

O/272/19

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION UK 3313560

BY

BOXIKI SOLUTIONS INC.

TO REGISTER THE FOLLOWING MARK IN CLASS 28

**KiddoLab**

AND

THE OPPOSITION UNDER NO. 413054 THERETO

BY


RAY GAR LTD

## Background and Pleadings

1. BOXIKI SOLUTIONS INC (the Applicant) applied to register the mark “KiddoLab” on the 26 May 2018 for goods in class 28 shown below. It was accepted and published on the 6 July 2018.

Class 28: Battery operated toys; Battery-operated action toys; Bouncing toys; Children's multiple activity toys; Children's toys; Crib mobiles [toys]; Crib toys; Educational toys; Fabric toys; Toys for babies; Toys made of plastics; Infant toys; Infants' action crib toys; Toys for infants; Electronic activity toys; Electronic learning toys; Infant development toys; Musical toys; Plastic toys; Talking toys; all for use for babies and toddlers only.

2. RAY GAR LTD (the Opponent) opposes the application under section 5(2)(b) of the Trade Marks Act 1994 (the Act) relying on its earlier UK registered mark for goods in class 28, shown below:

	UK 3071610 Registered 12 December 2014 Class 28: Children's tricycles; Children's ride on, battery powered cars/tractors; Children's ride on, pedal cars/tractors; Children's guitars.
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3. The Opponent relies on all its goods in class 28 for which the mark is registered, claiming that there is a likelihood of confusion under section 5(2)(b) because the trade marks are similar and are to be registered for goods identical or similar to those for which the earlier mark is protected.

4. The Opponent states that:

“our kiddo trademark is a range of Kid’s toys that our business have been selling for a number of years and have grown the brand successfully. This new application is likely to cause confusion as the class and products are both similar in that they are all children’s toys. We feel that the name KiddoLab may be confused or affiliated with our Kiddo brand due to the Kiddo being used and especially as they are both toy brands aimed at children.”

“Kiddolab could be mistaken for a related branch of KIDDO aimed at preschool children or educational toys”

5. The Applicant filed a defence and counterstatement denying the claims made, refuting “that KiddoLab could cause confusion with their mark Kiddo.”

6. The Opponent is represented by Marc Crooks. The Applicant is unrepresented. Only the Opponent filed evidence by way of a witness statement and exhibits, completed by Mr Raymond Crooks dated the 9 January 2019. Neither party requested a hearing however the Opponent filed additional submissions in lieu of a hearing. The decision is taken upon the careful perusal of the papers.

### **Preliminary Issue**

7. The Applicant filed a document on the 9 January 2019 which was neither in the correct format to be considered as evidence<sup>1</sup>, nor could the material be regarded as submissions. The Registry gave the Applicant two opportunities to rectify the matter

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<sup>1</sup> Rule 64(1) Trade Marks Rules 2008

and set out by way of letter dated the 4 February 2019 the consequences of failing to do so. No further correspondence or application was received from the Applicant and therefore the material filed on the 9 January 2019 will be disregarded for the purposes of my decision and will play no part in my assessment.

## **Opponent's Evidence**

8. The Opponent's evidence consists of a witness statement and exhibits from Mr Raymond Crooks. He is the owner and managing director of RayGar Ltd a position he has held since 2010.

9. Mr Crooks states that the trademark KIDDO was first used by RayGar in the United Kingdom in September 2014 for its range of children's toys. He continues that the mark is displayed on the toys themselves, on the product packaging and in their advertising and product listings online.

10. Mr Crooks states that the Kiddo brand represents approximately 20% of the Opponent's total annual sales. At paragraph 5 he produces approximate annual sales figures for KIDDO products between 2014 and 2017, collected from its two biggest selling platforms. Mr Crooks states that he is unable to produce one sales report showing a breakdown of annual sales because the company sells across multiple sales channels. The approximate annual Kiddo sales were broken down as follows:

2017	£369,872.83
2016	£644,856.57
2015	£381,587.61
2014	£83,593.37

11. The annual amounts spent on promoting the goods/services between 2014 and 2017 are set out by Mr Crooks as:

2017	£6,800
2016	£12,500
2015	£ 7,600
2014	£2,000

12. Mr Crooks states that the mark has been used on the goods/services all over the UK, as RayGar is an online retailer selling across numerous online platforms in the UK. He continues that the KIDDO brand of children's toys is shipped UK wide and is a market leader in the respective product categories.

13. Mr Crooks concludes that the Kiddo range represents at least 60% of the top ten shopping search results on google.co.uk for the term Kiddo toys at any time. He also states that he/they have the top listings on both eBay.co.uk and Amazon.co.uk for the search term KIDDO.

14. Mr Crooks attaches four exhibits to his statement marked RC1-4.

15. Exhibit RC1 is described as samples of the KIDDO mark on the product packaging. RC 1.1 and RC 1.2 shows two pictures of its packaging displaying the mark "Kiddo" as registered. RC 1.3 and RC 1.4 shows the mark, product description and a picture of the product as they appear on its packaging.

16. Exhibit RC 2 is described as an example of the product displaying the mark as well as showing KIDDO in the title of the online listing. RC 2 appears to be a screen shot taken from an online listing. The print out it headed "Kiddo Red 3 wheeler smart design

kids child children trike tricycle Ride on bike 2-5 years new” and underneath it is credited to “Kiddo by Raygar”. The screenshot displays a picture of a child’s tricycle offered for sale in pounds sterling with free delivery. The tricycle is attributed as being dispatched and sold by Raygar. The photograph of the tricycle itself, displays the mark as registered on its stem/frame.

17. Exhibit RC 3 is described as a small sample selection of redacted invoices from its supplier from 2014 to 2017 showing the dates, quantities, range and supply of Kiddo products ordered. All four invoices are from Easy Imex Limited to Raymond Crooks. They show the supply of various children’s bikes/go karts attributed to the Kiddo mark. RC 3.1 is for 1130 “Big Kiddo” Trikes in red and blue; RC 3.2 is for 600 small Kiddo trikes in each of the respective colours red, blue and pink; RC 3.3 is for 1000 units of KIDDO balance bikes and RC 3.4 is for 440 red go karts “With KIDDO logo”.

18. Exhibit RC 4 is described as print outs of various social media posts advertising the KIDDO range of toys from 2014 onwards. The print outs show screen shots of various tricycles and Go-Karts described as Kiddo Go-Karts, Kiddo 4-in-1 Smart Trikes and Kiddo 3 wheeler tricycles. Each print out displays a price in pounds sterling and gives details of the website from where the goods can be ordered.

## **Decision**

19. The opposition is based on section 5(2)(b) of the Act which 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. An earlier trade mark is defined in section 6 of the Act, which states:

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

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

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

21. In these proceedings, the Opponent is relying upon its UKTM registration shown above, which qualifies as an earlier trade mark under section 6 of the Act. As the earlier mark had been registered for less than five years at the date the application was published it is not subject to the proof of use provisions contained in section 6A of the Act. Consequently, the Opponent is entitled to rely upon all the goods of its registration without having to establish genuine use.

22. The following principles are gleaned from the decisions 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.

The principles:

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

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

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

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

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

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

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

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



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

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

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

### **Comparison of the goods**

23. The competing goods are as follows:

Applicant's Goods	Opponent's Goods
Battery operated toys; Battery-operated action toys; Bouncing toys; Children's multiple activity toys; Children's toys; Crib mobiles [toys]; Crib toys; Educational toys; Fabric toys; Toys for babies; Toys made of plastics; Infant toys; Infants' action crib toys; Toys for infants; Electronic activity toys; Electronic learning toys; Infant development toys; Musical toys; Plastic toys; Talking toys; all for use for babies and toddlers only.	Children's tricycles; Children's ride on, battery powered cars/tractors; Children's ride on, pedal cars/tractors; Children's guitars.

24. When conducting a goods and services comparison, all relevant factors should be considered as per the judgment of the Court of Justice of the European Union (CJEU) in *Canon Kabushiki Kaisha v Metro Goldwyn Mayer Inc* Case C-39/97, where the court stated at paragraph 23 of its judgment that:

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

25. I am also guided by the relevant factors for assessing similarity identified by Jacob J in *Treat*, [1996] R.P.C. 281 namely:

- (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. 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.

26. In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as he then was) stated that:

“I should add that I see no reason to give the word “cosmetics” and “toilet preparations”... anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context.”

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

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

28. In order to determine whether there is a likelihood of confusion, the competing specifications must either be identical or share similarity. In my view, the following goods are either identical because they use the same wording or are identical according to the decision in *Meric* as they are incorporated in the other party’s broader description. *“Battery operated toys; Battery-operated action toys; Children’s toys; Educational toys; Toys made of plastics; Infant toys; Toys for infants; Electronic learning toys; Infant development toys; Musical toys; Plastic toys; all for use for toddlers only”* are therefore identical to the Opponent’s *“Children’s tricycles; Children’s ride on, battery powered cars/tractors; Children’s ride on, pedal cars/tractors; Children’s guitars”*.

29. This leaves the remaining contested goods separated into those directed towards babies and those directed towards toddlers.

### **All for use for Toddlers only**

30. *“Bouncing toys; Children's multiple activity toys; Fabric toys; Electronic activity toys; Talking toys; all for use for toddlers only.”* Are all essentially playthings purchased to occupy a toddler or young child and can be seen as alternatives to *“children's tricycles; Children's ride on, battery powered cars/tractors; Children's ride on, pedal cars/tractors”* thus being in competition. Overall there will be a high proportion of the respective goods that will be viewed to be similar in nature in that they will be manufactured from plastic and be produced by the same undertaking. They will be sold in the same retail outlets although not necessarily the same aisle. Their end users will be the same and their purpose will be identical namely for entertainment. On this basis the goods share a high degree of similarity.

31. *Crib mobiles [toys]; Crib toys; Toys for babies; Infants' action crib toys; all for use for toddlers only”* are toys directed towards a broad spectrum of ages being cot based or babies' toys, directed towards older babies or toddlers. Despite this, however, they share a common purpose with the Opponent's goods in that they are all used for entertainment, development or educational purposes. Their nature may be different and they will not be in competition with the Opponent's goods, however they will share trade channels, be sold in the same retail outlets and have the same end user. On this basis the contested goods share a reasonably high degree of similarity.

### **All for use for babies only**

32. *“Battery operated toys; Battery-operated action toys; Bouncing toys; Children's multiple activity toys; Children's toys; Crib mobiles [toys]; Crib toys; Educational toys; Fabric toys; Toys for babies; Toys made of plastics; Infant toys; Infants' action crib toys; Toys for infants; Electronic activity toys; Electronic learning toys; Infant development toys; Musical toys; Plastic toys; Talking toys; all for use for babies*

**only.**” will share a medium degree of similarity with the Opponent’s “*Children's tricycles; Children's ride on, battery powered cars/tractors; Children's ride on, pedal cars/tractors; Children's guitars.*” Irrespective of whether the contested goods are directed towards babies, toddlers or children they all share a common goal; to be used for entertainment, development or educational purposes. They will not be in competition with each other, one cannot see how a tricycle or ride on car/tractor would be purchased as an alternative to a baby’s toy. The end user will also be different as the respective goods will be reliant on different motor development skills. Many baby’s/children’s toys are manufactured from plastic and therefore they will share similarity in nature and therefore be produced by the same undertaking. Again, the respective goods will be sold in the same retail outlets.

### **Average Consumer**

33. When considering the opposing marks, I must determine first of all who the average consumer is for the goods and the purchasing process. The average consumer is deemed reasonably informed and reasonably observant and circumspect. Taking into account the nature of the products namely children’s toys, the level of attention may vary<sup>2</sup> depending on the frequency of the purchasing process.

34. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited, [2014] EWHC 439 (Ch)*, Birss J described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words

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<sup>2</sup> Lloyd Schuhfabrik Meyer, case c- 342/97.

“average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

35. Although the goods in question may vary in price resulting in either frequent or infrequent purchases, on the whole they are all consumable goods. The average consumer is therefore likely to be a member of the general public who will purchase the goods from retail outlets through self-selection or from online or catalogue equivalents. The purchasing process is dominated primarily by visual considerations although I do not discount aural considerations, following discussions with sales assistants. In light of this, I find that an average degree of attention will be taken in the purchasing process because consumers will take into account a number of factors before purchasing the items namely the cost, longevity, and age appropriateness/suitability of the goods.


### **Comparison of the marks**

36. 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 the marks, 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.”

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

38. The respective trade marks are shown below:

Applicant's mark	Opponent's mark
KiddoLab	 The logo for 'Kiddo' features a large, bold, red letter 'K' followed by the word 'iddo' in a bold, black, sans-serif font.

### **Applicant's mark**

39. The Applicant's later mark consists of an eight-letter word "KiddoLab" where the first and sixth letter are capitalised and where the remaining letters are presented in lower casing. Although the mark is presented as one word it will be seen as being devised from two recognisable elements "Kiddo" and "Lab" which is reinforced by the capitalisation of the letter L. The fact that these words are conjoined does not alter the perception that they are two distinct words with neither dominating the other and both making a comparable contribution to the overall impression of the mark. As there are no other elements to contribute to the mark the overall impression is therefore contained in the two words in combination.

## The Opponent's mark

40. Although the Opponent's mark is categorised as a figurative mark on the register, in my view it is a stylised representation of the word Kiddo. The letter "K" at the beginning of the word is capitalised in a bold larger font, in red. The letters "iddo" are presented in lower case in an unremarkable black type face. Although the bold typeface, distinct colour and capitalisation of the letter K have a separating effect, these aspects are likely to be seen as decorative and play a lesser role in the overall impression of the mark. The way in which the letter K is presented contributes to the mark but does not detract from the word itself which is the dominant element of the mark and in which the overall impression resides.

## Visual

41. Both marks present visually as word marks differing in not only font and casing but also in length. A word trade mark registration however protects the word itself irrespective of font, capitalisation or otherwise and therefore, a trade mark in capitals covers use in lower case and vice versa.<sup>3</sup> The marks coincide in five of their letters; the first five of the Applicant's eight letter mark being identical to the entirety of the Opponent's mark, "Kiddo". The Applicant's mark has the additional letters/word "Lab" at the end of the word. I take note that as a general rule, beginnings of words tend to have more visual and aural impact than the ends<sup>4</sup> and although I accept this does not apply in all cases, the relevant public is unlikely to dissect each element of a mark but rather perceive them in their entirety. In this case, the shared presence of the letters/word "Kiddo", will result in the marks sharing a medium degree of visual similarity.

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<sup>3</sup> *Bentley Motors Limited v Bentley 1962 Limited* BL O/159/17

<sup>4</sup> *El Corte Inglés, SA v OHIM*, Cases T-183/02



## **Aural comparison**

42. I consider that the Applicant's mark will be pronounced "Kid-oh-lab" whereas the Opponent's mark will be pronounced "Kid-oh". In both cases the first and second syllable will be pronounced identically, the only difference being in the contested mark's third syllable there being no counterpart in the earlier mark. Since the case law above confirms that generally, beginnings of marks have a greater impact than their ends, overall there is sufficient similarity in the articulation of the words when taken as a whole for me to determine that the marks share a medium degree of aural similarity.

## **Conceptual Comparison**

43. Neither party has filed evidence as to the average consumer's view of the marks and therefore in my view the element "Kiddo" in both marks will be construed as a slang form or variation of the word kid; whilst the "Lab" element will be seen as an abbreviation for laboratory. Both marks will be viewed as having something to do with kids/children; this is particularly so taking into account the respective parties' goods. With the additional element "Lab" the Applicant's mark will be perceived by the average consumer as alluding to a place where children's goods are created/invented or tested. Conceptually both marks include and will be perceived as a reference to children/kids with or without the Lab element and therefore the marks share a reasonably high degree of similarity.

## **Distinctiveness of the earlier mark**

44. The case of *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 sets out the legal position to determine the distinctive character of a mark. In this case 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).”

45. Whilst Mr Crooks provided sales figures for its goods under the mark, totalling approximately £650,000 in 2017 there is no evidence of its market position other than stating “that they lead the market in their respective product categories.” Given the figures, this statement needs corroboration by objective evidence. The evidence produced of UK sales in my view is insufficient to enable it to benefit from enhanced distinctiveness in relation to its goods and therefore I will determine the matter on inherent characteristics.

46. Bearing in mind my assessment of the overall impression and where the word Kiddo is the dominant element of the mark I consider that the use of the word Kiddo has some allusive association to the Opponent’s goods as being suitable for children.

I do not consider that the consumer will recall the stylisation and colour of its first letter K and will merely view the mark as the word Kiddo. Since the word will be viewed as a reference to kid/children I consider it to possess a low to medium degree of inherent distinctiveness.

### **Likelihood of confusion**

47. When considering whether there is a likelihood of confusion between the two marks I must consider whether there is direct confusion, where one mark is mistaken for the other or whether there is indirect confusion where the similarities between the marks lead the consumer to believe that the respective goods or services originate from the same or related source.

48. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“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 recognised 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 he 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, I conclude that it is another brand of the owner of the earlier mark.”

49. In determining whether there is a likelihood of confusion there are a number of factors to bear in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods or services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the Opponent's trade mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must consider 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 that he has retained in his mind.

50. I have found that the marks are visually similar to a medium degree and that the marks share a medium degree of aural similarity. I have found the conceptual similarity between the marks to be reasonably high. I have found that the earlier mark has a low to medium degree of inherent distinctive character. I have identified the average consumer to be a member of the general public who would primarily select the goods via visual means but with aural considerations not being discounted. I have concluded that an average degree of attention will be paid in the purchasing process. I have found that the parties' goods directed towards toddlers are similar between a reasonably high and identical degree and at least a medium degree for those goods directed towards babies.

51. In my view the earlier mark does not form a unit in combination, having a different meaning as compared to its individual components taken separately. Taking all these matters into consideration, even if the average consumer recognises that the marks are different with the stylisation and colour of the letter "K" and the inclusion of the additional element "Lab" I consider they would perceive the Applicant's mark to be a sub brand of the earlier mark and that the respective goods originate from the same or economically linked undertaking. Those coming across the Applicant's mark having first encountered the Opponent's mark for children's tricycles/ride on cars and tractors and children's guitars would assume even for babies' toys that they were one and the same enterprise. On this basis I consider there would be a likelihood of indirect confusion.

52. This view would not have differed even if I had taken account of the additional material filed on the 9 January 2019. The material consisted of responses to the Opponent's evidence and arguments as to why the Applicant did not believe the marks were similar.

### **Outcome**

53. The opposition under section 5(2)(b) of the Act succeeds; subject to any appeal the application is refused.

### **Costs**

54. As the Opponent has been successful it is entitled to a contribution toward its costs. Award of costs in proceedings are based upon the scale as set out in Tribunal Practice Note 2 of 2016. Applying that guidance, I award costs to the Opponent on the following basis:

Preparing a notice of opposition and reviewing the counterstatement:	£200
Preparing and filing evidence	£500
Preparing submissions in lieu of a hearing:	£300
Official fee:	£100
<b>Total:</b>	<b>£1,100</b>

55. I order BOXIKI SOLUTIONS INC to pay RAY GAR LTD the sum of £1,100 as a contribution towards costs. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case, if any appeal against this decision is unsuccessful.

Dated 21 May 2019

Leisa Davies

For the Registrar