

O/865/21

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK APPLICATION NO. 3465115
BY C AND F STORE COMPANY LIMITED**

TO REGISTER:



AS A TRADE MARK IN CLASSES 25 & 32

AND

**IN THE MATTER OF THE OPPOSITION THERETO
UNDER NO. 422174 BY
ASSOS OF SWITZERLAND GMBH**

BACKGROUND AND PLEADINGS

1. C AND F STORE Company Limited (“the applicant”) applied to register the sign shown on the front cover of this decision as a trade mark in the United Kingdom on 7 February 2020. The application was accepted and published on 21 August 2020 in respect of the following goods:

Class 25

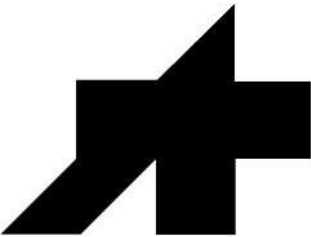
Clothing, footwear, headgear.

Class 32



Energy drink; healthy drink (Beverage, made of Cereal).

2. On 23 November 2020, the application was opposed by ASSOS of Switzerland GmbH (“ASSOS”) (“the opponent”). The opposition is based on sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”) and concerns all the goods in respect of which the application has been made.

3. Under section 5(2)(b), the opponent is relying on the following marks:

Marks	Goods relied upon
<p>EUTM No. 4441598 (“the 598 mark”)¹</p>  <p>Filing date: 14 June 2005 Registration date: 30 June 2006</p>	<p><u>Class 12</u> <i>Bicycle frames</i></p> <p><u>Class 25</u> <i>Clothing, footwear, headgear.</i></p>

¹ Although the UK has left the EU and the transition period has now expired, EUTMs and International Marks which have designated the EU for protection are still relevant in these proceedings given the impact of the transitional provisions of The Trade Marks (Amendment etc.) (EU Exit) Regulations 2019, SI 2019 No. 269, Schedule 5. Further information is provided in Tribunal Practice Notice 2/2020.

Marks	Goods relied upon
<p data-bbox="284 250 810 286">UKTM No. 3202625 (“the 625 mark”)</p>  <p data-bbox="284 743 724 779">Filing date: 16 December 2016</p> <p data-bbox="284 797 715 833">Registration date: 5 May 2017</p>	<p data-bbox="863 250 1390 394">Goods and services in Classes 3, 9, 12, 18, 25, 28 and 35 as listed in the Annex to this decision.</p>
<p data-bbox="284 855 826 891">EUTM No. 16112674 (“the 674 mark”)</p>  <p data-bbox="284 1281 724 1317">Filing date: 30 November 2016</p> <p data-bbox="284 1335 762 1370">Registration date: 30 March 2017</p>	<p data-bbox="863 855 1390 999">Goods and services in Classes 9, 18, 28 and 35 as listed in the Annex to this decision.</p>

3. The 598 mark completed its registration procedure more than five years before the date on which the application for the contested mark was made. The opponent has stated that it has used the mark for the goods relied on during that five-year period.

4. The opponent claims that the contested mark is visually highly similar and aurally and conceptually identical to the earlier marks, and that the contested goods are either identical or similar to goods and/or services covered by the earlier marks. It also claims that the earlier marks comprise a family of marks and that they enjoy an enhanced distinctive character. The opponent asserts that there is a clear likelihood of confusion.

5. Under section 5(3), the opponent is relying on the earlier marks shown in the table in paragraph 3 above and claims that they have a reputation for all the goods and services listed in the Annex. It further claims that, on account of the alleged high similarity or identity of the marks, consumers would assume the goods or services came from the same or economically linked undertakings, and that use of the contested mark would, without due cause, “inevitably” lead to the following types of damage:

- ***Unfair advantage taken of distinctive character and reputation.*** The opponent claims that use of the contested mark would take advantage of the time, effort and investment expended by the opponent in building up its brand to attract interest and trade from consumers without any cost to itself;
- ***Detriment to reputation.*** The opponent claims that it “has carefully nurtured its brand, its distribution channels and the goods and services it provides and sells so as to achieve a high level of quality and desirability” and that it would have no control over the quality of the applicant’s goods, which may be lower than its own; and
- ***Detriment to distinctive character.*** The opponent claims that the earlier marks have come to signify the opponent in relation to the goods and services relied on, and that unauthorised use of the contested mark would dilute, blur and reduce the distinctive character of these earlier marks.

6. It continues:

“In each case, the result will be not only theoretical, but economic and real, in nature. The Opponent will inevitably lose trade and sales, and/or the Applicant will gain trade and sales, as consumers choose to consume the Applicant’s goods rather than those of the Opponent; and/or choose to consumer fewer or less of the Opponent’s goods and services than would otherwise be the case.”²

² Statement of grounds, paragraph 48.

7. Under section 5(4)(a), the opponent claims to have used the following signs throughout the UK since 1980 for the goods and services listed below:



Cleaning products for cycling clothing; skin care creams; preparations and gels for the treatment and prevention of ailments associated with cycling; chamois cream for cycling; cycling sunglasses; sunglasses; protective eyewear; bicycles; parts and fittings for bicycles; racing bicycles and road bicycles; bags; backpacks; cups and mugs; water bottles and sports bottles; cycling (and non-cycling) clothing, footwear and headgear; the marketing, advertising, wholesale and retail of all of the foregoing; as well as of energy drinks, energy gels, energy bars, and other drinks, gels and foods used by cyclists and sportspeople for cycling and sport.

8. The opponent claims to have built up, and to own, a substantial goodwill in the UK under these signs in relation to the goods and services listed above. It asserts that use of the contested mark would lead the relevant UK public to believe that the goods of the applicant are those of the opponent, or vice versa, or that there was some other relationship between the two parties, and that this misrepresentation would lead to damage, or likely damage, to its goodwill.

9. The applicant filed a defence and counterstatement denying the claims made and put the opponent to proof of use of the 598 mark in relation to the goods relied upon and of the signs relied upon under section 5(4)(a). In particular:

- Under section 5(2)(b), it submits that there is only a low level of visual similarity between the marks and that, where the earlier mark is a single letter (which it admits is how the average consumer would perceive it), the inherent distinctiveness of such a mark is generally considered to be low

and that, therefore, differences between the marks have a greater impact on the average consumer. It submits that the differences between the marks are sufficient for there to be no likelihood of confusion, even in relation to identical goods;

- Under section 5(3), the applicant puts the opponent to proof of the existence of a reputation, claims that the contested mark is dissimilar to the earlier marks and so cannot be the basis for an opposition under this section, and denies that damage would occur; and
- Under section 5(4)(a), the applicant submits that, because of the alleged visual differences between the signs and the contested mark, the average consumer would not be deceived into thinking that the applicant's goods were those of the opponent, or that there was a relationship between the parties.

Evidence and Submissions

10. The opponent filed evidence in the form of a witness statement accompanied by 61 exhibits dated 9 June 2021 from Peter Hammerschmidt, the senior director of product management at the opponent. His evidence goes to the opponent's origins and history, the goods and services it has sold, the use made of the earlier marks and signs and their reputation. While I shall not summarise his evidence here, I will refer to it during the course of my decision. First, though, I shall make some general comments about it.

11. Dealing with the evidence has been a challenge, including, it appears, for the opponent. According to Mr Hammerschmidt, this stems from the distribution model and associated practices adopted by ASSOS over the years.

12. ASSOS was founded in 1976 by the Maier family. Until 2015, it operated what Mr Hammerschmidt describes as a "classic distribution" model: ASSOS would sell its

goods to third-party distributors who would then supply them to selected retailers.³ In the UK, the distributor was a company called Yellow Limited. Mr Hammerschmidt explains that this relationship was relatively informal and that full records were neither necessarily kept nor supplied.⁴ Exhibit PH49 contains only high-level figures, not broken down by product or even product category. Mr Hammerschmidt says:

“However I can personally say that those figures are true. I know Yellow’s owner personally, being involved in the last years of his distributorship, and in the negotiations that brought it to an end; obviously, working on the product distribution side of the business, I had to be. Those figures are if not forensically correct then at least broadly correct.”⁵

13. In 2015, ASSOS took wholesale distribution in house. From 2016 onwards, there are detailed spreadsheets for several EU Member States showing sales of individual products to retailers.⁶ This raw information is not consolidated in any way and so I have manually calculated total figures from this data, where that has been possible. The spreadsheets do, however, contain rows where the product cannot be identified (generally marked by “#NV”). Where the heading tells me what these goods are, I have included them in my calculations; where the heading covers several different types of goods, I have not. The earliest year for which records show EU sales figures set out according to different trade channels is 2019.⁷ Figures for UK sales through ASSOS’s own website are available for the years 2017 to 2020.⁸

14. Where I quote figures in my decision, I state the source of the data.

15. The applicant has filed no evidence or submissions. The opponent filed written submissions on 10 June 2021 and additional submissions on costs on 22 September 2021. I shall refer to these in my decision where that is appropriate.

³ Witness statement, paragraph 100.

⁴ Paragraph 107.

⁵ Paragraph 108.

⁶ Exhibit PH53.

⁷ Exhibit PH55.

⁸ Exhibit PH58.

16. Neither party requested a hearing, so this decision has been taken following a careful consideration of all the papers I have mentioned above.

Representation

17. In these proceedings, the opponent is represented by Bear + Wolf (UK) LLP and the applicant by Urquhart-Dykes & Lord LLP.

DECISION

18. 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 Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case law of EU courts.

Legislation

19. Sections 5(2)(b), (3) and (4)(a) are as follows:

“(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.

(3) A trade mark which –

(a) is identical with or similar to an earlier trade mark,

[...]

shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EU) in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.

(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

(a) by virtue of any rule or law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection 4(A) is met

...”

20. Subsection 4(A) is as follows:

“The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.”

21. An “earlier trade mark” is defined in section 6(1) of the Act as:

“(a) a registered trade mark, international trade mark (UK), a European Union 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,

(b) a European Union trade mark or international trade mark (EC) which has a valid claim to seniority from an earlier registered trade mark or international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired,

(ba) a registered trade mark or international trade mark (UK) which –

(i) has been converted from a European Union trade mark or international trade mark (EC) which itself had a valid claim to seniority within paragraph (b) from an earlier trade mark, and

(ii) accordingly has the same claim to seniority, or

(c) a trade mark which, at the date of application for registration of the trade mark in question or (where appropriate) of the priority claimed in respect of the application, was entitled to protection under the Paris Convention or the WTO agreement as a well known trade mark.”

Proof of Use

22. The registrations upon which the opponent relies under sections 5(2)(b) and 5(3) qualify as earlier trade marks. As I have already noted, the 598 mark is subject to the provisions set out in section 6A of the Act and the applicant put the opponent to proof of use of that mark. As the other marks were registered less than five years before the date on which the application for the contested mark was made, they are not subject to proof of use and the opponent is therefore entitled to rely on all the goods and services for which those marks stand registered.

23. Section 6A of the Act is as follows:

“(1) This section applies where

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section ‘the relevant period’ means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) For these purposes –

(a) use of a trade mark includes use in a form (the ‘variant form’) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5) In relation to a European Union trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Union.

(5A) In relation to an international trade mark (EC) the reference in subsection (1)(c) to the completion of the registration procedure is to be construed as a reference to the publication by the European Union Intellectual Property Office of the matters referred to in Article 190(2) of the European Union Trade Mark Regulation.

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

24. Section 100 of the Act is also relevant and reads as follows:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.

25. The relevant period during which the opponent must show use is 8 February 2015 to 7 February 2020.

26. The case law on genuine use was summarised by Arnold J (as he then was) in *Walton International Limited v Verweij Fashion BV* [2018] EWHC 1608 (Ch):

“114. *The law with respect to genuine use.* The CJEU has considered what amounts to ‘genuine use’ of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited

above), Case C-416/04 *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundersvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816] [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are

manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].

Form of the mark

27. First, I note that the 598 mark is registered in black. Exhibit 23 contains images that Mr Hammerschmidt states come from 2014 to 2021 showing the mark used on clothing and other goods in either black or white. An example of bib shorts from 2019 is reproduced below:⁹



⁹ Page 8.

because colour is an implicit component of a trade mark registered in black and white (as opposed to extraneous matter).¹⁰ Thus a black and white version of a mark should normally be considered on the basis that it could be used in any colour, which would include white where the mark is registered in black.

29. The same exhibit also shows clothing bearing the 598 mark within an ellipse: see, for example, the cap, shorts and jersey from 2017:¹¹



30. The device is also shown in this form on the frame of a bicycle. Mr Hammerschmidt states that the image below was taken at an ASSOS group ride that was organised at some point after November 2016.¹²

¹⁰ See *Specsavers International Healthcare Ltd & Ors v Asda Stores Ltd* [2014] EWCA Civ 1294, at paragraph 5, and *J.W. Spear & Sons Ltd v Zynga, Inc.* [2015] EWCA Civ 290, at paragraph 47.

¹¹ Page 5.

¹² Paragraph 85. The photograph is in Exhibit 39.1.



31. In *Colloseum Holding AG v Levi Strauss & Co*, Case C-12/12, the Court of Justice of the European Union (“CJEU”) held that:

“32. ... the ‘use’ of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

...

35. Nevertheless, ... a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term ‘genuine use’ within the meaning of Article 15(1).”

32. Where the issue is whether the use of a mark in a different form, rather than with, or as part of, another mark, constitutes genuine use of the mark as registered, the decision of Mr Richard Arnold QC (as he then was), sitting as the Appointed Person, in *NIRVANA Trade Mark*, BL O/262/06, is also relevant. He said:

“33. ... The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period ...

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter's distinctive character. ... this second question breaks down in the sub-questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all."

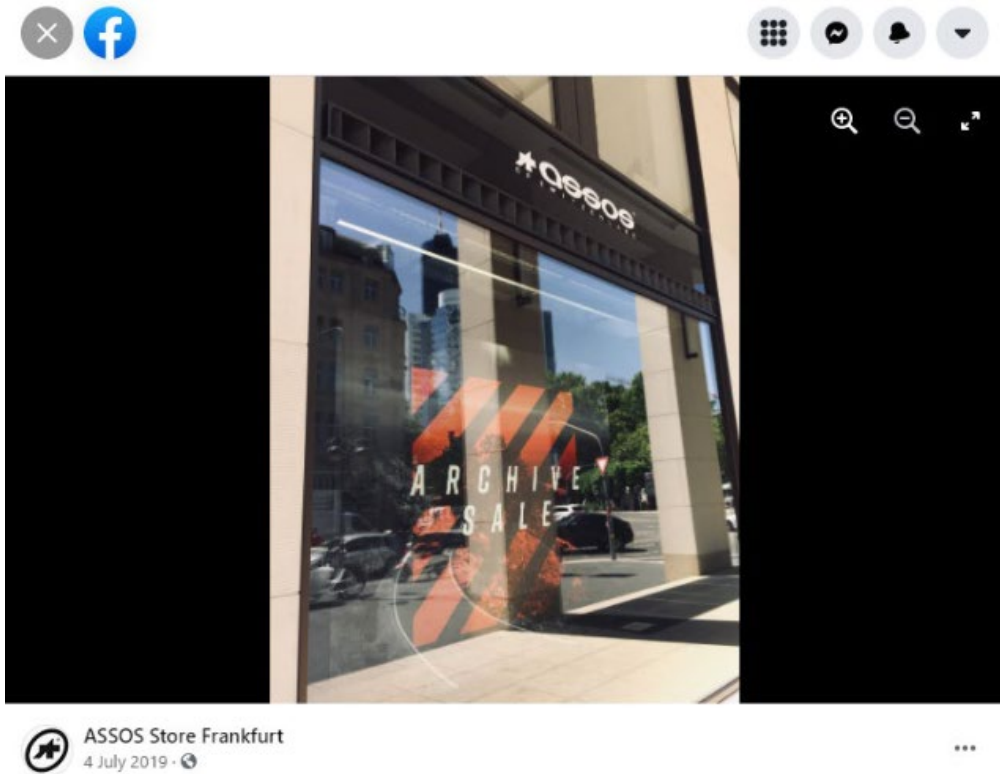
33. In *hyphen GmbH v European Union Intellectual Property Office (EUIPO)*, Case T-146/15, the General Court ("GC") held that use of the mark shown on the left below constituted use of the registered mark shown on the right. The court considered that the addition of a circle, being merely a banal surrounding for the registered mark, did not alter the distinctive character of the mark as registered.



34. In the same way, I find that the ellipse shown in the images in paragraphs 29 and 30 is a banal surrounding for the registered mark, and so the mark on the clothing is an acceptable variant of the registered mark.

35. The third variant consists of the 598 mark shown alongside the stylised word ASSOS, with what appears to be other text below it. This form is used on the opponent's website and on undated screenshots the additional text reads "OF SWITZERLAND". A dated example is a photograph taken from the Facebook account of the ASSOS Frankfurt store, posted on 4 July 2019:¹³

¹³ Exhibit PH48.



36. A final variant contains text on the horizontal bar of the device. On many of the images it is unclear what this text says.¹⁴ On others, it appears as “ASSOS” as shown on the headgear reproduced below.



¹⁴ See, for example, the cycling jersey shown in Exhibit PH14, page 1.

37. However, I need consider these variants no further, given the lack of dated evidence of their use on or in relation to clothing, footwear, headgear or bicycle frames within the relevant period.

Use of the mark

38. For use to be genuine, there must have been real commercial exploitation of the mark, in the course of trade, sufficient to create or maintain a market for the goods at issue in the relevant territory during the five-year period that ends with the date of application for the contested mark. In making my assessment, I am required to consider all relevant factors, including:

- the scale and frequency of the use shown;
- the nature of the use shown;
- the goods for which use has been shown;
- the nature of those goods and the market(s) for them; and
- the geographical extent of the use shown.

39. As the 598 mark is a EUTM, the relevant territory in which use must be shown is the territory of the European Union as it was at the relevant date: see *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11, paragraph 36. It is not, however, necessary for use to be shown in every single Member State: see *Leno*, paragraph 50. Mr Hammerschmidt has provided Excel spreadsheets showing figures for the wholesale of particular goods in Germany, France, Italy, Spain and the UK in 2016-2019.¹⁵ I recall that in *Laboratoire de la Mer Trade Mark* [2006] FSR 5, the Court of Appeal held that sales under the mark to the trade may qualify as genuine use. I shall say more about these figures below.

40. Mr Hammerschmidt states that the device that makes up the 598 mark (and what he describes as “the A logo”) has been used since the opponent was founded in the 1970s.¹⁶ Later, he says that ASSOS specialises in clothing and that the mark appears

¹⁵ Exhibit PH53.

¹⁶ Witness statement, paragraph 12.

somewhere on the exterior of all cycling goods. This is confirmed by the evidence, although I note that many of the images are either undated, consist of screenshots from websites taken in 2021 (and so after the relevant date) or show clothing worn by cycling teams and not necessarily for sale to the public.

41. Where goods can be identified as having been marketed during the relevant period, they bear the 598 mark. Exhibit 23 contains images taken from company archives, although it is not indicated where these particular goods were sold. Mr Hammerschmidt states that these images represent some of the styles and types of goods sold by the opponent. I have reproduced some examples in paragraphs 27 and 29 above.

42. The opponent sells its goods to the consumer via its website, authorised dealers and flagship stores in London (opened in 2016) and Frankfurt (opened in 2017).¹⁷ Sample invoices in Exhibits PH59.1 and PH59.3 show sales made to retailers in France, Germany and the UK between 2016 and 2019.

43. I show below the sales made in a variety of EU Member States¹⁸ in 2019 by product category. The source for this table is the spreadsheet in Exhibit PH55. I have taken the “Europe Grand Total” figure for each product category and removed the figures for sales made in non-EU states from the wholesale figures.¹⁹ It is possible that both the retail and e-commerce sales figures may include sales made outside the EU.²⁰

Product Type	Wholesale (Units)	E-commerce (Units)	Retail (Units)
Socks	66,544	5,539	3,838
Gloves	21,937	2,163	1,596
Warmers	15,043	1,162	715
Cap	11,502	1,292	819
Overshoes	5,329	702	475

¹⁷ Its other store is in Lugano, Switzerland.

¹⁸ France, Austria, Belgium, Germany, Spain, Finland, UK, Ireland, Italy, Luxembourg, Netherlands, Poland, Portugal, Sweden and Slovenia.

¹⁹ These are shown by the codes AN (Netherlands Antilles) and NO (Norway).

²⁰ ASSOS has a shop in Lugano, Switzerland.

Product Type	Wholesale (Units)	E-commerce (Units)	Retail (Units)
Headband	976	228	96
Eye protection	451	101	131
Accessories ²¹	394	58	148
Shorts	108,850	6,414	3,041
Tights	13,769	1,342	536
Knickers	4,591	442	160
Shorts Club	653	6	11
Chronosuit	509	70	42
Jerseys	36,808	6,679	2,500
Jerseys Club	1,809	854	242
Sportsmedics (creams, cleansers)	41,796	1,559	1,792
Jackets	11,658	1,650	838
Shells	903	1,112	754
Vest	1,454	394	147
Vest Club	85	0	0
Jackets Club	9	0	6
Signatures – Gadget ²²	2,496	1,186	694
Signatures – Wear	1,496	356	374
Pants – GTA	370	255	57
Bicycle frames	2	0	3
Jackets – GTA	2	112	14
Jerseys – GTA	0	61	9
Socks (DB.91 Socks)	12	0	0

44. The evidence as a whole indicates that the opponent's main product lines are types of cycling clothing. Mr Hammerschmidt says in his witness statement that:

“33. As would be expected, since the 1970s ASSOS has designed, made, distributed and sold a vast range of cycling and other apparel, both within Switzerland, the UK, the EU, and globally.

²¹ Includes socks, a bag and an item which I cannot identify (“koenigskronehelm”).

²² Includes waterbottles, mugs, stickers, stationery, mobile phone covers.

34. Much of this is ‘on the bike’ wear, designed for use while riding, but other items have included ‘off the bike’ or causal [sic] wear. We have also produced some triathlon apparel.”

45. Later, he explains that the current range of “off the bike” casual wear goes by the name “Signature” (identified separately in the table above), although some items of the older “dopo bici” range were still available for sale on the opponent’s website in 2021.²³

46. Exhibit PH53 and the table in paragraph 43 above show that sales of “off the bike” clothing are significantly lower than the sales of clothing designed for use while riding. That said, I remind myself that there is no *de minimis* rule. The items shown as being sold are polo shirts, T shirts, flip flops, track pants, track shorts, track jackets, lounge slippers, “FelpaJack” and “FelpaPants”. The table below shows the sales to retailers for each of these categories in France, Germany, Italy, Spain and the UK between 2016 and 2019:²⁴

Product	Units	Wholesale Revenue (CHF)
Polo shirts (male)	1,110	36,787
Polo shirts (female)	233	7,170
T shirts (male)	1,561	37,829
T shirts (female)	370	8,407
T-shirts (gender unstated)	993	30,332
Flip flops	445	5,523
Track pants	264	25,287
Track shorts	437	28,809
Track jacket	136	15,109
Lounge Slippers	715	3,610
FelpaJack	422	24,765
FelpaPants	216	10,746

47. Sales occurred consistently over the relevant period and in a number of the larger EU Member States. Mr Hammerschmidt’s statement that the mark is used

²³ See Exhibit PH37.

²⁴ Figures taken from the spreadsheets in Exhibit PH53.

“consistently and virtually without fail” on the exterior of off the bike goods, as well as on the bike goods, is unchallenged.²⁵ As I have already noted, there are limited dated images of the goods, but the mark can be seen on the track shorts and T-shirt from 2016:²⁶



48. I must consider the evidence as a whole: see *New Yorker SHK Jeans GmbH KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-415/09, paragraph 53. I am satisfied that the use for these items of clothing, headgear and footwear is in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods that bear, or are sold under, it. I shall consider what goods the opponent may rely on shortly, but before than I must also assess what use is shown in the evidence with respect to *Bicycle frames*.

49. Mr Hammerschmidt states that between the early 2010s and 2018, the opponent worked with a partner company, Goomah, to develop and co-brand a carbon fibre bike, which was sold in the EU in limited quantities up to 2019. He explains the small number of sales:

“This is because we are not, in essence, a bicycle manufacturer, less so one of the major bike brands (such as BMC, Trek, Cannondale, Canyon and the like).”²⁷

²⁵ See paragraph 91 of Mr Hammerschmidt’s witness statement.

²⁶ Exhibit PH23.

²⁷ Paragraph 73.

50. The Goomah bike plays a role in group rides, with it becoming “a talking point at the start and end of rides, and during breaks, because any serious amateur cyclist has probably heard of ASSOS creating the first carbon bike”.²⁸ He also says that:

“88. The Goomah may not therefore have been the ‘biggest seller’ for us, but understandably so, I believe. It’s an expensive bike. Nevertheless we regularly use it in connection with our stores, dealers, and the wider public, in the UK and EU, as a ‘link back’ to our origins in carbon bikes.

89. It helps increase sales of our apparel, too. We have found that riders on the group rides will often either that same day buy ASSOS kit or goods that they see on the rides (being ridden by a fast ASSOS ride leader, or even an ASSOS ex-professional ..., in head to toe ASSOS and riding a Goomah frame at the front of the ride; it’s quite inspiring for a serious amateur rider) the same day when they get back to the store or the dealer. Or come back in a few days or weeks later to buy. The whole idea is to create that ‘market leading’ or ‘epic’ look – we are after all the oldest manufacturer or [sic] some of the best kit in the world, ridden by professionals on the biggest tours and rides. We need to ‘look the part’ to encourage sales of our goods, which is why we have ride leaders in full ASSOS, on ‘the ASSOS bike’.”

51. The Excel spreadsheets to which I have already referred show that between 2016 and 2019 19 framesets were sold in the EU. This may be an incomplete figure as it covers 5 Member States for the whole period and the EU more broadly for 2019 only. Global sales in the same period reached 99. In addition, 49 framesets were sold globally in 2015.²⁹ Furthermore, there is scant evidence of efforts made by the opponent to promote the bicycle frame to customers who might be interested in purchasing one. For instance, the exhibits contain no advertising material. Mr Hammerschmidt says that it was for sale in the London store, but he places more emphasis on the role of the bicycle in generating interest in the opponent generally

²⁸ Paragraph 87.

²⁹ Exhibit PH54.

and ASSOS kit in particular. Taking the evidence as a whole, I do not consider that the opponent has shown that it has made genuine use of the 598 mark for *Bicycle frames*. I note, however, that the opponent's 625 mark, which is not subject to proof of use, is registered for *Bicycles and Parts and fittings for bicycles*.

Framing a fair specification

52. In *Euro Gida Sanayi ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs QC, sitting as the Appointed Person, summed up the law as being:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify.”

53. In *Property Renaissance t/a Titanic Spa v Stanley Dock Hotel Ltd t/a Titanic Hotel Liverpool & Ors* [2016] EWHC 3103 (Ch), Carr J summed up the law relating to partial revocation as follows:

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) (“Thomas Pink”) at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd (Extreme*

Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 (“Asos”) at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them: *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46.”

54. The opponent submits that it has used the 598 mark for *Clothing, footwear and headgear*. These terms, however, encompass clothing ranging from the highly formal to the extremely casual. Notwithstanding the opponent’s submissions that *Cycling clothing* is simply clothing, it is my view that the average consumer would consider the performance cyclewear sold by the opponent to be a distinct category and that this would be a fair term to cover those goods.

55. In terms of *footwear*, the evidence shows sales of cycling socks and overshoes. As the name implies, overshoes are designed to be worn over the cycling shoe to provide additional warmth or protection from the rain. Both these goods are, to my mind, distinct subcategories and a fair specification would not extend to the broader *Cycling footwear*. I find a fair term would be *Cycling overshoes, cycling socks*. Turning

to *headgear*, I note the sale of caps which would be worn under a cycling helmet. (The cycling helmets themselves are not included in Class 25 of the specification, so the level of use made in connection with those goods is not relevant here.) I consider that *Cycling headgear* would be a fair specification.

56. I did, however, find that the opponent had shown some use of the 598 mark in relation to off-the-bike clothing. The table in paragraph 46 lists the specific goods. In my view, all except *Flip flops* and *Lounge slippers* would be covered by the term *Casual clothing*. I do not consider that use in relation to *Flip flops* and *Lounge slippers* enables the opponent to rely on *Casual footwear* generally. There is no evidence of off-the-bike headgear.

57. I find that a fair specification for the 598 mark reads as follows:

Class 12

Cycling clothing and headgear; Cycling socks; Cycling overshoes; Casual clothing; Flip Flops; Lounge slippers.

Section 5(2)(b)

58. I have already set out the relevant legislation in paragraph 19 above.

59. In considering the opposition under this section, I am guided by the following principles, gleaned from the decisions of the CJEU 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 BV* (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-334/05 P) and *Bimbo SA v OHIM* (Case C-519/12 P):

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. The average consumer is deemed to be reasonably well informed and reasonably circumspect and observant, but someone who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them they have kept in their 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; and

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 and services

60. It is settled case law that I must make my comparison of the goods and services on the basis of all relevant factors. These may include the nature of the goods and services, their purpose, their users and method of use, the trade channels through which they reach the market, and whether they are in competition with each other or are complementary: see *Canon*, paragraph 23, and *British Sugar Plc v James Robertson & Sons Limited (TREAT Trade Mark)* [1996] RPC 281 at [296]. Goods and services are complementary when

“... there is a close connection between them in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking.”³⁰

61. The applicant’s goods are as follows:

Class 25

Clothing, footwear, headgear.

Class 32

Energy drink; healthy drink (Beverage made of Cereal).

62. The opponent’s 625 mark also covers *Clothing, footwear and headgear* and so the Class 25 goods are identical. In addition, contested goods may also be considered

³⁰ *Boston Scientific Ltd v OHIM*, Case T-325/06, paragraph 82.

identical where they are included in a broader category designated by the earlier mark, or vice versa: see *Gérard Meric v OHIM*, Case T-133/05, paragraph 29. The goods which I found to be included in a fair specification of the 598 mark are all encompassed by the applicant's *Clothing, footwear, headgear* and so are also identical.

63. The opponent submits that the contested Class 32 goods are similar to the majority of the goods and services covered by the earlier marks. Broadly, these consist of eyewear, helmets, bicycles and parts for bicycles, bags and backpacks, clothing, protective padding for cycling, and retail services associated with these goods and drinking and water bottles. In particular, it submits that, as stated in the evidence of Mr Hammerschmidt, serious cyclists pay a great deal of attention to drinks and nutrition generally, and that there is complementarity between the applicant's Class 32 goods and the opponent's goods and services.

64. I accept that there will be a degree of overlap between the users of *Energy drinks* and the opponent's cycling goods, and that there may even be some shared trade channels. However, the purpose, nature and method of use are different and the goods are not in competition. Nor do I find them to be complementary, as the contested goods are not indispensable or important for the use of any of the opponent's goods in such a way as to make the average consumer think that they come from the same undertaking. In my view, the same rationale applies if I were to compare the contested goods with the opponent's retail services. The evidence does indeed show that some cycling shops sell a range of goods, including drinks, clothing and bicycles, but that is not enough for me to find complementarity. I find that the applicant's Class 32 goods are dissimilar to the opponent's goods and services.

65. If there is no similarity between the goods and services, there is no likelihood of confusion under section 5(2)(b): see *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, paragraph 49. The section 5(2)(b) ground therefore fails with respect to the Class 32 goods.

Average consumer and the purchasing process

66. In *Hearst Holdings Inc & Anor v A.V.E.L.A. Inc & Ors* [2014] EWHC 439 (Ch), Birss J (as he then was) described the average consumer in these terms:

“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 word ‘average’ denotes that the person is typical. The term ‘average’ does not denote some form of numerical mean, mode or median.”³¹

67. The average consumer is a member of the general public. They will buy the goods from a specialist retailer, in the case of cycling clothing, or a general clothing or department store, either visiting a physical shop or ordering from the internet or a printed catalogue. This means that the mark will be seen and so the visual element will be the most significant: see *New Look Limited v OHIM*, Joined cases T-117/03 to T-119/03 and T-171/03, paragraph 50. However, I do not discount the aural element, as the consumer may in some cases be assisted by a member of staff. The price varies, but in many cases these goods will be frequent purchases. The consumer will pay attention to the size, the materials, the style and colours to ensure they buy a garment or item of footwear or headwear that fits them and achieves the effect they desire. In my view, the average consumer of these goods will be paying an average level of attention.

Comparison of marks

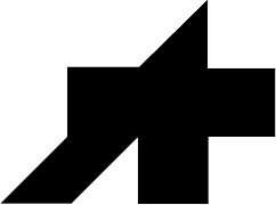


68. It is clear from *SABEL* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the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

³¹ Paragraph 60.

marks, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo* that:

“... it is necessary to ascertain in each individual case, the overall impression made on the target public by the sign for which the 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.”³²

69. It would be wrong, therefore, artificially to dissect the marks, although it is necessary to take into account their distinctive and dominant components and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

Earlier marks	Contested mark
<p data-bbox="284 1189 454 1218">598 mark:³³</p>  <p data-bbox="284 1518 427 1547">625 mark:</p> 	

³² Paragraph 34.

³³ This is also identical to the 674 mark. However, this is not registered for goods in Class 25.

71. The earlier 598 mark consists of a device which both parties agree would be seen by the average consumer as the letter A. It consists of a vertical and diagonal line that meet to form a sharp point at the top of the device. In the middle is a thick horizontal line, extending beyond the boundaries of the vertical and diagonal lines. The device is shown in black. As I have already noted earlier in this decision, registration in black covers the use of the mark in colour. The overall impression of the mark rests in this device. As the 598 mark consists of just the device, and so is closer in appearance to the contested design, I shall continue my comparison based on this mark alone. The Class 25 goods are identical for both earlier marks.

72. The overall impression of the contested mark is of a device on a black background. The device consists of two lines, one vertical and the other diagonal, that meet to form a sharp point at the top of the device. The bottom half is white. Above this is a shallow v-shaped monochrome line, with the top half of the device shaded in a paler monochrome. The black background will be seen as banal, and so the overall impression of the mark lies in the device, both in its shape and its shading.

73. The opponent submits that the contested mark will be seen as a letter A, leaning to the right. It continues:

“Notably however the presence or absence of that horizontal bar in the middle is not immediately noticeable in either mark. In the Earlier Marks it is merely suggested by the bar extending slightly either side. In the Application it is suggested by its absence and the almost identical height of the apex of the black triangle visible at the middle-bottom of the A.”³⁴

74. The applicant, on the other hand, submits that the average consumer would interpret the contested mark as an arrow or a snow-capped mountain. I am not persuaded by this submission. The device does not show the shaft of an arrow, and a snow-capped mountain would be expected to have a white top, rather than a white bottom.

³⁴ Written submissions, paragraph 60.

75. When viewed side by side, I accept that the contested mark could possibly be seen as a letter A, given the highly similar angle of the two limbs of the marks. However, this is not the test that I must apply. The average consumer rarely has the chance to make direct comparisons between the marks. In my view, it is more likely that they will see the contested mark as an abstract shape.

Visual comparison

76. The opponent submits that the marks are visually highly similar. Both consist of a single device. The diagonal limbs of the marks are placed at the same angle to the vertical limb, but this is where the similarities between them ends. I have already described the differences between the marks. Overall, I find them to be visually similar to no more than a medium degree.

Aural comparison

77. Having found it likely that the average consumer will see the contested mark as an abstract shape, it follows that it cannot be pronounced and so there is no aural comparison.

Conceptual comparison

78. The earlier mark will, as I have said, be seen as the letter A, which is the first letter of the alphabet. An abstract shape, however, has no concept. Consequently, there is no conceptual comparison to be made.

Distinctiveness of the earlier mark

79. In *Lloyd Schuhfabrik Meyer*, 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 Alternberger* [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).”

80. The opponent submits that the distinctive character of the earlier mark has been enhanced through use. I shall consider first the inherent distinctiveness of the mark before assessing whether the evidence shows that this has been enhanced.

81. Single letters are not inherently highly distinctive signs. That said, the letter A does not have any particular significance in relation to the goods and services for which the earlier mark is registered, and so has a moderate level of inherent distinctiveness. The stylisation of the earlier mark adds to the inherent distinctiveness, which I would pitch at a level between medium and high.

82. I have already discussed some of the limitations of the sales evidence, but the Excel spreadsheet in Exhibit PH49 does show that sales of between £4m and £5m per annum were made in the UK between 2012 and 2014, although it is not possible to see which products were sold.

83. There is more detailed information on sales after 2015. Sales to UK-based retailers amounted to CHF1.7m (55.5k units) in 2016, CHF2.4m (78.2k units) in 2017, CHF2.5m

(44.6k units) in 2018 and CHF2.8m (54.7k units) in 2019.³⁵ These are wholesale figures, so they do not include sales made through the opponent's own store in London or internet sales. The majority of these sales related to cycling clothing. I have no evidence on the size of this market, so am unable to determine what share of it the opponent had secured. I do note, though, that the goods are relatively highly priced so volumes of goods sold are unlikely to be very large.

84. Sample invoices in Exhibit PH59.3 show sales to cycling retailers in Newcastle, Aylesford, Crawley, London and Northern Ireland between 2016 and 2019. There is also an invoice for sales to Wiggle, which is an internet retailer of cycling, running and swimming, as well as other sporting, goods.³⁶ It is reasonable therefore to infer that the goods were available throughout the UK.

85. Mr Hammerschmidt has given no data on marketing expenditure. He does, however, refer to activities undertaken to promote the mark. These include the attendance at shows, such as the Scottish Cycling, Running and Outdoor Pursuits Show in March 2019,³⁷ and sponsorship of events, such as *Cyclist* magazine's "Track Days" events in 2018-19, where consumers could test-ride a range of different bike brands.³⁸ From 2017, the opponent has sponsored a professional team (BMC) in high-profile cycling events such as the Tour de France, Spanish Vuelta and Giro d'Italia.³⁹ It also has a longstanding relationship with the Swiss national cycling team and the evidence contains images showing members of that team wearing kit bearing the earlier mark at world championship events and the London Olympics in 2012.⁴⁰ An example showing the BMC team is reproduced below:

³⁵ Exhibit PH53.

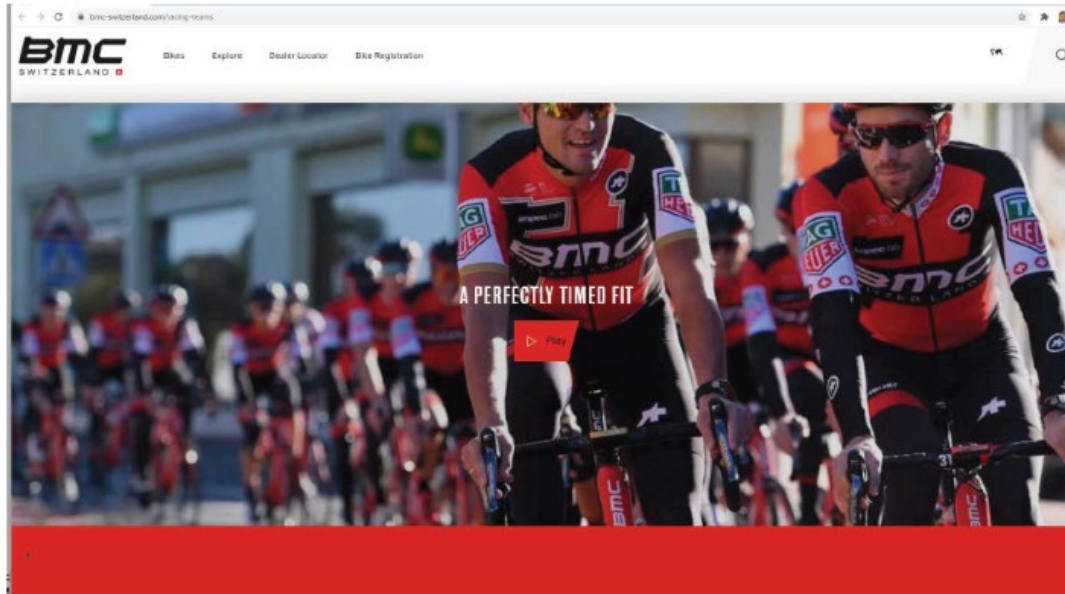
³⁶ Witness Statement, paragraph 54, and Exhibit PH32.

³⁷ Exhibit PH45.

³⁸ Exhibit PH44.

³⁹ Paragraph 31 and Exhibit PH14.

⁴⁰ Exhibits PH11 and PH12.



86. Elsewhere in the evidence, Mr Hammerschmidt provides UK viewing figures for cycling events in 2011: 65,000 for events on Eurosport and up to 502,000 for highlights of the Tour de France on ITV4, with a live audience for that event peaking at 878,000. Cycling events were still being broadcast on ITV4 in 2021, suggesting that there remained an audience for these programmes.⁴¹

87. Reviews of the opponent's cycling clothing have appeared in specialist cycling magazines and websites such as *Road.cc* and *Total Women's Cycling*, as well as more general publications like *The Times*.⁴² All these date from 2016, but Mr Hammerschmidt stresses that they represent a sample. All the articles show the mark on the clothing. Exhibit PH61 contains a report showing PR activity in March and April 2019, including highlights of media coverage. Looking at the page for the UK, while the images are small, the mark is apparent on a variety of cycling clothing.

88. Taking the evidence as a whole, I find that the distinctiveness of the mark has been slightly enhanced to a just higher than medium level in relation to its use for cycling clothing. Among particularly keen and/or competitive cyclists, this is likely to be higher.

⁴¹ Exhibits PH19-PH21.

⁴² Exhibit PH60.

Conclusions on likelihood of confusion

89. There is no scientific formula to apply in determining whether there is a likelihood of confusion. It is a global assessment where a number of factors need to be borne 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 vice versa. It is necessary for me to take account of the distinctive character of the opponent's marks, the average consumer and the nature of the purchasing process for the contested goods. In doing so, I must be aware 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 they have in their mind.

90. There are two types of confusion: direct and indirect. In *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10, Mr Iain Purvis QC, sitting 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 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)."

91. In *Liverpool Gin Distillery Limited & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ commented that:

"This is a helpful explanation of the concept of indirect confusion, which has frequently been cited subsequently, but as Mr Purvis made clear it was not intended to be an exhaustive definition."⁴³

92. I remind myself that the goods that are still in play are identical and that the purchasing process will largely be a visual one, with the average consumer paying an average degree of attention. I found the marks to be visually similar to no more than a medium degree. I also found that the distinctiveness of the earlier mark had been enhanced through use to a slightly higher level among cyclists as a whole, and higher still for the keen and competitive cyclists. However, it is the former group that is more likely to be confused.

⁴³ Paragraph 12.

93. First, I shall consider whether there is a likelihood of direct confusion, which, as Mr Purvis said, involves the average consumer mistaking one mark for another. The marks are, in my view, not sufficiently visually similar for this to occur, even when I bear in mind that the average consumer will recollect the marks only imperfectly. The earlier mark would be seen and recalled as a stylised letter A in a single colour; the contested mark is multi-shaded and missing the prominent horizontal line. The differences are, in my view, too great for the necessary mistake to be made. I find that there is no likelihood of direct confusion.

94. Indirect confusion does not require such a mistake. Before drawing my conclusions on this, I will address the opponent's claim that the earlier marks upon which it relies for this ground comprise a family of marks "used either in black on white or white on black, and with or without a bounding ellipse, but all of which share the common central component of the Opponent's earlier 'A' logo".⁴⁴

95. In *Il Ponte Finanziaria SpA v OHIM*, Case T-194/03, the GC explained the meaning, and potential effect, of a "family of marks" as follows:

"It must be held that, when the opposition to a Community trade mark application is based on several earlier marks and those marks display characteristics which give grounds for regarding them as forming part of a single 'series' or 'family', which may be the case, inter alia, either when they reproduce in full a single distinctive element with the addition of a graphic or word element differentiating them from one another, or when they are characterised by the repetition of a single prefix or suffix taken from an original mark, such a circumstance constitutes a relevant factor for the purpose of assessing whether there is a likelihood of confusion."⁴⁵

96. The court went on to say that two conditions must be present. First, there must be use on the market of a sufficient number of marks to constitute a family. Secondly, the contested mark must display characteristics capable of associating it with the family.⁴⁶

⁴⁴ Statement of grounds, paragraph 40.

⁴⁵ Paragraph 123.

⁴⁶ Paragraphs 126-127.

97. Earlier in my decision, I found that the ellipse was a banal and non-distinctive element of the mark. Given that, it is not clear to me that the earlier marks relied upon by the opponent could be said to constitute a family: two are identical and one is only different from those marks by virtue of a non-distinctive border.

98. Even if they could be seen as a family, though, I do not consider that the contested mark displays characteristics that would lead the average consumer to make the assumption that the contested mark has the same commercial origin as the earlier marks. The configuration of the two limbs of the contested mark mirrors that of the earlier mark, minus the horizontal line that forms the cross-bar of the A. However, recognising this requires both a more accurate recollection of either mark than is expected from the average consumer under section 5(2)(b), and an analytical approach to the earlier mark that is not consistent with viewing the mark as a whole. I find that there is no likelihood of indirect confusion.

99. **The section 5(2)(b) ground fails.**

Section 5(3)

100. I have already set out the relevant legislation in paragraph 19 above.

101. The relevant case law can be found in the following judgments of the CJEU: *General Motors Corp v Yplon SA* (Case C-375/97), *Intel Corporation Inc v CPM United Kingdom Ltd* (Case C-252/07), *Adidas Salomon AG v Fitnessworld Trading Ltd* (Case C-408/01), *L'Oréal SA & Ors v Bellure & Ors* (Case C-487/07) and *Interflora Inc & Anor v Marks and Spencer plc & Anor* (Case C-323/09). The law appears to be as follows:

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Salomon*, paragraph 29, and *Intel*, paragraph 63.

d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods and/or services, the extent of the overlap between the relevant consumers for those goods and/or services, and the strength of the earlier mark's reputation and distinctiveness; *Intel*, paragraph 42.

e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or that there is a serious likelihood that such an injury will occur in the future; *Intel*, paragraph 68. Whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.

f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods and/or services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods and/or services for which the earlier mark is registered, or a serious risk that this will happen in the future; *Intel*, paragraphs 76 and 77.

g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel*, paragraph 74.

h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact on the earlier mark; *L'Oréal*, paragraph 40.

i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation; *Interflora*, paragraph 74, and the court's answer to question 1 in *L'Oréal*.

Reputation

102. In *General Motors Corp v Yplon SA*, Case C-375/97, the CJEU held that:

“24. The public amongst which the earlier trade mark must have acquired a reputation is that concerned by that trade mark, that is to say, depending on the product or services marketed, either the public at large or a more specialised public, for example traders in a specific sector.

25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use and the size of the investment made by the undertaking in promoting it.

28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation ‘in the Member State’. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation ‘throughout’ the territory of the Member State. It is sufficient for it to exist in a substantial part of it.”

103. The opponent submits that it has a “valuable and extensive” reputation in the UK and wider EU in relation to the goods covered by the earlier marks. Where those goods are related to the pursuit of cycling, the relevant public will be cyclists; where they are more general goods, such as clothing or bags, it is the general public that I must have in mind. In the case of the 598 and 674 marks, the reputation must be shown in the EU; in the case of the 625 mark, it must be shown in the UK.

104. Mr Hammerschmidt’s evidence shows that the majority of the opponent’s sales concern clothing. The largest market is Germany, with around twice the volume of sales in the next biggest markets, UK, Italy, Spain and France.⁴⁷ I turn back to the table in paragraph 43 above. In 2019, volumes of sales of goods other than clothing, specialist creams and cleansers for cyclists (categorised as “Sportmedics”) and drinking bottles were extremely small. Even in the case of the bottles, only around 2,800 individual units were sold, along with 40 packs of 50 bottles. The same pattern is shown in the data for individual Member States from 2016-2018.⁴⁸

105. As I have already noted, there is no evidence of marketing expenditure, but I have referred to the sponsorship of teams in cycling events and the exposure of the public to the mark on the kit of riders. There has also been press coverage in specialist and general publications. In these, the opponent is presented as a clothing company, in particular a cycling clothing company. I give some examples below:

“Dubious marketing strategies aside, you have to admire Assos. Not many clothing brands have lasted as long in the cycling sector.

...

⁴⁷ See spreadsheets in Exhibits PH53 and PH55.

⁴⁸ See Exhibit PH53.

Over those years the brand has garnered a loyal following, and it has become the mark of a true seasoned cyclist. See someone out riding in ancient Assos gear and you know he has a good few miles under his belt.”⁴⁹

“ASSOS are a luxury brand because so much care and attention is giving [sic] to each product from the design concept, through to the delivery at your front door.

...

Whilst ASSOS is quite an expensive brand name, you’re paying for luxury, high quality cycling apparel that will last.”⁵⁰

“ASSOS is a name synonymous with high performance, quality and innovation, with a reassuringly expensive price tag to match, and the Swiss company has gained a loyal following with performance-minded cyclists and racers over the last couple of decades.”⁵¹

106. On the basis of the evidence before me, I find that the 598 mark has a moderately strong reputation for cycling clothing in the EU. In my view, the evidence is insufficient to support a finding of a reputation for any other clothing, footwear or headgear.

107. As the mark frequently appears in the form registered as the 625 mark, I find that this also has a reputation for the items in Class 25 that fall under the heading of “cycling clothing”. Again, I do not consider that the evidence shows that this reputation extends to any of the other goods. I make the same finding with respect to the goods covered by the 674 mark.

108. Turning now to the retail services, I remind myself that selling goods is not the same thing as providing retail services, as Mr Geoffrey Hobbs QC, sitting as the Appointed Person, held in *Tony Van Gulck v Wasabi Frog Ltd*, Case BL O/391/14, paragraph 9. At the relevant date, the opponent had two physical stores in the EU –

⁴⁹ “Kit review: Assos Habu 5 jacket”, *The Times*, 24 February 2016, reproduced in Exhibit PH60.

⁵⁰ Review of Rally Bib Shorts and Rally Jersey, *Total Women’s Cycling* website, 10 April 2016, reproduced in Exhibit PH60.

⁵¹ “ASSOS 2016 Summer Clothing – first look”, *Road.cc* website, 24 May 2016, reproduced in Exhibit PH60.

one in Frankfurt (opened in 2017) and one in London (opened in 2018). In my view, the extent and duration of this use, together with the lack of evidence of marketing expenditure, are insufficient to demonstrate that either the 625 or 674 mark had a reputation for any retail services.

Link

109. In assessing whether the public will make the required mental link between the marks, I must take account of all relevant factors, which were identified by the CJEU in *Intel* at paragraph 42 of its judgment. I shall consider each of them in turn.

The degree of similarity between the conflicting marks

110. Under section 5(2)(b), I found that the contested mark was visually similar to the 598 mark to no more than a medium degree, and that there were no aural or conceptual comparisons to be made.

111. In the 625 mark, the device is surrounded by an ellipse. Earlier in this decision, I found the ellipse to be a banal feature. There remains a degree of visual similarity between the 625 and the contested marks at no more than a medium level.

The nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public

112. The contested *Clothing* is identical to the goods for which the earlier marks have a reputation.

113. The contested *Footwear* and *Headgear* have different purposes and physical nature from that of *Cycling clothing*, but will include some goods with shared trade channels and users. They are not in competition, but there is a degree of complementarity so far as footwear and headgear for cycling are concerned. I find that there is a fairly high degree of similarity.

114. Under section 5(2)(b), I found that the contested Class 32 goods were dissimilar to the ones for which the 598 mark had been used. The goods for which a reputation has been shown comprise a subset of those goods. It therefore follows that the Class 32 goods are also dissimilar under this ground.

The strength of the earlier marks' reputation

115. The limitations of the evidence lead me to find that the earlier marks' reputation is moderately strong, but no greater.

The degree of the earlier mark's distinctive character, whether inherent or acquired through use

116. I found that the distinctive character of the 598 mark was slightly higher than medium, and the same holds for the 625 mark.

Whether there is a likelihood of confusion

117. Under section 5(2)(b), I found no likelihood of confusion.

Analysis

118. The first point to make is that it is not fatal to the opponent's case that I found there to be no likelihood of confusion. The level of similarity required for the public to make a link between the marks is less than that required for confusion under section 5(2): see *Intra-Press SAS v OHIM*, Joined cases C-581/13 P and C-582/13 P, paragraph 72.

119. Even so, in my view the differences between the marks are too pronounced for the contested mark to bring the earlier marks to the minds of the relevant public, who are cyclists. The earlier marks will, as I have already found, be seen as depicting the letter A. The public would, I consider, need to compare the marks in some detail before the earlier mark were brought to mind. I find that there is no link and **the section 5(3)**

ground fails. Even if I were to find a link, though, it would be such a weak one that, in my view, it would provide no advantage to the applicant or detriment to the opponent.

Section 5(4)(a)

120. I have set out the relevant legislation in paragraph 19 above.

121. In *Reckitt & Colman Products Limited v Borden Inc. & Ors* [1990] RPC 341, HL, Lord Oliver of Aylmerton described the ‘classical trinity’ that must be proved in order to reach a finding of passing off:

“First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying ‘get-up’ (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff’s goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by him are the goods or services of the plaintiff. Thirdly, he must demonstrate that he suffers or, in a quia timet action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant’s misrepresentation that the source of the defendant’s goods or services is the same as the source of those offered by the plaintiff.”⁵²

122. First I must determine the relevant date. In *Advanced Perimeter Systems v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander QC, sitting as the Appointed Person, quoted with approval the summary made by Mr Allan James, acting for the Registrar, in *SWORDERS Trade Mark*, BL O/212/06:

⁵² Page 406.

“Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.”⁵³

123. The applicant has not claimed to have used the mark before the date of application (7 February 2020), which is therefore the only relevant date.

Goodwill

124. The concept of goodwill was considered by the House of Lords in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217:

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantages of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has the power of attraction sufficient to bring customers home to the source from which it emanates.”

125. The goods and services in relation to which the opponent claims to have goodwill are as follows: *Cleaning products for cycling clothing; skin care creams; preparations and gels for the treatment and prevention of ailments associated with cycling; chamois cream for cycling; cycling sunglasses; sunglasses; protective eyewear; bicycles; parts and fittings for bicycles; racing bicycles and road bicycles; bags; backpacks; cups and mugs; water bottles and sport bottles; cycling (and non-cycling) clothing, footwear and*

⁵³ Quoted in paragraph 43 of BL O-410-11.

headgear; the marketing, advertising, wholesale and retail of all of the foregoing as well as of energy drinks, energy gels, energy bars, and other drinks, gels and foods used by cyclists and sportspeople for cycling and sport.

126. I must consider whether the trade shown in the evidence in these goods and services is sufficient to generate a protectable goodwill. In *Hart v Relentless Records* [2002] EWHC 1984 (Ch), Jacob J (as he then was) stated that:

“In my view the law of passing off does not protect a goodwill of trivial extent. Before trade mark registration was introduced in 1875 there was a right of property created merely by putting a mark into use for a short while. It was an unregistered trade mark right. But the action for its infringement is now barred by s.2(2) of the Trade Marks Act 1994. The provision goes back to the very first registration Act of 1875, s.1. Prior to then you had a property right on which you could sue, once you had put the mark into use. Even then a little time was needed, see per Upjohn LJ in *BALI Trade Mark* [1969] RPC 472. The whole point of that case turned on the difference between what was needed to establish a common law trade mark and passing off claim. If a trivial goodwill is enough for the latter, then the difference between the two is vanishingly small. That cannot be the case. It is also noteworthy that before the relevant date of registration of the BALI mark (1938) the BALI mark had been used ‘but had not acquired any significant reputation’ (the trial judge’s finding). Again that shows one is looking for more than a minimal reputation.”⁵⁴

127. In *Smart Planet Technologies, Inc. v Rajinda Sharma (Recup Trade Mark)*, BL O/304/20, Mr Thomas Mitcheson QC, sitting as the Appointed Person, reviewed the following authorities about the establishment of goodwill for the purposes of passing-off: *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2015] UKSC 31, paragraph 52, *Reckitt & Colman Product v Borden* [1990] RPC 341, HL and *Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd* [1980] R.P.C. 31. After doing so, he concluded that:

⁵⁴ Paragraph 62.

“.. a successful claimant in a passing off claim needs to demonstrate more than nominal goodwill. It needs to demonstrate significant or substantial goodwill and at the very least sufficient goodwill to be able to conclude that there would be substantial damage on the basis of the misrepresentation relied upon.”⁵⁵

128. More recently, Ms Emma Himsworth QC, sitting as the Appointed Person in *THE MEDICAL CANNABIS CLINICS*, BL O/777/21, said that establishing goodwill

“... requires the party seeking to establish the right to show *inter alia* (1) that it has significant, or at least more than nominal goodwill, in the form of customers in the jurisdiction; and (2) that the mark is recognised by the public as distinctive specifically of that party’s goods or services.”⁵⁶

129. On the basis of the evidence that I have already considered, I am satisfied that the opponent had a protectable goodwill in relation to cycling clothing, socks, overshoes and headgear at the relevant date. I set out my findings on the remaining goods and services below.

Cleaning products for cycling clothing

130. The opponent sold 4,187 units of a product described as Active Wear Cleanser to UK-based retailers between 2016 and 2019, generating income of CHF 64,151. In addition, UK customers purchased 57 units via the opponent’s website in 2018 and 2019, with a total value of £1486.⁵⁷

131. An image of the bottle can be found in Exhibit PH23. It is stated that the image dates from 2016. It will be seen that the product is described as “detergent” and as Active Wear Cleanser (my emphasis). I am therefore satisfied that the image shows use of the sign in connection with cleansers intended for cycling clothing. The second sign shown in paragraph 7 above is found towards the top of the bottle.

⁵⁵ Paragraph 34.

⁵⁶ Paragraph 40.

⁵⁷ Exhibits PH53 and PH58.



132. Sales are relatively modest, and mostly to the trade, but they are more than nominal, and consequently I find that the opponent had protectable goodwill in relation to these goods and that the sign was distinctive of the opponent at the relevant date.

Skin care creams; preparations and gels for the treatment and prevention of ailments associated with cycling; chamois cream for cycling

133. The products listed on the spreadsheets in Exhibits PH53 and PH58 that fall within this group are Chamois Crème, Chamois Crème for Women and Skin Repair Gel. At several points in his witness statement, Mr Hammerschmidt explains the discomfort that can be caused by hours in the saddle and that these goods are designed to alleviate the discomfort and help the skin heal when there has been chafing.⁵⁸ Just under 93,000 units were sold to UK retailers between 2016 and 2019 with a total value of CHF 1.38 million. 256 units were sold via the website to customers in the UK between 2017 and 2019, at a value of £3145.

⁵⁸ See, for example, paragraph 20.

134. The second sign can be seen on the container in which the Chamois Crème was sold in 2016.⁵⁹



135. I find that sufficient sales were made for the opponent to have at the relevant date a protectable goodwill in relation to preparations and gels for the treatment and prevention of ailments associated with cycling and chamois cream for cycling. In the case of skin care creams, I find that the goodwill is restricted to Skin care creams for cyclists. I also find that the sign was distinctive of the opponent at that date.

Cycling sunglasses; sunglasses; protective eyewear

136. Mr Hammerschmidt states that the opponent produces eyewear designed for use while cycling and that the sign is shown prominently on the front of them, as can be seen in the example below from 2019:⁶⁰

⁵⁹ Exhibit PH23.

⁶⁰ Exhibit PH23.



137. Sales of eyewear to UK retailers between 2016 and 2019 amounted to 178 units at a wholesale cost of just under CHF27,000, with 20 further units sold via the opponent's website to UK customers at a total cost of £6,525 between 2017 and 2019.⁶¹ This is a small number of units for a four-year period. When Mr Mitcheson was considering the evidence in *RECUP*, he reminded himself that he should bear in mind the size of the UK market (in that case, around 2.5 billion paper cups) and the impact on it of selling 40,000 cups.⁶² I have no indication of the size of the market for cycling sunglasses, sunglasses or protective eyewear. However, it seems to me that the latter two markets are likely to be large and so the volumes sold do not, in my view, represent protectable goodwill in relation to sunglasses or protective eyewear. The market for cycling sunglasses, on the other hand, would be more specialised and consequently smaller. I consider that the opponent has shown a modest protectable goodwill in relation to cycling sunglasses, and that the earlier signs were distinctive of the opponent at the relevant date.

Bicycles; parts and fittings for bicycles; racing bicycles and road bicycles

138. I can find no evidence that the opponent has sold bicycles as finished goods and the only parts that appear to have been sold are frames. Mr Hammerschmidt has stated that the partnership with Goomah ended in 2018, but that sales from existing stock continued until the end of 2019, a matter of weeks or months before the relevant

⁶¹ Exhibits PH53 and PH58.

⁶² BL O/304/20, paragraph 38.

date. The evidence stresses the opponent's history and that it was the first company to develop a carbon bicycle frame. However, nowhere in the evidence can I find any figures for sales in the UK, and Mr Hammerschmidt himself admits that these were limited. I have already noted that the Goomah bicycle plays a role in the promotion of the brand, but the attractive force that brings in custom emanates, to my mind, from other goods, such as the cycling clothing.

Bags; backpacks

139. Sales of bags and backpacks have also been low. Between 2016 and 2019, 13 bags and 1 backpack were sold to UK retailers, and 20 bags to UK consumers on the opponent's website. The total revenue for the former was CHF283 and for the latter £2,134. In my view, these sales are not sufficient to establish that the opponent had protectable goodwill in relation to bags and/or backpacks by the relevant date.

Cups and mugs

140. The spreadsheets show a total of 187 mugs, mug sets or coffee sets sold to UK retailers or website customers, generating CHF2,044 and £249 in income between 2016 and 2019. The impact on the UK market for cups and mugs of such sales over the four-year period would have been extremely small and in my view not sufficient to establish that the opponent had protectable goodwill in relation to these goods.

Water bottles and sports bottles

141. Sales to UK retailers amounted to 443 units between 2016 and 2019, at a wholesale price of CHF1,455. In addition, 177 bottles were sold via the ASSOS website to UK customers at a total value of £723 between 2017 and 2019. Yet again, I do not have any information on the size of the UK market for these products, but it seems likely that the number of people interested in buying them would be fairly high. They would not only appeal to cyclists but people engaged in all types of sport or fitness activities, not to mention the general public who want to carry a bottle with them for refreshment during the day. In my view, then, the sales are small and insufficient to establish protectable goodwill in relation to these goods.

Non-cycling clothing, footwear and headgear

142. As my assessment of the use of the 598 mark for clothing, footwear and headgear generally was based on the EU market, I shall reproduce the table from paragraph 48 with only UK data from the period 2016-2019 and adding internet sales between 2017 and 2019:

Product	Wholesale Units	Wholesale Revenue (CHF)	Internet Sales Units	Internet Sales (£)
Polo shirts (male)	153	1,056	5	250
Polo shirts (female)	17	604	1	50
T shirts (male)	86	2,067	26	924
T shirts (female)	12	344	3	105
T-shirts (gender unstated)	67	4,904	14	575
Flip flops	29	382	0	0
Track pants	11	1,346	5	779
Track shorts	25	1,768	7	553
Track jacket	17	2,362	0	0
Lounge Slippers	19	127	28	249
FelpaJack	16	898	6	570
FelpaPants	11	550	7	525

143. Set against what is undoubtedly a large market for non-cycling clothing, headgear and footwear, these figures are extremely small and, in my view, insufficient to establish a protectable goodwill in relation to these goods.

The marketing, advertising, wholesale and retail of all of the foregoing, as well as of energy drinks, energy gels, energy bars, and other drinks, gels and foods used by cyclists and sportspeople for cycling and sport

144. In paragraph 108 above, I considered whether the opponent's earlier marks had a reputation for retail services. For the same reasons, I find that goodwill has not been established in connection with the above services.

Summary

145. My findings are that the opponent has established protectable goodwill in relation to the following goods: *Cleaning products for cycling clothing; skin care creams for cyclists; preparations and gels for the treatment and prevention of ailments associated with cycling; chamois cream for cycling; cycling sunglasses; cycling clothing, socks, overshoes and headgear.* I also found the signs to be distinctive of the opponent at the relevant date.

Misrepresentation

146. The relevant test was set out by Morritt LJ in *Neutrogena Corporation & Anor v Golden Limited & Anor* [1996] RPC 473 at [493]:

“There is no dispute as to what the correct legal principle is. As stated by Lord Oliver of Aylmerton in *Reckitt & Colman Products Ltd v Borden Inc* [1990] RPC 341 at page 407 the question on the issue of deception or confusion is:

‘is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants’ [product] in the belief that it is the respondents’ [product].

The same proposition is stated in Halsbury’s Laws of England 4th Edition Vol. 48 para. 148. The necessity for a substantial number is brought out also in *Saville Perfumery Ltd v June Perfect Ltd* (1941) 58 RPC 147 at page 175; and *Re Smith Hayden’s Application* (1945) 63 RPC 97 at page 101.”

147. In *Halsbury’s Laws of England* Vol. 97A (2012 reissue), it is noted that:

“In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

(a) the nature and extent of the reputation relied upon;

(b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;

(c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;

(d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and

(e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.”⁶³

148. I will deal with the contested Class 25 goods first. It will be recalled that I found no likelihood of confusion under section 5(2)(b). Sections 5(2)(b) and 5(4)(a), of course, deal with different areas of law. In the light of the Court of Appeal’s decision in *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41, it seems doubtful whether the difference between the legal test for confusion under trade mark law and that for deception under the law of passing off will (all other factors being equal) produce different outcomes. The opposition failed under section 5(2)(b) and the opponent is, in my view, in respect of the Class 25 goods in no better a position under section 5(4)(a).

149. Under section 5(2)(b), I had found the Class 32 goods to be dissimilar to the opponent’s goods and services, which included all the goods in paragraph 146 above, with the exception of *Skin care creams for cyclists; preparations and gels for the treatment and prevention of ailments associated with cycling; chamois cream for cycling*. I would also have found dissimilarity had the aforementioned goods been included in my comparison.

⁶³ Paragraph 309.

150. It is not necessary for the opponent and the applicant to share the same field of activity: see *Harrods Limited v Harrodian School Limited* [1996] RPC 697 (CA). However, Millet LJ went on to say that:

“Where there is no or only a tenuous degree of overlap between the parties’ respective fields of activity the burden of proving the likelihood of confusion and resulting damage is a heavy one. In *Stringfellow v McCain Foods (G.B.) Ltd* [1984] RPC 501 Slade LJ said (at page 535) that the further removed from one another the respective fields of activities, the less likely was it that any member of the public could reasonably be confused into thinking that the one business was connected with the other; and he added (at page 545) that

‘even if it considers that there is a limited risk of confusion of this nature, the court should not, in my opinion, readily infer the likelihood of resulting damage to the plaintiffs as against an innocent defendant in a completely different line of business. In such a case the onus falling on plaintiffs to show that damage to their business reputation is in truth likely to ensue and to cause them more than minimal loss is in my opinion a heavy one.’

In the same case Stephenson LJ said at page 547:

‘... in a case such as the present the burden of satisfying Lord Diplock’s requirements in the *Advocaat* case, in particular the fourth and fifth requirements, is a heavy burden, how heavy I am not sure the judge fully appreciated. If he had, he might not have granted the respondents relief. When the alleged ‘passer off’ seeks and gets no benefit from using another trader’s name and trades in a field far removed from competing with him, there must, in my judgment, be clear and cogent proof of actual or possible confusion or connection, and of actual damage or real likelihood of damage to the respondents’ property in their goodwill, which

must, as Lord Fraser said in the *Advocaat* case, be substantial.”⁶⁴

151. It is unlikely, in my view, that a substantial number of the opponent’s customers or potential customers (who, after all, are the ones who must be deceived) would be misled into believing that the applicant’s goods come from the opponent, given the differences between the signs and the contested mark, which I have considered in more detail under section 5(2)(b). Mere wondering is not enough: see *W. S. Foster & Son Limited v Brooks Brothers UK Limited* [2013] EWPC 18 (PCC), paragraph 54. I find there is no misrepresentation.

152. **The section 5(4)(a) ground fails.**

OUTCOME

153. The opposition has failed and, subject to a successful appeal, the Application No. 3465115 may proceed to registration.

COSTS

154. The applicant has been successful and is entitled to a contribution towards its costs in line with the scale set out in Tribunal Practice Notice (TPN) 2/2016. I note that the applicant filed no evidence or submissions. In the circumstances, I award the applicant the sum of £400 as a contribution towards the cost of the proceedings. This award has been calculated as follows:

Preparing a statement and considering the other side’s statement: £400

TOTAL: £400

155. I therefore order ASSOS of Switzerland GmbH to pay C and F Store Company Limited the sum of **£400**. This sum should be paid within 21 days of the expiry of the

⁶⁴ Pages 714-15

appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 26th day of November 2021

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

Annex: Specifications of the Earlier Marks

The 625 Mark

Class 3

Cleaning products for cycling clothing.

Class 9

Eyewear; protective eyewear; sports eyewear; eyewear for cycling; triathlon eyewear; eyewear for swimming; eyewear cases; sun glasses; anti-glare glasses; protective helmets; sports helmets; helmets for cycling; helmets for racing cycling.

Class 12

Bicycles; parts and fittings for bicycles; touring bicycles; racing bicycles; road racing bicycles; triathlon bicycles.

Class 18

Bags; backpacks for cycling; sports bags.

Class 25

Clothing; casual clothing; leisure wear; sportswear; gym clothing; cycling clothing; clothing for urban cyclists; clothing for commuting cyclists; mountain biking clothing; indoor and outdoor track cycling clothing; triathlon clothing; running clothing; swimming clothing; clothing for use on stationary exercise bicycles; thermally insulated clothing; thermally insulated clothing for cycling; thermally insulated clothing for mountain biking; thermally insulated clothing for triathletes; thermal underwear; thermal underwear for mountain biking; water resistant clothing; water resistant clothing for cyclists; water resistant clothing for mountain bikers; water resistant clothing for triathletes; waterproof clothing; waterproof clothing for cycling; waterproof clothing for mountain biking; waterproof clothing for triathletes; windproof clothing; windproof clothing for cycling; windproof clothing for mountain biking; windproof clothing for triathletes; shorts; shorts for mountain bikers; protective shorts for mountain bikers; triathlon shorts; shorts for use on stationary exercise bicycles; bib shorts; bib shorts for cycling; bib shorts for mountain biking; bib shorts for racing mountain bikers; bib shorts for use on stationary exercise bicycles; triathlon bib shorts; thermally insulated bib shorts for cycling; thermally insulated bib shorts for mountain biking; trousers; trousers for cycling; trousers for mountain biking; tights for cycling; tights for mountain biking; t-shirts; polo shirts; shirts; sleeveless shirts; long, short and sleeveless jerseys; long, short and sleeveless jerseys for cycling; long, short and sleeveless jerseys for mountain biking; long, short and sleeveless jerseys for racing mountain bikers; windproof jerseys for cycling; windproof jerseys for mountain biking; thermally insulated jerseys for cycling; thermally insulated jerseys for mountain biking; track suits; track pants; track tops; hoodies; jackets; jackets for cycling; water resistant jackets for cycling; jackets for mountain biking; jackets for racing mountain bikers; shell jackets for mountain biking; waterproof jackets for cycling; water resistant jackets for mountain biking; waterproof jackets for mountain biking; windproof jackets for cycling; windproof jackets for mountain biking; thermally insulated jackets for cycling; thermally insulated jackets for mountain biking; gilets for cycling; shell gilets for cycling; gilets for mountain biking; gilets for racing mountain bikers; shell gilets for mountain biking; waterproof gilets for cycling; waterproof gilets for mountain biking; water resistant gilets

for cycling; water resistant gilets for mountain biking; thermally insulated gilets for cycling; thermally insulated gilets for mountain biking; skinsuits for racing cyclists; skinsuits for racing mountain bikers; skinsuits for triathletes; arm warmers; arm warmers for cyclists; arm warmers for mountain bikers; arm warmers for racing mountain bikers; windproof arm warmers for cyclists; windproof arm warmers for mountain bikers; water resistant arm warmers for cyclists; water resistant arm warmers for mountain bikers; leg warmers; leg warmers for cyclists; leg warmers for mountain bikers; leg warmers for racing mountain bikers; water resistant leg armers for cyclists; water resistant leg warmers for mountain bikers; gloves; cycling gloves; mountain biking gloves; gloves for racing mountain bikers; long and short finger cycling gloves; long and short finger cycling gloves for mountain biking; windproof cycling gloves; windproof cycling gloves for mountain biking; waterproof cycling gloves; waterproof cycling gloves for mountain biking; thermally insulated cycling gloves; thermally insulated cycling gloves for mountain biking; cycling gloves made of neoprene; cycling gloves made of neoprene for mountain biking; water resistant cycling gloves; water resistant cycling gloves for mountain biking; socks; cycling socks; socks for mountain biking; socks for racing mountain bikers; thermally insulated socks for cycling; thermally insulated socks for mountain biking; footwear; casual footwear; leisure footwear; sports footwear; gym footwear; cycling footwear; footwear for mountain biking; footwear for racing mountain bikers; indoor and outdoor track cycling footwear; footwear for use on stationary exercise bicycles; triathlon footwear; running footwear; swimming footwear; overshoes for cycling; overshoes for racing cyclists; overshoes for mountain biking; overshoes for racing mountain bikers; overshoes for triathletes; oversocks for cycling; oversocks for mountain biking; waterproof overshoes for cycling; waterproof overshoes for mountain biking; water resistant overshoes for cycling; windproof overshoes for mountain biking; thermally insulated overshoes for cycling; thermally insulated overshoes for mountain biking; headgear; casual headgear; headgear for leisure wear; caps; beanies; headbands; cycling headgear; indoor and outdoor track cycling headgear; triathlon headgear; running headgear; swimming headgear; headgear for mountain biking; headgear for racing mountain bikers; insulating caps for cycling; waterproof caps for cycling; waterproof caps for mountain biking; water resistant caps for cycling; water resistant caps for mountain biking; windproof caps for cycling; windproof caps for mountain biking; cycling headbands; headbands for mountain biking.

Class 28

Protective padding for sport; protective padding for cycling; protective padding for use in cycling shorts.

Class 35

Retail and wholesale services connected with the sale of cleaning products for cycling clothing, eyewear, protective eyewear, sports eyewear, eyewear for cycling, triathlon eyewear, eyewear for swimming, eyewear cases, sun glasses, anti-glare glasses, protective helmets, sports helmets, helmets for cycling, helmets for racing cycling, bicycles, parts and fittings for bicycles, touring bicycles, racing bicycles, road racing bicycles, triathlon bicycles, bags, backpacks, backpacks for cycling, sport bags, drinking vessels, water bottles, drinking bottles for sports, drinking bottles for cycling, clothing, casual clothing, leisure wear, sportswear, gym clothing, cycling clothing, clothing for urban cyclists, clothing for commuting cyclists, mountain biking clothing, indoor and outdoor track cycling clothing, triathlon clothing, running clothing, swimming

clothing, clothing for use on stationary exercise bicycles, thermally insulated clothing, thermally insulated clothing for cycling, thermally insulated clothing for mountain biking, thermally insulated clothing for triathletes, thermal underwear, thermal underwear for mountain biking, water resistant clothing, water resistant clothing for cyclists, water resistant clothing for mountain bikers, water resistant clothing for triathletes, waterproof clothing, waterproof clothing for cycling, waterproof clothing for mountain biking, waterproof clothing for triathletes, windproof clothing, windproof clothing for cycling, windproof clothing for mountain biking, windproof clothing for triathletes, shorts, shorts for mountain bikers, protective shorts for mountain bikers, triathlon shorts, shorts for use on stationary exercise bicycles, bib shorts, bib shorts for cycling, bib shorts for mountain biking, bib shorts for racing mountain bikers, bib shorts for use on stationary exercise bicycles, triathlon bib shorts, thermally insulated bib shorts for cycling, thermally insulated bib shorts for mountain biking; trousers, trousers for cycling, trousers for mountain biking, tights for cycling, tights for mountain biking, t-shirts, polo shirts, shirts, sleeveless shirts, long, short and sleeveless jerseys, long, short and sleeveless jerseys for cycling, long, short and sleeveless jerseys for mountain biking, long, short and sleeveless jerseys for racing mountain bikers, windproof jerseys for cycling, windproof jerseys for mountain biking, thermally insulated jerseys for cycling, thermally insulated jerseys for mountain biking, track suits, track pants, track tops, hoodies, jackets, jackets for cycling, water resistant jackets for cycling, jackets for mountain biking, jackets for racing mountain bikers, shell jackets for mountain biking, waterproof jackets for cycling, water resistant jackets for mountain biking, waterproof jackets for mountain biking, windproof jackets for cycling, windproof jackets for mountain biking, thermally insulated jackets for cycling, thermally insulated jackets for mountain biking, gilets for cycling, shell gilets for cycling, gilets for mountain biking, gilets for racing mountain bikers, shell gilets for mountain biking, waterproof gilets for cycling, waterproof gilets for mountain biking, water resistant gilets for cycling, water resistant gilets for mountain biking, thermally insulated gilets for cycling, thermally insulated gilets for mountain biking, skinsuits for racing cyclists, skinsuits for racing mountain bikers, skinsuits for triathletes, arm warmers, arm warmers for cyclists, arm warmers for mountain bikers, arm warmers for racing mountain bikers, windproof arm warmers for cyclists, windproof arm warmers for mountain bikers, water resistant arm warmers for cyclists, water resistant arm warmers for mountain bikers, leg warmers, leg warmers for cyclists, leg warmers for mountain bikers, leg warmers for racing mountain bikers, water resistant leg armers for cyclists, water resistant leg warmers for mountain bikers, gloves, cycling gloves, mountain biking gloves, gloves for racing mountain bikers, long and short finger cycling gloves, long and short finger cycling gloves for mountain biking, windproof cycling gloves, windproof cycling gloves for mountain biking, waterproof cycling gloves, waterproof cycling gloves for mountain biking, thermally insulated cycling gloves, thermally insulated cycling gloves for mountain biking, cycling gloves made of neoprene, cycling gloves made of neoprene for mountain biking, water resistant cycling gloves, water resistant cycling gloves for mountain biking, socks, cycling socks, socks for mountain biking, socks for racing mountain bikers, thermally insulated socks for cycling, thermally insulated socks for mountain biking, footwear, casual footwear, leisure footwear, sports footwear, gym footwear, cycling footwear, footwear for mountain biking, footwear for racing mountain bikers, indoor and outdoor track cycling footwear, footwear for use on stationary exercise bicycles, triathlon footwear, running footwear, swimming footwear, overshoes for cycling, overshoes for racing cyclists, overshoes for mountain biking, overshoes for racing mountain bikers, overshoes for triathletes,

oversocks for cycling, oversocks for mountain biking, waterproof overshoes for cycling, waterproof overshoes for mountain biking, water resistant overshoes for cycling, windproof overshoes for mountain biking, thermally insulated overshoes for cycling, thermally insulated overshoes for mountain biking, headgear, casual headgear, headgear for leisure wear, caps, beanies, headbands, cycling headgear, indoor and outdoor track cycling headgear, triathlon headgear, running headgear, swimming headgear, headgear for mountain biking, headgear for racing mountain bikers, insulating caps for cycling, waterproof caps for cycling, waterproof caps for mountain biking, water resistant caps for cycling, water resistant caps for mountain biking, windproof caps for cycling, windproof caps for mountain biking, cycling headbands, headbands for mountain biking, protective padding for sport, protective padding for cycling, protective padding for use in cycling shorts.

The 674 mark

Class 9

Eyewear; protective eyewear; sports eyewear; eyewear for cycling; triathlon eyewear; eyewear for swimming; sun glasses; anti-glare glasses; protective helmets; sports helmets; helmets for cycling; helmets for racing cycling.

Class 18

Bags; backpacks for cycling; sport bags.

Class 28

Protective padding for sport; protective padding for cycling; protective padding for use in cycling shorts.

Class 35

Retail and wholesale services connected with the sale of cleaning products for cycling clothing, eyewear, protective eyewear, sports eyewear, eyewear for cycling, triathlon eyewear, eyewear for swimming, eyewear cases, sun glasses, anti-glare glasses, protective helmets, sports helmets, helmets for cycling, helmets for racing cycling, bicycles, parts and fittings for bicycles, touring bicycles, racing bicycles, road racing bicycles, triathlon bicycles, bags, backpacks, backpacks for cycling, sport bags, drinking vessels, water bottles, drinking bottles for sports, drinking bottles for cycling, clothing, casual clothing, leisure wear, sportswear, gym clothing, cycling clothing, clothing for urban cyclists, clothing for commuting cyclists, mountain biking clothing, indoor and outdoor track cycling clothing, triathlon clothing, running clothing, swimming clothing, clothing for use on stationary exercise bicycles, thermally insulated clothing, thermally insulated clothing for triathletes, thermal underwear, thermal underwear for mountain biking, water resistant clothing, water resistant clothing for cyclists, water resistant clothing for mountain bikers, water resistant clothing for triathletes, waterproof clothing, waterproof clothing for cycling, waterproof clothing for mountain biking, waterproof clothing for triathletes, windproof clothing, windproof clothing for cycling, windproof clothing for mountain biking, windproof clothing for triathletes, shorts, shorts for mountain bikers, protective shorts for mountain bikers, triathlon shorts, shorts for use on stationary exercise bicycles, bib shorts, bib shorts for cycling, bib shorts for mountain biking, bib shorts for racing mountain bikers, bib shorts for use on stationary exercise bicycles, triathlon bib shorts, thermally insulated bib shorts for

cycling, thermally insulated bib shorts for mountain biking; trousers, trousers for cycling, trousers for mountain biking, tights for cycling, tights for mountain biking, t-shirts, polo shirts, shirts, sleeveless shirts, long, short and sleeveless jerseys, long, short and sleeveless jerseys for cycling, long, short and sleeveless jerseys for mountain biking, long, short and sleeveless jerseys for racing mountain bikers, windproof jerseys for cycling, windproof jerseys for mountain biking, thermally insulated jerseys for cycling, thermally insulated jerseys for mountain biking, track suits, track pants, track tops, hoodies, jackets, jackets for cycling, water resistant jackets for cycling, jackets for mountain biking, jackets for racing mountain bikers, shell jackets for mountain biking, waterproof jackets for cycling, water resistant jackets for mountain biking, waterproof jackets for mountain biking, windproof jackets for cycling, windproof jackets for mountain biking, thermally insulated jackets for cycling, thermally insulated jackets for mountain biking, gilets for cycling, shell gilets for cycling, gilets for mountain biking, gilets for racing mountain bikers, shell gilets for mountain biking, waterproof gilets for cycling, waterproof gilets for mountain biking, water resistant gilets for cycling, water resistant gilets for mountain biking, thermally insulated gilets for cycling, thermally insulated gilets for mountain biking, skinsuits for racing cyclists, skinsuits for racing mountain bikers, skinsuits for triathletes, arm warmers, arm warmers for cyclists, arm warmers for mountain bikers, arm warmers for racing mountain bikers, windproof arm warmers for cyclists, windproof arm warmers for mountain bikers, water resistant arm warmers for cyclists, water resistant arm warmers for mountain bikers, leg warmers, leg warmers for cyclists, leg warmers for mountain bikers, leg warmers for racing mountain bikers, water resistant leg armers for cyclists, water resistant leg warmers for mountain bikers, gloves, cycling gloves, mountain biking gloves, gloves for racing mountain bikers, long and short finger cycling gloves, long and short finger cycling gloves for mountain biking, windproof cycling gloves, windproof cycling gloves for mountain biking, waterproof cycling gloves, waterproof cycling gloves for mountain biking, thermally insulated cycling gloves, thermally insulated cycling gloves for mountain biking, cycling gloves made of neoprene, cycling gloves made of neoprene for mountain biking, water resistant cycling gloves, water resistant cycling gloves for mountain biking, socks, cycling socks, socks for mountain biking, socks for racing mountain bikers, thermally insulated socks for cycling, thermally insulated socks for mountain biking, footwear, casual footwear, leisure footwear, sports footwear, gym footwear, cycling footwear, footwear for mountain biking, footwear for racing mountain bikers, indoor and outdoor track cycling footwear, footwear for use on stationary exercise bicycles, triathlon footwear, running footwear, swimming footwear, overshoes for cycling, overshoes for racing cyclists, overshoes for mountain biking, overshoes for racing mountain bikers, overshoes for triathletes, oversocks for cycling, oversocks for mountain biking, waterproof overshoes for cycling, waterproof overshoes for mountain biking, water resistant overshoes for cycling, windproof overshoes for mountain biking, thermally insulated overshoes for cycling, thermally insulated overshoes for mountain biking, headgear, casual headgear, headgear for leisure wear, caps, beanies, headbands, cycling headgear, indoor and outdoor track cycling headgear, triathlon headgear, running headgear, swimming headgear, headgear for mountain biking, headgear for racing mountain bikers, insulating caps for cycling, waterproof caps for cycling, waterproof caps for mountain biking, water resistant caps for cycling, water resistant caps for mountain biking, windproof caps for cycling, windproof caps for mountain biking, cycling headbands, headbands for mountain biking, protective padding for sport, protective padding for cycling, protective padding for use in cycling shorts.