

O-183-10

TRADE MARKS ACT 1994
AND
THE TRADE MARKS (INTERNATIONAL REGISTRATION) ORDER 1996

IN THE MATTER OF APPLICATION NUMBER 950870 IN THE NAME OF
MIP METRO GROUP INTELLECTUAL PROPERTY GMBH & CO. KG

AND

OPPOSITION THERETO UNDER NUMBER 71820
BY METRO INDUSTRIES INC.

Background

1. An application with a date of designation of 7 August 2007 was made seeking to extend protection of International Registration No. 950870 to the UK under the provisions of the Madrid Protocol for a range of services in class 35 of the Nice Agreement concerning the International Classification of Goods and Services. The application stands in the name of MIP METRO Group Intellectual Property GmbH & Co KG (“MIP”) and is for the following trade mark:



2. On 10 October 2008 Metro Industries, Inc (“Metro”) filed a Notice of Opposition in which it opposed the application in respect of all the services for which registration was sought. The opposition is founded on section 5(2)(b) of the Act. In support of its claim, Metro relies on the following trade marks:

Registration No	Mark
1430325	
1430327	
1430328	
2067047	METRO

3. MIP filed a counterstatement denying the grounds of opposition and putting Metro to proof of use of its trade marks. MIP denied the respective marks were similar but also indicated that it was unable to admit or deny whether the respective goods and services were similar as the basis of Metro’s opposition was not clear on this point. Metro filed clarification (its letter of 23 February 2009 refers) in which it indicated which of the respective goods and services it considered to be similar and which I set out later in this decision. MIP then filed a further counterstatement in which it says it is “not able to admit or deny [any similarity of goods and services] until they have had an opportunity to review the [...] proof of use of their marks”.

4. Metro filed evidence and both parties filed written submissions. Neither requested to be heard and therefore I give this decision on the basis of all the written material before me.

The objection under section 5(2)(b)

5. This section of the Act reads:

(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 of association with the earlier trade mark.

6. 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 -

- (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,
- (b)
- (c)

(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.”

7. In these proceedings, Metro is relying on four registered trade marks all of which have an application date prior to that of the application for registration. Each qualifies as an earlier trade mark under the above provisions. The application for registration was published for opposition purposes on 11 July 2008 and Metro’s trade marks were registered on 2 July 1993 (no.1430325), 23 July 1993 (no.1430327), 8 October 1993 (no.1430328) and 28 November 1997 (no.2067047). As each of the earlier marks relied on by Metro was registered more than five years before the publication date of the mark for which registration has been applied, I go on to consider the position under The Trade Marks (Proof of Use, etc) Regulations 2004, the relevant sections of which read as follows:

“6A (1) This section applies where-

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

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

(3) The use conditions are met if-

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

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

(4) For these purposes-

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

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

(5)

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

(7)....”

8. Also of relevance is section 100 of the Act which states:

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

9. I go on to consider whether genuine use has been shown of the marks relied on by Metro. In doing so, I take into account that the relevant period is the five year period ending with the date of publication of MIP’s application, i.e. 12 July 2003 to 11 July 2008.

10. The guiding principles to be applied in determining whether there has been genuine use of a mark are set out in *Ansul BV v Ajax Brandbeveiliging BV* [2003]RPC 40 and *Laboratoire de la Mer Trade Mark* [2006] FSR 5. From these cases it is clear that:

- genuine use entails use that is not merely token. It must also be consistent with the essential function of a trade mark, that is to say to guarantee the identity of the origin of goods or services to consumers or end users (*Ansul*, paragraph 36);
- the use must be ‘on the market’ and not just internal to the undertaking concerned (*Ansul*, paragraph 37);
- it must be with a view to creating or preserving an outlet for the goods or services (*Ansul*, paragraph 37);
- the use must relate to goods or services already marketed or about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns (*Ansul*, paragraph 37);
- all the facts and circumstances relevant to determining whether the commercial exploitation of the mark is real must be taken into account (*Ansul*, paragraph 38);
- the assessment must have regard to the nature of the goods or services, the characteristics of the market concerned and the scale and frequency of use (*Ansul*, paragraph 39);
- but the use need not be quantitatively significant for it to be deemed genuine (*Ansul*, paragraph 39);
- an act of importation could constitute putting goods on the market (*Laboratoire de la Mer*, paragraph 25 referring to the earlier reasoned order of the ECJ);
- there is no requirement that the mark must have come to the attention of the end user or consumer (*Laboratoire de la Mer*, paragraphs 32 and 48);

- what matters are the objective circumstances of each case and not just what the proprietor planned to do (*Laboratoire de la Mer*, paragraph 34);
- the need to show that the use is sufficient to create or preserve a market share should not be construed as imposing a requirement that a significant market share has to be achieved (*Laboratoire de la Mer*, paragraph 44).

11. Metro's evidence takes the form of a witness statement by Joseph Sokirka. Mr Sokirka is the Advertising Manager of InterMetro Industries Corp of which Metro is a wholly owned subsidiary. He states that he has personal knowledge of the information he gives.

12. Mr Sokirka's evidence is not extensive. He states that there have been "significant sales of METRO branded products" which have "been marketed in the United Kingdom for years" but provides, for example, no details of turnover or advertising under the marks. Other than stating that the products sold "includ[e] the products claimed" in the earlier registrations, Mr Sokirka provides no explanation of on which goods the mark has been used. That said, at exhibit 2, he provides copies of a number of sales invoices issued to a number of companies within the UK. Although several of these invoices date from after the relevant period, there are others dated for each of the years 2004 to 2008. From the information on these invoices it is not possible for me to identify all of the goods which have been sold. For example, invoice R65227 refers to "14 x 36 METROSEAL 111 SASE" and R66448 refers to "METRO MAX Q GRI D SHF" neither of which are explained. Others are more easily understood: e.g. Invoice R66461 refers to 74" Chrome post, R66448 refers to swivel caster, R66805 refers to drawers, R60465 to Label Holders and R66495 to Wire Chrome Shelf. Each of these invoices bears the earlier mark as registered under Nos. 1430325, 1430327 and 1430328.

13. Mr Sokirka explains that Metro has developed relationships with international distributors and sales agents with its UK distributor being H C Slingsby Plc. At Exhibit 3, Mr Sokirka provides copies of a number of catalogues distributed by Metro "in collaboration with Slingsby". These bear each of the earlier marks relied upon (and which can be seen on some of the products themselves), and are dated 2005 and 2006/2007. They show a range of goods described as commercial products designed to be "solutions to meet any display, storage or transportation requirement" and which include shelving and related parts and accessories, trolleys for a variety of uses such as hotel housekeeping trolleys, bins, boxes and workstations. At Exhibit 4 is what is described as a price list "used by....a dealer authorized to carry, promote and sell METRO-branded products" but this is not dated in any way. Mr Sokirka states that Metro has its own Internet website and, at Exhibit 5 is what is said to be a "selection of print-outs of a number of Metro products". I do not know when these pages were downloaded though note that they bear copyright dates and dates of revision ranging from 1993 to 2005 and show use on a range of goods including garment racks, circuit board carriers, reel holders, desks, tables and bins.

14. MIP submits that "the total amounts of the invoices submitted in evidence are not enormous-the invoices from 2005 have the highest total of some 14,000 euros-but this is not informative without any market share information or indication of the overall size of the Opponent's UK business". I accept that the evidence is silent as to

turnover etc. and I am unable to establish what market share the sales shown by the invoices which have been provided may represent however when taken as a whole there is evidence of sales of a range of equipment throughout the relevant period and I have no doubt that these sales have created and preserved a market share under the marks within the relevant period. The use has been shown on most of the goods as registered with the exception of the goods as registered in class 10 (earlier mark 2067047 refers). Under the provisions of section 6A of the Act, I therefore find there has been genuine use of the earlier mark in relation to the following goods:

Mark	Specification as registered	Use shown
1430325	<i>Shelves, shelf supports; coat hangers and brackets; reel holders; printed circuit board carriers; baskets; parts and fitting for all the aforesaid goods; all included in Class 6</i>	All goods
1430327	<i>Carts, trucks, dollies and trolleys; linen hampers; rubbish bag carriers; parts and fittings for all the aforesaid goods; all included in Class 12</i>	All goods
1430328	<i>Shelves, shelf supports; baskets, boxes and bins; plastic bin markers; work counters; cabinets; work stations; parts and fittings for all the aforesaid goods; all included in Class 20</i>	All goods
2067047	<p><i>Class 10</i> <i>Surgical, medical, dental and veterinary apparatus and instruments, artificial limbs, eyes and teeth; orthopaedic articles; suture materials</i></p> <p><i>Class 12</i> <i>Carts, trucks (not road vehicles), dollies, trolleys, rubbish bag carriers, linen hampers; none being passenger motor vehicles</i></p> <p><i>Class 20</i> <i>Shelves, shelf supports and shelving systems; baskets, boxes and bins, none for use on railway trucks and in ships' holds; plastic bin markers; work counters; cabinets; work stations; tables; parts and fittings for all the aforesaid goods, all of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-pearl, meerschaum and substitutes for all these materials, or of plastics; but not including self-watering baskets or compost makers or any goods similar to these excluded goods.</i></p>	<p>No use shown</p> <p>All goods</p> <p>All goods</p>

15. With this in mind, I go on to consider the opposition under section 5(2)(b). This reads:

“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,

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

16. In determining the question under Section 5(2)(b), I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel v Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] R.P.C. 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R 77, *Marca Mode CV v Adidas AG* [2000] E.T.M.R.723, *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di Laudato & C. Sas v OHIM* C-334/05 (Limoncello). It is clear from these cases that:

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors: *Sabel BV v Puma AG*, paragraph 22;
- (b) the matter must be judged through the eyes of the average consumer of the goods/services in question: *Sabel BV v Puma AG*, paragraph 23, 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 he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen B. V.* paragraph 27;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details: *Sabel BV v Puma AG*, paragraph 23;
- (d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG*, paragraph 23;
- (e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki v Metro-Goldwyn-Mayer Inc*, paragraph 17;
- (f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v Puma Ag*, paragraph 24;
- (g) in determining whether similarity between the goods or services covered by the two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer inc*;

- (h) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*, paragraph 26;
- (i) further, 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; *Marca Mode CV v Adidas AG*, paragraph 41;
- (j) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, paragraph 29;
- (k) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH*;
- (l) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L Laudato & C. Sas v OHIM*.

17. In essence the test under Section 5(2)(b) is whether there are similarities in marks and goods and services which, when taking into account all the surrounding circumstances, would combine to create a likelihood of confusion. The likelihood of confusion must be appreciated globally and I need to address factors such as the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those different elements and taking into account the degree of similarity in the goods and services, the category of goods and services in question and how they are marketed.

The relevant public and the purchasing act

18. As indicated earlier, Metro's products are described as "commercial products designed to be "solutions to meet any display, storage or transportation requirement"". That being the case, these are goods which are likely to be purchased by business users. These are specialist goods likely to be sold through specialist suppliers with at least a fair level of consideration given to their purchase given their likely cost and the need to ensure they meet the particular business's needs. MIP's services are wholesale and retail trade services and thus the average consumer could be a business user or a member of the public with a commensurate level of attention being paid to the provision of these services.

Comparison of marks

19. The opposition is based on four earlier marks as set out above. The first three of these, which for the purposes of comparison I shall treat as a single mark, consists of the word METRO on a black rectangular background with the letter M slightly larger than the other letters but with all letters being in white, plain block capitals. Two parallel, white diagonal lines of differing widths extend from the bottom left-hand side of the rectangular background to the right-hand side of the lower edge of the upright of the letter T. The remaining mark relied on consists of the word METRO in plain block capitals. MIP's mark consists of the word METRO presented in yellow on a blue rectangular background. This mark is also presented in a standard font though I note the letter O is slightly squared in style. In each case, the word METRO is the dominant and distinctive element within the mark.

20. In its counterstatement, MIP refer to "visual differences between the marks" which it submits is "sufficient for consumers to distinguish between [them]" but, of course, I have to consider the matter on a global basis. On a forensic analysis it is certainly possible to note some visual differences between the respective marks however, in my view, the marks are visually, very highly similar given that each contains (or, in the case of 2067047, consists of) the same single word METRO and the prominence of that word within the marks. Each of the marks will be referred to as METRO and I consider them to be aurally identical. The word METRO may bring to mind an underground railway system or may be understood to be an abbreviation for the word metropolis but given the same word appears in each of the respective marks, there is conceptual identity.

The distinctive character of the earlier marks

21. Whilst it is clear the marks have been used I am unable to say, on the basis of the evidence filed, that their distinctiveness has been enhanced through that use such that any one of them has any reputation. That said, whilst the word METRO is a dictionary word, it has no particular meaning in relation to the goods and is therefore inherently distinctive.

Comparison of goods and services

22. As I indicated earlier in this decision, Metro's initial objection was against all of the services of the application however in its letter of 23 February 2009, it limited its attack. As a consequence and taking into account my findings regarding proof of use of the earlier marks, the goods and services to be compared stand as follows:

Metro's earlier registrations	The opposed services of MIP's application
<i>Shelves, shelf supports; coat hangers and brackets; reel holders; printed circuit board carriers; baskets; parts and fitting for all the aforesaid goods; all included in Class 6 (1430325)</i>	<i>Wholesale and retail trade services connected with the sale of wood preservatives and colorants, wood mordants, repair materials for background treatment in particular fillers (colouring), precoat, wood, iron and coating materials, cleaners for office</i>
<i>Carts, trucks, dollies and trolleys; linen</i>	

hampers; rubbish bag carriers; parts and fittings for all the aforesaid goods; all included in Class 12 (1430327)

Shelves, shelf supports; baskets, boxes and bins; plastic bin markers; work counters; cabinets; work stations; parts and fittings for all the aforesaid goods; all included in Class 20 (1430328)

and, as regards 2067047,

(Class 12)

Carts, trucks (not road vehicles), dollies, trolleys, rubbish bag carriers, linen hampers; none being passenger motor vehicles

(Class 20)

Shelves, shelf supports and shelving systems; baskets, boxes and bins, none for use on railway trucks and in ships' holds; plastic bin markers; work counters; cabinets; work stations; tables; parts and fittings for all the aforesaid goods, all of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-pearl, meerschaum and substitutes for all these materials, or of plastics; but not including self-watering baskets or compost makers or any goods similar to these excluded goods

equipment and office furniture, wood, iron and preservatives; furniture cleaner and preservatives; filled first-aid boxes, cash boxes of metal, safes, aluminium ladders, metal ladders, metal folding steps, metal packing containers, metal baskets, metal blinds, metal mounting accessories for shutters, upper rails, lower rails, panels and side guide rails of aluminium and steel, metal clamps, fastening elements, springs, locks, chains all of metal and for blinds and curtains, aluminium roller tubes, metal cables and wires (not for electrical purposes), transportable constructions of metal, metal hardware, in particular nails, rivets, nuts, screws, hooks, ends, installation pipes of metal, electric and pneumatic tools for the woodworking industry, for craft trades and DIY, ratchet boxes, mitre joint boxes and mitre blocks, workstations and thin clients, monitors, projectors, printers, scanners, computer peripheral appliances, in particular printers, keyboards, mouse; accessories, lamps for medical purposes, heating blankets and heating cushions (electric) for medical purposes, medical apparatus, namely foot baths, massage apparatus, pulse meters, lighting, heating, steam generating, cooking, refrigerating, drying, ventilating and water supplying appliances, electrically operated domestic appliances also for use in catering, fittings for bathrooms and showers, fittings for showers, complete shower and washing cabins, file baskets (stationery), containers for paper and stationery, tubes (not of metal) for building purposes, furniture, ladders (not of metal), plastic packaging containers, bottle crates, multipurpose carts (furniture), baskets (not of noble metal), bottle crate stands (not of metal), clothes hangers, shelves and shelving systems (furniture)(not of metal), clothes racks, including movable, washing baskets, laundry storage/sorting systems,

	<i>namely appliances and containers for household use (not of metal or plated), waste bins, baskets for household use (not of metal)</i>
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23. Given that the earlier marks are registered in respect of various goods whereas the mark applied for seeks registration in respect of services, these cannot be considered identical and I go on to consider whether the goods which have been classified in classes 6, 12 and 20 are similar or not to the services which have been classified in class 35. The leading authorities on determining the similarity of goods and services are well established and set out in the *Canon* case (supra) and *British Sugar Plc v James Robertson & Sons Ltd (Treat)* [1996] R.P.C. 281. From these cases I take note that all relevant factors should be taken into account including the nature of the goods and services, their intended purposes, their method of use and whether they are in competition with each other or are complementary. I also take into account the findings in Case T-116/06, *Oakley Inc. v. OHIM*, 24 September 2008, where the CFI (now the General Court) held that there existed a certain similarity between goods on the one hand and the retail trade in those same goods on the other because they are complementary and the services are normally offered in the same places where the goods themselves are offered for sale (paragraphs 42–62).

24. With these cases in mind, I find the following goods and services to be similar:

Earlier marks	MIP's application
<i>Workstations (1430328 and 2067047)</i>	<i>Wholesale and retail trade services connected with the sale of workstations</i>
<i>Shelves, shelf supports, shelving systems (1430325, 1430328, 2067047)</i>	<i>Wholesale and retail trade services connected with the sale of shelves, shelving systems (furniture), (not of metal), clothes racks, including movable, clothes hangers</i>

25. These goods and services are clearly complementary with the services likely to be offered in the same places where the goods themselves are offered for sale.

26. In *G rard Meric v OHIM*, Case T-133/05 paragraph 29, it was established that goods can be considered as identical when the goods designated by the earlier mark are included in a more general category within the later mark and vice versa. Applying this finding to the facts of this case, I consider the following goods and services to be similar:

Earlier mark	MIP's application
<i>Baskets (1430325, 1430328, 2067047)</i>	<i>wholesale and retail trade services connected with the sale of metal baskets, file baskets (stationery), baskets (not of noble metal), washing baskets and baskets for household use (not of metal)</i>
<i>Bins (1430328, 2067047)</i>	<i>wholesale and retail trade services connected with the sale of waste bins</i>

<i>Carts (1430327, 2067047)</i>	<i>Wholesale and retail trade services connected with the sale of multipurpose carts (furniture)</i>
<i>Baskets, boxes and bins (1430325, 1430328, 2067047)</i>	<i>Wholesale and retail trade services connected with the sale of plastic packaging containers, bottle crates, bottle crate stands (not of metal), containers for papers and stationery</i>
<i>Cabinets, workstations (1430328, 2067047)</i>	<i>Wholesale and retail trade services connected with the sale of furniture</i>
<i>Parts and fittings as included in class 6 (1430325)</i>	<i>Wholesale and retail trade services connected with the sale of metal hardware, in particular nails, rivets, nuts, screws, hooks and ends</i>
<i>Carts, trucks, dollies and trolleys, linen hampers (1430327, 2067047)</i>	<i>Wholesale and retail trade services connected with the sale of laundry storage/sorting systems, namely appliances and containers for household use (not of metal or plated)</i>

27. With the same cases in mind, I do not consider there is any similarity between any of the goods of the earlier marks and the following services of the application:

“Wholesale and retail trade services connected with the sale of wood preservatives and colorants, wood mordants, repair materials for background treatment in particular fillers (colouring), precoaters, wood, iron and coating materials, cleaners for office equipment and office furniture, wood, iron and preservatives; furniture cleaners and preservatives; filled first-aid boxes, cash boxes of metal, safes, aluminium ladders, metal ladders, metal folding steps, metal packing containers, metal blinds, metal mounting accessories for shutters, upper rails, lower rails, panels and side guide rails of aluminium and steel, metal clamps, fastening elements, springs, locks, chains all of metal and for blinds and curtains, aluminium roller tubes, metal cables and wires (not for electrical purposes), transportable constructions of metal, installation pipes of metal, electric and pneumatic tools for the woodworking industry, for craft trades and DIY, ratchet boxes, mitre joint boxes and mitre blocks, thin clients, monitors, projectors, printers, scanners, computer peripheral appliances, in particular printers, keyboards, mouse; accessories, lamps for medical purposes, heating blankets and heating cushions (electric) for medical purposes, medical apparatus, namely foot baths, massage apparatus, pulse meters, lighting, heating, steam generating, cooking, refrigerating, drying, ventilating and water supplying appliances, electrically operated domestic appliances also for use in catering, fittings for bathrooms and showers, fittings for showers, complete shower and washing cabins, tubes (not of metal) for building purposes or ladders (not of metal).

28. Each of these services have different users and uses to the goods of the earlier marks, their natures differ and the respective goods and services are neither in competition nor complementary.

Likelihood of confusion

29. In reaching a decision on whether there is a likelihood of confusion, I must make a global assessment based on all relevant factors. I have found the marks to be very highly similar from a visual standpoint and to be aurally and conceptually identical. On a global appreciation and considering all relevant factors including imperfect recollection, I consider the average consumer would mistake one mark for the other and be confused as to the economic origin of the goods and services sold under the respective marks to the extent that I have found them to be similar. That being the case, the opposition under section 5(2)(b) succeeds in respect of the following services:

Wholesale and retail trade services connected with the sale of metal baskets, metal hardware, in particular nails, rivets, nuts, screws, hooks, ends, workstations, file baskets (stationery), containers for paper and stationery, furniture, plastic packaging containers, bottle crates, multipurpose carts (furniture), baskets (not of noble metal), bottle crate stands (not of metal), clothes hangers, shelves and shelving systems (furniture)(not of metal), clothes racks, including movable, washing baskets, laundry storage/sorting systems, namely appliances and containers for household use (not of metal or plated), waste bins, baskets for household use (not of metal)

30. MIP's application is free to proceed to registration for all other services for which the application for extension of protection was made.

Costs

31. As both parties have achieved a measure of success, I consider that each should bear its own costs of these proceedings.

Dated this 07 day of June 2010

**Ann Corbett
For The Registrar
The Comptroller-General**