

O-015-13

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO 2609196  
BY  
GLAXO GROUP LIMITED  
TO REGISTER THE TRADE MARK**

**AYLYQ**

**IN CLASS 05**

**AND**

**THE OPPOSITION THERETO  
UNDER NO 103203  
BY  
BOEHRINGER INGELHEIM INTERNATIONAL GMBH**

**Trade Marks Act 1994**  
**In the matter of application no 2609196**  
**by Glaxo Group Limited**  
**to register the trade mark:**  
**AYLYQ**  
**in class 05**  
**and the opposition thereto**  
**under no. 103203**  
**by Boehringer Ingelheim International GmbH**

## **BACKGROUND**

1. On 6 February 2012, Glaxo Group Limited (the applicant) applied to register the above trade mark in class 05 of the Nice Classification system, as follows:<sup>1</sup>

Pharmaceutical and medicinal preparations and substances; vaccines

2. Following publication of the application on 24 February 2012, Boehringer Ingelheim International GmbH (the opponent) filed notice of opposition against the application.

3. The grounds of opposition were brought under section 5(2)(b) of the Trade Marks Act 1994 (the Act).

4. The opposition is directed at all of the applicant's goods in class 5. The opponent relies upon the mark shown below.

<b>MARK DETAILS AND RELEVANT DATES</b>	<b>GOODS</b>
<b>IR:</b> 922400  <b>MARK:</b> AYLILE  <b>Filing date(Germany):</b> 21 December 2006  <b>Priority date:</b> 13 October 2006  <b>International registration date:</b> 2 March 2007	<b>Class 5:</b>  Pharmaceutical preparations

5. In its statement of grounds, the opponent states that the marks are phonetically, visually and conceptually similar and the goods are identical or similar.

6. On 2 July 2012 the applicant filed a counter statement in which it states:

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*1 International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement (15 June 1957, as revised and amended).*

*“4. It is admitted that the goods covered by the Applicant’s mark are identical or similar to ‘pharmaceutical preparations’ as covered by the earlier trade mark’.*

...

*12. More weight should be given to the clear overall visual, phonetic and conceptual differences between the Applicant’s trade mark and the earlier mark.”*

7. The opponent's mark is an earlier mark which is not subject to proof of use because, at the date of publication of the application, it had not been registered for five years.<sup>2</sup>

8. Neither party filed evidence or requested a hearing. The opponent filed written submissions in lieu of a hearing which I will refer to as necessary below.

## **DECISION**

9. The opposition is based upon section 5(2)(b) of the Act which reads as follows:

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

(a)....

(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, or there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

### **Section 5(2)(b) case law**

10. In his decision in *La Chemise Lacoste SA v Baker Street Clothing Ltd* - BL O/330/10 (approved by Arnold J in *Och-Ziff Management Europe Ltd v Och Capital LLP* [2011] FSR 11), the Appointed Person, Mr Geoffrey Hobbs QC, expressed the test under this section (by reference to the CJEU cases mentioned) on the basis indicated below:

### **The CJEU cases**

11. *Sabel BV v Puma AG* [1998] RPC 199; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117; *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77; *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723; *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-6/01; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04; *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P.

The principles

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

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<sup>2</sup> See section 6A of the Act (added by virtue of the Trade Marks (Proof of Use, etc.) Regulations 2004: SI 2004/946) which came into force on 5th May 2004.

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

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

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

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

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

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

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

(k) if the association between the marks causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion.”

### **The average consumer and the nature of the purchasing act**

12. In accordance with the above cited case law, I must determine who the average consumer is and also identify the nature of the purchasing process. The average consumer is reasonably well informed and reasonably circumspect and observant but with a level of attention likely to vary according to the category of goods. The attention paid is likely to vary depending on price and, to some extent, the nature of the goods and the frequency of the purchase.

13. In its submissions dated 12 November 2012 the opponent submits:

*“8. The relevant public for the respective goods will be medical specialists such as doctors and consultants, pharmacists who will dispense the goods, and also the patient or member*

*of the public who will require to use the goods for the treatment of their specific condition. The goods of the respective parties are not restricted in any way and so could be pharmaceutical or like products which are available „over the counter”(OTC) in local pharmacies or even in more general retail outlets such as supermarkets and convenience stores. Nowadays, it is also increasingly common for such goods to be available over the internet or via electronic commerce. The level of attention may vary, therefore, depending on the exact goods and whether they are being prescribed by a physician for a specific medical condition or whether the consumer is self selecting goods the goods from the shelves of a supermarket or convenience store (or even a large High Street pharmacy such as Boots or Superdrug, for example) or from a drop-down list of goods on a website. In several of these instances, where the consumers [sic] is purchasing straight off the shelf or adding such goods to a virtual basket, there is an increased risk of confusion due to the fact that such consumers do not in most instances possess specialist or pharmacological knowledge and so are more likely to be confused into purchasing inappropriate or unwanted pharmaceutical or medical products.”*

14. In its counter statement the applicant submits:

*“10. The relevant average consumer of “pharmaceutical and medicinal preparations and substances” are likely to pay more attention to these products because they relate to their, or their patient’s health. Where it is established that the objective characteristics of a given product mean that the average consumer purchases it only after a particularly careful examination, it is important in law to take into account that such a fact may reduce the likelihood of confusion between marks relating to such goods at the crucial moment when the choice between those goods and marks is made.”*

15. In *Mundipharma AG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (OHIM), Case T-256/04, the Court of First Instance (CFI) stated:

*“44 Second, it has not been disputed in the present case that the relevant public for the goods covered by the mark applied for, namely therapeutic preparations for respiratory illnesses, is made up of patients in their capacity as end consumers, on the one hand, and health care professionals, on the other.*

*45. As to the goods for which the earlier mark is deemed to have been registered, it is apparent from the parties’ written submissions and from their answers to the questions put at the hearing that some therapeutic preparations for respiratory illnesses are available only on prescription whilst others are available over the counter. Since some of those goods may be purchased by patients without a medical prescription, the Court finds that the relevant public for those goods includes, in addition to healthcare professionals, the end consumers.”*

16. Both parties’ goods include pharmaceutical preparations at large which would include prescription medication and over the counter or self-selected goods. In addition the applicant’s goods include vaccines which are clearly unlikely to be available off the shelf.

17. The average consumer for such goods would include medical professionals and members of the general public. Where the the goods are prescription medication the average consumer will be primarily a medical professional and to some extent the patient, who is the end user. I anticipate that such an average consumer would be aware of these

products from articles in medical journals, approaches from medical sales representatives and additional literature such as medical catalogues. In the case of pharmaceutical preparations administered in hospital, the relevant public is more likely to be the physician and hospital pharmacist.

18. When a member of the general public purchases over the counter or off the shelf medication the purchase may be made visually from a shelf or website, or, aurally, when requesting advice from a pharmacist.

19. In either case, whether the goods are prescription medicines or medicines available over the counter or off the shelf, I cannot conclude that either the visual or aural elements play a more significant role in the purchasing act and will give both equal weight.

20. In *Armour Pharmaceutical Co v OHIM*, Case T-483/04, the CFI stated:

“79. The Court finds that the level of attention of the average consumer of pharmaceutical preparations must be determined on a case-by-case basis, according to the facts in the case-file, especially the therapeutic indications of the goods in question. Likewise, the Court finds that, in the case of medicinal products subject to medical prescription such as those being considered in the present case, that level of attention will generally be higher, given that they are prescribed by a physician and subsequently checked by a pharmacist who delivers them to the consumers.”

21. Further in *Aventis Pharma SA v OHIM*, Case T-95/07, the CFI stated:

“29. First, as noted in the case-law, medical professionals display a high degree of attention when prescribing medicinal products. Second, with regard to end consumers, it can be assumed, where pharmaceutical products are sold without prescription, that the consumers interested in those products are reasonably well informed, observant and circumspect, since those products affect their state of health, and that they are less likely to confuse different versions of such products (see, to that effect, Case T-202/04 *Madaus v OHIM – OptimaHealthcare (ECHINAID)* [2006] ECR II-1115, paragraph 33). Furthermore, even supposing a medical prescription to be mandatory, consumers are likely to display a high degree of attention when the products in question are prescribed, having regard to the fact that they are pharmaceutical products (ATURION, paragraph 27).”

22. The consumer who is a member of the general public is more likely to be subject to the effects of imperfect recollection, though that is not to say that such a purchase requires only the lowest level of attention. Pharmaceutical products sold without prescription, even where they are low cost, will require at least a reasonable level of attention to be paid to their selection, taking into account the ingredients, side effects and condition for which the treatment is required.

23. A medical professional is likely to pay a high degree of attention when prescribing medication, as is the patient for whom it is being prescribed. Both have knowledge of the patient's medical history and an interest in the patient's prognosis.

## Comparison of goods

24. The goods to be compared are as follows:

<b>The opponent's goods</b>	<b>The applicant's goods</b>
<b>Class 5:</b> Pharmaceutical preparations	<b>Class 5:</b> Pharmaceutical and medicinal preparations and substances; vaccines

25. In comparing the goods, I bear in mind the following guidance provided by the General Court (GC) in *Gérard Meric v OHIM*, Case T-133/05:

“29. ...goods can be considered identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

26. Both parties' specifications include „pharmaceutical preparations' which are clearly identical terms. The applicant's specification also includes „medicinal preparations' and „vaccines'. In the absence of any evidence from the parties, who accept that their respective goods are identical or similar, I consider these terms to be included within the broader term pharmaceutical preparations. Consequently, the parties' goods are identical.

## Comparison of marks

<b>The opponent's mark</b>	<b>The applicant's mark</b>
AYLILE	AYLYQ

27. In making a comparison between the marks, I must consider the respective marks' visual, aural and conceptual similarities with reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components, but without engaging in an artificial dissection of the marks, because the average consumer normally perceives a mark as a whole and does not analyse its details.

## Dominant and distinctive components

28. The opponent's mark consists of the word AYLILE presented in upper case. The applicant's mark consists of the word AYLYQ presented in upper case. Neither of the competing trade marks has a distinctive or dominant element, the distinctiveness of both trade marks lie in their totalities.

## Visual and aural similarities

29. The opponent submits:

“7. The respective marks share the same number of syllables, i.e. two. Additionally, they share the first three letters, “AYL-”. It is generally recognised that consumers

are most likely to retain the first part of a mark in their memory. The next letters in the respective marks, i.e. 'l' and „Y' are often pronounced in an identical fashion in the English languages [sic], increasing the aural similarities between the marks. Overall, therefore, the beginning of the respective marks is identical, the middle vowels are aurally identical and only the end part of the marks is difference [sic]. Visually and aurally, therefore, the marks are similar to a very high degree.”

30. The applicant submits:

*“5. When comparing the Applicant’s trade mark AYLYQ (five letters) with the earlier trade mark AYLILE (six letters), it can be seen that although the earlier mark contains the element “AYL”, this is combined with “ILE” which does not have any aural visual or phonetic similarity to the ‘YQ’ suffix of the Applicant’s trade mark. The use of the “YQ”, or indeed the “LYQ’, suffix totally changes the distinctive character of the mark AYLYQ.*

*6. The letter combination “LYQ” is not used in the English language (as a suffix or otherwise). Accordingly, visually it will make a strong impact on English consumers who are more likely to pay particular attention to it in the mark AYLYQ. Accordingly, we contend that the “LYQ” component of AYLYQ will create the greatest impression on and will be most memorable to the average consumer.*

...

*8. The suffix “LYQ” is characterised by an unusual arrangement of consonants, punctuation of which the average UK consumer would find difficult. As a result, it is likely that there are many different pronunciations to the “LYQ” part of the mark. With consumer’s [sic] spending a greater deal of time considering the pronunciation of the later part of the mark, phonetically, the “LYQ” component of AYLYQ will create the greatest impression on and will be most memorable to the average consumer.”*

31. The applicant’s mark is five letters in length, the opponent’s is six. Any similarity between the marks rests in the first three letters of each, which are „AYL’. The applicant’s mark ends with the two letters „LQ’, the opponent’s with the three letters „ILE’. The opponent draws my attention to the fact that consumers are likely to retain the first parts of marks. The general rule, that the average consumer tends to place most importance on the start of a word,<sup>3</sup> is exactly that - a general rule, which can be mitigated depending on the circumstances of the case.<sup>4</sup>

32. In this case the fact that the applicant’s mark ends with the letters „LQ’ is a significant factor. The average English speaking consumer is not used to encountering words which end in the letter ‘Q’. In a mark which is only five letters in length I consider this to be the element of the word which stands out, rather than the first three letters of the word. Consequently, while there is a degree of visual similarity, this is not at the highest level. In my view the parties’ marks share a moderate degree of visual similarity.

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<sup>3</sup> *Les Editions Albert Rene v Office for Harmonisation in the Internal Market (Trade Marks and Designs)(OHIM) Case T-336/03*

<sup>4</sup> *Castellani SpA v OHIM, T-149/06 and Spa Monopole, campagne fermiere de Spa SA/NV v OHIM, T-438/07*



33. Both parties are silent as to the pronunciation of their marks as a whole and the mark of the other party. The applicant acknowledges:

*“it is likely that there are many different pronunciations to the “LYQ” part of the mark’ without suggesting what some of these many be.”*

34. The applicant mark is such an odd combination that it may not be recognized as a word at all, but as a series of letters. For those who do attempt to pronounce it, it is likely to be sounded A-LEEK, A-LICK, EYE- LEEK or EYE-LICK. The opponent’s mark is likely to be pronounced EYE-LEEL or EYE-LILLY. Taking all of these factors into account I consider these marks to share a fairly low degree of aural similarity.

### **Conceptual similarities**

35. For a conceptual meaning to be relevant it must be one capable of immediate grasp by the average consumer.<sup>5</sup>

36. In its submission dated 12 November 2012 the opponent states:

*“7. Conceptually, both marks present to the average consumer as being invented words with no apparent meaning or signification in relation to the goods in question.*

37. In its counter statement the applicant submits:

*“9. Both AYLILE and AYLYQ have no meaning in the English language and as such there is no conceptual similarity between the two marks.”*

38. As far as I am aware, the words AYLILE and AYLYQ have no meaning in respect of the goods at issue. Consequently, I agree with the parties that the competing trade marks are neither conceptually similar nor conceptually different.

### **Distinctive character of the earlier mark**

39. I must now assess the distinctive character of the opponent’s earlier trade mark. In these proceedings, the distinctive character of the opponent’s earlier trade mark must be appraised first, by reference to the goods upon which I have found it has been used and, secondly by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been used as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

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<sup>5</sup> This is highlighted in various judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R. 29

40. As far as I am aware, the word „AYLILE’ is an invented word which is neither descriptive of nor non-distinctive for the goods at issue; consequently, it enjoys a high level of inherent distinctive character.

### **Likelihood of confusion**

41. In its counter statement the applicant points out that there are other marks on the Register which use the prefix „AY’:

*“7. Further, the prefix “AY” is diluted on the UK register in relation to goods in class 5. The UK trade mark register contains over 35 registered trade marks that begin with the letters “AY” and cover goods in class 5 (including AYLORA, AYDO, AYJOY, AYOLUT, AYERST, AYENDI and AYURSAN). This indicates the Opponent does not have exclusivity in the “AY’ prefix.”*

42. No evidence has been provided to illustrate which of the marks, if any, is actually in use in the UK and what the relevant public’s perception of these marks may be in relation to the goods in question. In any event I am not assisted by this evidence and I am guided on this point by the following comments of Mr Justice Jacob in *British Sugar plc v James Robertson & Sons Ltd* [1996] RPC 281:

*“Both sides invite me to have regard to the state of the register. Some traders have registered marks consisting of or incorporating the word “Treat”. I do not think this assists the factual inquiry one way or the other, save perhaps to confirm that this is the sort of word in which traders would like a monopoly. In particular the state of the register does not tell you what the circumstances were which led the Registrar to put the marks concerned on the register. It has long been held under the old Act that comparison with other marks on the register is in principle irrelevant when considering a particular mark tendered for registration, e.g. MADAM Trade Mark and the same must be true under the 1994 Act. I disregard the state of the register evidence.”*

43. In assessing the likelihood of confusion I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them he has kept in his mind.<sup>6</sup> I must also keep in mind the average consumer for the goods, the nature of the purchasing process and have regard to 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 and vice versa.

44. I have found that the marks share a moderate degree of visual similarity, a fairly low degree of aural similarity and are conceptually neutral. I have identified a high level of inherent distinctive character in the opponent’s earlier mark and have concluded that the parties’ goods are identical. I have identified the average consumer, namely a medical practitioner or member of the general public. I have concluded that the purchase may be visual or aural and will involve at least a reasonable degree of care and attention. In the case of a medical professional and/or patient, it is likely to involve a high degree of attention being paid to prescribed medication.

45. As I have discussed above, the general rule, that the average consumer tends to place most importance on the start of a word is exactly that - a general rule, which can be

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<sup>6</sup> *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.* paragraph 27

mitigated depending on the circumstances of the case. In this case the applicant's mark consists of an unusual combination of letters, the last of which is the letter 'Q', a formation not common in the English language. In a mark which is only five letters in length the unusual combination is fairly memorable. In my view, the similarities between the competing marks are more than offset by the differences.

46. Taking all the above factors into account, and considering the marks as a whole, I have no difficulty concluding that there is no likelihood of confusion between the competing marks.

## **CONCLUSION**

**47. The opposition fails.**

## **COSTS**

48. The opposition having failed, the applicant is entitled to a contribution towards its costs. I have taken into account that no hearing has taken place, but that submissions were filed in lieu of a hearing. I make the award on the following basis:

Preparing a statement and considering the other side's statement	£200
Considering the other side's submissions	£200
<b>Total:</b>	<b>£400</b>

49. I order Boehringer Ingelheim International GmbH to pay Glaxo Group Limited the sum of £400. 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 this case if any appeal against this decision is unsuccessful.

**Dated this 11th day of January 2013**

**Ms Al Skilton  
For the Registrar,  
The Comptroller General**

