

O-0085-26

TRADE MARKS ACT 1994

UK TRADE MARK APPLICATION NO. 3745566

IN THE NAME OF SKECHERS U.S.A., INC. II

TO REGISTER

GO WALK

IN CLASSES 9, 35, 41, AND 42

AND

OPPOSITION NO.434884 THERETO

BY EWOKE LTD

BACKGROUND AND PLEADINGS

The Application

1. Skechers U.S.A., Inc. II (“**the Applicant**”) applied to register the following as a trade mark in the UK:

GO WALK (word mark)

Filing date: 20 January 2022

Priority date: 19 January 2022

The Applicant’s Goods and Services

Goods in Class 9:

Downloadable virtual goods, namely, computer programs featuring footwear, clothing, headwear, eyewear, bags, sports bags, backpacks, sports equipment, art, toys, and accessories for use online and in online virtual worlds; downloadable computer software for interactive games for use via a global computer network and through various wireless networks and electronic devices; downloadable software for engaging in social networking and interacting with online communities; downloadable software for accessing and streaming multimedia entertainment content; downloadable software for providing access to an online virtual environment; downloadable computer software for the creation, production and modification of digital animated and non-animated designs and characters, avatars, digital overlays and skins for access and use in online environments, virtual online environments, and extended reality virtual environments.

And the following services:

Class 35:

Retail store services featuring virtual goods, namely, footwear, clothing, headwear, eyewear, sports bags, backpacks, sports equipment, art, toys and accessories for use online; on-line retail store services featuring virtual merchandise, namely, footwear,

clothing, headwear, eyewear, bags, sports bags, backpacks, sports equipment, art, toys and accessories.

Class 41:

Entertainment services, namely, providing on-line, non-downloadable virtual footwear, clothing, headwear, eyewear, bags, sports bags, backpacks, sports equipment, art, toys, accessories, digital animated and non-animated designs and characters, avatars, digital overlays, and skins for use in virtual environments; virtual reality and interactive game services provided online from a global computer network and through various wireless networks and electronic devices; entertainment services, namely, providing online non-downloadable game software and online video games; entertainment services, namely, providing virtual environments in which users can interact for recreational, leisure, or entertainment purposes; entertainment services, namely, providing an online environment featuring streaming of entertainment content and live streaming of entertainment events; entertainment services in the nature of organizing, arranging, and hosting virtual performances and social entertainment events.

Class 42:

Non-downloadable computer software for the creation, production and modification of digital animated and non-animated designs and characters, avatars, digital overlays and skins for access and use in online environments, virtual online environments, and extended reality virtual environments; Providing an interactive website and computer application software for virtual reality game services.

The Opposition

2. An opposition was filed against the Application on 8 July 2022. The opposition was filed originally in the name of Mladen Grabovac, but on 17 July 2022 Mr Grabovac assigned all the rights asserted in the opposition, and all rights in relation to the opposition proceedings, to his company, eWoke Ltd ("**the Opponent**").
3. The opposition is based on grounds under **sections 5(2)(b), 5(3) and 5(4)(a)** of the Trade Marks Act 1994 ("**the Act**").

4. The claims under **sections 5(2)(b)** and **5(3)** rely on the Opponent's registered UK trade mark No. 3340434 ("**the Earlier Trade Mark**"), as follows:

gWalk / G-Walk (series of 2 Word Marks)

Filing date: 22 September 2018

Registered: 7 December 2018

5. The Opponent's **Registered Services** are in Classes 41 and 44. The specifications are lengthy, and are set out in the **Annex** at the end of this decision.
6. The claims under **sections 5(2)(b)** and **5(3)** are directed against all of the Applicant's goods and services. The Opponent relies on all of the Registered Services for the claims under these grounds.
7. Thus, under **section 5(2)(b)** it is claimed that the applied-for mark "Go Walk" is similar to the Opponent's mark series "gWalk/G-Walk", and that all of the applied-for goods and services in Classes 9, 35, 41 and 42 are identical or similar to all of the Opponent's services registered in Classes 41 and 44, and that these factors give rise to a likelihood of confusion on the part of the consumer as to the source of the goods or services.
8. Under **section 5(3)** the claim is that the Opponent's trade mark had a reputation in the UK in respect of all of its services in Classes 41 and 44 and that use of the Applicant's trade mark, without due cause, would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the Opponent's trade mark.
9. **Section 5(4)(a)** is based on the Opponent's claimed entitlement to unregistered trade mark rights, resulting from use in the course of trade of various signs ("**the Opponent's Signs**" as set out below) in respect of various goods and services (as set out below), such that the Opponent acquired goodwill and that use of the Application was liable to be prevented by virtue of the law of passing off.

The Opponent's Signs	
Alleged use since 2015 throughout the UK	gWalk ("Sign 1")
	G-Walk ("Sign 2")
Alleged use since 2017 throughout the UK	GO WALK ("Sign 3")
	 ("Sign 4")
Alleged use since 2018 throughout the UK	 ("Sign 5")
	 ("Sign 6")

The Opponent's section 5(4)(a) goods and services

Signs 1 – 6 are all claimed to have been used in respect of the following goods and services

Games;

plays; theatrical and stage productions;

Software; software applications; games software;

Recorded and downloadable media; Audio recordings; video recordings; audio-visual recordings; podcasts; electronic publications; ebooks;

electronic publications featuring, games, puzzles, educational and instructional material;

Software, software applications, and electronic publications relating to posture, structural alignment therapy, structural integration, anatomy, physiology, mobility, walking, movement, fitness, exercise, workouts, health, wellbeing, metabolism, diet, weight loss, treatment of injuries, physical rehabilitation, relaxation, physical therapy, wellness, pain management and pain relief; courses, classes, teaching, coaching, education, educational material, instructional material, audio recordings, entertainment, podcasts, advice, information and assistance relating to posture, structural alignment therapy, structural integration, anatomy, physiology, mobility, walking, movement, fitness, exercise, workouts, health, wellbeing, metabolism, diet, weight loss, treatment of injuries, physical rehabilitation, relaxation, physical therapy, wellness, pain management and pain relief; structural integration therapy; physical therapy; physical education.

10. The Opponent claims that at the date of the Application, the Signs were distinctive of goods and services offered by the Opponent, or with its consent, with the result that a

significant number of members of the public in the UK expect that those goods and services supplied by reference to each of those marks are connected in the course of trade with the opponent, or their licensees, and with no other.¹

Applicant's defence

11. The Applicant submitted a notice of defence, including a counterstatement denying all of the grounds. Its denials included that, with the exception of Sign 3, the marks or signs are not similar, and the registered services are not similar to any of the Applicant's goods and services; it denied any misrepresentation and put the Opponent strict proof of its claimed reputation and goodwill and denied the asserted consequent types of damage.

Representation, papers filed and hearing

12. The Applicant is represented by D Young & Co LLP. In the initial stages of these proceedings, the Opponent was represented by Beck Greener LLP before the matter was pursued in person by Mr Mladen Grabovac, as Director of the Opponent company. During the evidence rounds, both parties filed evidence in chief, and the Opponent also filed submissions in reply dated 29 December 2023.²
13. The Applicant requested an oral hearing, which, following a reschedule, took place before me by video conference on 16 January 2025. Victoria Jones of Counsel attended on behalf of the Applicant; Mr Grabovac attended on behalf of the Opponent. Ms Jones filed a helpful skeleton argument in advance of the oral hearing. The Opponent, then without professional legal representation, was not required to do so, but Mr Grabovac nonetheless filed a skeleton argument ahead of the hearing. This decision is taken based on my close reading of the papers filed and the submissions made at the oral hearing.

STATUTORY PROVISIONS

14. Sections of the Act applicable to this decision are set out below:

¹ Paragraph 4 of its statement of grounds.

² These submissions in reply were presented as a witness statement signed by Mr Grabovac and dated 29 December 2023, but since the document was formally imperfect, the tribunal wrote, on 31 January 2024, to inform the parties that the statement would be considered as comprising submissions arguing the Opponent's position, and that such content as may be intended as evidence of fact relates to matters that are not relevant to the grounds of opposition raised.

Section 5 Relative grounds for refusal of registration.

- (1) [...]
- (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”.
- (3) A trade mark which is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”
 - (3A) Subsection (3) applies irrespective of whether the goods and services for which the trade mark is to be registered are identical with, similar to or not similar to those for which the earlier trade mark is protected.]
- (4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented—
 - (a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

....

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.

- (4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.

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.

15. Since the Opponent's trade mark was filed before the priority date of the contested Application, it constitutes an "earlier trade mark" for the purposes of section 5.³ Since the Opponent's Earlier Trade Mark had been registered for less than five years at the Applicant's priority date, the use conditions set out in section 6A of the Act are not engaged and the Opponent may rely on all of the specified services under the Earlier Mark.
16. Nonetheless, the section 5(3) ground requires evidence of use to bear out the Opponent's claimed reputation, which is asserted in respect of the whole scope of its registered services, as set out in the Annex at the end of this decision. Additionally, the section 5(4)(a) ground requires evidence of relevant actionable goodwill associated with the unregistered signs in relation to the goods and services detailed in the table above.

THE EVIDENCE

17. The Opponent's evidence comprises a witness statement of Mladen Grabovac, dated 12 April 2023, introducing Exhibits A to J. Mr Grabovac has been the director of eWoke Ltd (his company, and the Opponent in these proceedings) since 2020. Exhibit A is a synopsis of 14 supportive statements from a range of third parties, broadly referencing their awareness of Mr Grabovac's G-Walk offerings by various means; the full statements from those third parties are filed as Exhibits A1 to A14.
18. Mr Grabovac states that the purpose of his evidence is to demonstrate that "G-WALK" had a reputation in the UK by 20 January 2022, when the Application was filed ("**the Relevant Date**"). To permit the Opponent a modest degree of leeway, I will construe that statement as not intended to limit the purpose of the evidence only to the reputation claimed under section 5(3) in respect of the Earlier Registered Mark series, and will proceed on the basis that the evidence is also to be considered for what it establishes with regard to the goodwill claimed under section 5(4)(a) in respect of all six signs relied on.

3 Section 6 of the Act.

The Opponent's evidenced market

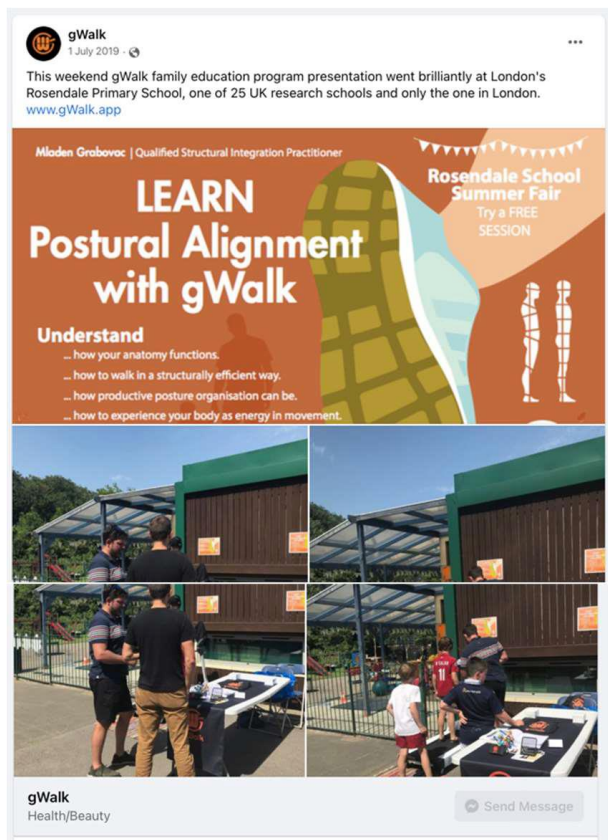
19. Mr Grabovac states that the use of the earlier trade mark (and, to some extent, the Signs claimed for goodwill) is in the field of “haptic education process software” and therapeutic movement software.⁴ This is not a widely familiar area, and I found some of the evidence a little difficult to fully grasp as to what it signified in concrete terms.
20. What seems clear from the evidence, is that Mr Grabovac has developed software that is of interest primarily to those engaged in the field of **Structural Integration (SI)**. It is my understanding from the evidence, that SI is an educational or therapeutic framework concerned with the effects of movement and gravity on the body's connective tissue (fascia), to improve alignment and posture, address pain and restore balance. It seeks to optimise correct movement of the body as a means of healing and transforming itself.⁵
21. The reputation and goodwill that the Opponent claims, appears therefore based on a very limited pool of users. Mr Grabovac states that the UK SI practitioner market is 90 people. Exhibit B2 includes a table (seemingly provided by the EU Guild for Structural Integration) that shows a total of 62 SI practitioners in the UK in 2019. Even taking the number 90 as the whole market of SI practitioners to be accurate, this is a tiny number. Mr Grabovac presents a table of numbers of SI practitioners and others in the UK who he states have used G-WALK. He states that 77 SI practitioners (85%) have used G-Walk between 2015 – 2022. From this Mr Grabovac states that “even by modest projection, there are around 69,000 users of the G-WALK ... making G-WALK representing the SI industry’s most progressive marketing product and the industry development platform.” Mr Grabovac states that since 2015, the G-WALK delivery system operated “specifically in the SI market” but “with successful expansion to the general population within the ImTec sector”.
22. I do not consider the claimed expansion to “the general population within the ImTec sector” to be robustly demonstrated. The evidence on this claim is as follows:


4 Paragraph3 of Mr Grabovac's witness statement.

5 **Exhibit A9** - witness statement of Stacey Jenkins, director of the Guild for Structural Integration GSI, in Utah, USA.

- (i) **SI Practitioners and their clients:** From the base of 77 SI practitioners, Mr Grabovac states that 16,000 of their clients will have been educated “using G-WALK in practice format.” However, very little evidence is filed to explain that extrapolation and on what basis it may be considered reliable. Various of the 14 third parties do state, either as clients or practitioners, that they have used G-WALK in some way. However, as I discuss further later in this decision, it is not fully clear what quite is comprised in what the Opponent has offered. It is therefore difficult to ascertain in what ways a consumer may have encountered any of the claimed signs and in relation to what goods or services. The asserted 16,000 is not supported by the evidence of numbers of downloads of the Opponent’s app, which are extremely low.⁶
- (ii) **Music:** Mr Grabovac also states that between 2015 – 2022, 50,000 people have used G-WALK in relation to “formative music”. In support of this assertion he refers to **Exhibit A4**, which is a witness statement of Joel Clements, dated 14 December 2022. Mr Clements is a DJ and UK hip hop musician. He states that his first knowledge of G-WALK was in 2017, “as an already established product” when he started SI sessions with Mr Grabovac. He states that he started a cooperation with G walk to produce specific music material designed to create movement aligned with the structure of walk. He states that some of this original music is “part of the G-WALK app on the UK and international market”, and that “some of the material has already been performed publicly via different music channels, including social media, and has been heard by an estimated 50,000 people.” However, this asserted estimation of 50,000 is unsupported by any corroborating evidence and it is not possible to ascertain in what ways a consumer may have encountered any of the claimed signs, and in relation to what goods or services.
- (iii) **Schools:** He states that 1147 school children and parents of school children in the UK used G-WALK 2015 – 2022. In support of this statement, the Opponent refers to Exhibits A6 and A7, and Exhibit E. **Exhibit E** largely consists of the image, shown below, of a Facebook post, celebrating the success of the presence of gWalk at a London primary school fair, one weekend at the end of June 2019.

6 See paragraph 22(iv)(c) and (d) below.



The exhibit, alongside the above image, describes itself as showing “Use and rent of sport and other equipment (treadmill, head phones, phone holders, t-shirts etc) to children and parents”. I can see that the exhibit includes a picture of treadmill, and the post appears to invite attendees to try a free session, to understand how anatomy works and how to walk in a structurally efficient way. While the image of the treadmill is not clear, I am prepared to accept that the orange markings that are visible, may  perhaps, be Sign 5:

However, I do not consider that Exhibit E establishes the stated “rent of sport and other equipment” to children and parents.⁷ I find the exhibit shows only that some attendees at the Rosendale Primary School Fair in June 2019 will have had an opportunity to experience the G-WALK offering, walking on a treadmill, supported, presumably by some sort of audio guidance. I accept, too, that it is likely that those who tried out the treadmill will have been exposed to the sign “G-WALK”. However,

⁷ At best, it may be that the treadmill was hired out to the school as part of Mr Grabovac’s services, but this is not clear from the evidence.

it is not possible to determine how many people came across the G-WALK offering that day. The exhibit does not even show how many people saw the Facebook post.

Exhibits A6 and **A7** are witness statements from headteachers at Montessori schools in London, stating that “Mr Grabovac delivered his first G-WALK to the school in 2015, when he began taking groups of children on educative walking excursions to local woods and allotments” and that “in 2018, when the online application was published, Mr Grabovac delivered classes of guided G-WALKs to children within the schools.” The walks were also “offered to the school’s teachers and parents.” Exhibit A6 states that Mr Grabovac promoted to the school “his G-WALK app and game Tesla a.d. that can be played online, educating movement through and science in movement.” The exhibits refer to Mr Grabovac’s work for the schools as including providing a number of “G-WALK related games ... building toys related to movement and growth, for outdoors and in a growing garden.”

It is not clear to me that the stated figure of 1147 school children and parents is one that is robust or that it is possible to ascertain reliably in what ways a consumer may have encountered any of the claimed signs, and in relation to what goods or services. It seems to me that the best that may be concluded is that Mr Grabovac has provided, to a small number of Montessori schools in London, educational and engagement services based around movement and walking, where some of the children may have used the G-WALK app.

(iv) **Direct and online clients:** Mr Grabovac states that 1718 people have used G-WALK as “direct and online clients”. Mr Grabovac’s evidence includes a table at Exhibit B1 that breaks down this 1718 figure of direct and online clients as comprised of:

(a) **Personal G-WALKS:** 40 people given “personal G-WALKS” between 2015 – 2018, and 171 given “personal G-WALKS” since 2018. It is my understanding that these personal G-Walks were provided by Mr Grabovac in the context of

his being “a certified advanced SI practitioner”.⁸ It is not clear how many of the 171 are to be attributed as before the Relevant Date, but even allowing that the great majority or even all of those 171 pre-date the Relevant Date, the numbers are very small in absolute terms and in the context of the UK general population at large. It is unclear which goods or services are comprised by “personal G-WALKS” offered, so it is difficult to ascertain in what ways a consumer may have encountered any of the claimed signs and in relation to what goods or services.

- (b) **Web G-Walks:** The table refers to 1292 Web G-Walks, which appears to be based on a figure of 63 in 2021 and 798 in 2022. It is not clear how many of the 798 are to be attributed as before the Relevant Date (in January 2022) and it is not fully clear to me which goods or services are comprised by “Web G-Walks”, so it is again difficult to ascertain in what ways a consumer may have encountered any of the claimed signs and in relation to what goods or services. The figure of 1292 is stated to be a compound based on $798 + 63 \times 1.5$ to cover the 2018, 2019 and 2020. It is not clear why actual figures for 2018 – 2020 were not provided. It is difficult to assess the overall reliability of these precisely given figures, which are anyway modest.
- (c) **Google Play downloads:** The table gives a figure of 50 people using G-WALK between 2015 – 2022 as a result of android app sales in the UK via the Google Play store. The image shown Exhibit B3 appears to be an undated screenshot of the app’s page on the Google Play store. The exhibit features the signs gWalk and Sign 5.
- (d) **Apple downloads:** The chart and data, presumably from the App Store, shows that the app has been downloaded 87 times to Apple devices.
- (e) **Manual sales:** Exhibit B refers to a total of 78 “Game Manual Book Users”. 60 of those 78 appear to be sales via Amazon of the book “Tesla A.D: AI Resurrection: Age of the Drones” and the other 18 copies of the “Game workbook” are said to have been given out in person. These numbers are very

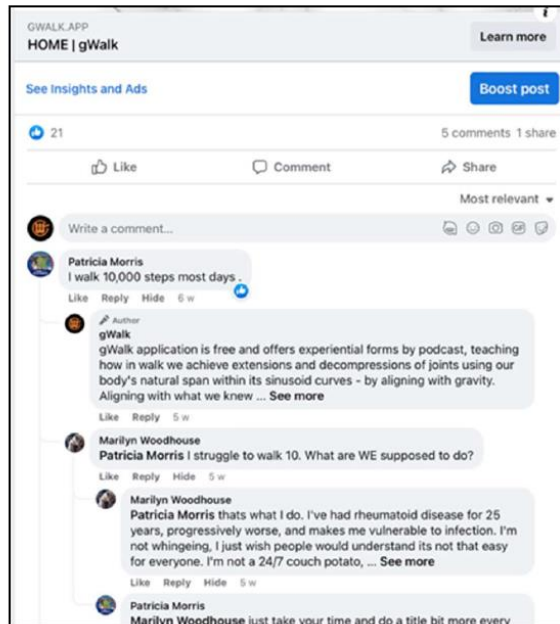
8 Paragraph 5 of his witness statement.

small. As to the relationship between Tesla A.D. and the Opponent, **Exhibit G1** is a screenshot of Tesla A.D. offered for sale on Amazon.co.uk as paperback or Kindle where the rubric refers to “an interactive and immersive online game and modern take on Embodiment and Structural Integration of humanity in the peak of the digital age through the conceptual work of Nikola Tesla”. The product details show the publisher as eWoke (the Opponent), dated 23 May 2020. **Exhibit G2** shows screenshots from the Kindle edition where the opening page refers to “gWalk through Structural Integration of Human Potential with original lectures of Nikola Tesla”; a later page in the Kindle edition is also shown, which includes a direction to a “www.gwalk.app”. In the explanatory text accompanying the Exhibit G2, Mr Grabovac states that the “G-walk app directs to ‘Play’ the game, exploring and building haptic forms, both, as games clues, points and levels”.

Marketing Strategies

23. I will return to consider the difficulties I found with regard to the nature and scope of what is offered by the Opponent, but for now, I record my views on what the evidence shows by way of marketing and promotion of the Opponent’s offerings.
24. **First marketing:** At paragraph 6 of his witness statement, Mr Grabovac states that G-WALK was first marketed as follows:
- i. To Jaime Wong during “a commercially presented financial pitch” on 28 March 2015, where Mr Wong states that “Mr Grabovac demonstrated GO WALK the G-WALK”;
 - ii. To Cranfield University and Hybrid Air Vehicles (HAV) Limited, seemingly in the context of a PhD research proposal;
 - iii. To the Montessori schools mentioned;
 - iv. To the School of Natural Therapies in London, from which Mr Grabovac gained his Diploma in Sports Massage Therapy in 2015. Exhibit A8 is a witness statement from the Director of that course, Joseph O'Dwyer, who states that Mr Grabovac “included delivered therapy extension walking experience as post-treatment recommendations” which he states Mr Grabovac “referred to as G walk”. Mr O'Dwyer states that Mr Grabovac later informed him that he had turned his G-Walk into an online application.

25. **Social media:** Mr Grabovac states that “G-Walk social media follower ratio is 1:129”. I am unclear what is meant by that statement; I note that it is accompanied by a hyperlink to a Facebook page for “gWalk.the.Woke”, but I have not accessed that hyperlink because hyperlinks are not acceptable forms of evidence, partly because what they link to is subject to change and is not therefore a stable format to show a state of affairs at any given point in time. The Facebook page has not been exhibited in evidence, so I cannot determine what information it may have contained.
26. **Marketing routes:** Mr Grabovac states that G-Walk “is currently” marketed through SI professional associations, conferences and symposiums, periodical professional and commercial bulletins. These points are corroborated inasmuch as the witness statements at Exhibit A confirm that G-Walk gave sponsorship to the 2020 and 2021 International Association of structural integrators (IASI) Symposium and featured in the 2019 IASI yearbook, which “was distributed in the UK and accessed by close to 70% of SI practitioners in the UK”.⁹ Mr Grabovac also refers to use in “professional schools”, but most of the supporting evidence on this comes from witnesses overseas (US, Brazil, EU), which is irrelevant for this UK tribunal decision. Mr Grabovac also states that marketing has been through the schools mentioned, SI practitioners, individual clients, a music application (Exhibit A4), app stores, social media and social networks. The supporting evidence is extremely thin, barely expanding beyond the materials I have already summarised. The witness asks a great deal of each of the pieces of evidence. Exhibit F is headed as being in support of the claims on “social networking” and “open interactive platforms”. **Exhibit F1** is described as “an interactive Facebook page with customers communicating as part of G walk social network”. It shows simply the following image:



All I can discern from this undated image, is that one of the five comments, in response to the original post (someone saying that they walk 10,000 steps most days), is “gWalk application is free and offers experiential forms by podcast, teaching how in walk we achieve extensions and decompressions of joints using our body’s natural span within its sinusoid curves by aligning with gravity.” The original post is shown to have garnered 21 likes and been shared once.

What goods and services are in evidence?

27. I remind myself that the Opponent has claimed a reputation for *all* of its Registered Services (in Classes 41 and 44 as set out in the Annex at the end of this decision), and goodwill in respect of an array of goods and services as set out in the table at paragraph 9 above. Before I come to address the claims under the section 5(3) and 5(4)(a) grounds, I set down here my findings on what the evidence may be said to establish in terms what is the nature and scope of the goods or services shown to have been provided under the Signs/Marks claimed by the Opponent. There are various descriptions or accounts across the evidence, including the following:

- (i) A marketing product and the industry development platform;¹⁰

¹⁰ Paragraph 7 of Mr Grabovac’s witness statement

- (ii) **Exhibit A11** is a witness statement, dated 4 January 2021, by Paul Wilby, Director of the UK Guild for Structural Integration, who describes G-Walk as a referral platform offered to the general public in the UK as an open source online tool working for SSI practitioners. Since the online G walk sessions are free of charge, the app acts as an online introduction experience point for the general public;
- (iii) Similarly, **Exhibit A13** is a witness statement by a former director of IASI who describes G-Walk as “an online educational application aimed to introduce the general public to SI practice by providing online experience through mindfulness. It connects the general public to certified SI practitioners through its social network promoting in person SI experience after online experience, assessing transition from the online immersive technology experienced into real world, serving and educating the SI-specific market”;
- (iv) a supportive app alongside the digital book Tesla AD “exploring and building haptic forms”;
- (v) therapy extension walking experience as post-treatment recommendations;
- (vi) providing “WALK related games ... building toys related to movement and growth, for outdoors and in a growing garden;”
- (vii) Mr Clements refers to “sensory immersive material produced by G walk, such as sensory products related to music i.e. sound and tactile I touch and walk (that is touching ground and balancing against the touch established with the ground) as walking designs”;
- (viii) **Exhibit A5** is a witness statement of Klen Samarinac, a US-based software developer, who developed part of the software for the G-walk app, which he describes as “the only application on the market that educates dynamic structure of walking”. Mr Grabovac too states that he believes the G-WALK’s walking app is the only “educating walking” app in existence. He refers to the availability of “the app / online course and game as being available via Google Play, the Apple

App Store and Amazon”, but the supporting evidence shows an extremely modest reach. Mr Grabovac states that “users of the G-WALK can access educational online games and relevant characters and avatars, available on Amazon.co.uk or app. We have currently 78 players, 60 purchases through Amazon.co.uk (Exhibit G and B7), plus 18 were delivered on different electronic media in person.”

- (ix) At paragraph 7 of his witness statement Mr Grabovac states “*since 2015, the G walk delivery comes about as a comprehensive compiled set of, individual or combined: recorded media, audio recordings, video recordings, audio visual recordings (including music, art and synaesthetic graphics), podcasts, non printed publications, electronic publications, e-books; electronic playscripts (including characters and avatars); Electronic film scripts; electronic publications featuring, games, puzzles, scripts, educational, instructional and entertainment material, as an app (Exhibit A5, B3, B4, F2, G2), website, email distribution, art products (etc), ImTec and real sport equipment, interactive software and electronic publications relating to posture, structural alignment therapy, structural integration, anatomy, physiology, mobility, walking, movement, fitness, exercise, workouts, health, wellbeing, metabolism, diet, weight loss, treatment of injuries, physical rehabilitation, relaxation, physical therapy, wellness, pain management and pain relief. All these media are used within the gWalk system.*”

I find that none of this detailed delivery content is actually substantiated in the evidence, and, again, the evidence shows that the UK customer base and uptake for any of the above claimed usage has been very limited.

The Applicant’s evidence

28. The evidence on behalf of the Applicant comprises a witness statement of Richard Parker, dated 8 December 2023, introducing **Exhibits RP01 to RP16**.¹¹ Witness statement of Anna Reid, dated 15 September 2023, supported by **Exhibits AMR01 to AMR07**.

11 (Exhibits RP04 and RP16 being confidential.)

29. Mr Parker is the Managing Director of Skechers USA Ltd and his evidence convincingly demonstrates that the Opponent has a reputation in the UK in respect of footwear. Mr Grabovac accepted as much in his skeleton argument. The first GO WALK product line was launched to retail in the UK in 2011 and has been consistently sold ever since. The shoes have been offered for sale through over 500 retail customers, operating over 1500 branches, including John Lewis, Jones Bootmaker, Schuh and Sports Direct, and sold online through the Opponent's website, Amazon, Next, ASOS and others. The Go Walk mark can be seen on the tongues and lining of various styles of footwear, as well as on box lids and swing tags.¹² The footwear goods have been widely advertised and promoted, including on social media. **Exhibit RP10** shows a representative selection of Instagram and Facebook posts, dated 2013 and 2021. YouTube advertising campaigns from 2021 are shown at **Exhibit RP11**, where the mark GO WALK is included within the video title and description, as well as in the content of the video, which has been viewed over 222,000 times. UK sales figures of GO WALK products from 2014 – 2022 achieved over £5 million.
30. Anna Reid is a partner at D Young & Co LLP, the Applicant's legal representative. Her evidence reflects her firm's exploration of some of the points arising in the Opponent's evidence, including broken hyperlinks, low web traffic and the shortcomings of the evidence of Amazon and the app stores. I note the criticisms, but I doubt that they materially affect the strength of the Opponent's evidence, given the shortcomings I have previously highlighted.

DECISION

SECTION 5(4)(a) CLAIM

31. The Opponent's statement of grounds begins with presenting its case in respect of the section 5(4)(a) ground, the provisions of which I set out above at paragraph 14. This ground is again directed against all of the applied-for goods and services.

12 Exhibit RP5.

Applicable principles

32. In *Discount Outlet v Feel Good UK*, [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a Deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the Jif Lemon case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely **goodwill** or reputation; **misrepresentation** leading to deception or a likelihood of deception; and **damage** resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether “*a substantial number*” of the Claimants’ customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21).”

33. **Goodwill:** The first element described in *Reckitt & Colman* refers to “goodwill or reputation”, although case law has developed so as to distinguish between goodwill and “mere reputation” – the latter being insufficient alone to sustain a claim of passing off. To satisfy the first element of the tort, the Opponent is required to show that it has goodwill among UK consumers.

34. The best-known case as to the meaning of ‘goodwill’ is given in *IRC v Muller and Co’s Margarine Limited* [1901] AC 217. At 223, Lord MacNaghten said:

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom.”

35. In *Hart v Relentless Records*, Jacob J. (as he then was) stated his view that “the law of passing off does not protect a goodwill of trivial extent. one is looking for more than a minimal reputation.”¹³ This does not mean that a small business is incapable of establishing goodwill - even though its goodwill may be modest, a business can

13 *Hart & Anor v Relentless Records* [2002] EWHC 1984 (Ch) [62]

protect signs which are distinctive of that business under the law of passing off. Thus in *Lumos Skincare Ltd v Sweet Squared Ltd*,¹⁴ the Court of Appeal upheld a claim for passing off based on the claimant's use of the mark "LUMOS" for around three years before the defendant's use of the same mark, even though sales volumes and turnover were modest.

36. Halsbury's Laws of England Vol. 97A (2021 reissue) contains guidance on establishing the likelihood of **misrepresentation or** deception, in particular, paragraph 636, in which it is noted (with footnotes omitted) that:

"Establishing a likelihood of deception generally requires the presence of two factual elements:

(1) that a name, mark or other distinctive indicium used by the claimant has acquired a reputation among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other indicium which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as two successive hurdles which the claimant must surmount, consideration of these two aspects cannot be completely separated from each other.

The question whether deception is likely is one for the court, which will have regard to:

- (a) the nature and extent of the reputation relied upon,
- (b) the closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business;
- (c) the similarity of the mark, name etc used by the defendant to that of the claimant;
- (d) the manner in which the defendant makes use of the name, mark etc complained of and collateral factors; and

14 [2013] EWCA Civ 590

(e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.”

My findings on the section 5(4)(a) claim

37. Although the Opponent had the benefit of registered rights under its earlier trade mark, with no requirement for proof of use, its statement of grounds led with the section 5(4)(a) claim. The reason for leading with that ground is presumably because:
- (i) one of the signs claimed as the anchor of goodwill (Sign 3) is “Go Walk”, which self-evidently identical to the Applicant’s mark; and
 - (ii) the Opponent claims goodwill attached to Sign 3 in respect of goods and services that differ from those for which the earlier trade mark is registered, that include, for example, “Software; software applications; games software”.
38. Had the Opponent’s evidence made good the claimed points (i) and (ii) above, then the opposition would clearly be likely to succeed on the section 5(4)(a) ground, at the very least in relation to the applied-for *downloadable computer software for interactive games*, which would be covered by the claimed games software.
39. However, I find it is apparent from my consideration of the evidence, that the Opponent has not established the existence or ownership of goodwill in respect of the claimed **Sign 3** (GO WALK). Indeed, I find that the evidence is insufficient to establish goodwill in connection with *any* of the Signs claimed under section 5(4)(a). I agree with the submissions made by Ms Jones, criticising the strength, clarity and focus of the Opponent’s evidence, as follows.
40. Even though the concept of ‘trader’ for the purposes of passing off can extend beyond the simple definition of someone who derives income from the provision of goods and services, the Opponent’s evidence still falls short of what is necessary to establish a protectable goodwill.

41. Although Mr Grabovac states that the G-WALK trade mark has been used “on all the components (products and services) of an interactive information system operating a work management software”, the evidence shows very few examples of actual use of any of the 6 Signs; much of the evidence is undated or current (thereby falling outside of the relevant period); the evidence contains what appear to be documents which have been created by Mr Grabovac and which contain links to various websites with no clear explanation as to what is shown on those websites or why they are relevant; it refers to products or services which appear to have no clear connection to any of the 6 Signs; and it contains evidence about overseas activity and provides unsupported facts and figures.
42. I have commented on the opaque nature of the goods and services in evidence; it is far from clear what ‘trade’, if any, has been carried out either by Mr Grabovac or the Opponent. Mr Grabovac describes his products and services as “*an interactive information system operating a work management software*”, “*haptic education process software*” and “*movement engaging, sport and therapy ‘work-out’ software*’. The only concrete examples of the provision of any such ‘products and services’ (in the UK) appear to be the following:
- Mr Grabovac having been involved in providing some ‘G-Walks’ to a small number of schools.¹⁵ There is however no clear evidence of if/how any of the marks relied upon were used in relation to such activity nor is there any evidence of income having been generated from such activity; and/or
 - Mr Grabovac/the Opponent having created an app called ‘G-Walk’, the precise contents of which are unclear. It is variously described as “*an educating walking app*” and “*an app platform used as a referral platform offered to the general public in the UK as an open-source online tool...Since the G-WALK sessions are free of charge, the app acts as an online introduction experience point for the general public.*”¹⁶

15 [Exhibit A6, Exhibit A7 and Exhibit E.](#)

16 [Paul Wilby witness statement at Exhibit A11.](#)

43. No details of income/other revenue are provided, nor is there any compelling information regarding the use of any of the claimed Signs in relation to the app, nor as to the extent of downloads/use/marketing of the app in the UK during the Relevant Period. The evidence is that the scale of any such use is minimal.
44. There is no evidence in respect of transfers or assignments of goodwill from Mr Grabovac to the Opponent, so even the ownership of the asserted goodwill has not been firmly established.
45. Mr Grabovac states at paragraph 4 of his witness statement that the “SI profession” has had a trade mark “GO WALK” since 1950. However, there is no information on whether that “trade mark” is registered, and if so, where, by whom or in respect of which goods or services. It may be that the reference to “trade mark” is here more metaphorical – signifying that that “Go Walk” is a slogan typically used by SI practitioners since the development of the theory and discipline. Even allowing, as the evidence suggests, that the small number of individual SI practitioners in the UK may have routinely deployed the instruction “go walk” or even “go walk the G-Walk”, this does not give rise to goodwill or trade mark significance even among the limited number of clients with whom they may have engaged. It will be understood only as an instruction.
46. **Exhibit H** purports to set out the timeline of the graphical development of the G walk signs; it is a narrative exhibit, which includes the Signs claimed for the section 5(4)(a) grounds, and elaborates on the intended conceptual implications of each of the iterations. However, there is no evidence to show actual use of the signs or their exposure to the public. In any event, given that I have found that the greater evidence in respect of the sign G-Walk/gWalk, which is self-evidently closer in similarity to the applied-for mark, fails to satisfy the threshold of use or exposure sufficient to give rise to actionable goodwill, the case for goodwill or misrepresentation based on the other signs is weaker still.
47. Even if I am wrong in my finding of no protectable goodwill, and the Opponent indeed has goodwill, associated with the Sign G-Walk/gWalk, among a very small set of the UK public, as indicated by the various supportive third-party witness statements, any

such goodwill could relate only to a very narrow set of products or services in the field of Structural Integration treatment/therapy related to walking. Such products or services are dissimilar in nature, intended purpose and method of use from the goods and services for which the applied-for mark is sought to be registered and will be provided by distinct and different trade channels. Taking this into account along with the Applicant's pre-existing and highly reputed business under the 'GO WALK' brand, there is no risk of any misrepresentation or damage arising.

48. **OUTCOME UNDER SECTION 5(4)(a):** The opposition under section 5(4)(a) fails.

DECISION ON THE SECTION 5(2)(b) CLAIM

49. I turn next to consider whether the opposition succeeds based on the claim that the marks are similar and the applied-for goods and services are identical or similar such that there is a likelihood of confusion. An assessment under section 5(2)(b) is multi-factorial and the claim must be determined in light of the following principles, which 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 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.¹⁷

50. The relevant principles are:

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

¹⁷ 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 retained EU trade mark case law.

- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question. The average consumer is deemed to be reasonably well informed and reasonably circumspect and observant, but someone who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them they have kept in their 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 greater 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; and

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

Comparison of the goods and services

51. Section 60A(1) of the Act provides that for the purpose of the Act goods and services are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification, nor are they to be regarded as being dissimilar from each other on the ground that they appear in different classes.
52. When considering whether goods are similar, all the relevant factors relating to the goods should be taken into account. Those factors include, inter alia:¹⁸
- i. the physical nature of the goods;
 - ii. their intended purpose;
 - iii. their method of use / uses;
 - iv. who the users of the goods and services are;
 - v. the trade channels through which the goods reach the market;
 - vi. in the case of self-serve consumer items, where in practice they are found or likely to be found in shops and in particular whether they are, or are likely to be, found on the same or different shelves; and
 - vii. whether they are in competition with each other (taking into account how those in trade classify goods, for instance whether market research companies put them in the same or different sectors);
 - viii. whether they are complementary to each other. Complementary has been described as meaning that *“there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”*.¹⁹ Complementary is an autonomous criterion capable of being the

¹⁸ See *Canon*, Case C-39/97, paragraph 23; and *British Sugar PLC v James Robertson & Sons Ltd.*, [1996]

R.P.C. 281 – the “*Treat*” case

¹⁹ *Boston Scientific Ltd v OHIM*, Case T-325/06, paragraph 82

sole basis for the existence of similarity.²⁰ Complementarity should be distinguished from ‘use in combination’, where goods are merely used together, whether by choice or convenience (e.g. bread and butter; or wine and wine glasses²¹) but are not essential or important to one another’s use such that they would be assumed to share source.

53. I bear in mind too that when interpreting terms in a specification that it is “*necessary to focus on the core of what is described [... and that] trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise*”, although “*where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods [and services] in question*”.²²

My approach on similarity of the goods and services

54. For the sake of brevity, I do not consider it necessary to set out complete findings with regard to the similarity or otherwise of the parties’ respective goods and services. It seems to me self-evident that most of the goods and services are not similar, but that equally, on the face of the specifications, some of the services must be considered identical or similar. The reason for my not setting out a thoroughgoing analysis in respect of each of the specified terms is that as I shall explain below, it is my view that even in respect of identical services the marks themselves are not sufficiently similar to sustain an objection under section 5(2)(b) of the Act.
55. For the purposes of making a comparison, goods can be grouped together where the same reasoning applies.²³ In broad terms the parties’ goods and services may be characterised as follows:

20 *Kurt Hesse v OHIM, Case C-50/15 P*

21 As Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amalia Mary Elliot v LRC Holdings Limited*, BL-0-255-13 - “*It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes.*”

22 *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), paragraphs 11 - 12

23 *Separode Trade Mark* BL O/399/10, paragraph 5

The Applicant's goods and services (approximately)	
Class 9	<p>Downloadable virtual goods, such as clothing, footwear and toys, for use in online virtual worlds;</p> <p>downloadable software for various purposes, namely;</p> <p>for interactive games;</p> <p>for social networking;</p> <p>for streaming multimedia entertainment;</p> <p>for access to an online virtual environment;</p> <p>for creating digital characters and avatars for use in virtual online environments.</p>
Class 35	Retail services featuring virtual merchandise and the above Class 9 goods.
Class 41	Entertainment services in the form of <i>providing virtual environments in which users can interact or hosting virtual performances and social entertainment events</i>
Class 42	<i>Non-downloadable computer software for the creation of digital characters and avatars Providing an interactive website and computer application software for virtual reality game services</i>
The Opponent's services (approximately) (See ANNEX)	
Class 41	<p>Many types of educational services;</p> <p><i>Scriptwriting services;</i></p> <p><i>Sporting and cultural activities</i></p> <p><i>On-line entertainment; Online interactive entertainment</i></p>

Class 44	A wide range of health and beauty services
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56. In my view, the Opponent has failed to establish why any of its services in Class 44 are similar to any of the applied-for goods or services. I do not consider the Opponent's Class 44 services to be similar to the contested goods or services. Nor, despite its claimed reliance on all of its registered services, has the Opponent established why the vast majority of its earlier services in Class 41 are similar to any of the applied-for goods or services.
57. However, in my view, the earlier specified services in Class 41 *On-line entertainment; Online interactive entertainment* are broad enough to encompass or have similarity with most of the applied-for services in Class 41 and Class 42. Thus, for example, I find the Opponent's *Online interactive entertainment* in Class 41 to be at least highly similar, if not identical, to the Applicant's Class 41 *entertainment services, namely, providing virtual environments in which users can interact* and to the applied-for services *Providing an interactive website and computer application software for virtual reality game services* in Class 42. It is on this basis, that some of the goods and services are at least highly similar, that I shall make my determination of this section 5(2)(b) ground.

The average consumer and the nature of the purchasing act

58. Trade mark questions, including the likelihood of confusion, must be viewed through the eyes of the average consumer of the goods or services in question. The word "average" here denotes that the person is typical.²⁴ The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect.
59. It is therefore necessary to determine who is the average consumer of the respective goods or services, and how the consumer is likely to select those goods. It must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question.²⁵

²⁴ *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), paragraph 60

²⁵ *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97

60. The average consumer of the parties' goods and services will be a member of the general public, though some may be used by a business or professional. The goods and services are likely to be marketed online where the consumer will select the goods or services having viewed relevant webpages (or mobile device screens). The selection of the goods or services is therefore primarily visual, although I do not discount that aural considerations may play a part by way of word-of-mouth recommendations.
61. Whilst the parties' goods and services may vary in price, they are not particularly costly (indeed some may be accessed free of charge) and purchasing will not, on average, require an overly considered thought process – typically no more than a medium level of attention for most of the services.

Comparison of marks

62. Section 41(2) of the Trade Marks Act 1994 provides as follows:

“(2) A series of trade marks means a number of trade marks which resemble each other as to their material particulars and as to matters of a non-distinctive character not substantially affecting the identity of the trade mark.”

63. I accept the submission by Ms Jones that as a result of the above provision, the use of a small case or upper case 'g' in the Earlier Trade Mark series of 2 and the use of a '-' in the second mark in the series are matters of a non-distinctive character not substantially affecting the identity of the mark. Accordingly, the Earlier Trade Mark comprises a single invented word. It is accepted that the average consumer will recognise the word 'Walk' within the mark.
64. The Applicant's Mark will be perceived as 2 words which create a unit in the mind of the average consumer, and which will be perceived to mean/refer to an instruction or request to 'Go [and] walk'.
65. **Visual similarity:** There is a medium degree of visual similarity as a result of both marks containing the word 'Walk'. Although both marks also contain the letter 'g' this

is offset by the fact that in the Earlier Mark it appears as part of a composite whole with the word 'Walk' and in the Applicant's Mark it appears in the word 'GO'.

66. **Aural similarity:** There is a medium degree of aural similarity. Whilst the second syllable of each mark will sound the same, the first syllable of each mark will be pronounced differently, namely 'JEE' and 'GOH'.
67. **Conceptual similarity:** The marks are conceptually dissimilar, and I find this is perhaps the most significant factor in the present case. The Applicant's Mark carries the immediate concept of an instruction or request to "Go [and] Walk". Contrastingly, in my view, the 'g' element when used in combination with 'Walk' and appearing at the beginning of the mark will most likely be perceived to have no obvious meaning, though I note the submission by Ms Jones that it may be perceived as referring to 'gravity/gravitational' as a result of its similarity with the well-known word 'G-force' (and in view of the evidenced awareness of gravity in the field of SI services in which the Opponent is interested). I also note the Opponent's evidence that, for some, "G-Walk" is a nickname for a dance style called Gangster Walk.²⁶ Despite the marks having in common the element "walk", I find the clarity of the different conceptual message of the Applicant's Mark to be significant.

Distinctive character of the Opponent's Earlier Trade Mark series

68. The distinctive character of the earlier mark must be assessed, as, potentially, the more distinctive the earlier mark, either inherently or through use, the greater the likelihood of confusion.²⁷
69. In *Lloyd Schuhfabrik*, the Court of Justice of the European Union ("**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

26 Exhibit A4, Witness Statement of Mr Clements.
27 *Sabel* at [24]

of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, 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)".

70. The distinctive character of a trade mark may be enhanced through its use, but having regard to the factors from case law identified in my previous paragraph, the extent of use shown in the evidence is insufficient to have enhanced the distinctiveness of the mark among the UK public. In reaching that conclusion, I note the great size of the UK market for the registered services, the lack evidence of any significant promotion by the Opponent and the lack of sales. With regard to the factor of statements from trade or professional associations, I do not find that the third-party witness statements, supportive of the Opponent, assist in determining the distinctive character of the earlier registered trade mark. The notional average consumer for the similar registered services in Class 41 extends far beyond the limited group who may have encountered Signs 1 and 2 in the niche area of Structural Integration.

71. I find the distinctive character of the Opponent's series G-Walk/gWalk in respect of its similar services in Class 41 to be no more than medium.

Conclusion as to likelihood of confusion

72. I turn now to make a global assessment of likelihood of confusion if the parties' marks were used concurrently in respect of their respective goods and services. This assessment takes account of my findings set out in the foregoing sections of this decision and of all of the various principles from case law outlined in my paragraph 49 above.

73. It requires a realistic appraisal of the net effect of the similarities and differences between the marks and the goods in issue, giving the similarities and differences as much or as little significance as the relevant average consumer would attach to them, noting that such a consumer is taken to be reasonably well-informed and reasonably observant and circumspect. The average consumer is a hypothetical person - a legal construct - created to strike the right balance between the various competing interests including, on the one hand, the need to protect consumers and, on the other hand, the promotion of free trade in an openly competitive market.²⁸
74. Confusion can be direct or indirect. Whereas direct confusion involves the average consumer mistaking one trade mark for the other, indirect confusion is where the average consumer realises that the trade marks are not the same but puts the similarity that exists between the trade marks/goods down to the responsible undertakings being the same or related.
75. The assessment of likelihood of confusion involves factoring in the potential for a greater degree of similarity (or identity) between the goods or services to offset a lesser degree of similarity between the marks. Another favourable factor is that the average consumer will typically exercise no more than a medium level of attention in the purchasing process. However, despite potentially or formally identical specified services, I find that even paying a lower degree of attention, the average consumer will not confuse the marks. They are short marks where even small differences are likely to be noted visually, and where there are clear aural differences in the opening sounds, and a clear conceptual difference. The Applicant's Mark has a conceptual mental hook that will enable a reasonably well informed and reasonably circumspect and observant average consumer to not mix up the marks directly. Nor do I see any basis why a consumer would conclude that the G may be substitute for GO, or a related brand. There is no proper basis for a finding of a likelihood indirect confusion. Despite the mark being identical, there will no more than mere association.
76. **OUTCOME UNDER SECTION 5(2)(b):** The opposition under section 5(2)(b) fails.

28 *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41, Kitchin LJ, particularly paragraph 34.

THE SECTION 5(3) CLAIM

77. This ground is also directed against all of the applied-for goods and services. The statutory provision is set out at my paragraph 14 above. The Opponent claims a reputation in respect of the entirety of its registered services .
78. The relevant case law for section 5(3) can be found in the following judgments of the CJEU: *General Motors*, C-375/97, EU:C:1999:408; *Intel Corporation Inc. v CPM United Kingdom Ltd*, C252/07, EU:C:2008:655; *Adidas-Salomon & Anor v Fitnessworld Trading Ltd*, C-408/01, Page 34 of 61 EU:C:2003:582; *L'Oréal v Bellure*, C-487/07, EU:C:2009:378); and *Marks and Spencer v Interflora*, C-323/09, EU:C:2011:604.. The law appears to be as follows:
- (a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors, paragraph 24*.
 - (b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors, paragraph 26*.
 - (c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman, paragraph 29* and *Intel, paragraph 63*.
 - (d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel, paragraph 42*.
 - (e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel, paragraph 68*; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel, paragraph 79*.

- (f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel, paragraphs 76 and 77.*
- (g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74.*
- (h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oréal v Bellure NV, paragraph 40.*
- (i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora, paragraph 74 and the court's answer to question 1 in L'Oréal v Bellure*).

79. The function and value of a trade mark are not confined to its being an indicator of origin of goods or services (which section 5(2)(b) safeguards); a trade mark can also convey messages, such as a promise or reassurance of quality or a certain image of, for example, lifestyle or exclusivity ('advertising function').²⁹ Section 5(3) aims at

²⁹ (judgment of 18/06/2009, C-487/07, L'Oréal, EU:C:2009:378)

protecting this advertising function and the investment made in creating a certain brand image by granting protection to reputed trade marks, irrespective of the similarity of the goods or services or of a likelihood of confusion, provided that it can be demonstrated that the use of the contested application without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier mark.

Reputation

80. A trade mark has a reputation within the meaning of section 5(3) if it was known to a significant part of the relevant public at the relevant date; the relevant public are those concerned by the products or services covered by the trade mark. There is no fixed percentage threshold which can be used to assess what constitutes a significant part of the public; it is proportion rather than absolute numbers that matters. Reputation constitutes a knowledge threshold, to be assessed according to a combination of geographical and economic criteria. All relevant facts are to be taken into consideration when making the assessment, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by undertaking in promoting it.³⁰
81. The relevant public for the registered services is the UK public at large (including some professional / business use). It is clear from my close account of the evidence that it is insufficient to establish any reputation in the Earlier Mark. In particular, the evidence barely shows any use at all of the mark and does not come anywhere near to what is required to establish reputation. There is no evidence of any real trading for any of the services in the specification or at all. Nor is there any evidence of any income generated, marketing spend, customer base/reach, geographic spread or market share.
82. Since I find that the Opponent's evidence has not established the claimed reputation, which is a required component of section 5(3), it follows that the claim must fail. In the circumstances it is not necessary for me to consider whether the necessary mental link would arise, nor the claimed bases of damage.

30 See, for instance, ruling of Judge Hacon in *Burgerista Operations GmbH v Burgista Bros Limited* [2018] EWHC (IPEC),

83. I do, however, note the Applicant's evidence establishes that at the Relevant Date the Applicant already enjoyed a reputation itself in the subject Mark in relation to its well-known footwear range of products, pre-dating the Opponent's use of the Earlier Signs/Mark. This factor mitigates against a mental link to the Opponent's Earlier Mark and supports an argument that the Applicant had 'due cause' for using the Application Mark given its longstanding, extensive and unchallenged use of the mark in the UK since 2011 as a retailer of footwear. The expansion of its brand and retail services into the proximate online virtual world may therefore be viewed as a natural extension of its business.

84. **OUTCOME UNDER SECTION 5(3):** The claim under section 5(3) fails.

85. **OVERALL OUTCOME** The opposition fails overall and, subject to any successful appeal of this decision, trade mark application 3745566 may proceed to registration.

COSTS

86. The Applicant has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016, as these proceedings commenced before 1 February 2023.

Considering the Notice of opposition and preparing the counterstatement £300

Preparing evidence / considering / commenting on Opponent's evidence £1200

Preparing for and attending a hearing: £1000

TOTAL £2500

87. I order EWOKE LTD to pay SKECHERS U.S.A., INC. II the sum of £2500, to be paid within 21 days of the end of the period allowed for appeal or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings (subject to any order of the appellate tribunal).

Dated this 30th day of January 2026

**Matthew Williams
For the Registrar**

ANNEX

Services registered under the Opponent's Earlier Trade Mark

Class 41

Academic examination services; Advisory services relating to education; Advisory services relating to entertainment; Advisory services relating to the organisation of sporting events; Advisory services relating to training; Arranging and conducting of educational courses; Arranging and conducting of educational events; Arranging and conducting of educational seminars; Arranging and conducting of entertainment activities; Arranging and conducting of entertainment events; Arranging and conducting of music concerts; Arranging and conducting of training courses; Arranging and conducting of workshops; Arranging and conducting seminars; Arranging professional workshop and training courses; Coaching; Coaching services; Coaching services for sporting activities; Computer assisted teaching services; Computer based educational services; Conducting classes in exercise; Conducting classes in nutrition; Conducting classes in weight control; Conducting classes in weight reduction; Conducting educational support programmes for healthcare professionals; Conducting fitness classes; Conducting of classes; Conducting of courses; Conducting of educational courses; Conducting of educational courses in business; Conducting of entertainment activities; Conducting of entertainment events; Conducting seminars; Conducting training seminars; Conducting training sessions on physical fitness online; Conducting workshops and seminars in personal awareness; Conducting workshops and seminars in self awareness; Consultancy relating to physical fitness training; Consultancy services in the field of entertainment;

Consultancy services relating to training; Continuous training; Courses for the development of consulting skills; Courses (Training -) relating to philosophical subjects; Cultural activities; Cultural and sporting activities; Dance schools; Demonstration [for instructional purposes]; Developing educational manuals; Development of educational courses and examinations; Development of educational materials; Directing of plays; Disc jockey services; Education; Education and instruction; Education and instruction services; Education and training consultancy; Education, entertainment and sport services; Education in movement awareness; Education services relating to health; Education services relating to management; Education services relating to medicine; Education services relating to meditation; Education services relating to modelling; Education services relating to music; Education services relating to nutrition; Education services relating to physical fitness; Education services relating to therapeutic treatments; Education services relating to yoga; Educational and instruction services relating to sport; Educational and training services relating to healthcare; Educational consultancy; Educational research; Educational services for teaching acting; Educational services for the dramatic arts; Educational services in the nature of correspondence courses; Educational services in the nature of correspondence schools; Educational services provided by a school; Educational services provided by academies; Educational services provided by institutes of further education; Educational services provided by institutes of higher education; Educational services provided for children; Educational services provided for teachers of children; Educational services provided to industry; Educational services relating to beauty therapy; Educational services relating to dancing; Educational services relating to physical fitness; Entertainer services provided by musicians; Entertainment; Entertainment, education and instruction services; Exercise and fitness classes; Exercise classes; Exercise [fitness] advisory services; Exercise [fitness] training services; Exercise instruction; Exhibition services for entertainment purposes; Exhibitions (Arranging -) for cultural purposes; Exhibitions (Arranging -) for educational purposes; Fitness club services; Fitness training services; Gym activity classes; Gymnasium club services; Gymnasium services; Health and fitness club services; Health and fitness training; Health and wellness training; Health club [fitness] services; Health club services [exercise]; Health education; Higher education services; Information relating to computer gaming entertainment provided online from a computer database or a global communication

network; Information relating to cultural activities; Information relating to education, provided on-line from a computer database or the internet; Information relating to entertainment, provided on-line from a computer database or the internet; Information relating to sports education; Information services relating to books; Information services relating to education; Information services relating to entertainment; Information services relating to recreation; Information services relating to schools; Information services relating to sport; Instruction; Instruction courses relating to physical fitness; Instruction courses relating to sporting activities; Instruction in body grooming; Instruction in cosmetic beauty; Instruction in dancing; Instruction in diet [not medical]; Instruction in languages; Instruction in martial arts; Instruction in music; Life coaching (training); Live band performance services; Live band performances; Modeling for artists; Modelling for artists; Modelling services for artists; Motion picture film production; Movement tuition for pre-school children; Music composition for others; Music mixing services; Music performances; Online education services; On-line entertainment; Online interactive entertainment; On-line publication of electronic books and journals (non-downloadable); Operation of sports camps; Organisation of balls; Organisation of continuing educational seminars; Organisation of entertainment and cultural events; Organisation of exhibitions for cultural or educational purposes; Organisation of festivals; Organisation of live performances; Organisation of training courses; Organisation of training seminars; Organising of educational conferences; Organising of educational congresses; Organising of educational exhibitions; Organising of educational games; Organising of educational lectures; Organising of educational seminars; Organising of entertainment; Perceptual teaching services; Physical education instruction; Physical education services; Physical fitness centre services; Physical fitness consultation; Physical fitness education services; Postgraduate training courses; Pre-school education; Pre-school teaching; Production of entertainment in the form of sound recordings; Production of entertainment shows featuring dancers and singers; Production of entertainment shows featuring instrumentalists; Production of films for educational purposes; Production of teaching reports; Production of theatrical performances; Production of theatrical shows; Providing courses of instruction; Providing courses of training; Providing education in the field of art rendered through correspondence courses; Providing educational demonstrations; Providing educational entertainment services for children in after-school centers; Providing of training, teaching and tuition;

Recording, film, video and television studio services; Recreation services; Recreational facilities (Provision of -); Rental of artwork; Rental of audio books; Rental of audio cassettes; Rental of audio discs; Rental of audio equipment; Rental of audio recordings; Rental of audio tapes; Rental of audio tapes bearing recorded music; Rental of audio tapes for language training; Rental of audio-visual apparatus; Rental of audio-visual recordings; Rental of billiard tables; Rental of books; Rental of educational materials; Rental of electronic book readers; Rental of equipment for use at gymnastic events; Rental of equipment for use at sporting events; Rental of recorded education; Rental of recorded entertainment; Research library services; School courses relating to examination preparation; School courses relating to study assistance; School services; School services for the teaching of art; Script writing services; Scriptwriting services; Self-awareness courses [instruction]; Shows and films production; Singing classes; Song writing services; Songwriting; Sound recording studios; Sport camps; Sporting and cultural activities; Sports camp services; Sports information services; Sports instruction services; Syndication of radio programmes; Teaching; Teaching services; Technical training relating to safety; Training; Training and education services; Training courses; Training courses (Provision of -); Training in yoga; Training or education services in the field of life coaching; Training services; Training services relating to fitness; Tuition in physical fitness; Tuition in sports; University education services; University services; Vocational education; Vocational education and training services; Vocational education for young people; Vocational education relating to avoidance of health related problems; Vocational guidance [education or training advice]; Yoga instruction; Workshops for cultural purposes; Workshops for educational purposes; Workshops for recreational purposes; Workshops for training purposes; Written training courses.

Class 44:

Advisory services relating to beauty; Advisory services relating to diet; Advisory services relating to health; Advisory services relating to slimming; Advisory services relating to the care of animals; Advisory services relating to weight loss; Art therapy; Beauty consultation; Bodywork therapy; Clinics; Consultancy in the field of body and beauty care; Consultancy in the field of nutrition; Consultancy provided via the Internet in the field of body and beauty care; Consultancy relating to health care; Consultancy

services relating to farming; Consultancy services relating to personal behaviour; Consultancy services relating to slimming; Consultation services in the field of weight management; Consulting services relating to health care; Cosmetic treatment; Cosmetic treatment for the body; Cosmetic treatment for the face; Cosmetics consultancy services; Counselling relating to diet; Counselling relating to nutrition; Cultivation of plants; Development of individual physical rehabilitation programmes; Facial beauty treatment services; Foot care; Health advice and information services; Health care; Health care relating to osteopathy; Health care relating to relaxation therapy; Health care relating to remedial exercise; Health care relating to therapeutic massage; Health clinic services; Health consultancy; Health counseling; Health spa services; Healthcare advisory services; Healthcare consultancy services; Healthcare information services; Information relating to health; Information relating to massage; Information relating to nutrition; Information services relating to health care; Insomnia therapy services; Massage services; Meditation services; Nutrition consultancy; Occupational therapy and rehabilitation; Occupational therapy services; Personal therapeutic services relating to circulatory improvement; Physical rehabilitation; Physical therapy services; Physiotherapy [physical therapy]; Professional consultancy relating to health; Professional consultancy relating to health care; Providing health information; Providing information in the field of health via a website; Providing information relating to dietary and nutritional guidance; Reflexology; Reflexology services; Reiki services; Therapeutic treatment of the body; Therapeutic treatment of the face; Therapeutical pilates; Therapy (Physical -).
