

O/1004/22

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3745862
IN THE NAME OF GRAVITIQ ACQUISITION CO.3, LLC
IN RESPECT OF THE TRADE MARK**

PILPOC

IN CLASS 28

AND

**THE FAST TRACK OPPOSITION THERETO UNDER NO. 600002324
BY SHUOZHOU MAOMAO E-COMMERCE CO., LTD**

Background and pleadings

1. Gravitiq Acquisition Co.3, LLC (“the applicant”) applied to register the trade mark application number 3745862 for the mark PILPOC in the UK on 21 January 2022. It was accepted and published in the Trade Marks Journal on 18 February 2022 in respect of the following goods:

Class 28: Games, toys, and playthings; video game apparatus; gymnastic and sporting articles; decorations for Christmas trees; fairground and playground apparatus; sporting and physical exercise equipment; toys, games, and playthings; toys; toys made of plastics; toys made of rubber; toys made of wood; plastic toys; developmental toys; mechanical toys; squeeze toys; bendable toys; children's toys; children's educational toys for developing fine motor skills; stress relief exercise toys; sensory toys in the nature of hand-held pieces of material for stress relief and to increase attention and concentration for children and adults with ADHD, autism and other conditions; fidget toys; spinning tops [toys]; spinning fidget toys; parts and fittings for all the aforesaid goods.

2. Shuozhou Maomao e-commerce Co., Ltd (“the opponent”) oppose the trade mark via the fast track opposition route, on the basis of Section 5(1) of the Trade Marks Act 1994 (“the Act”) only. This is on the basis of its earlier UK Trade Mark registration number 3596609 for the mark PILPOC. The following goods are relied upon in this opposition:

Class 10: Sex aids; Sex toys; Love dolls [sex dolls]; Adult sexual aids; Vibrators, being adult sexual aids; Artificial vaginas, being adult sexual aids; Artificial penises, being adult sexual aids; Penis enlargers, being adult sexual aids; Artificial breasts; Breast shields; Teething rings; Ear thermometers; Clinical thermometers; Thermometers for medical purposes; Ear plugs; Protective ear plugs; Ear protectors; Ear picks.

Class 28: Stress relief exercise balls; Squeezable balls used to relieve stress; Stress relief balls for hand exercise; Fidget toys; Spinning fidget toys; Toy spinning tops; Squeezable squeaking toys; Toys; Toy balls; Educational toys;

Developmental toys; Children's toys; Infant toys; Toy dolls; Fabric toys; Pet toys; Squeeze toys; Push toys; Puzzles [toys]; Toy pistols; Sand toys; Smart toys; Toy balloons; Model toys; Talking toys; Rocking toys; Cuddly toys; Plush toys; Drones [toys]; Modular toys; Assembly toys; Cloth toys; Inflatable toys; Stuffed toys; Bouncing toys; Punching toys; Soft toys; Bendable toys; Sports games; Sports equipment; Sporting articles; Rings for sports; Sports training apparatus; Discuses for sports; Gloves for sports; Toy sporting apparatus; Protective padding for sports; Climbers' harness; Christmas dolls; Christmas tree decorations; Christmas stockings; Artificial Christmas trees; Toy Christmas trees; Decorations and ornaments for Christmas trees; Festive decorations, party novelties and artificial Christmas trees; Cube puzzles; Weight lifting belts; Swimming belts; Wrist weights for exercise; Leg weights [sports articles]; Balloons; Party balloons; Men's athletic supporters [sports articles]; Athletic protective sportswear; Wrist guards for athletic use; Chest protectors for athletic use; Abdomen protectors for athletic use; Leg guards for athletic use; Face protectors for athletic use; Waist protectors for athletic use; Knee pads for athletic use; Arm protectors for athletic use; Instep guards for athletic use; Athletic protective arm pads for cycling; Shoulder pad laces for athletic use; Athletic protective elbow pads for cycling; Athletic protective knee pads for cycling; Athletic protective wrist pads for cycling; Puzzles; Parlor games; Arcade games; Go games; Checkers games; Cards [games]; Memory games; Chess games; Boards games; Dart games; Pinball games; Electronic games; Musical games; Boule games; Dice games; Party games; Balls for games; Table-top games; Role play games; Gloves for games; Racing car games; Action skill games.

3. By virtue of its earlier filing date of 17 February 2021, the above mark constitutes an earlier mark in accordance with section 6 of the Act.

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

5. The applicant filed a counterstatement denying that the marks are identical and that the goods are identical.

6. 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.”

7. The net effect of these changes is to require the parties to seek leave in order to file evidence in fast track oppositions. No leave was sought to file evidence in these proceedings.

8. 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; however, the applicant filed written submissions in lieu. This decision is taken following a careful perusal of the papers.

9. Both parties are represented in these proceedings. The opponent is represented by HUO YUHUI. The applicant is represented by Stobbs.

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

Proof of use

11. The earlier mark holds a registration date of 31 July 2021. As it had not been registered for a period of five years or more at the date on which the application was filed, it is not yet subject to proof of use provisions in accordance with section 6A of

the Act. The opponent may therefore rely upon all of the pleaded goods within the opposition.

Decision

Section 5(1)

12. Section 5(1) of the Act is as follows:

(1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.

Section 5(A)

13. Section 5(A) of the Act is as follows:

5A Grounds for refusal relating to only some of the goods or services

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.

Comparison of the marks

14. In *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA*, Case C-291/00, the Court of Justice of the European Union held that:

“54... a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer.”

15. In this instance, both marks are the identical work PILPOC. Within its final submissions, the applicant admits the marks are identical. There are no modifications or additions made to the earlier word mark within the mark applied for, and I accept that the marks are therefore identical for the purposes of section 5(1) of the Act.

Comparison of the goods

16. Where goods are included identically within a specification it is clear they should be considered identical. Additionally, where the wording differs but shares an identical meaning, the goods will be self evidently identical. Finally, goods may be considered identical where they fall within a term covered by another application or registration. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court stated that:

“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”.

17. Within its written submissions, the applicant makes the general statement “[t]he applicant denies that the goods in the Earlier Right are identical to that of the application.”

18. The applicant goes on to provide a table of goods which it submits are *not* identical to the opponent’s goods. This table comprises of the following goods only:

- Video game apparatus
- Gymnastic articles
- Fairground and playground apparatus

19. The applicant goes on to say:

“As the applicant has failed to argue how the above goods in the Application are identical to those goods covered by the Earlier Right, the Applicant submits the opposition must be rejected in relation to such goods.

...

In summary, for the reasons set out in the Applicant’s submissions, the Applicant requests that the Opposition be refused entirely, or at least in relation to the non-identical goods.”

20. Whilst I note that the applicant has named specific goods included within its specification that it does not consider to be identical to the opponent’s goods, it is my view that it has not explicitly conceded that the remaining goods are identical. Indeed, this has been denied within its counterstatement and elsewhere within its submissions as set out above. As such a full comparison of the goods is required.

21. I note that the earlier mark includes the term *Toys*. I find this to be identical to the following goods included within the applicant’s specification, either self-evidently or in line with the principles set out in *Meric*:

Toys; toys [...]; toys; toys made of plastics; toys made of rubber; toys made of wood; plastic toys; developmental toys; mechanical toys; squeeze toys; bendable toys; children's toys; children's educational toys for developing fine motor skills; stress relief exercise toys; sensory toys in the nature of hand-held pieces of material for stress relief and to increase attention and concentration for children and adults with ADHD, autism and other conditions; fidget toys; spinning tops [toys]; spinning fidget toys.

22. The applicant’s mark includes *Games and playthings*. This covers a large range of goods within the opponent’s specification, including *Parlor games; Arcade games; Go games; Checkers games; Cards [games]; Memory games; Chess games; Boards games; Dart games; Pinball games; Electronic games; Musical games; Boule games; Dice games; Party games; Balls for games; Table-top games; Role play games; Gloves for games; Racing car games; Action skill games*. The applicant’s *Games and playthings* are therefore identical to the opponent’s earlier goods in line with the principles set out in *Meric*.

23. The applicant's specification covers [...] *sporting articles* and *sporting and physical exercise equipment*. These will include many of the opponent's goods including *Sports equipment; Sporting articles; Rings for sports; Sports training apparatus; Discuses for sports; Protective padding for sports; Climbers' harness; Swimming belts; Wrist weights for exercise; Leg weights [sports articles]* by way of example. The applicant's goods [...] *sporting articles* and *sporting and physical exercise equipment* are therefore identical to the opponent's earlier goods in line with the principles set out in *Meric*.

24. The opponent's earlier mark covers the goods *Decorations and ornaments for Christmas trees*. These are self evidently identical to the applicant's *decorations for Christmas trees*.

25. The applicant covers *fairground and playground apparatus*. I note firstly that I do not consider any of the opponent's goods to constitute *playground apparatus*, which in my view will include articles such as climbing frames and swings. *Playground apparatus* is therefore not identical to the opponent's goods by the opponent.

26. I consider that *fairground apparatus* will include all of the types of apparatus generally used to create a fairground. I find 'apparatus' to have a fairly broad meaning, that being "*the equipment, such as tools and machines, which is used to do a particular job or activity*".¹ I therefore find that fairground apparatus will include the equipment required for the provision of a fairground, and it is my view this will include fairground games, including certain types of electronic games, and types of non-electronic games that will be offered at fairground stalls I note the opponent's specification includes the goods *Dart games; Pinball games; Electronic games; Musical games and Arcade games* which in my view will fall within the meaning of *fairground apparatus*. I therefore consider *fairground apparatus* included within the applicant's specification to be identical to the opponent's earlier goods.

27. In respect of *gymnastic [...] articles* the applicant submits:

¹ <https://www.collinsdictionary.com/dictionary/english/apparatus> [accessed 1 November 2022]

“The Earlier Right does not cover any goods which relate to “Gymnastics”, or even use the identical term “Gym” or “Gymnastics”.

28. However, I note the opponent’s goods include *sporting articles* and *rings for sports*. It is my view that gymnastics is a sport, and that the broad term sporting articles will also cover *gymnastic articles*. Further, it is my view that *rings for sports* will include rings for gymnastics, which I also find to be *gymnastic articles*. I therefore find the applicant’s *gymnastic [...] articles* to be identical to the opponent’s goods in line with the principles set out in *Meric*.

29. In respect of *video game apparatus*, the applicant submits:

“Whilst the Earlier Right covers a variety of “games”, it does not cover any goods which would be considered identical to that of “video game apparatus”, which is a more specific type of electronic audio-visual game compared to non-electronic games, e.g. “Card Games”.

30. Whilst I agree with the applicant’s submissions that video game apparatus is not identical to games such as card games, I note the opponent also holds protection for the term *electronic games*. I consider video game apparatus to include the apparatus required for playing a video game including the game discs and the gaming machines. I find *electronic games* will include will *video games* and I therefore considered it to be identical to *video game apparatus* as included within the applicant’s specification.

31. This leaves the applicant’s *parts and fittings for all the aforesaid goods*. It is my view that the parts and fittings for the goods listed in the applicant’s specification will not be identical to any of the goods covered by the opponent’s earlier mark. Parts and fittings for the goods will include replacement parts, and fittings for the goods mentioned, but they do not constitute the goods themselves, or their equivalents as included within the opponent’s specification.

32. As I have found the marks are identical, the requirements for section 5(1) of the Act have been met in respect of all of the goods for which I have found to be identical. The opposition under section 5(1) of the Act therefore succeeds in respect of all of the

identical goods. Where the goods are not considered identical, the opposition must fail.

Final remarks

33. The opposition has partially succeeded, and subject to any successful appeal, the application will be refused in respect of all the following goods:

Class 28: Games, toys, and playthings; video game apparatus; gymnastic and sporting articles; decorations for Christmas trees; fairground apparatus; sporting and physical exercise equipment; toys, games, and playthings; toys; toys made of plastics; toys made of rubber; toys made of wood; plastic toys; developmental toys; mechanical toys; squeeze toys; bendable toys; children's toys; children's educational toys for developing fine motor skills; stress relief exercise toys; sensory toys in the nature of hand-held pieces of material for stress relief and to increase attention and concentration for children and adults with ADHD, autism and other conditions; fidget toys; spinning tops [toys]; spinning fidget toys.

34. Subject to any successful appeal, the application will proceed to registration in respect of the following goods only:

Playground apparatus; parts and fittings for games, toys, and playthings, video game apparatus, gymnastic and sporting articles, decorations for Christmas trees, fairground and playground apparatus, sporting and physical exercise equipment, toys, games, and playthings, toys, toys made of plastics, toys made of rubber, toys made of wood, plastic toys, developmental toys, mechanical toys, squeeze toys, bendable toys, children's toys, children's educational toys for developing fine motor skills, stress relief exercise toys, sensory toys in the nature of hand-held pieces of material for stress relief and to increase attention and concentration for children and adults with ADHD, autism and other conditions, fidget toys, spinning tops [toys] and spinning fidget toys.

Costs

35. Both parties have achieved a measure of success within these proceedings. Whilst I note that the applicant has maintained its protection for the parts and fittings for all of the goods, it is my view that the opponent has achieved considerably more success than the applicant. In the circumstances I award the opponent the sum of £210 as a contribution towards the cost of the proceedings in accordance with Tribunal Practice Notice 2/2015, accounting for a 30% reduction to account for the applicant's partial success. The sum is calculated as follows:

Official fee:	£100
Preparing the notice of opposition and considering the counterstatement:	£200
30% reduction for applicant's partial success:	- £90
Total:	£210

36. I therefore order Gravitiq Acquisition Co.3, LLC to pay Shuozhou Maomao e-commerce Co., Ltd the sum of £210. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 15th day of November 2022

Rosie Le Breton
For the Registrar