement reflects that the Opponent did not file evidence in support of its s.5(3) and 5(4)(a) claims and succeeded only on its section 5(2) claim.