

O/926/21

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003536733

**IN THE NAME OF
TOBY RHODES**

**TO REGISTER THE FOLLOWING TRADE
MARK:**



WalkEase

IN CLASSES

16, 18, 20 & 25

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 422409

BY INTERPET LIMITED

Background and pleadings

1. On 24 September 2020, Toby Rhodes (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. It was accepted and published in the Trade Marks Journal on 20 November 2020 in respect of the following goods:

Class 16: Clothing patterns.

Class 18: Clothing for dogs; Dog apparel; Dog leads; Dog leashes; Leads for animals; Animal leads; Dog leads.

Class 20: Dog baskets; Dog beds.

Class 25: Clothing; Clothing for leisure wear; Clothing for men, women and children.

2. On 11 December 2020, Interpet Limited (“the opponent”) opposed the application on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). This is on the basis of its earlier UK Trade Mark no. 2563992 “WALK-EASE”. The following goods are relied upon in this opposition:

Class 18: Accessories for dogs, namely collars, headcollars, leads, harnesses and muzzles dogs; parts and fittings for the aforesaid goods.

3. By virtue of its earlier filing date of 11 November 2010, the above registration constitutes an earlier mark within the meaning of section 6 of the Act.

4. The opponent argues that the respective goods are identical or similar and that the marks are similar.

5. The applicant filed a counterstatement, the contents of which is set out below:

“I would like to express my profound support for any previous trademarks identified within the attached TM7 and wish the owner all the very best. I had not been contacted regarding my application and if so, would have hoped to

explain further, why my trademark would not impact or confuse the public during its use. WalkEase as described and shown below, will be used in its entirety inclusive of both Paw and Foot print. I hope that the opponent can agree that my applied trade mark bares no representation to any earlier submissions.”

6. On the 23 February 2021, the Tribunal wrote to the applicant stating further information was required. The letter invited the applicant to file an amended counterstatement by 9 March 2021, and provided the applicant with the following guidance:

Counterstatement

The purpose of the counter statement is to admit (agree) or deny (disagree) with the opponents claims made in the Form TM7. In this case the opponent has made claims under section 5 (2)(b) of the Trade Marks Act 1994 and are claiming that your trade mark 3536733 is similar to their trade mark number 2563992 WALK-EASE and for identical goods or services.

Please will you review the claim and state if you admit or deny the opponents claim.

7. No response was received from the applicant by 9 March 2021, and on the 1 April 2021 the Tribunal wrote to the applicant a second time, repeating the guidance above and requesting an amended counterstatement was filed by 15 April 2021.

8. No response was received from the applicant by the date given, and so by letter dated 2 June 2021, the Tribunal advised the parties as follows:

“The Registry has not received an amended Form TM8 and counterstatement from the applicant, therefore the Form TM8 filed on 22 February 2021 has been reconsidered and in the circumstances the form is being admitted into the proceedings. However, the opposition case will proceed on the basis that the opponent’s claim that the goods are similar or identical has not been denied.”

9. Neither the applicant nor the opponent filed evidence or written submissions in these proceedings. No hearing was requested and so this decision has been taken after careful consideration of the papers before me.

10. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark law.

11. In these proceedings the opponent is represented by Haseltine Lake Kempner LLP; the applicant is a litigant in person.

Preliminary Issue

12. It has been set out above that upon receipt of the applicant's TM8 and counterstatement, it was the Tribunal's preliminary view that further information was required. Guidance for amending the counterstatement was given to the applicant on two occasions, and on both occasions the dates given by the Tribunal to file an amended counterstatement were not met.

13. The position that should be taken by the Tribunal in circumstances where pleadings have not been denied by a party was discussed at length by Mr Phillip Johnson, sitting as the Appointed Person in *Sky Club*, BL O/044/21. At paragraphs 24 and 25 of this decision, Mr Johnson states:

"24. The position in the Civil Procedure Rules (CPR) is clear; namely, a defendant must state which allegations are denied, which allegations a defendant is unable to admit or deny, and which allegations the defendant admits (CPR, 16.5(1)). Where a defendant fails to deal with an allegation it is taken to be admitted (CPR 16.5(5)). This is subject to the rule that where an allegation is not dealt with, but the defence sets out the nature of his case in relation to the issue to which that allegation is relevant, then the allegation must

be proved by the Claimant (CPR 16.5(3)). Thus, the filing of a “blank” defence would lead to the whole of the Claimant’s case being admitted.

25. The procedure before neither the registrar nor the Appointed Person is governed by the CPR, but there is a Tribunal Practice Notice (TPN 4/2000) which deals with pleadings and provides a similar rule to the CPR:

19. A defence should comment on the facts set out in the statement of case and should state which of the grounds are admitted or denied and those which the applicant is unable to admit or deny but which he requires the opponent to prove.

20. The counter-statement should set out the reasons for denying a particular allegation and if necessary the facts on which they will rely in their defence. For example, if the party filing the counterstatement wishes to refer to prior registrations in support of their application then, as above, full details of those registrations should be provided.”

14. At paragraph 29, Mr Johnson went on to state:

29. The Hearing Officer has the power to request clarifications from a party to proceedings under r 62(1)(a) of the Trade Marks Rules 2008. He also could have invited Mr Engelman to apply to amend his pleadings to put in issue the similarity of goods and services, confusion and so on. Neither of these things happened. Accordingly, the Hearing Officer was wrong to proceed on the basis that the similarity of goods and services, confusion and anything other than similarity of the marks was in issue.

15. It was with consideration to the above that the Tribunal’s letter of 2 June 2021 was issued, directing that proceedings would continue on the basis that the similarity between the goods had not been denied.

16. In *Sky Club*, Mr Johnson as the Appointed Person commented that it was open to the Hearing Officer to invite the applicant to amend its pleadings at a late stage in the

proceedings. Whilst I acknowledge it would also be open for to me to do so, I do not find this would be appropriate in this instance, based on the two previous requests for the applicant to amend its TM8 which were met with no response, followed by the direction made to the parties on how the this matter would proceed, which was also met with no response. However, I note that there have been no specific pleadings from the opponent in relation to the level of similarity or identity between the goods in this instance. Whilst I therefore do not find the fact there is similarity between the goods to be in issue in this instance, I find it is still open to me, and indeed necessary for me to make a finding on the level similarity that is shared between the goods. It is on this basis that I intend to proceed.

Proof of Use

17. As the Earlier Registration had completed its registration process more than 5 years before the application date of the mark in issue, it is subject to proof of use pursuant to section 6A of the Act. However, no proof of use has been requested by the applicant, so proof of use is not relevant in respect of this mark.

DECISION

Section 5(2)(b)

18. Section 5(2)(b) of the Act is as follows:

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

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

19. 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 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.

Comparison of goods and services

20. When making the comparison, all relevant factors relating to the goods in the specification should be taken into account. In *Canon*, the CJEU stated at paragraph 23 of its judgment:

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

21. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services;

c) The respective trade channels through which the goods or services reach the market;

d) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

22. The General Court (“GC”) confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, that, even if goods are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

“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 fur 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”.

23. For the purposes of considering the issue of similarity of goods, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux- Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

24. The goods for comparison are as follows:

Opponent's goods	Applicant's Goods
Class 18: Accessories for dogs, namely collars, headcollars, leads, harnesses and muzzles dogs; parts and fittings for the aforesaid goods.	Class 16: Clothing patterns. Class 18: Clothing for dogs; Dog apparel; Dog leads; Dog leashes; Leads for animals; Animal leads; Dog leads. Class 20: Dog baskets; Dog beds. Class 25: Clothing; Clothing for leisure wear; Clothing for men, women and children.

25. I have set out how I intend to approach the comparison of the goods under the preliminary issues section of this decision. It is with this in mind that I assess the level of similarity between the same.

Comparison of goods in Class 16:

26. The contested goods are *Clothing patterns*. This is entirely different in nature and purpose to any of the opponent's goods. Further, there is no complementary relationship between them nor are they in competition with one another. I also do not consider that the users and distribution channels would be likely to coincide. In the absence of any intrinsic similarity between these goods, I assess the degree of similarity as being very low.

Comparison of goods in Class 18:

27. The opponent's goods cover a range of accessories for dogs, *including leads*. I consider the contested terms *Dog leads; Dog leashes; Leads for animals; Animal leads; Dog leads* to be identical to the opponent's goods, either self-evidently, or in line with the principles as set out in *Meric*.

28. The remaining goods in Class 18 are *Clothing for dogs; Dog apparel*. While I understand that both these terms encompass items intended to be worn by dogs, I do not find the opponent's goods to be clothing or apparel within the ordinary and natural meaning of the same. Both these goods and the opponent's earlier goods are for use in connection with dogs and the users of the competing goods will be the same i.e. dog owners. While the physical nature and intended purpose of the goods may somewhat differ; the trade channels are likely to be shared, and these items are likely to be sold in the same targeted shops such as pet shops, and in the same aisle in a supermarket. Keeping this in mind, I find these goods to be similar to a medium degree.

Comparison of goods in Class 20:

29. The contested goods in Class 20 in the applicant's specification and the opponent's goods will overlap in trade channels, user and where they are likely to be found. They would however differ in terms of the nature, intended purpose, method of use and would not be complementary or in competition with one another. I would therefore consider these goods to also be similar to a low to medium degree.

Comparison of goods in Class 25:

30. The goods in Class 25 are *Clothing; Clothing for leisure wear; Clothing for men, women and children*. The users of these goods may be shared with the opponent's goods, but only to the very general extent that all of the goods may be targeted at members of the general public, which in some cases will include dog owners. In this case the physical nature, intended purpose and method of use of the goods would differ. There may be a degree of similarity between trade channels and where these items are likely to be found such as a supermarket however these would likely be found in completely different departments. Keeping this in mind, I find these goods to be similar to a very low degree.

The average consumer and the nature of the purchasing act

31. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then decide the manner in which these goods are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median”.

32. In respect of the goods in classes 16 and 25, the average consumer is likely to be a member of the general public with the end goods self-selected from traditional high street retail outlets or their online equivalents. In addition to the general public, the relevant consumer in respect of the goods in class 16 will also in part be made up of professional consumers running businesses. Whilst I accept that the price can vary considerably, the goods are generally purchased relatively frequently, with consumers alive to considerations such as quality, compatibility and sustainability when approaching the selection. Given the process of selection, the marks' visual impact is likely to play the greater role, though I do not discount the opportunity for aural recommendations made by salespeople, for example. Weighing all factors, I find it likely that the average consumer will apply a medium degree of attention to the purchase.

33. All the other goods covered by the respective specifications relate to goods designed for dogs in one way or another. The average consumer will be a member of

the pet owning public. The goods are sold in general and pet-specialist retail outlets (physical and online) and the marks used in relation to them may be seen in advertisements and catalogues. The price of the goods differ slightly depending on what they are. I consider that the average consumer will take some care in assessing the type of the product, their design, quality and compatibility for their pet. Overall, I consider that the selection process will be a largely visual process (although I will not discount aural use completely such as recommendations and assistance from retail staff), with a medium degree of care and consideration being deployed.


Comparison of marks

34. 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 Court of Justice of the European Union 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.”

35. It would be wrong, therefore, to dissect the trade marks artificially, although it is necessary to take into account 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.

36. The respective trade marks are shown below:

Earlier trade mark	Contested trade mark
<p>WALK-EASE</p>	

Overall impression

The applicant’s contested mark

37. The contested mark is a device containing the words “Walk” and “Ease” presented as one word in a navy font and book-ended by two devices set out in the centre of a white square background. On the left of the wording is an image of a paw print presented in a light blue colour on a navy circle and on the right is an image of a footprint presented in navy on a light blue circle. In this case I find the role of the white square background to be negligible therefore the overall impression comprises the words and the two devices. I believe that the consumer would be initially drawn to the verbal element, and on this basis and due to its larger size I therefore consider the word element plays the dominant role in the mark.

The opponent’s earlier mark

38. The opponent’s mark is a word mark that solely consists of the words “WALK” and “EASE” presented in upper case font with a hyphen between the two words. The overall impression resides in the mark as a whole.

Visual comparison

39. Visually, the marks contain the words “walk” and “ease” which creates a point of similarity. However, there are a number of differences. The most significant is the device elements of a paw print and footprint contained in the contested mark. Further differences reside in the use of a hyphen to separate the words “walk” and “ease” in the earlier mark whereas there is no space between the wording in the contested mark. I do note, however that the “E” in the contested mark being presented in an upper-case font serves a similar purpose to the hyphen and thus separately emphasises the terms “Walk” and “Ease”. I have assessed the figurative devices in the contested mark and the hyphen in the earlier mark as playing only a lesser role in their overall impression which consequently impacts on the degree of visual difference such elements create. Balancing the points of similarity and difference, together with my assessment of the overall impression of the marks, my view is that there is a high level of visual similarity between the earlier mark and the contested mark.

Aural comparison

40. The common wording “WALK” and “EASE” in both marks will be articulated in the same way (“walk-ease”). I do not consider that the hyphen in the earlier mark would change the pronunciation or the emphasis put on either word. I therefore consider the marks to be aurally identical.

Conceptual comparison

41. Conceptually, the earlier sign will be understood as comprising the two English words ‘walk’ and ‘ease’. The word walk will be understood as the action of moving one leg after the other to travel from one place to another. The word “ease” denotes the absence of difficulty or effort. Together, these words will convey to the consumer the concept of walking without difficulty. However, in the context of the goods, particularly those relating to pets, it is my view that this will be also viewed by the consumer as a play on words, as when the terms are pronounced together, they create the term “walkies”. This will be viewed by the consumer as the informal term used to refer to walking a dog and may also indicate the products will make ‘walkies’ less difficult. The

contested mark would also be perceived this way, and the addition of the pawprint and footprint simply reinforce this meaning. In view of this, I consider the marks to be conceptually similar to at least a high degree.

Distinctive character of the earlier mark

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

43. I have no submissions from either party regarding the distinctiveness of the earlier trade mark nor has there been any evidence filed. Consequently, I have only the inherent position to consider. Invented words usually have the highest degree of distinctive character; words which are descriptive of the goods relied upon normally have the lowest. Whilst the mark is not descriptive, I find it alludes to dog walking. I therefore find that the earlier mark has a below medium degree of inherent distinctive character in respect of the opponent’s goods.

Likelihood of confusion

44. There is no simple formula for determining whether there is a likelihood of confusion. I must make a global assessment of the competing factors (*Sabel* at [22]), keeping in mind the interdependency between them (*Canon* at [17]) and considering the various factors from the perspective of the average consumer. In making my assessment, I must bear 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]).

45. There are two types of possible confusion: direct (where the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same but puts the similarity that exists between the marks/goods down to the responsible undertakings being the same or related). The distinction between these was explained by Mr Iain Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10. He said:

“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 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 as a whole, I conclude that it is another brand of the owner of the earlier mark.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ("26 RED TESCO" would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as "LITE", "EXPRESS", "WORLDWIDE", "MINI" etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ("FAT FACE" to "BRAT FACE" for example)."

46. I found the verbal element to play a more significant role in the overall impression of the contested mark and I found the marks to be visually similar to a high degree. Aurally, I found the marks to be identical. Conceptually, I found the marks to be similar to at least a high degree as most average consumers would view "WALK-EASE" as a play on words and, in the contested mark, the paw print and footprint elements are allusive of the goods being for pets and their owners.

47. I found the relevant consumer to be the general public as well as professionals. I found they would purchase the goods primarily on visual inspection, but that aural considerations cannot be discounted. I found the relevant consumer will pay a medium level of attention in respect of the goods.

48. I consider that, in this instance, I found that the earlier mark has a below medium degree of inherent distinctive character in respect of the goods. I also found there to be varying degrees of similarity between the earlier and contested goods, although as stated earlier, I am proceeding on the basis that the opponent's claim that the goods are similar or identical has not been denied. As per *Canon*, it should be considered that a lesser degree of similarity between the goods may be offset by a greater degree of similarity between the marks. However, taking this into consideration along with all of the relevant factors, it is my view that the average consumer of medium attentiveness may misremember the marks by way of imperfect recollection, and it is my view that the devices and the hyphen in particular may be forgotten or go unnoticed. I find on this basis that it is likely that the consumer may mistake one mark for the other in respect of all of similar goods, and as such I find there is a likelihood of direct confusion.

49. I also consider at this stage if there is a likelihood of indirect confusion. I consider that the word element is the entire earlier mark, and that the hyphen is likely to go unnoticed. I consider that a highly similar word element is the most dominant element in the later mark. It is my view that even if the average consumer were to recognise the differences between the marks, by way of the paw and foot device, even considering the below medium level of distinctiveness in the word element, I believe they would consider the contested mark to merely be a stylised version of the earlier mark and would therefore consider the goods to originate from the same undertaking. In view of this, I find there is also a likelihood of indirect confusion between the marks.

CONCLUSION

50. The opposition under section 5(2)(b) of the Act has succeeded in full. Subject to any successful appeal against my decision, the application will be refused in the UK for the full range of goods applied for.

COSTS

51. The opponent has been successful and is entitled to a contribution towards its costs. Awards of costs in proceedings commenced after 1 July 2016 are governed by Annex A of Tribunal Practice Notice ('TPN') 2 of 2016. Using that TPN as a guide, I award the opponent the sum of £300 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Official Fee:	£100
Preparing a statement and considering the other side's statement:	£200

52. I therefore order Toby Rhodes to pay the sum of £300 to Interpet Limited. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 20th day of December 2021

Catrin Williams
For the Registrar