

O-098-09

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 82756
BY PUNCH INDUSTRIES FOR REVOCATION OF
REGISTRATION NO. 1508695 STANDING
IN THE NAME OF ACDOCO LIMITED**

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BACKGROUND

1. Trade mark no. 1508695 is registered in respect of the following goods:

“Soaps, detergents, scouring and abrasive preparations, bleaching preparations, substances and preparations for laundry use; all included in Class 3.”

2. The mark in question consists of the words ACDO GLO-WHITE COLOUR LOCK. I note that the registration details record a disclaimer in the following terms “Registration of this mark shall give no right to the exclusive use of the words “GLO-WHITE COLOUR LOCK””. The registration stands in the name of ACDOCO Limited.

3. On 29 January 2007 Punch Industries applied for revocation of this registration under section 46(1)(a) and/or (b) of the Act. The registration date of the mark under attack is 15 October 1993. Consistent with that, the relevant period identified by the applicant for Section 46(1)(a) purposes is 16 October 1993 to 15 October 1998 with revocation sought from 16 October 1998.

4. In relation to section 46(1)(b) the applicant has specified a five year period running from 29 January 2002 to 28 January 2007 with revocation sought from 29 January 2007¹.

5. The applicant says that its investigations suggest that the trade mark in question has not been used in the UK and there are no proper reasons for non-use.

6. The registered proprietor filed a counterstatement denying that the mark has not been used. In the alternative it says that there are proper reasons for non use. It asks that the application be dismissed.

¹ The amended statement of case that was before me at the hearing is dated 5 April 2007. The applicant had, it seemed, intended that this statement of case should specify an alternative period under section 46(1)(b) covering the period 15 October 1998 to 14 October 2003 (earlier versions of the statement of case had clearly given expression to this intention – see, for instance, the previous version dated 23 March 2007). A letter received from Barker Brettell after the hearing explained how an oversight had resulted in the final version of the document failing to correctly identify this period. For reasons that will become apparent I do not need to engage in further consideration of this matter.

7. Both sides have filed evidence in this case as follows:

Registered proprietor's evidence accompanying Form TM8

Witness statement: Kevin Jones and Exhibits KJ1-KJ2

Applicant's evidence in chief

Witness statement: Sarah J Lait and Exhibits SJL1-SJL5

Registered proprietor's evidence in support

Witness statement: Terry Roy Rundle and Exhibit TRR1

Applicant's evidence in reply

Witness statement: Sarah J Lait (no exhibits)

8. Mr Jones is the export manager of ACDOCO Ltd and has responsibility for the administration and management of the trade mark portfolio. Mr Rundle is a consultant for Wilson Gunn and one of the trade mark attorneys acting for and on behalf of ACDOCO Ltd in these proceedings. Ms Lait is a partner in Barker Brettell and is the trade mark attorney acting on behalf of Punch Industries.

9. The matter came to be heard on 2 April 2009 when the applicant for revocation was represented by Mr M Edenborough of Counsel instructed by Barker Brettell. The registered proprietor's attorneys wrote to the Registry on 20 February 2009 indicating that the registered proprietor would not be represented at the hearing and did not intend to file written submissions.

The Law

10. Section 46 reads as follows:

"46.-(1) The registration of a trade mark may be revoked on any of the following grounds –

(a) that within the period of five years following the date of completion of the registration procedure it has not 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, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c) that, in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service for which it is registered;

(d) that in consequence of the use made of it by the proprietor or with his consent in relation to the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

(2) For the purpose of subsection (1) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and 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.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) An application for revocation may be made by any person, and may be made either to the registrar or to the court, except that –

- (a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and
- (b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from –

- (a) the date of the application for revocation, or
- (b) if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date.”

11. The onus is on the proprietor to show use when a challenge arises (Section 100).

The authorities on genuine use

12. The two leading authorities on the guiding principles to be applied in determining whether there has been genuine use of a mark are *Ansul BV v Ajax Brandbeveiliging BV* [2003] R.P.C. 40 and *Laboratoire de la Mer Trade Marks* [2006] F.S.R. 5. From

these I derive the following main points that are of particular relevance to the circumstances of this case:

- genuine use entails use that is not merely token. It must also be consistent with the essential function of a trade mark, that is to say to guarantee the identity of the origin of goods or services to consumers or end users (*Ansul*, paragraph 36);
- the use must be 'on the market' and not just internal to the undertaking concerned (*Ansul*, paragraph 37);
- it must be with a view to creating or preserving an outlet for the goods or services (*Ansul*, paragraph 37);
- the use must relate to goods or services already marketed or about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns (*Ansul*, paragraph 37);
- all the facts and circumstances relevant to determining whether the commercial exploitation of the mark is real must be taken into account (*Ansul*, paragraph 38);
- the assessment must have regard to the nature of the goods or services, the characteristics of the market concerned and the scale and frequency of use (*Ansul*, paragraph 39);
- but the use need not be quantitatively significant for it to be deemed genuine (*Ansul*, paragraph 39);
- there is no requirement that the mark must have come to the attention of the end user or consumer (*Laboratoire de la Mer*, paragraphs 32 and 48);
- what matters are the objective circumstances of each case and not just what the proprietor planned to do (*Laboratoire de la Mer*, paragraph 34);
- the need to show that the use is sufficient to create or preserve a market share should not be construed as imposing a requirement that a significant market share has to be achieved (*Laboratoire de la Mer*, paragraph 44).

The registered proprietor's evidence

13. The substance of the proprietor's case is put as follows by Mr Jones:

- "4. During the latter half of 2006, ACDOCO manufactured and distributed across the United Kingdom, washing powders with built in fabric conditioners and colour fade preventative treatments. These goods were manufactured and distributed in powdered format in cardboard cartons of 350g. There is now produced and show to me marked exhibit KJ1 an example of the product packaging. Thereon the registration can be

viewed on the rear of the product packaging, as well as the base thereof. These products will hereinafter be referred to as “the goods”.

5. ACDOCO supplied the goods and bearing the trade mark, to the following wholesalers:
 - i. East End Foods (Midlands) Ltd on 28 July 2006
 - ii. Bestway Cash & Carry on 6 September 2006
 - iii. Dhamecha Cash & Carry on 14 September 2006
 - iv. Batleys Ltd on 25 September 2006
 - v. Nield Manchester on 9 October 2006
 - vi. Nisa Today’s Ltd on 13 October 2006

All of the above referenced organisations are long established wholesale outlets and who supply goods to independent retailers for onward sale to the general public. There is now shown to me marked exhibit KJ2 copies of sales invoices to all of the above referenced wholesalers. The goods are identified as product code 3117 on each invoice, and the quantities of product supplied are clearly set out. The price paid by the wholesaler to ACDOCO Limited is considerably lower than the cost which the wholesaler will sell on to the retailer. Equally, the end retailer will sell the goods to the general public with an additional “mark up”. I estimate the average retail value of the goods at approximately £0.51 per 350g pack. I consequently estimate retail sales during the period from July 2006 to January 2007 as being approximately £15,000.”

14. I need to say a little more about the two exhibits to Mr Jones’ statement. Exhibit KJ1 is an original piece of packaging which is said to show use of the registered mark. As important criticisms have been made about the nature of the mark shown I have, for ease of reference, reproduced the elements of the packaging in the Annex to this decision. I will give my own view of the claimed use of the mark on this packaging later in the decision.

15. So far as the invoice evidence (KJ2) is concerned there is an example relating to each of the wholesalers referred to by Mr Jones. The goods that are said to show the mark are identified under product code 3117. The details are as follows (in relevant part):

Recipient	Date	Description	Pack	Quantity	Total Cost £
East End Foods (Midlands) Ltd	28/7/2006	ACDO BIO ‘2 in 1’ 350g (4 x 8)	32	20	209.20
Bestway Cash & Carry	6/9/2006	ACDO BIO ‘2 in1’ 350g (4 x 8)	32	12	121.92
Dhamecha Cash & Carry	14/9/2006	ACDO BIO ‘2 in 1’ 350g (4 x 8)	32	10	Nil

Batleys Ltd	25/9/2006	ACDO BIO '2 in 1' 350g (4 x 8)	32	10	101.60
Nield Manchester	9/10/2006	ACDO BIO '2 in 1' 350g (4 x 8)	32	48	502.08
Nisa Today's Ltd	13/10/2006	ACDO BIO '2 in 1' 350g (4 x 8)	32	12	115.44

16. The other piece of evidence filed on behalf of the registered proprietor comes from Mr Rundle. He responds firstly to a criticism made by Ms Lait to the effect that the invoices do not show use of the full mark. He suggests that it is quite common for invoices to contain the minimum information necessary to identify the product concerned. In this case the use of 'ACDO BIO '2 in 1' 350g (4 x 8) was sufficient to identify the product conforming to Product Code 3117. The use of ACDO GLO-WHITE COLOUR LOCK on the packaging identifies the 'anti-fade' system in the product. Finally he exhibits, TRR1, copies of webpages from the ACDOCO website showing other product descriptions.

The applicant's evidence

17. Ms Lait's two witness statements provide a detailed critique of Mr Jones' evidence and a commentary on the issues that arise in the context of the law and relevant authorities. I do not propose to summarise these submissions but take them into account to the extent necessary for the purpose of reaching my decision. However, I should put on record that Ms Lait has supplied five exhibits as follows:

- SJL1- an internet extract from www.prnewswire.co.uk stating that the average household uses their washing machine 274 times a year.
- SJL 2 and 4 -an extract from the Office for National Statistics website showing there are 21,660,475 households in England and Wales according to the 2001 census and that the UK population was estimated to be in excess of 60 million in 2006.
- SJL 3 - an extract from the website www.bharatbook.com showing that the UK market for household soaps and detergents including fabric care, household cleaning and dishwashing products was valued at £2.05 billion in 2006.
- SJL 5 - website information giving population figures for the towns where the registered proprietor claims to have sold the products

18. The collective force of this material is said to show that the registered proprietor has an inconsequentially small percentage share of the relevant market.

DECISION

The disclaimer

19. I noted in paragraph 2 above that the registration is subject to a disclaimer of the words “GLO-WHITE COLOUR LOCK”. The registered proprietor has not suggested that the effect of the disclaimer is that I should ignore that element of the mark. For the avoidance of doubt I should put on record that that is also my understanding of the position. A disclaimer operates negatively in the sense that it identifies an element or elements in a mark that the proprietor concedes is/are not independently distinctive. The exclusive right that the proprietor enjoys is in the totality of the mark - in this case ACDO GLO-WHITE COLOUR LOCK. It is use of that totality that must be shown.

Proper reasons for non use

20. Although the registered proprietor pleaded proper reasons for non use as an alternative defence, so far as I can see this case has always been fought on the basis of the claim that the mark has been used. The claim to proper reasons for non use has not been pursued as a separate line of defence.

The mark used

21. Ms Lait’s evidence for the applicant and Mr Edenbrough’s submissions at the hearing concentrated on two main areas of criticism, firstly the mark used and secondly the slight amount of trade shown. I will deal firstly with the mark itself.

22. As *Ansul* makes clear genuine use entails “use of the mark on the market for the goods or services protected by that mark”. The mark must be placed before the consumer and act as the guarantee that goods or services sold under the mark emanate from a single trade source. The consumer must rely on the mark even if he or she is not aware of the identity of the underlying manufacturer or supplier. The mark must, however, be the mark as registered and not simply an element or elements thereof. That requirement places the registered proprietor in considerable, and in my view insurmountable, difficulties here.

23. The registered proprietor’s evidence is clear. It claims to have sold washing powders in cardboard cartons of 350g. The exhibited carton and invoices (under code 3117) are consistent with that claim. It is true that the carton does not carry a date (copyright or otherwise) that links it to the invoices. But there is no particular reason why a washing powder carton should in the normal course of events carry a date and no reason to doubt Mr Jones’ statement in relation to the carton. I, therefore, take the exhibited carton to be entirely representative of the ones used in relation to the goods placed on the market. I have had the advantage of seeing an actual carton in exhibit KJ1 (and not just a photocopy) – that is to say in precisely the form that it would be presented to consumers in a retail environment. The copy of KJ1 contained in the Annex to this decision is also actual size. It is fair to say that the process of photocopying may involve some slight degradation of the image quality of the original but I am satisfied that the loss of quality/legibility is negligible.

24. It is readily apparent that the main brand on the packaging is the word ACDO. It appears in large lettering on both the front and back panels along with one of the side panels accompanied in each case by the word 'Biological'. The rear panel contains other largely descriptive text. Towards the foot of the rear panel can be seen 'Acdo Bio with Colour Lock' with the latter element in coloured lettering accompanied by an arrow device. 'Acdo Bio' and 'Colour Lock' would in this respect be taken as separate marks. Side text contains further explanatory descriptive text.

25. However, 'Acdo Bio with Colour Lock' is not, it seems, the usage relied on by the registered proprietor. Rather, above the 'o' of 'Colour' there is further text. The registered proprietor says that that text is the words ACDO GLO-WHITE and hence use of the registered mark when taken with the words COLOUR LOCK. The base panel of the carton also records that "'ACDO' and 'ACDO GLO-WHITE COLOUR LOCK' are registered trade marks of ACDOCO".

26. The applicant's position is that the wording above the letter 'o' is minute and either illegible or cannot be read unless particular attention is paid. Specifically, it says the words cannot be viewed by someone with normal eyesight and are only decipherable if the packet is picked up and held up immediately to one's face. Mr Edenborough referred me to the following passage from *Stradivarius Espana SA v OHIM*, Case T-340/06, [2009] E.T.M.R. 11 on the need for legibility in the sign used (albeit in the context of likelihood of confusion):

“**34** On a preliminary basis, with regards to the definition, in the present context, on the illegibility of a sign used as trade mark, it is necessary to remind that the perception of the trade marks the average consumer has on the type of goods or services in question plays a decisive role in the global assessment of the likelihood of confusion (judgments SABEL at [23], and Lloyd Schuhfabrik Meyer at [25]). In this regard, it shall be noted that the average consumer will assess the sign at the time of the purchase, a moment in which the consumer usually does not undertake a detailed analysis (see, in that sense, judgment of the Court of First Instance of October 22, 2003, Editions Albert René v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (Trucco--Starix) (T-311/01) [2003] E.C.R. II-4625 at [58]). Henceforth, it shall be considered as illegible not only the sign that is in fact impossible to read or decipher, but also the sign that is so difficult to decipher, understand or read, that the reasonably observant and prudent consumer can grasp it only by applying an analysis exceeding what can reasonably be expected from him at the time of purchase.”²

27. So far as reference to the mark on the bottom panel of the carton is concerned Mr Edenborough submitted that this was not considered to be trade mark use or, if it is, it is not such as to create or preserve a market for the goods because it would not create an impression on the consumer.

28. The applicant has also pointed to the invoice entries which in relation to product code 3117 consistently refer to ACDO BIO with no mention of GLO-WHITE

² According to the curia website this decision is only available in French and Italian. It seems, therefore, that the E.T.M.R. entry, and hence this extract, is an unofficial translation.

COLOUR LOCK. It was, Mr Edenborough submitted, indicative of how the registered proprietor saw its mark. That position is contrasted with other entries on the invoices where GLO-WHITE³ and GLO-CARE are recorded as brand references.

29. To take this latter point first, I do not regard it as necessarily telling against the registered proprietor. Invoices may contain abbreviated references to branding and the presence of a product code is likely to be the key identifier. The most that can be said is that other products are referred to by references such as GLO-WHITE IN-WASH STAIN REMOVER, GLO-WHITE NET CURTAIN WHITENER and GLO-WHITE COLOUR CATCHER so there may be some inconsistency in the way branding is presented on invoices. But the invoices on their own are not decisive of the position.

30. So far as use of the mark itself is concerned as shown on the carton, I largely agree with the applicant's assessment. The words ACDO GLO-WHITE are barely discernible above the letter 'o' of 'Colour'. In fact I had some difficulty spotting them even though for the purposes of this decision I knew what I was meant to be looking for. That approach scarcely reflects how the average consumer⁴ would meet and respond to branding in a busy retail environment where there will be many competing visual stimuli amongst the products on display. Consumers do not engage in close, forensic examination of packaging in these circumstances. They do not 'search out' brands or scrutinise barely noticeable text on a label against the possibility that it will yield a previously unnoticed piece of branding. That is particularly so when there is other more obvious branding present (in this case the words ACDO and possibly COLOUR LOCK).

31. Is that view of the matter displaced by the fact that the bottom panel of the packet refers to ACDO GLO-WHITE COLOUR LOCK as one of ACDOCO's brands? I do not think it is. The bottom of the packet is unlikely to be visible in normal circumstances and would be unlikely to be inspected by the consumer at point of sale. Even if a particularly enquiring consumer did come across the claim I fail to see how that helps when he or she would struggle to make a connection between the claim and the branding that is apparent on the main visible surfaces of this particular packaging. It would be far more likely that the consumer would simply interpret the trade mark claims on the bottom panel as generic ones applicable to a variety of products (of which the ACDO claim was the only one applicable to this particular item). There is also force to Mr Edenborough's submission that putting a trade mark notice or claim on packaging is not the same as actually showing genuine use as a

³ The product code references are not relied on by Mr Jones. I infer that, although the element GLO-WHITE appears, either that is the totality of the mark or that this element does not appear in combination with other elements that would serve to establish use of the mark in the form registered.

⁴ The role of the consumer in determining the elements that make up the distinctive character of a mark was explained by the Court of Appeal in *Bud and Budweiser Budbräu Trade Marks* [2003] R.P.C. 25:

"There was a debate before us as to whether the matter should be viewed through the eyes of the registrar or through the eyes of the average consumer. I agree with the approach of the judge so far as it goes. But it appears that he may not have given adequate weight to the consideration that the registrar, in assessing the distinctiveness of the mark, would necessarily have to view the matter through the eyes of the average consumer." (per Sir Martin Nourse)

trade mark⁵. As he put it “[I]f it were, then all trade marks could be kept alive merely by listing them in such a way”.

32. There is a further reason why the use shown is ineffective in defending the registration. It has always been the case that, where a mark is registered in plain block capital form, normal and fair use would include use in, for instance, upper and lower case letters, in a variety of fonts and typefaces and use in colour. This simply reflects the normal range of commercial use. Section 46(2) also provides for “use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered” though I do not understand the proprietor to make any claim in this respect.

33. Even if it cannot be said that the element ACDO GLO-WHITE is not present, I would hold that the nature of the usage shown is such that it completely distorts the mark in the form in which it is registered. When one element is so diminished or another element so exaggerated in significance as is the case here, it has the inevitable consequence of changing the overall character of the mark. If it is appropriate to consider whether the usage I have described is use of an ‘acceptable variant’ form for section 46(2) purposes then I agree with Mr Edenborough that it fails the test set out in *Bud and Budweiser Budbräu Trade Marks* [2003] R.P.C. 25. A consumer who was sharp-eyed or enquiring enough to spot the element ACDO GLO-WHITE at all would consider it to be so relegated in significance in comparison to COLOUR LOCK that it would not be seen as contributing to the distinctive character of the mark. However, that additional reason for rejecting the use shown, should not obscure my primary finding that the aforesaid element is simply not going to be discernible at all in the normal course of trading.

The use shown

34. My above finding decides the matter in the applicant’s favour but, in deference to the fact that Ms Lait’s evidence and Mr Edenborough’s submissions also dealt with what the applicant considers to be the *de minimis* nature of the proprietor’s claimed trade, I will set out my views on the matter.

35. The authorities referred to above make it clear that use need not be quantitatively significant for it to be deemed genuine and it is not necessary for a significant market share to be achieved. On the other hand, as the Court of Appeal made clear in *Laboratoire de la Mer Trade Marks*

“.....it would be illogical to assert that every case of non-token use qualifies as genuine use. Ansul and the reasoned order in this case are clear that, even if the use is not token, it is still necessary to consider other factors in order to decide whether or not the use of the mark is genuine. For example, internal use by the registered proprietor may not be token or sham, but it will fail to qualify as genuine use because it is internal only.”

⁵In relation to the need to show use as a trade mark, Mr Edenborough referred by way of comparison to *Animated Music Ltd’s Trade Mark (Nellie the Elephant)* [2004] E.T.M.R. 79.

36. It is clear from the fact that internal use is given as an example that the Court did not consider that internal use was the only kind of non-token use that would fail to qualify as genuine use.

37. The applicant's case is that the use shown is small and suggests sales to an inconsequential percentage of the population when one considers the number of households in the United Kingdom and their washing requirements.

38. The registered proprietor has not pointed to any use of the mark between 16 October 1993 and 15 October 1998 (the 46(1)(a) period) but that is not fatal to its position because section 46(3) provides that the registration shall not be revoked if use is commenced or resumed after the expiry of that period as the proprietor claims is the position here. Furthermore, the circumstances set out in the proviso to section 46(3) do not apply at least in so far as the invoices are concerned.

39. The invoice evidence and the use claimed is from a narrow timeframe within the period 29 January 2002 to 28 January 2007 (the 46(1)(b) period). It falls to be considered whether the use can be considered genuine within the meaning of the relevant authorities.

40. The invoices that have been exhibited are from a roughly three month period between the end of July and the middle of October 2006. Mr Jones does not say that there were no sales prior to that date. His evidence does at one point in paragraph 3 seek to reserve the right to file evidence to address the 46(1)(a) period but no such further evidence has been filed. Furthermore, it is scarcely credible that Mr Jones would not have made explicit mention of trading activity in the 46(1)(b) period prior to July 2006 if it was capable of making a material contribution to the proprietor's defence. I consider that I am entitled to conclude that there was no activity of substance prior to that date.

41. The invoices are addressed to what Mr Jones describes as long established wholesalers. In terms of the quantity and value of goods disclosed in the invoices⁶ there does not appear to be a direct correlation between the invoices and the estimated retail value of sales of £15,000 referred to in paragraph 5 of Mr Jones' evidence. I infer that the invoices are simply examples of such documents intended to support the claimed trade with each of the named wholesalers.

42. I also note that the invoices refer to the sale of other products by Acdoco including other ACDO branded goods along with other brands. There is every reason, therefore, to suppose from the context that the sale of relevant goods under the product code 3117 formed part of a wider trade with the wholesalers concerned.

43. There is no evidence of retail sales as such. But it is unrealistic to suppose that the goods to the value claimed were sold to wholesalers but never put on the market. If my above calculations are anything like correct it must point to further sales to wholesalers over and above those disclosed in the exhibited invoices which would

⁶Multiplying invoice pack numbers by quantity gives a figure of 3584 individual packs at a total wholesale cost of £1050 and hence a retail value of £1827 based on Mr Jones' average retail price of £0.51 per 350g pack. The 'nil cost' for the Dhamecha invoice has not been explained but is unlikely to have a significant effect on the overall position.

be consistent with the establishment of a regular trade and hence onward retail sales. In any case, as *Laboratoire de la Mer* makes clear there is no requirement that the mark must have come to the attention of the end user or consumer.

44. The question nevertheless remains as to whether the modest sales achieved by the registered proprietor can be said to constitute genuine use. In Case T-131/06, *Sonia Rykiel création et diffusion de modèles v OHIM*, the Court of First Instance explained that:

“To examine whether an earlier trade mark has been put to genuine use in a particular case, an overall assessment must be carried out, taking account of all the relevant factors in the case. That assessment entails a degree of interdependence between the factors taken into account. Thus, the fact that commercial volume achieved under the mark was not high may be offset by the fact that use of the mark was extensive or very regular, and vice versa. In addition, the turnover and the volume of sales of the product under the earlier trade mark cannot be assessed in absolute terms but must be looked at in relation to other relevant factors, such as the volume of business, production or marketing capacity or the degree of diversification of the undertaking using the trade mark and the characteristics of the products or services on the relevant market. As a result, the Court of Justice has stated that use of the earlier mark need not always be quantitatively significant in order to be deemed genuine. Even minimal use can therefore be sufficient to be deemed genuine, provided that it is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark (order in Case C-259/02 *La Mer Technology* [2004] ECR I-1159, paragraph 21; *LA MER*, cited in paragraph 32 above, paragraph 57; see, by way of analogy, *Ansul*, cited in paragraph 21 above, paragraph 39).” (paragraph 41 of the judgment)

45. The application of these principles has, so far as value and duration of trade are concerned, produced results which may at first glance appear to be inconsistent. Thus, in the above case sales of clothing items amounting to 432 euros over a thirteen month period were held to be insufficient to show genuine use. On the other hand in Case T-325/06, *Boston Scientific Ltd v OHIM*, sales of hollow fiber oxygenators amounting to 19,901 euros were considered sufficient. In the *Laboratoire de la Mer* case £800 of sales over a six month period were enough (see the Court of Appeal’s judgment reported at [2006] F.S.R. 5). In each case, of course, the answer is that the Courts’ judgments took into account not just the value and duration of sales but the particular circumstances of the undertaking itself, the trade concerned and any other factors relevant to the particular cases.

46. The present case is one at the margins. The use relied on took place over a relatively short period of six months. There is nothing to put that trade into a wider context either before or after the period covered by the invoices or in the claims made in the narrative text of the evidence. Moreover, the volume of trade claimed for the six month period up to January 2007 (£15,000) must on any measure be considered to be small.

47. On the other hand, the proprietor has developed the necessary contacts with six wholesalers suggesting serious intent. One of them at least, Nisa Today, is an organisation of some size and national standing. It seems unlikely that such entities would agree to take goods unless they were satisfied that Acdoco had the capacity and intention to be a reliable source of supply. The invoices cover a range of laundry products under various Acdoco brands supporting the view that it has wider commercial interests in this product area and is a credible player in the marketplace. Sales of £15,000, whilst modest to say the least, cannot be said to be negligible. Even so I have hesitated as to what the outcome should be. In the event I consider that the registered proprietor has done just enough to satisfy me that the use shown would have qualified as genuine but for the failure to present the full mark to consumers.

Conclusion

48. The registration falls to be revoked in respect of all the goods for which it is registered. There is no need to consider the applicant's fall-back claim of partial revocation relating to all goods save for 'washing powder'. The applicant clearly put in play use of the mark within the period of five years following the date of completion of the registration procedure as well as the later period. The registered proprietor has not met either of those challenges. In accordance with section 46(6)(b), revocation will take effect from 16 October 1998, this being the earlier date requested under section 46(1)(a).

COSTS

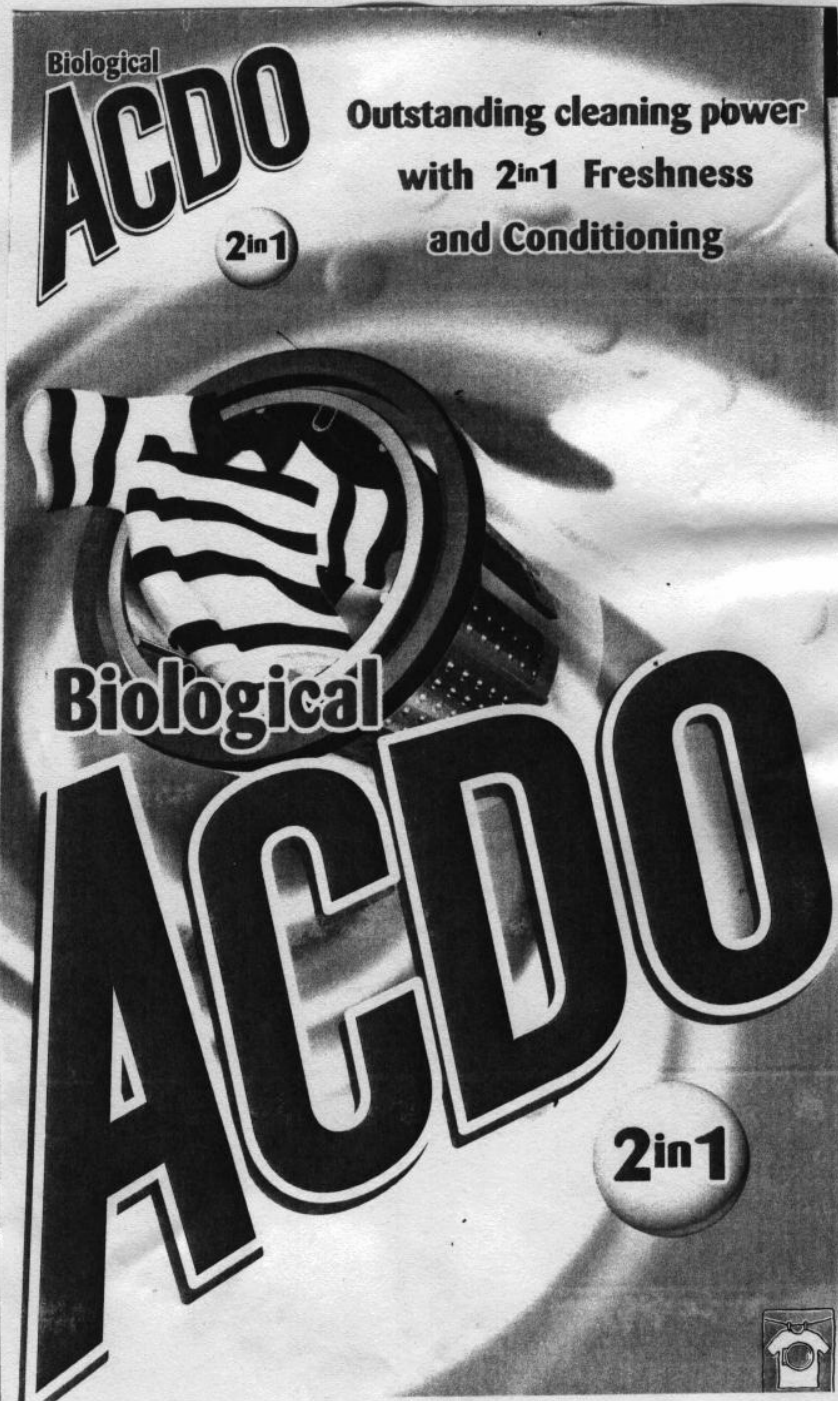
49. The applicant has succeeded and is entitled to a contribution towards its costs. Mr Edenborough submitted that the award should be at the top end of the scale to reflect the fact that the applicant had been put to the trouble of taking its case all the way to a hearing when the registration could simply have been surrendered.

50. I do not accept that the registered proprietor's behaviour merits such an approach. The proprietor has defended its position by filing evidence and was under no obligation to attend the hearing. In all the circumstances I order the registered proprietor to pay the applicant the sum of **£2000** as a contribution towards its costs. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of the case if any appeal against this decision is unsuccessful.

Dated this 17th day of April 2009

**M Reynolds
For the Registrar
The Comptroller-General**

FRONT PANEL



TOP PANEL

Biological
ACDO
 2ⁱⁿ1

Outstanding cleaning power
 with 2ⁱⁿ1 Freshness
 and Conditioning

BOTTOM PANEL

INGREDIENTS

Less than 5%: Anionic Surfactant, Soap, Non-ionic Surfactant, Cationic Surfactant, Phosphonate.
 5-15%: Oxygen Based Bleaching Agent, Phosphates.

Also contains brightening agents, enzymes and perfume. Store in a cool dry place.

'ACDO' and 'ACDO GLO WHITE COLOUR LOCK' are registered trademarks of **ACDOCO**



5 010287 431164 >

Telephone: 01204 600500

SIDE PANEL

PUSH HERE TO OPEN

Biological
ACDO
 2ⁱⁿ1

WASH CARE

REMEMBER: Always check the garment wash care label and machine instructions before use.
 Do not wash flame resistant fabrics in hot water, i.e. 50 °C.
 Do not soak flame resistant fabrics, leather or garments with metal fasteners.

Avoid under filling the machine
 Measure according to soil and water hardness.
 Use the lowest recommended temperature
 Reduce packaging waste

CAUTION
 KEEP OUT OF THE REACH OF CHILDREN.
 AVOID PROLONGED CONTACT WITH SKIN.

350g

SIDE PANEL

HOW TO USE

- Pour the powder into your main wash dispenser drawer
- Select the correct wash settings and temperature.

HOW MUCH TO USE

1 Cup contains 50g of powder (100ml).

Water hardness	Light Soiling	Normal Soiling	Heavy Soiling
SOFT WATER	1 1/2 CUPS 150ml	1 3/4 CUPS 175ml	2 1/2 CUPS 250ml
MED WATER	1 1/2 CUPS 150ml	2 CUPS 200ml	2 3/4 CUPS 275ml
HARD WATER	1 3/4 CUPS 175ml	2 1/2 CUPS 250ml	3 CUPS 300ml

PREWASH: Add an extra 50g (1 Cup) of powder alongside the dosage recommended for your main wash. This pack contains up to 3 standard washes based on normal soiling and medium water hardness. For environmental reasons, we do not put a Cup in the pack. If one is required, send your name and address to: ACDO CUP ACDOCO SERVICE BUREAU, FREEPOST, MALLISON STREET, BOLTON BL1 8YZ, ENGLAND.

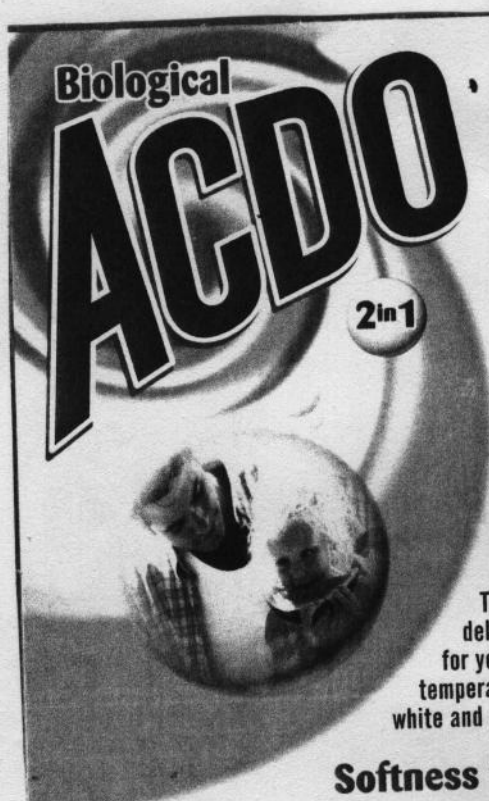
HAND WASHING

Simply add up to 150g (3 cups) of powder into a bowl or bucket of water (approximately 10 litres). The powder must be dissolved completely before adding garments. Once washed, rinse garments thoroughly in clean water before drying.

HAND CARE

Always rinse and dry hands after contact with powder. Avoid prolonged contact with the washing solution, particularly if you have sensitive or damaged skin.

REAR PANEL



Biological
ACDO
2in1


Outstanding cleaning power with 2in1 Freshness and Conditioning

Unbeatable cleaning - made easy

The active ingredients in Biological ACDO deliver outstanding cleaning performance for your whole wash even at the lowest temperatures, leaving your whites white and your colours bright.

Softness that lasts

The built in fabric conditioner treats your laundry to keep it soft and fresh while making it easier to iron.



Acdo Bio with Colour Lock anti-fade system that helps lock in colour, keeping clothes brighter for longer.

For on-line advice visit www.acdo.co.uk

For expert advice write to:
HELEN WHY, **ACDOCO** CUSTOMER SERVICE DEPARTMENT, BOLTON BL1 8PP, ENGLAND.
e-mail: helen-why@acdoco.com

ANOTHER QUALITY ACDOCO PRODUCT
www.acdoco.com