

o-112-19

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION 3247238

BY QINHUANGDAO JOY BILLIARDS PROMOTION CO., LTD.

TO REGISTER THE FOLLOWING TRADE MARK IN CLASS 10:



BING

AND

OPPOSITION THERETO (NO. 411354)

BY ACAMAR FILMS LIMITED

Background and pleadings

1. The above trade mark application (“the applied for mark”) was filed by Qinhuangdao JOY Billiards Promotion Co., Ltd. (“the applicant”) on 31 July 2017 for specified goods in class 28. It was accepted and published in the Trade Marks Journal on 13 October 2017. Registration of the mark is opposed by Acamar Films Limited (“the opponent”). The opponent relies on European Union trade mark registration 016732877 (“the earlier mark”), for the word mark “BING” which was filed on 17 May 2017 and registered on 31 October 2017.
2. The applicant indicated in their TM8 that they agreed to the deletion of “Games” and “Toys” from their applied for specification. However, they failed to file form TM21B that the Registry requires to amend their applied for specification. It follows that I must consider their specification as it appears on the register. The opponent has limited the goods relied upon in this opposition. The competing class 28 goods in play are therefore:

Earlier Mark	Applied For Mark
Games, toys and playthings; video game apparatus; gymnastic and sporting articles; decorations for Christmas trees; Christmas tree stands; confetti; novelties for parties, dances [party favors, favours]; paper party hats; fairground and playground apparatus; festive decorations and artificial Christmas trees; sporting articles and equipment.	Billiard balls; Games; Toys; Balls for games; Billiard cues; Billiard table cushions; Table cushions being parts of billiard tables; Billiard cue tips; Tips (Billiard cue -); Tips for billiard cues; Cue tips (Billiard -); Playing balls; Chalk for billiard cues; Machines for physical exercises.

3. The opponent relies on 3 grounds of opposition under the Trade Marks Act 1994 (“the Act”):
 - (1) Section 5(1), the applied for mark is identical to the earlier mark and is applied for in respect of identical goods;
 - (2) Section 5(2)(a), the applied for mark is identical to the earlier mark and is applied for in respect of goods which are identical or similar to the opponent’s goods and there exists a likelihood of confusion;
 - (3) Section 5(2)(b), the applied for mark is similar to the opponent’s earlier mark and is applied for in respect of goods which are identical or similar to the opponent’s goods and there exists a likelihood of confusion.
4. The opponent filed a Notice of Opposition and Statement of Grounds. The applicant filed a Notice of Defence and Counterstatement. The Registry wrote to the applicant inviting them to expand upon their response to the grounds of opposition. A further Notice of Defence and Counterstatement was filed in identical format to the original and therefore the Registry admitted the Notice of Defence and Counterstatement as first filed. Neither party filed evidence or requested a hearing. The opponent filed written submissions dated 13 December 2018. This decision is taken following a careful reading of all the papers.
5. The applicant is represented by Arnolds Zvirgzds and the opponent by Allen & Overy LLP.
6. I note that there have been parallel opposition proceedings between the parties in relation to the applicant’s EU trade mark application number 17054693 culminating in a decision dated 24 October 2018. The European Union

Intellectual Property Office decision is, however, not binding upon me and I assess this opposition afresh.

Section 5(1)

7. Section 5(1) of the Act states:

“5. - (1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.”

8. A successful opposition under this ground therefore requires the applied for mark to be identical with an earlier trade mark, and also that the competing goods are identical. Given its date of filing, the opponent’s mark qualifies as an earlier mark in accordance with Section 6(1) of the Act. As the earlier mark had not been registered for five years or more at the publication date of the opposed application, it is also not subject to the proof of use provisions contained in section 6A of the Act. The opponent can, as a consequence, rely upon all of the goods it has identified in its opposition without having to prove use.

Identity of the marks

9. The opponent submits that the marks are identical, arguing:

- (a) the differences between the marks are so insignificant that they would go unnoticed by the average consumer;
- (b) the stylisation applied to the applied for mark is low meaning that identity can be found;
- (c) the “dot” in the letter “B” in the applied for mark would go unnoticed by the average consumer;

- (d) alternatively, if noticed, the “dot” in the letter “B” is intended to represent a ball and would be descriptive and non-distinctive for the applied for goods. Therefore, even if it is perceived it should be disregarded when comparing the marks;
- (e) the figurative elements of the applied for mark are likely to be perceived as decorative, not distinctive, having no meaning and not an element that would indicate the commercial origin of the goods. The fact that there is an identical word element is therefore sufficient for there to be identity, referring to case R1929/2010-2 **ARCO**.

10. The applicant states “it is obvious that trademark BING & Device is different from trademark BING and BUNNY.”
11. The applicant’s reference to “BUNNY” relates to the fact that the opponent is (as described in paragraph 1 of their submissions) a production company and producer of an animated TV show for pre-school children called “BING”. I am aware from my own knowledge and experience that the animated TV show in question features a rabbit called “BING”, after whom the show is named. However, it is important to note that is of no relevance here. I must compare the marks as registered or applied for. Here the earlier mark is the word “BING” and it makes no reference to a rabbit /bunny.
12. In *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA* [2003] FSR 34, the Court of Justice of the European Union (“CJEU”) commented on what constitutes an identical trade mark. The Court said:

“50 The criterion of identity of the sign and the trade mark must be interpreted strictly. The very definition of identity implies that the two elements compared should be the same in all respects. Indeed, the absolute protection in the case of a sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered, which is guaranteed by Article 5(1)(a)

of the directive, cannot be extended beyond the situations for which it was envisaged, in particular, to those situations which are more specifically protected by Article 5(1)(b) of the directive.

51 There is therefore identity between the sign and the trade mark where the former reproduces, without any modification or addition, all the elements constituting the latter.

52 However, the perception of identity between the sign and the trade mark must be assessed globally with respect to an average consumer who is deemed to be reasonably well informed, reasonably observant and circumspect. The sign produces an overall impression on such a consumer. That consumer only rarely has the chance to make a direct comparison between signs and trade marks and must place his trust in the imperfect picture of them that he has kept in his mind. Moreover, his level of attention is likely to vary according to the category of goods or services in question (see, to that effect, Case C 342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I 3819, paragraph 26).

53 Since the perception of identity between the sign and the trade mark is not the result of a direct comparison of all the characteristics of the elements compared, insignificant differences between the sign and the trade mark may go unnoticed by an average consumer.

54 In those circumstances, the answer to the question referred must be that Article 5(1)(a) of the directive must be interpreted as meaning that a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer."

13. In *Reed Executive plc v Reed Business Information Ltd* [2004] EWCA Civ 159 the Court of Appeal found that “Reed” was not identical to “Reed Business Information.” The words “Business Information” were part of the trade mark and would not go unnoticed by the average consumer. In *Compass Publishing BV v Compass Logistics Ltd* [2004] EWHC 520 (Ch) the Court likewise held that “Compass Logistics” was not identical to “Compass” as the differences between the two would be identified without difficulty by the average consumer. Laddie J. explained that identity applied in cases where the marks are so close that one could be considered a counterfeit of the other and that:

“However, identity still exists where the marks look and sound identical save to the eye or ear of an expert. Differences which ordinary members of the public will not notice, save by close side-by-side comparison or the pronunciation of a 1940’s BBC news reader, can be ignored. Where such small differences exist, in the market place the mark and sign are identical.

There is nothing in *LTJ* or *Reed* to suggest that noticeable differences should be ignored because they have only limited trade mark significance. To avoid infringement, the addition must not only be more than insignificant (see *LTJ* paras. 53 and 54) but it must have trade mark impact. For example, were the Defendant to use in an advertisement the sentence “At Compass logistics are king” or “At Compass logistics solutions are provided”, it could be said that the only relevant sign being used is “Compass” alone (see similar examples given in *Reed* at paragraph 37). In these cases “logistics” is no part of the identifier of the company’s services. But that is not the case here. “COMPASS LOGISTICS” is the name of the Defendant and is used, and would be perceived, as its trade mark.”

14. The earlier mark is a word mark: BING. The applied for mark is a figurative mark. It is a stylised version of the word BING. The letters are in block capitals

and in a bold font and with a slight stylisation to the typeface. There is further stylisation to the letter “B” as the top left-hand corner of the letter is missing and has been replaced with what could be described by the average consumer as a dot, a circle or a ball. It does not, however, prevent the letter “B” being seen as such.

15. I do not find the marks to be identical. The difference is not so insignificant that it would only be noticed by the average consumer undertaking a side by side comparison. A word trade mark registration protects the word itself written in any normal font and irrespective of capitalisation or highlighting in bold.¹ I accept that the opponent could therefore present their word mark in a way that is close to the general stylisation adopted by the applicant. However, the presentation of the letter “B” in the applied for mark, is beyond the ambit of the potential fair notional presentation of the opponent’s word mark.² Moreover, whether seen by the average consumer as a dot, a circle or a ball, it is a difference that is not negligible and would be noticed.

16. I do not agree that the presentation of the letter “B” should be disregarded when comparing the marks on the basis that it is decorative, descriptive and non-distinctive for the goods in play. Not all average consumers would perceive the “dot” to be a ball. Further, a ball would not be descriptive or allusive for all the goods; for example, “machines for physical exercise.” Moreover, the ball or circular device will be seen by the average consumer as an intrinsic part of the letter B and therefore of the whole mark. It is an element that is not negligible and it will play a part in the formation of the overall impression albeit to a lesser degree. It therefore has some trade mark significance. As explained in *Compass Logistics* it does not fall to be ignored, even if it has limited trade mark significance by itself.

¹ See the decision of the Appointed Person in *Bentley 1962 Limited v Bentley Motors Limited* 0-158-17 and the case law referred to at paragraph 16

² See by way of analogy the decision of the General Court in *Migros-Genossenschafts-Bund v EUIPO*, Case T-189/16 (Cremespresso)

17. The *Arco* case relied upon by the opponent is not binding upon me, being a decision of the Second Board of Appeal of the Office for Harmonization in the Internal Market. It is in any event, not supportive of the opponent's argument as to identity of the marks. It is a case in which a word mark and a stylised version of the word mark were found not to be identical but instead highly similar due to differences introduced by what were unremarkable but not negligible graphic features of the applied for mark.
18. The opponent's opposition under section 5(1) therefore fails at the first hurdle as the marks are not identical. The opponent's opposition under section 5(2)(a) similarly cannot succeed as it also depends upon the marks being identical. I will therefore proceed to assess the opposition under section 5(2)(b).

Section 5(2)(b)

19. Section 5(2)(b) of the Act states:

"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".

20. The following principles are gleaned from the judgments of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-

120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

- (a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- (f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a 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

21. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) OHIM* case T-133/05, the General Court (“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 T110/01 *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).”

22. For its opposition under section 5(2)(b) the opponent relies on fewer goods. The competing specifications are therefore:

Earlier Mark	Applied For Mark
Games, toys and playthings; gymnastic and sporting articles; sporting articles and equipment.	Billiard balls; Games; Toys; Balls for games; Billiard cues; Billiard table cushions; Table cushions being parts of billiard tables; Billiard cue tips; Tips (Billiard cue -); Tips for billiard cues; Cue tips (Billiard -); Playing balls; Chalk for billiard cues; Machines for physical exercises.

23. The opponent submits that the parties' goods are identical, or alternatively highly similar, applying the following analysis:

Earlier Mark	Applied For Mark
sporting articles and equipment	billiard balls
games	games
sporting articles and equipment; games, toys and playthings	balls for games
sporting articles and equipment	billiard cues
sporting articles and equipment	billiard table cushions
sporting articles and equipment	table cushions being parts of billiard tables
sporting articles and equipment	tips (Billiard cue -)
sporting articles and equipment	tips for billiard cues
sporting articles and equipment	cue tips (Billiard -)
sporting articles and equipment	billiard cue tips
toys	toys
games, toys and playthings; sporting articles and equipment	playing balls
sporting articles and equipment	chalk for billiard cues

gymnastic and sporting articles; sporting articles and equipment	machines for physical exercise
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24. The parties both have “toys” and “games” within their specification. These goods are clearly identical.
25. Billiards is an umbrella term for all cue sports (such as snooker and pool) as well as a specific type of cue sport played with 3 balls. In cue sports, the billiard balls are struck with a cue stick. In turn the ball collides with other balls and they bounce off the cushions on the side and the corners of the billiards table. “Tips (Billiard cue -)”, “tips for billiard cues”, “cue tips (Billiard -)”, “billiard cue tips” are all synonymous terms as they are all cue tips for billiard cues. They together with “billiard balls”, “billiard cues”, “billiard table cushions”, “table cushions being parts of billiard tables” and “chalk for billiard cues” are all part of the essential equipment or apparatus for playing billiards. As such they all fall within the opponent’s broader term of “sporting articles and equipment” and are identical goods under the principle established in *Meric*.
26. The applicant’s “balls for games” and “playing balls” will include balls used for children’s games and other recreational playing. They therefore fall within the opponent’s wider term of “games, toys and playthings” and the terms are identical under the *Meric* principle. It would also include balls used for sporting activities, which would fall within the opponent’s wider term of “sporting articles and equipment.” Again, the terms would be identical under the *Meric* principle.
27. The applicant’s “machines for physical exercise” are fitness equipment such as exercise bicycles, running machines and mechanised weight lifting apparatus. Again, they fall within and are identical with the opponent’s terms of “gymnastic and sporting articles” and “sporting articles and equipment”.

The average consumer and the purchasing act

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

29. The opponent submits that the average consumer will be the general public who are neither professional or specialised. They submit the average consumer will pay the same degree of attention as they would for the purchase of everyday consumer goods.
30. For most of the goods in play the average consumer will be an ordinary member of the public. Some billiards equipment may also be bought by individuals with a specialist interest. Some goods, such as billiard apparatus and machines for physical fitness may also be bought by commercial buyers to stock gyms, public houses, snooker and pool halls etc. For the most part average consumers will pay an average degree of attention when selecting most of the goods at issue. However, where the goods are likely to be

infrequent and/or expensive purchases (such as some of the machines for physical exercise), or specialist equipment is being bought, the consumer is likely to take more care over their purchase such that an above average level of attention may be afforded.

31. The goods will be selected mainly by eye in retail stores, supermarkets, specialist sports stores, and their online equivalents. However, I do not discount the potential for aural use of the marks in recommendations (particularly for more specialist equipment) or where retail advice and assistance is given face to face or by telephone.

Comparison of trade marks

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

33. It would be wrong, therefore, to artificially 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 created by them.

34. The trade marks to be compared are:

Opponent	Applicant
BING	

35. The opponent argues that the marks are visually highly similar (if not identical) and are phonetically identical. They submit that BING does not have any meaning in English such that a conceptual comparison is not possible. The applicant argues that the marks are obviously different.

Overall Impression

36. The earlier mark is the word mark BING, presented in block capitals. The overall impression it will convey and its distinctiveness lie in that single word.

37. The applied for mark is as described at paragraph 14 above. The word component “BING” has the greatest relative weight in and dominates the overall impression. The letter “B” with its circular or ball device element appears first in the mark and the ball or circular device element makes a visual contribution to the overall impression but it plays a lesser role compared to the word component. The stylisation of the remaining letters plays a far smaller visual contribution again. All the stylisation is part of and integral to the word itself. The overall impression lies in the mark as a whole.

Visual Comparison

38. The marks share the same letters making up the word “BING” which is a strong point of visual similarity in what is the dominant visual component in the applied for mark and is the only visual component in the earlier mark. The figurative

element of the ball or circle device forming part of the letter “B” in the applied for mark has no counterpart in the earlier mark. It is a general rule of thumb that the average consumer will pay the most attention to the first part of a word mark, albeit each case must be assessed on its own facts³. Here, the principle has a degree of relevance as the ball or circle device creates a visual difference in the first letter of the mark that strikes the eye first and means it will be noticed by the average consumer. However, the letter will still be understood as a letter “B” and the ball or circle device is within and is an integral part of that letter “B”. It is therefore a small component in the overall mark and is limited in the visual difference it creates. The remaining stylisation of the letters in the applied for mark creates little additional visual difference, particularly bearing in mind fair and notional presentation of the earlier word mark means it can be presented in any standard font, which may bring it closer to the stylisation of the applied for mark. Overall there is a high degree of visual similarity

Aural Comparison

39. The figurative element in the applied for mark will not be articulated. As the stylisation of the “B” in the applied for mark does not prevent it from being seen as the letter B, the marks will be pronounced in an identical manner by the average consumer. They are aurally identical.

Conceptual Comparison

40. The applicant argues that the opponent’s goods relate to “BING bunny”, presumably a reference to the TV character. However, as already explained that is not the earlier mark relied upon in opposition. I cannot, without evidence, attribute such meaning to the average consumer by way of judicial notice. In particular, it is important to bear in mind that the specification in play covers a wide range of goods seemingly unrelated to the TV character. There is nothing within the earlier mark that limits or links its use to goods with an image or other

³ See for example *Nike International Ltd v OHIM* (Victory Red) T-356/10 at paragraph [38]

reference to “BING Bunny” the TV character, that would show that this is the concept that the opponent’s goods would bring to mind and that would create a conceptual difference.

41. The opponent argues that the average consumer would perceive “BING” as an invented word. In my view, the average consumer is in fact likely to perceive “BING” as an onomatopoeic word and therefore indicative of a sound. In any event, whatever meaning the average consumer attributes to the word “BING” they will do so for both marks.
42. In the applied for mark, the circular or ball shaped device incorporated in the letter “B” will add little, if any, conceptual difference (even if seen as a ball and in respect of goods where a ball is not descriptive or allusive) as it will be viewed as a decorative feature. The marks are therefore conceptually identical or at least highly similar.

Distinctive character of the earlier trade mark

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

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

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

44. Absent evidence, I therefore have only to consider the inherent distinctiveness of the earlier mark. The opponent submits that their earlier mark has a high level of inherent distinctive character as it is original, unique, unusual and carries no link or allusion to the goods in class 28. It is a general rule of thumb that invented words usually have the highest level of distinctiveness; words which are allusive of the goods usually have the lowest.
45. The opponent’s mark consists of the word “BING” and I have found that the average consumer would perceive this as an onomatopoeic word indicative of a sound. It is a standard, albeit marginally less common, word in the English language that does not describe or allude to any of the goods. It has an average degree of inherent distinctive character.

Likelihood of confusion

46. The factors considered above have a degree of interdependency (*Canon* at [17]), so that a higher degree of similarity between the goods may be offset by a lower degree of similarity between the marks, and vice versa. I must make a global assessment of the competing factors (*Sabel* at [22]), considering them

from the perspective of the average consumer and deciding whether the average consumer is likely to be confused. In making my assessment, I must keep in mind 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 (*Lloyd Schuhfabrik* at [26]).

47. Confusion can be direct or indirect. In *L.A. Sugar Limited v By Back Beat Inc*; Case BL O/375/10 Mr. Iain Purvis Q.C., sitting as the Appointed Person, explained these types of confusion as follows:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when she or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”

48. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr. James Mellor Q.C., as the Appointed Person, stressed that a finding of indirect confusion should not be made simply because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

49. The applicant submits “It is obvious that trade mark BING & Device is different from trade mark BING and BUNNY⁴.” The opponent submits there is a likelihood of confusion heightened by the identity or high similarity between the competing goods and high similarity between the marks.
50. Earlier in this decision, I concluded that the competing goods are identical and that the average consumer of such goods would select them by predominantly visual means (but not discounting aural considerations) paying either an average or higher than average degree of attention during that process, depending on the goods in question. I found the competing trade marks to be visually highly similar and aurally identical. The marks are at least conceptually highly similar, if not identical, and the opponent’s mark has an average degree of inherent distinctive character.
51. Weighing up those interdependent factors, I conclude there is a likelihood of confusion. Bearing in mind the imperfect recollection of the average consumer, and given the high visual and conceptual similarity and aural identity, there is a likelihood the average consumer will mistake or misremember the competing marks during a purchasing process for identical goods, even where the average consumer is a professional purchaser of sports equipment paying a higher than average degree of attention. For any average consumers that do notice the minor difference between the marks they will simply consider that it is a slightly stylised mark used by the same undertaking.

Conclusion

52. The opposition has been successful and, subject to appeal, the application will be refused.

⁴ However, as already noted, a bunny is not part of the earlier mark relied upon in opposition.

Costs

53. The opponent has been successful and is entitled to a contribution towards its costs. Applying Annex A of Tribunal Practice Note (“TPN”) 2 of 2016, I award costs to the opponent on the following basis:

Official fees	£100
Preparing the notice of opposition and considering the counterstatement	£200
Written submissions	£300
Total	£600

I order **QINHUANGDAO JOY BILLIARDS PROMOTION CO., LTD.** to pay **ACAMAR FILMS LIMITED** the sum of **£600**. This sum is to be paid within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated 22 February 2019

Rachel Harfield
For the Registrar