

O/274/20

TRADE MARKS ACT 1994

IN THE MATTER OF THE INTERNATIONAL REGISTRATION NO.

IR0000001475005

DESIGNATING THE UNITED KINGDOM

IN THE NAME OF MOOSE CREATIVE MANAGEMENT PTY LTD:

KINDI KIDS

IN CLASSES 25 AND 41

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 600001258 BY

KINDY PROJECT SAS

BACKGROUND AND PLEADINGS

1. International trade mark 1475005 (“the IR”) consists of the following sign:

KINDI KIDS

2. The holder is Moose Creative Management PTY LTD (“the holder”). The IR was registered on 8 May 2019. With effect from the same date, the holder designated the UK as a territory in which it seeks to protect the IR under the terms of the Protocol to the Madrid Agreement. The priority date of the IR is 26 April 2019. The holder seeks protection for the mark in relation to the following goods and services:

Class 25: Apparel, namely, clothing, footwear and headwear; sleepwear.

Class 41: Children's entertainment services; entertainment; live entertainment; musical entertainment services; organisation and conducting of dance, music and other entertainment festivals; production of television programs; production of webcasts, other than advertising; online publication of electronic books and journals; publication of books; publication of magazines; publication of journals; weblog (blog) services (online publication of journals or diaries); publication of multimedia material online; providing television programs, not downloadable, via video-on-demand services; distribution of motion picture films (rental services); motion picture production; producing of motion pictures, plays and videos; production of motion pictures; production of video recordings, other than advertising; production of audio and/or video recordings, other than advertising; providing online electronic publications, not downloadable; magazine publishing; publishing by electronic means; publishing of books; publishing of printed matter.

3. The request to protect the IR was published for opposition purposes on 27 September 2019. On 27 November 2019, the IR was opposed by Kindy Project SAS (“the opponent”) by way of the Fast Track opposition procedure. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”).
4. The opponent relies on EUTM no. 018033604 for the following trade mark:



5. The opponent’s mark was filed on 8 March 2019 and registered on 18 September 2019. The priority date of the opponent’s mark is 30 January 2019. The opponent relies upon all of the goods for which it’s mark is registered, as set out in paragraph **28** below.
6. The opposition is directed against the following goods within the IR’s specification only:

Class 25: Apparel, namely, clothing, footwear and headwear; sleepwear.
7. In its Notice of Opposition, the opponent claims that the marks are visually and aurally similar to a higher than average degree, that the goods for which they are registered/applied-for are identical and that there is a likelihood of confusion between them.
8. The holder filed a counterstatement denying the claims made.
9. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

“(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit.”

10. The net effect of these changes is to require the parties to seek leave in order to file evidence in fast track oppositions. The holder sought leave to file evidence in these proceedings, stating as follows:

“The evidence the Holder intends to file is a copy of the Search Report issued by the UKIPO dated 11 July 2019. The Holder intends to refer to said Search Report in its written submissions.

As it was the Opponent who elected to use the fast track process, the Holder respectfully requests that it be granted leave to file the above evidence given that it would have been allowed to do so had the Opponent filed a standard opposition.”

11. The holder’s request was declined by letter dated 10 March 2020, in which the Registry confirmed as follows:

“Having considered the nature of the request, it is the Registry’s view that the Search Report the Holder is seeking to file as evidence will be of no assistance to them in these proceedings. The request is therefore declined.

The parties are reminded that they have until 27th March 2020 to file any written submissions before the case proceeds to a decision.”

12. The holder is represented by Appleyard Lees IP LLP and the opponent is represented by Novagraaf UK. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken. A hearing was neither requested nor considered necessary; both parties have filed written submissions in lieu. I have

taken these into consideration and will refer to them below where necessary. This decision is taken following a careful perusal of the papers.

PRELIMINARY ISSUES

13. I note that in the holder's written submissions, it stated the following:

“As the UK Examiner did not raise the Opponent's earlier mark(s) in their Examination Report, one must infer that the UK Intellectual Property Office did not deem the respective marks (being the subject of the present Opponent proceedings) confusingly similar either.”

14. For reasons I will now explain, the holder's point regarding the examination report conducted by this office has no bearing on the outcome of this opposition. The initial search undertaken by a UK Trade Mark Examiner is not an exhaustive search of the register for potentially similar marks. Further, opposition against trade marks is not exclusively reserved for those parties identified by this office as having potentially similar marks to the applied for mark. The guidance provided by this office in relation to earlier rights¹, at paragraph 9, states:

“Any third party can object to your trade mark, including those not notified. Please note, if you receive a notice of threatened opposition the onus is on you to contact the earlier right holder to try and negotiate or reach an agreement before the end of the opposition period.”

15. The holder was informed of this by way of written correspondence dated 11 July 2019, which stated:

“If you proceed, your designation will be published in the online Trade Marks Journal and anyone can oppose your designation should they have grounds to do so.”

¹ <https://www.gov.uk/government/publications/trade-marks-earlier-rights/earlier-rights-fact-sheet--2>

16. It is within any party's rights to oppose an applicant and it is not detrimental to an opponent's case if the UK Trade Mark Examiner did not identify them within their initial search. Ultimately, the matter before me depends upon a global assessment taking into account all relevant factors and the holder's submissions regarding the notification process is not relevant to that assessment.

17. Further, I note that the holder has, in its submissions, put forward a number of web links to both EU and UK trade marks. In reference to these, the holder submitted that:

"[...] all of the aforementioned trade marks are much more similar to the Opponent's mark than the Holder's mark "KINDI KIDS" is. It would appear that the Opponent co-exists on the relevant trade mark registers with marks which are arguably highly similar to their "Kindy" mark, and certainly more similar than the Holder's KINDI KIDS mark."

18. For reasons that I will now explain, the holder's point regarding the presence of multiple allegedly similar trade marks on the Register has no bearing on the outcome of this opposition.

19. I note that in the case of *Zero Industry Srl v OHIM, Case T-400/06*, the General Court ("GC") stated that:

"73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word 'zero', it should be pointed out that the Opposition Division found, in that regard, that '... there are no indications as to how many of such trade marks are effectively used in the market'. The applicant did not dispute that finding before the Board of Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word 'zero' is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy, Case T 135/04 GfK v OHIM – BUS(Online Bus) [2005] ECR II 4865,

paragraph 68, and Case T 29/04 Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH) [2005] ECR II 5309, paragraph 71). “

20. The fact that there are a number of trade marks on the EU and UK registers that the holder deems similar to the opponent’s mark is not a relevant factor to the distinctiveness of the opponent’s mark. The holder has made no request to file evidence to demonstrate that any of these marks were actually in use in the marketplace at the relevant date. The only evidence that the holder sought to file was a Search Report identifying the marks that the examiner considered to be similar to the holder’s mark and for the reasons set out above this would not be relevant to my assessment. The outcome of this opposition will be determined after making a global assessment whilst taking into account all relevant factors and the state of the register is not relevant to that assessment.

21. Additionally, the holder also submitted that it has:

“an existing International Trade Mark Registration (No. 1431497) designating the EU and UK for KINDI KIDS (word mark) covering goods in Classes 9, 16 and 28. The present application for KINDI KIDS (word mark) covers goods and services in Classes 25 and 41. The Holder is merely extending the range of goods and services they offer under their already successful KINDI KIDS children’s brand. As a result of this existing successful brand in the UK it is submitted that the relevant consumer will not be confused by the existence of the respective marks, despite the fact the respective marks cover goods in Class 25.”

22. The holder’s submission appears to be that because of familiarity with their existing brand, consumers are more likely to view the applied-for mark as an expansion of that brand, rather than confusing it with the opponent’s mark. However, the holder has filed no evidence to demonstrate that the International Trade Mark Registration (No. 143497) is actually in use in the mark place and, in any event, prior use of an

applied-for mark is not a defence in law to an opposition.² Consequently, I do not consider this to be relevant to the assessment I must make.

DECISION

Section 5(2)(b): legislation and case law

23. Section 5(2)(b) of the Act reads as follows:

“(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,

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

24. Section 5A of the Act states as follows:

“Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

25. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

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

² See TPN 4/2009

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

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

26. The mark upon which the opponent relies qualifies as an earlier trade mark under the above provisions. As the opponent’s mark had not completed its registration process more than 5 years before the date of the application in issue, it is not subject to proof of use pursuant to section 6A of the Act. The opponent can, therefore, rely upon all of the goods for which the mark is registered.

27. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v Office for Harmonization in the Internal Market (Trade Marks and Designs) (“OHIM”)*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

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

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely

upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- (f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

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

Comparison of goods

28. The competing goods are as follows:

The opponent’s mark’s goods	The IR’s goods
<u>Class 25</u> Clothing; Underwear; Footwear; Socks; Tights; Stockings; Headgear; Hosiery.	<u>Class 25</u> Apparel, namely, clothing, footwear and headwear; sleepwear.

29. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

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

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

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category,

designated by trade mark application (Case T-388/00 Institut fur Lernsysteme v OHIM- Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

31. Within its written submissions, the opponent has stated:

“The Applicant has in paragraph 3 of their counterstatement denied that all of the goods covered by the Contested Mark are identical to the goods of the Opponent's earlier mark in Class 25 and has put the Opponent to strict proof of that allegation. We submit that all is required to test this allegation is a straight forward comparison of the goods at issue. The earlier mark is registered in Class 25 for **Clothing; Underwear; Footwear; Socks; Tights; Stockings; Headgear; Hosiery**. The Contested Mark is filed for the Class 25 goods *Apparel, namely, clothing, footwear and headwear; sleepwear*. The identical term are **highlighted**. The term *sleepwear* is included in the general term *Clothing* and therefore identically contained in both sets of goods.”

32. The holder has submitted that:

“Whilst it is acknowledged that the respective marks both cover goods in Class 25, the Holder's KINDI KIDS products are centred around a number of toy dolls who are known collectively as the “KINDI KIDS”. As such, their goods are specifically targeted at children. It is therefore submitted that the Holder's goods will be directed at a different public to the Opponent's goods.”

33. Whilst it may be the case that the holder's goods are targeted at children, that is not apparent from their specification. My assessment of the similarity or identity of the goods is a notional one and I am required to take into account all of the ways in which the marks could be used by reference to the goods for which they are applied for/registered.

34. “Apparel, namely, clothing” and “Apparel, namely [...] footwear” contained within the IR’s specification have direct counterparts in the opponent’s mark’s specification i.e. “clothing” and “footwear”. These goods are identical.
35. The terms “apparel, namely [...] headwear” contained within the IR’s specification and “headgear” contained within the opponent’s specification both describe goods that will be worn on the user’s head, such as hats and caps. Although expressed in slightly different terms, these goods are self-evidently identical.
36. “Sleepwear” contained within the IR’s specification describes goods that the user will wear to sleep in, such as pyjamas and nightdresses. These goods will therefore fall within the broader category of “clothing” as contained within the opponent’s mark’s specification. These goods are, therefore, identical under the principle outlined in *Meric*.

The average consumer and the nature of the purchasing act

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

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

38. The holder, within its counterstatement, stated that “It is disputed that the Holder’s goods will be directed at the same public as the Opponent’s goods.” The holder has not made submissions on who it considers the average consumer for its goods to be, but it has submitted that its goods are specifically aimed at children.

39. In respect of the average consumer, the opponent has submitted that:

“the average consumer’s degree of attention is likely to vary according to the category of goods or services in questions. In the present case, the goods being identical are directed at the public at large. The degree of attention is considered average”.

40. I agree with the opponent’s submissions and consider that the average consumer for the goods will be the public at large.

41. In *New Look Limited v OHIM*, joined cases T-117/03 to T-119/03 and T-171/03, the GC stated that:

“50..... Generally in clothes shops customers can themselves either choose the clothes they wish to buy or be assisted by the sales staff. Whilst oral communication in respect of the product and the trade mark is not excluded, the choice of the item of clothing is generally made visually. Therefore, the visual perception of the marks in question will generally take place prior to purchase. Accordingly the visual aspect plays a greater role in the global assessment of the likelihood of confusion.”

42. The goods at issue are most likely to be sold through a range of clothing retailers and their online or catalogue equivalents. In clothing retailers, the goods at issue will be displayed on shelves or racks, where they will be viewed and self-selected by the consumer. A similar process will apply to websites and catalogues, where the consumer will select the goods having viewed an image displayed on a webpage or in a catalogue. The selection of the goods at issue will, therefore, be primarily visual. While the visual aspect plays a greater role in the selection process, I do not discount aural considerations in the form of advice sought from

sales assistants, word of mouth recommendations or telephone queries with retailers.

43. The price and frequency of purchase of the goods at issue may vary. Even where the goods are of low cost and purchased relatively frequently, a number of factors will still be considered by the average consumer during the purchasing process. For example, the consumer may consider current fashion trends, price, quality and suitability. With this in mind, I consider that the average consumer will pay a medium degree of attention during the purchasing process.

Distinctive character of the opponent's mark

44. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in *Joined Cases C-108/97 and C-109/97 Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

45. Registered trade marks possess various degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use made of it. In this case, the opponent has not pleaded that its mark has acquired enhanced distinctiveness through use and has not filed any evidence to support such a claim. Consequently, I have only the inherent position to consider.

46. In its written submissions, the opponent stated that “the dominant and distinctive feature of the opponent’s mark is the stylized verbal element KINDY.” Further, the opponent submits that “No claim is made to the distinctiveness of the colour red”.

47. The mark is made up of two elements, being the word element and the device element. The mark contains the word ‘Kindy’ displayed in a white, stylised font. The device element of the mark is a red diamond. The word element of the mark is placed in the centre of the device element, which acts as a background.

48. The opponent has submitted that the word ‘Kindy’ (along with the word ‘KINDI’) is “used in Australia and New Zealand as an informal reference to a kindergarten but as far as we are aware that use of the words is not common in the UK.” Additionally, the opponent submits that ‘Kindy’ is not a word “with which the English speaking consumer is likely familiar”.

49. The holder submits that:

“There is nothing on the Opponent’s website to suggest that this word has any meaning. Further, a translation on Google Translate of the word “Kindy” from French to English provided no translation. One must therefore infer that this is a completely made up word by the Opponent with no actual meaning.”

50. The above submissions regarding the opponent’s website and Google Translate put forward by the holder are noted but are unsupported by evidence.

51. While I acknowledge that 'Kindy' may be an informal reference to kindergarten in Australia and New Zealand³, this is not relevant to the question of whether the word will be attributed a meaning by the UK average consumer. The word may be subject to a number of different interpretations by average consumers within the UK. Some consumers may view the word as a misspelling of the word 'kind', some may consider it a made-up word with no particular meaning, some may recognise it as the German word for 'child' and some may make the link to a kindergarten, being a class or school for young children⁴.

52. The opponent's specification is broad and the word 'Kindy' will, therefore, be found on a wide range of clothing (both for adults and children). In order for the average consumer to make the link to children and/or kindergartens on children's clothes displaying the opponent's mark, the average consumer must acknowledge either:

- a) That the word 'kind' is German for the word 'child' and that 'kindy' is a deliberate misspelling of the German word; or
- b) That the word 'kindergarten' is a name for a children's nursery, that 'kinder' is short for 'kindergarten' and that 'kindy' is a deliberate misspelling of 'kinder'.

53. I consider that the above connection is more likely to be made where the opponent's mark is used on children's clothing. For those consumers the misspelling of the word 'kind' or 'kinder' will result in the mark being allusive and the word 'kindy' will have between a low and medium degree of inherent distinctive character. For those consumers who do not make the connection, the word 'kindy' is likely to be viewed either as an invented word with no particular meaning or as a misspelling of the English word 'kind'. For those consumers, the word 'kindy' will have between a medium and high degree of inherent distinctive character. The stylisation of the word 'Kindy' and the use of the red, diamond shaped background, slightly increases the inherent distinctive character of the mark to a very small degree. Overall, I consider the opponent's mark to have between a medium and

³ <https://www.collinsdictionary.com/dictionary/english/kindy>

⁴ <https://www.collinsdictionary.com/dictionary/english/kindergarten>

high degree of inherent distinctive character for those consumers who do not identify the connection with the German word for 'child' and between a low and medium degree of inherent distinctive character for those consumers who do.

Comparison of marks

54. It is clear from *Sabel v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.

55. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“... it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

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

57. The respective trade marks are shown below:

The opponent's mark	The IR
	<p data-bbox="858 353 1337 436">KINDI KIDS</p>

58. I have lengthy submissions from both parties regarding the similarity of the marks. Whilst I do not propose to reproduce these in full here, I will refer to them below where necessary.

Overall Impression

The IR

59. The holder has submitted that:

“The word KINDI is a made-up word which has no actual definition. However, the Holder has confirmed that the word “KINDI” is in fact derived from the word “kindergarten”. According to the Cambridge Dictionary, being an English dictionary, the word “kindergarten” is defined as “*a nursery school*”.

60. The IR consists of the words KINDI KIDS. I note that the holder has confirmed that the word KINDI is derived from the word ‘kindergarten’. However, whilst I accept that a significant proportion of average consumers in the UK may connect the word KINDI to kindergarten, I also find that a significant proportion of them would not. The second word of the IR, being KIDS, when used on children’s clothing, would be descriptive of the goods for which the holder seeks protection. On goods that are not children’s clothing, the word KIDS would be attributed its ordinary dictionary meaning and would not, therefore, be descriptive of the goods for which the holder seeks protection.

61. Where the mark is used on children's clothing the word KIDS will be descriptive and will play a lesser role in the IR with the word KINDI playing the greater role in the overall impression of the mark. Where the mark is used on other clothing, the words will play an equal role in the overall impression of the mark.

The opponent's mark

62. The opponent's mark consists of two elements, being a word element and a device element. The word element consists of the word 'Kindy' displayed in a white, stylised, cursive font. The word element is placed in the middle of the device element, which is a red diamond shape and acts as a background. The eye is naturally drawn to the elements of the mark that can be read and I consider the word 'Kindy' plays a greater role in the overall impression of the mark, with the device element playing a lesser role.

Visual Comparison

63. The opponent has submitted that:

“Visually, the marks under comparison coincide with regard to the words KINDI and KINDY, both of which comprise of five letters of which the first four letters 'KIND' are identical and the last letter is different ('I' versus 'Y'). The marks differ in that the earlier mark does not contain the word 'KIDS' and the contested mark has no figurative element. Those differences do not override or diminish in any significant way the visual similarity between the marks under comparison.”

64. The holder has submitted that:

“At the outset, it must be appreciated that the earlier mark is a figurative mark whereas the opposed mark is a word mark. Immediately, by their very nature i.e. one is a figurative mark and one is a word mark, there are clear differences between the respective marks.

The average consumer normally perceives a sign as a whole and does not proceed to analyse its various details. As noted above, the respective marks are Kindy (figurative mark) and KINDI KIDS (word mark). It is therefore submitted that the marks should be compared as whole and not broken down into their individual parts. With this in mind, when taken as a whole, the respective marks are clearly very different from a visual perspective.

In any event, the opposed mark is a plain word mark and contains two words comprising of five uppercase letters and four uppercase letters respectively. The earlier mark is a figurative mark, being lowercase stylised white writing on a red diamond-shaped background. [...] The last letter of the first word of the opposed mark is different to the last letter of the verbal element of the earlier mark, being "l" rather than "y". As such, there are clear visual differences between the respective marks.

In view of the above, it is submitted that the respective marks are visually similar to a low degree."

65. Visually, the marks coincide in that they share the letters 'K-I-N-D', which forms the majority of the word element of the opponent's mark and the majority of the first word of the IR. The marks differ in that the word element of the opponent's mark ends with the letter 'Y' whereas the first word of the IR ends with the letter 'l'. The IR also has a second word, being KIDS, that is not present in the opponent's mark. The word element of the opponent's mark is stylised and displayed in a white, cursive font. The red diamond-shape element that is present in the opponent's mark is absent in the IR. I note that the IR is a word only mark and can be used in any standard typeface and registration in black and white will cover the use of the IR in different colours. Taking all of this into account, I find that the marks are visually similar to a medium degree.

Aural Comparison

66. The opponent has submitted that:

“**Aurally**, the pronunciation of the word element KINDI in the contested mark KINDI KIDS is identical to the early mark KINDY due to the fact that aurally the sound of the letter ‘I’ is identical to the sound of the letter ‘Y’. Although the rhythm of the contested mark KINDI KIDS is different because it consists of the two words KINDI and KIDS in that order, the word element KINDY remains clearly audible even though visually represented as KINDI and plays an independent role in the contested mark.”

67. The holder has submitted that:

“Phonetically, it is submitted that the respective marks are not similar.

From a phonetic perspective, the earlier mark is one word, made up of five letters, comprising of two syllables i.e. KIN-DY. In contrast, the opposed mark is two words, made up of nine letters, comprising of three syllables i.e. KIN-DI-KIDS. As such, the marks are phonetically quite different.

Alliteration is generally used to emphasize certain phonetics in a sentence which leads to a particular tone being created. The fact that the opposed mark has two words, each beginning with the letter “K”, also differentiates it from the earlier mark. This alliteration, i.e. K[INDI] K[IDS], results in the opposed mark being fanciful from a phonetic perspective. Furthermore, this alliteration will also result in the relevant consumer speaking both words in a special and unique rhythm. Thus, when spoken, the pronunciation of the opposed mark will be very different to the pronunciation of the earlier mark.

It is submitted that neither word in the opposed mark plays a more important role than the other and the mark should therefore be assessed as whole rather than broken down into separate parts, particularly in view of the clever and fanciful use of alliteration within the mark i.e. KINDI KIDS. The use of alliteration by the Holder in the opposed mark will result in each word being treated with the same weight by the relevant consumer rather than them focussing their attention on just the first part of the mark (as previously suggested by the

Opponent). In view of the above, it is submitted that the respective marks are phonetically similar to a low degree."

68. Aurally, the opponent's mark consists of two syllables that will be pronounced 'KIN-DEE'. The IR consists of three syllables, being 'KIN-DEE-KIDS". I do not consider that the alliteration will affect the pronunciation of the words by a significant proportion of average consumers as the first two syllables will be pronounced 'KIN-DEE' regardless of what the succeeding syllable would be.

69. The device element of the opponent's mark will not be pronounced. The similarities, therefore, include the entirety of the aural element of the opponent's mark. The marks differ aurally with the inclusion of the last syllable of the IR, being 'KIDS'. In respect of those goods for which KIDS would be considered descriptive, I conclude that it is unlikely to be pronounced (because it is simply viewed as the type of goods for which the holder seeks protection). In those circumstances, the marks will be aurally identical. However, if the word KIDS is pronounced, then they will be aurally similar to a high degree.

Conceptual Comparison

70. The only element of the opponent's mark that might convey a conceptual message is the word 'Kindy'. For the average consumers who view the words 'Kindy' and 'KINDI' as invented words they will be conceptually neutral. However, I recognise that the word 'KIDS' in the IR will act as a point of conceptual difference between them. For those average consumers who recognise a connection between the words 'Kindy' and 'KINDI' and the German word for children or kindergarten, both will be seen as a misspelling and will convey the same meaning. In those circumstances, the conceptual meaning conveyed by the marks as a whole will be highly similar.

Likelihood of confusion

71. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the

average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, 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 and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

72. I have found the goods to be identical. I have found the average consumer to be a member of the general public who will purchase the goods by primarily visual means, although I do not discount an aural component. I have concluded that a medium degree of attention will be paid in the purchasing process. I have taken these factors into account in my assessment of the likelihood of confusion between these marks.

Direct confusion

73. I have found the marks to be visually similar to a medium degree and aurally identical if the word 'KIDS' of the IR is not pronounced or similar to a high degree if it is. The conceptual position is neutral if the words Kindy/KINDI are viewed as invented (although the word 'KIDS' in the IR will act as a point of conceptual difference between the marks). If the words Kindy/KINDI are recognised as being misspellings of the German word for children (such as being a reference to kindergarten) then they will be conceptually highly similar. I have found that the opponent's mark is inherently distinctive to between a low and medium degree (if it is viewed as a reference to children and used on children's clothes) or to between a medium and high degree if it is not. Taking all of these factors in account, I am satisfied that the average consumer would likely mistake one mark for the other.

This is particularly the case given that I have found the word 'Kindy' in the opponent's mark and the word 'KINDI' in the IR to be the dominant elements of their respective marks. It is therefore likely that the word 'KIDS' within the IR will be overlooked or forgotten by the average consumer. Given that the words 'Kindy' in the opponent's mark and 'KINDI' in the IR are aurally identical if the word KIDS is not pronounced, when encountered aurally the visual differences between them will not serve to distinguish them. Further the visual differences are the letter 'y' and the letter 'l' at the end of each word and the addition of stylisation and background in the opponent's mark. Given that the beginning of marks tend to have more focus than the ends (see *El Corte Inglés, SA v OHIM Cases T-183/02 and T-184/02*), the differences between the ends of the words are likely to be forgotten or overlooked by the average consumer. Further, the IR is a word only mark and can be used in any standard font and in any colour, which, when taken into account, leaves the red diamond shaped device as the only difference between the marks. Given that I have found that the device element of the opponent's mark acts as a background to the word 'Kindy', it likely to be overlooked or forgotten by the average consumer. Further, when used on children's clothing the word 'KIDS' may be forgotten due to its descriptive nature. Taking all of the above factors into account and based on the principle of imperfect recollection, I consider there to be a likelihood of direct confusion between the marks. In the event that I am incorrect in my finding of direct confusion, I will proceed to consider the likelihood of indirect confusion.

Indirect confusion

74. Indirect confusion was described in the following terms by Iain Purvis Q.C., sitting as the Appointed Person in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10.

"16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the

later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: "The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark."

75. I must now consider the possibility of indirect confusion and whether average consumers would believe that there is an economic connection between the marks or that they are variant marks from the same undertaking as a result of the shared common elements of the marks. If I am wrong in my finding that the marks will be misremembered or mistakenly recalled as each other by the average consumer, because the word KIDS and the presentational differences will be recalled, they are likely to be seen as an extension of a brand (being a variant mark that identifies a range of children's clothing). In my view, the differences between the words 'KINDI' and 'Kindy', being the different last letter, will be overlooked by the average consumer and the different presentational differences (such as the stylisation and background) will be viewed as an alternative mark being used by the same or economically linked undertakings. I therefore consider there to be a likelihood of indirect confusion between the marks.

CONCLUSION

76. The opposition succeeds in its entirety and the application is refused in respect of the following goods:

Class 25: Apparel, namely, clothing, footwear and headwear; sleepwear.

77. The opposition was not directed against the following services, for which the IR can proceed to registration:

Class 41: Children's entertainment services; entertainment; live entertainment; musical entertainment services; organisation and

conducting of dance, music and other entertainment festivals; production of television programs; production of webcasts, other than advertising; online publication of electronic books and journals; publication of books; publication of magazines; publication of journals; weblog (blog) services (online publication of journals or diaries); publication of multimedia material online; providing television programs, not downloadable, via video-on-demand services; distribution of motion picture films (rental services); motion picture production; producing of motion pictures, plays and videos; production of motion pictures; production of video recordings, other than advertising; production of audio and/or video recordings, other than advertising; providing online electronic publications, not downloadable; magazine publishing; publishing by electronic means; publishing of books; publishing of printed matter.

COSTS

78. The opponent has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2015. In the circumstances, I award the opponent the sum of **£500** as a contribution towards the costs of proceedings. The sum is calculated as follows:

Filing a notice of opposition and considering the holder's counterstatement:	£200
Preparing written submissions in lieu:	£200
Official fee:	£100
Total:	£500

79. I therefore order Moose Creative Management PTY LTD to pay Kindy Project SAS the sum of £500. This sum is to be paid within two months or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 7th day of May 2020

**A COOPER
For the Registrar**