O/0140/26

TRADE MARKS ACT 1994

IN THE MATTER OF
INTERNATIONAL REGISTRATION NO. WO0000001796774
BY TOUCHE TEKSTİL ANONİM ŞİRKETİ
IN RESPECT OF THE TRADE MARK:

IN CLASS 25

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 451045
BY ALTERNATIVA DE MODA S.A.S.

BACKGROUND AND PLEADINGS

1. TOUCHE TEKSTİL ANONİM ŞİRKETİ ("the holder"), is the holder of international trade mark registration 1796774 ("the IR"), shown on the cover page of this decision. The IR is registered with effect from 14 February 2024. The request to protect the IR in the UK was made on 14 February 2024. It was accepted and published for opposition purposes on 27 September 2024 in respect of goods in class 25, as set out in the Annex to this decision.

2. On 27 November 2024 Alternativa de Moda S.A.S. ("the opponent") opposed the protection of the IR in the UK based upon section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opposition is directed at all of the holder's class 25 goods.

3. For the purposes of its opposition, the opponent relies upon its earlier comparable UK trade mark ("UKTM"),[1] namely:

TOUCHÉ

UKTM 00910515807

Filing date: 21 December 2011

Registration: 26 September 2014

Relying upon all its goods in class 25, namely:

Class 25	Swimwear, beachwear accessories, intimate apparel, lingerie, sleepwear, pyjamas, loungewear; all the aforementioned goods except for gloves.

4. The opponent submits that due to the close similarity between the respective marks and the identity or close similarity between the goods at issue, there exists a likelihood of confusion on the part of the public.

[1] Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable UK trade marks for all right holders with an existing registered EUTM or International Registration designating the EU. As a result, the opponent's mark was converted into a comparable UK trade mark. Comparable UK marks are now recorded in the UK trade mark register, have the same legal status as if they had been applied for and registered under UK law, and the original filing dates remain the same. See also Tribunal Practice Notice ("TPN") 2/2020 End of Transition Period – impact on tribunal proceedings.

5. The holder filed a counterstatement denying the ground of opposition and putting the opponent to proof of use.

6. Only the opponent filed evidence. Neither party requested a hearing and only the opponent filed written submissions in lieu of a hearing. This decision is taken following a careful review of the papers.

7. The opponent is represented by Beck Greener LLP; the holder is represented by De Clercq & Partners.

EVIDENCE AND SUBMISSIONS

8. The opponent's evidence was in the form of two witness statements:

- The witness statement of Ms Ana Lucia Zuluaga dated 5 May 2025, accompanied by 3 exhibits (ALZ1 to ALZ3). Ms Zuluaga is the submanager of the opponent, a position held for 20 years.

  The main purpose of Ms Zuluaga's evidence is to demonstrate that the earlier mark has been put to genuine use in the EU and the UK during the relevant period in relation to the goods relied upon.

- The witness statement of Ms Jessica Vallis dated 6 May 2025, accompanied by 1 exhibit (JMV1). Ms Vallis is a trade mark attorney acting on behalf of the opponent.

  Ms Vallis' evidence comprises extracts from the UKIPO register showing pending and registered trade marks containing the word PRIVE or PRIVÉ.

9. The opponent filed written submissions in lieu on 27 August 2025.

10. This decision is taken following careful consideration of the papers on file.

RELEVANCE OF EU LAW

11. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

DECISION

Section 5(2)(b)

12. Sections 5(2)(b) of the Act reads as follows:

> "5(2) A trade mark shall not be registered if because-
>
> > (a)…
> >
> > (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected
>
> there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark."

Proof of use

13. The registration procedure for the earlier mark was completed more than five years prior to the filing date of the contested application. Therefore, it is subject to proof of use pursuant to section 6A of the Act. In its notice of opposition, the opponent made a statement of use in relation to the class 25 goods relied upon. Accordingly, I will begin by assessing whether there has been genuine use of the earlier mark.

14. The relevant statutory provisions are as follows:

"6(1) This section applies where:

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) 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 relevant period.

(1A) In this section "the relevant period" means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(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 relevant period 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 (the "variant form") differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), 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)-(5A) [Repealed]

(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.

15. Section 100 of the Act reads:

"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."

16. The relevant period during which genuine use must be shown is the five years ending with the application date of the contested IR, being 14 February 2024. Therefore, the relevant period is 15 February 2019 to 14 February 2024. As the opponent's earlier mark is a comparable mark, the territory in which use of the mark must be shown is the EU (including the United Kingdom)[2] prior to IP completion day, being 31 December 2020,[3] and the United Kingdom only thereafter.

17. Consequently, the onus is upon the opponent to prove that genuine use of the earlier mark was made within the relevant territories, during the relevant period, and in respect of the relevant goods as registered.

18. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

[2] *Leno Merken BV v Hagelkruis Beheer BV,* Case C-149/11, paragraphs 36, 50 and 55.
[3] See paragraph 7 of Part 1, Schedule 2A of the Act.

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the Court of Justice of the European Union (“CJEU”) in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung amaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13];

Silberquelle at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial raison d'être of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or

preserving market share for the relevant services. For example, use of the mark by a single client which imports the relevant services can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].

107. The trade mark proprietor bears the burden of proving genuine use of its trade mark: see section 100 of the 1994 Act and *Ferrari* at [73]-[83]. The General Court of the European Union has repeatedly held that genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned: see e.g. Case T-78/19 *Lidl Stiftung & Co KG v European Union Intellectual Property Office* [EU:C:2020:166] at [25]. It has also repeatedly held that the smaller the commercial volume of the exploitation of the mark, the more necessary it is for the proprietor to produce additional evidence to dispel any doubts as to the genuineness of its use: see e.g. *Lidl* at [33]."

19. Whether the use shown is sufficient for this purpose will depend on whether there has been real commercial exploitation of the earlier mark, in the course of trade, sufficient to create or maintain a market for the goods at issue during the relevant five-year period. In making the assessment, I am required to consider all relevant factors, including:

i) The scale and frequency of the use shown;
ii) The nature of the use shown;
iii) The goods for which use has been shown;
iv) The nature of those goods and the market(s) for them; and
v) The geographical extent of the use shown.

20. Before assessing the opponent's evidence of use, I remind myself of the comments of Mr Daniel Alexander QC, (as he then was) sitting as the Appointed Person, in *Awareness Limited v Plymouth City Council*, where he stated that:[4]

> "22. The burden lies on the registered proprietor to prove use […]. However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public."

21. I also note Mr Alexander QC's (as he then was) comments in *Guccio Gucci SPA v Gerry Weber International AG*.[5] Although the case concerned revocation proceedings, the principle is the same for proof of use in opposition actions. He stated:

> "The Registrar says that it is important that a party puts its best case up front – with the emphasis both on "best case" (properly backed up with credible exhibits, invoices, advertisements and so on) and "up front" (that is to say in the first round of evidence). Again, he is right. If a party does not do so, it runs a serious risk of having a potentially valuable trade mark right revoked, even where that mark may well have been widely used, simply as a result of a procedural error. […] The rule is not just "use it or lose it" but (the less catchy, if more reliable) "use it – and file the best evidence first time round – or lose it"."

[4] Case BL O/230/13.
[5] Case BL O/424/14.

22. The comments of Mr Geoffrey Hobbs QC (as he then was) in *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, where he sat as the Appointed Person, are also relevant.[6] He stated that:

> "21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed in *Matsushita Electric Industrial Co. v. Comptroller General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:
>
> > [24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.
>
> 22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not 'show' (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services

[6] Case BL O/404/13.

covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use."

23. Accordingly, whilst there is no requirement to produce any specific form of evidence, I must consider what the evidence as a whole shows me and, whether on this basis, I can reasonably be satisfied that there has been genuine use of the mark.

Form of the mark

24. Before I move on to assess if the opponent has shown genuine use, I must first consider if I find the use of the mark as shown in the evidence to be use of the mark as registered or acceptable variants.

25. Section 6A(4)(a) of the Act states:

> "…use of a trade mark includes use in a form (the "variant form") differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor)…"

26. The opponent's registration is for the mark:

TOUCHÉ

27. Where the opponent has used its earlier mark as registered, that will clearly be use on which the opponent can rely.

28. However, it is noted from the evidence that the opponent's mark has also been used in the following ways:

TOUCHÉ COLLECTION	TOUCHÉ COLLECTION
Touche Internacional	Touché Collection
TOUCHÉ BALNÉAIRE	TOUCHÉ COLLECTION
TOUCHÉ ALNÉAIRE	TOUCHÉ BALNEAIRE

29. In *Lactalis McLelland Limited v Arla Foods AMBA*,[7] Phillip Johnson, sitting as the Appointed Person, considered the correct approach to the test under section 46(2). He said:

> "13. […] While the law has developed since *Nirvana* [BL O/262/06], the recent case law still requires a comparison of the marks to identify elements of the mark added (or subtracted) which have led to the alteration of the mark (that is, the differences) (see for instance, T-598/18 *Grupo Textil Brownie v EU*IPO*, EU:T:2020:22, [63 and 64]).
>
> 14. The courts, and particularly the General Court, have developed certain principles which apply to assess whether a mark is an acceptable variant and the following appear relevant to this case.
>
> 15. First, when comparing the alterations between the mark as registered and used it is clear that the alteration or omission of a non-distinctive element does not alter the distinctive character of the mark as a whole: T-146/15 *Hypen v EUIPO*, EU:T:2016:469, [30]. Secondly, where a mark contains words and a

[7] BL O/265/22

figurative element the word element will usually be more distinctive: T-171/17 *M & K v EUIPO*, EU:T:2018:683, [41]. This suggests that changes in figurative elements are usually less likely to change the distinctive character than those related to the word elements.

16. Thirdly, where a trade mark comprises two (or more) distinctive elements (eg a house mark and a sub-brand) it is not sufficient to prove use of only one of those distinctive elements: T-297/20 *Fashioneast v AM.VI. Srl*, EU:T:2021:432, [40] (I note that this case is only persuasive, but I see no reason to disagree with it). Fourthly, the addition of descriptive or suggestive words (or it is suppose figurative elements) is unlikely to change the distinctive character of the mark: compare, T-258/13 *Artkis*, EU:T:2015:207, [27] (ARKTIS registered and use of ARKTIS LINE sufficient) and T-209/09 *Alder*, EU:T:2011:169, [58] (HALDER registered and use of HALDER I, HALDER II etc sufficient) with R 89/2000-1 CAPTAIN (23 April 2001) (CAPTAIN registered and use of CAPTAIN BIRDS EYE insufficient).

17. It is also worth highlighting the recent case of T-615/20 *Mood Media v EUIPO,* EU:T:2022:109 where the General Court was considering whether the use of various marks amounted to the use of the registered mark MOOD MEDIA. It took the view that the omission of the word "MEDIA" would affect the distinctive character of the mark (see [61 and 62]) because MOOD and MEDIA were in combination weakly distinctive, and the word MOOD alone was less distinctive still."

30. In conjunction with the above case law, I remind myself that section 6A(4)(a) of the Act enables an opponent to rely on use of a mark "in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered". With regards to the above marks, I acknowledge that where a registered mark is used with additional matter, this may still constitute acceptable use of the mark as registered, where this element continues to act independently as an indicator of origin.

31. Further, as the earlier registered mark is a word mark, I note that the registration of a word mark gives protection irrespective of capitalisation, colour and stylisation.[8]

32. Accordingly, I am of the view that use of the marks shown in the above table do constitute use of the earlier mark, as I find that the additional text and/or device elements make no material difference to the distinctiveness of the mark as registered, on the basis that this element in all of the above versions continues to play an independent, dominant role and therefore continues to indicate origin. Consequently, I find that use of the above stated marks is use upon which the opponent can rely.

33. Even if I am wrong in my finding, I am of the view that the additional text and/or device elements added to the registered word TOUCHÉ, does not sufficiently alter the distinctive character of the earlier mark, and therefore use of the marks shown above, constitute as acceptable variant use of the earlier mark upon which the opponent can rely.

Use of the mark

34. Whether the use shown of the earlier mark is sufficient to establish genuine use will depend on whether there has been real commercial exploitation of the same, in the course of trade, sufficient to create or maintain a market for the goods at issue, in the relevant territories, during the relevant five-year period.

35. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.[9] As indicated in the case law above, use does not need to be quantitively significant to be genuine.

36. The opponent claims to have used its earlier mark in the EU/UK during the relevant period, in relation to the goods relied upon, namely:

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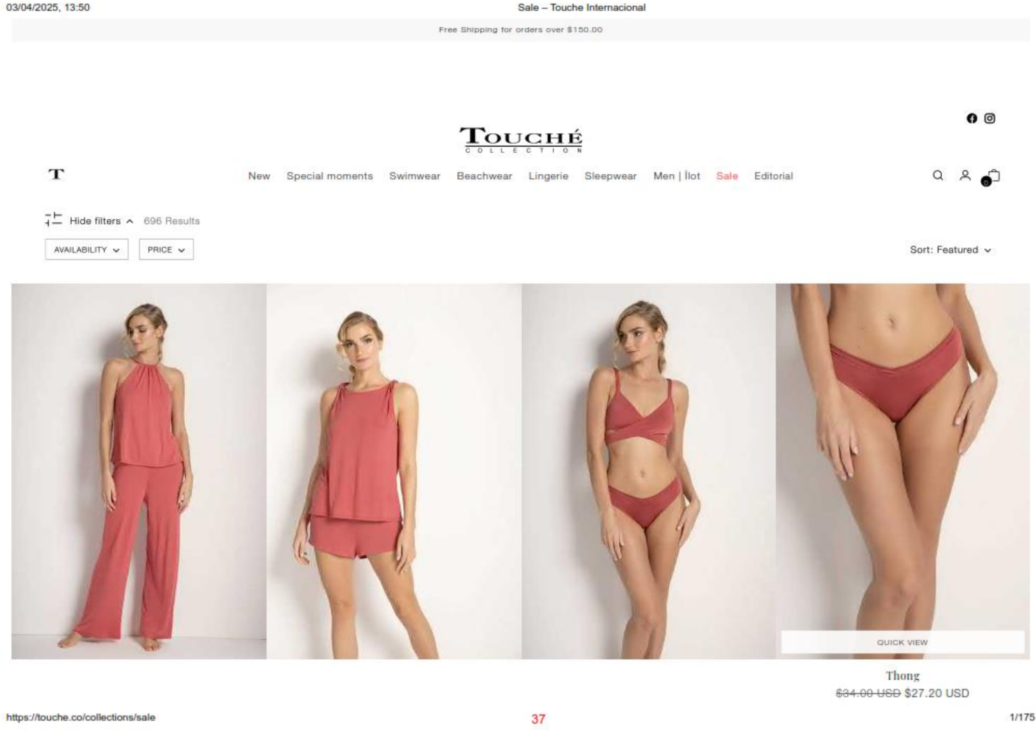
[8] *Bentley Motors Limited v Bentley 1962 Limited*, BL O/158/17
[9] *New Yorker SHK Jeans GmbH & Co KG v OHIM*, Case T-415/09.

Class 25 Swimwear, beachwear accessories, intimate apparel, lingerie, sleepwear, pyjamas, loungewear; all the aforementioned goods except for gloves.

37. With regards to use of the earlier mark, the following has been deduced from Ms Zuluaga's witness statement and annexes ("exhibits"):

- The opponent has produced and offered lingerie, swimwear and other clothing under the brand name TOUCHÉ for nearly 40 years. The opponent, based in Colombia, South America, employs over 120 members of staff at its production plant, 50 employees in its stores and 65 employees in its administrative offices.[10]

- The opponent is a global brand with sales to their international consumers made through their website 'www.touche.co'.[11] A snapshot from their website is shown below:



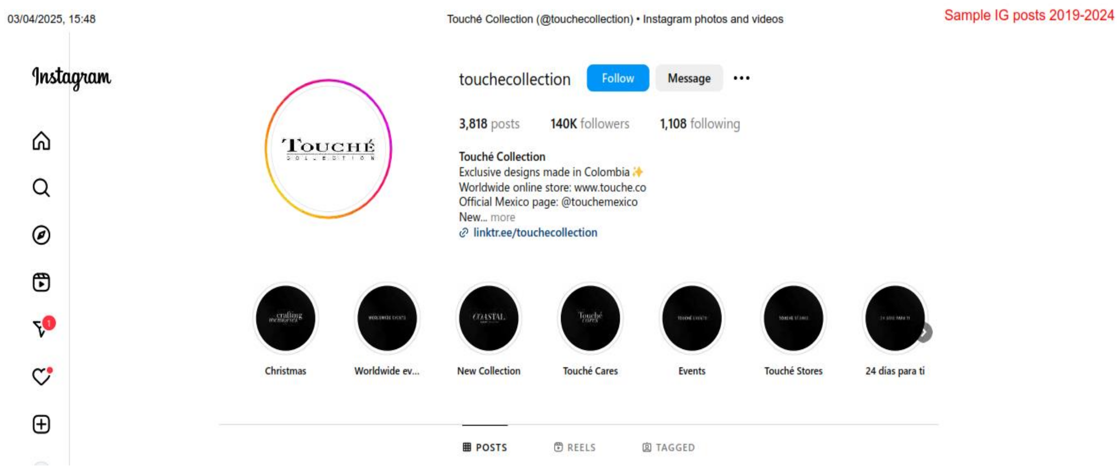
[10] See witness statement of Ms Zuluaga, paragraph 6.
[11] Exhibit ALZ1.

The website screenshots feature various items of clothing, namely sandals, shorts, swimwear, lingerie, beachwear accessories, loungewear, dresses, trousers, tops, sleepwear, shirts, t-shirts and hats. The opponent's trademark features prominently throughout the screenshots.

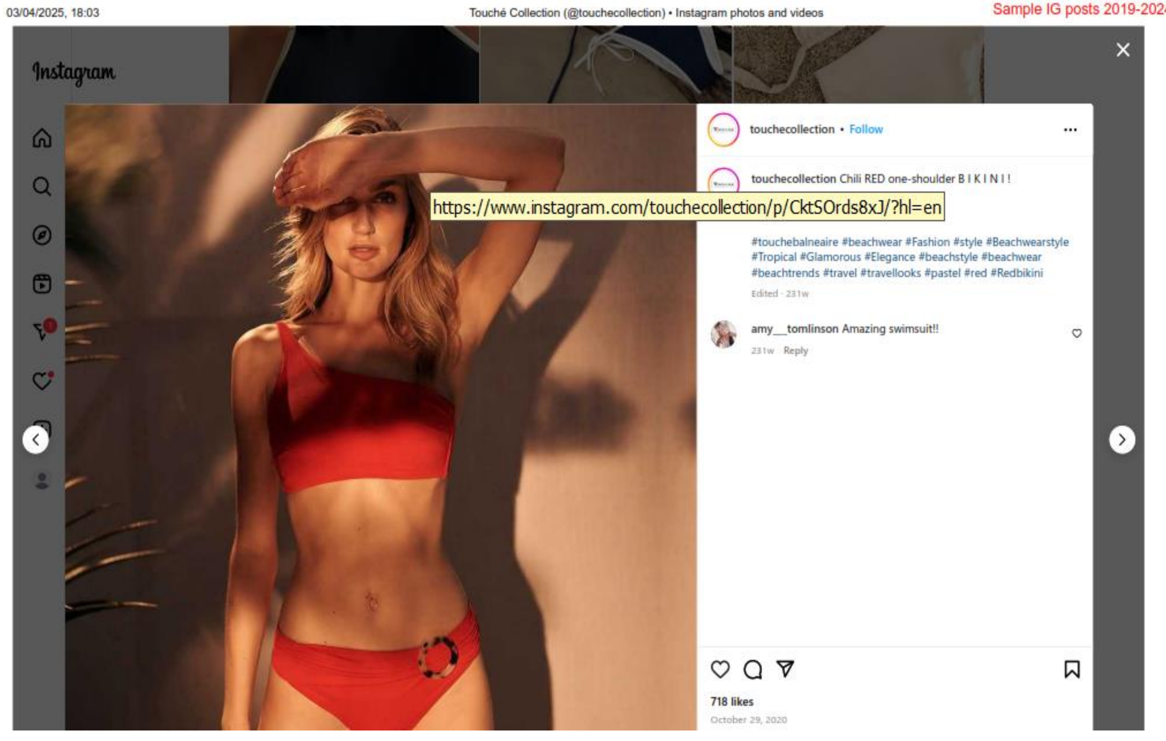
It is noted that the prices displayed on the website are shown in US dollars. The website screenshots are dated 3 April 2025 and 4 April 2025, which is presumably the date on which the pages were printed from the website. As these dates fall outside of the relevant period, I am unable to determine with any accuracy how the opponent's website looked during the relevant period.

In addition, I am unable to ascertain from the screenshots the number of visitors to the opponent's website, the target audience of the website and whether any visitors to the website were based in the EU/UK.

- When posting on social media platforms, namely Instagram, the opponent's TOUCHÉ mark features prominently, as the following snapshots show: [12]



[12] Exhibit ALZ2.



The Instagram posts are produced in English, often followed by a Spanish translation. The posts are dated between 2019 to 2024. However, whilst it is noted that the posts have received engagement in the form of 'likes' and that the platform 'homepage' shows that the opponent's Instagram account has

140,000 followers, it is not clear how many of the ‘likes’ or ‘followers’ relate to EU/UK consumers.

- In February 2024, the opponent’s 133,045 Instagram followers, 0.32% being from the UK (equating to 426 UK followers), received regular updates regarding products offered under the opponent’s brand:[13]

Seguidores por país — Ver gráfico

País	%
Brasil	0.49%
Reino Unido	0.32%
Guatemala	0.31%
Francia	0.29%
Italia	0.29%
Alemania	0.26%

However, I remind myself that the end of the relevant period is 14 February 2024 and note that ‘follower’ data has not been provided for the relevant period prior to February 2024.

- During the month of February 2024, the opponent’s international webpage ‘www.touche.co’ had over 4,000 active users across 5,571 sessions, who spent an average of 1 minute 29 seconds per session.[14]

  However, again I note that February 2024 falls at the end of the relevant period and there is no data for the relevant period prior to this date. Furthermore, it is not possible to ascertain from the above information the geographical location of the ‘4,000 active users’ of the opponent’s website, nor am I able to establish with any certainty if the opponent’s website targeted consumers in the UK or EU (during the relevant period). Though, I take note of the ‘example purchase page’ in the opponent’s evidence[15] which suggests that the UK consumer is catered for.

[13] See witness statement of Ms Zuluaga, paragraph 8.
[14] See witness statement of Ms Zuluaga, paragraph 9.
[15] Exhibit ALZ1, page 47.

- In her witness statement Ms Zuluaga states that *"Invoices for sales to UK consumers over the relevant periods are attached […]."*[16] Accordingly, I infer from this statement that the ten invoices included in the evidence represent the total amount of invoices that the opponent has which demonstrate sales to UK consumers, during the relevant period. I note that the invoices clearly display the opponent's trade mark and include descriptions and unit prices of the products at issue.[17]

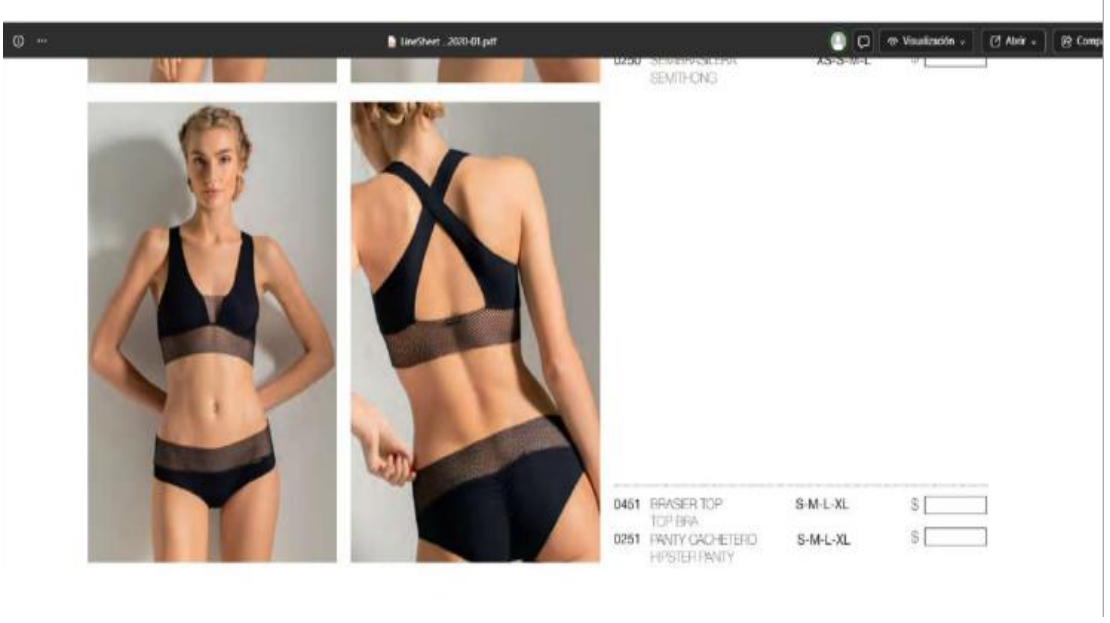
- A summary of the ten invoices is shown in the following table:[18]

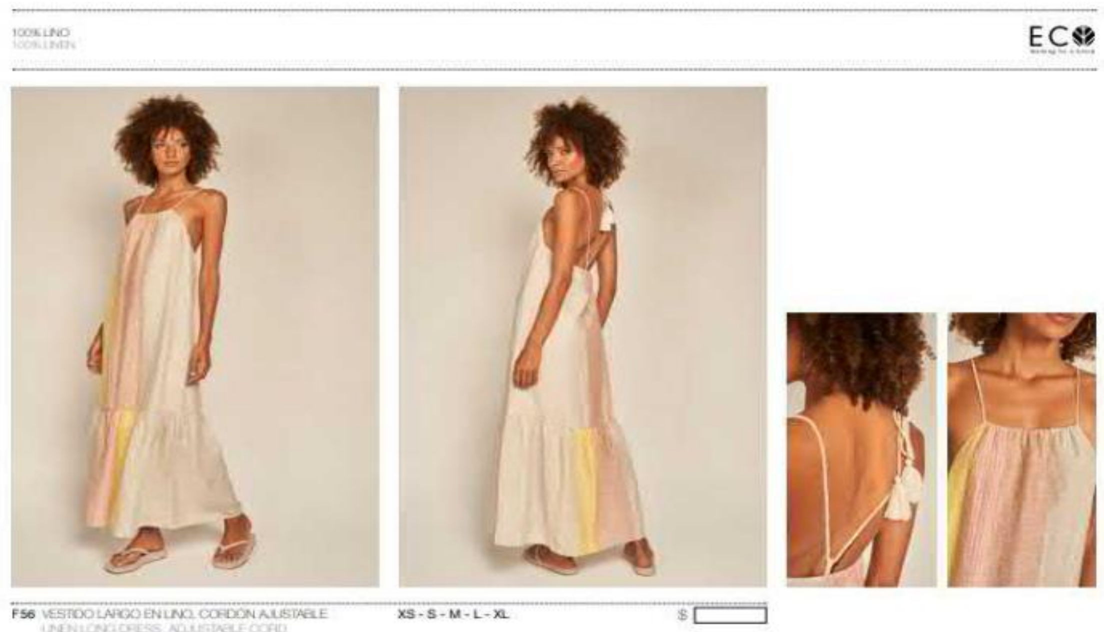
Invoice No.	Date	Customer location	Item(s)	Total (USD)
FEEI80	05 Nov 2020	Lancaster	Dress	69.81
FEEI81	05 Nov 2020	Lancaster	Kimono	146.19
FEEI83	11 Nov 2020	Liverpool	Panty, Bras	131.19
FEEI305	08 Apr 2021	Liverpool	Swimwear, Dress	252.40
FEEI633	12 Nov 2021	London	Swimwear	893.00
FEEI741	19 Jan 2022	London	Swimwear	259.20
FEEI787	22 Feb 2022	Epping	Swimwear	350.00
FEEI1546	31 July 2023	Manningtree	Dress	156.80
FEEI1615	11 Sep 2023	London	Body	44.40
FEEI1616	11 Sep 2023	London	Swimwear	127.20
			Total	**$2430.19**

  The invoices are dated between 5 November 2020 and 11 September 2023. Whilst personal details and invoice delivery addresses have been redacted, it is clear that they relate to various delivery locations in England (UK), namely Lancaster, Liverpool, London, Epping and Manningtree. However, the unit amounts of the goods at issue along with the invoice totals are shown in US dollars ($).

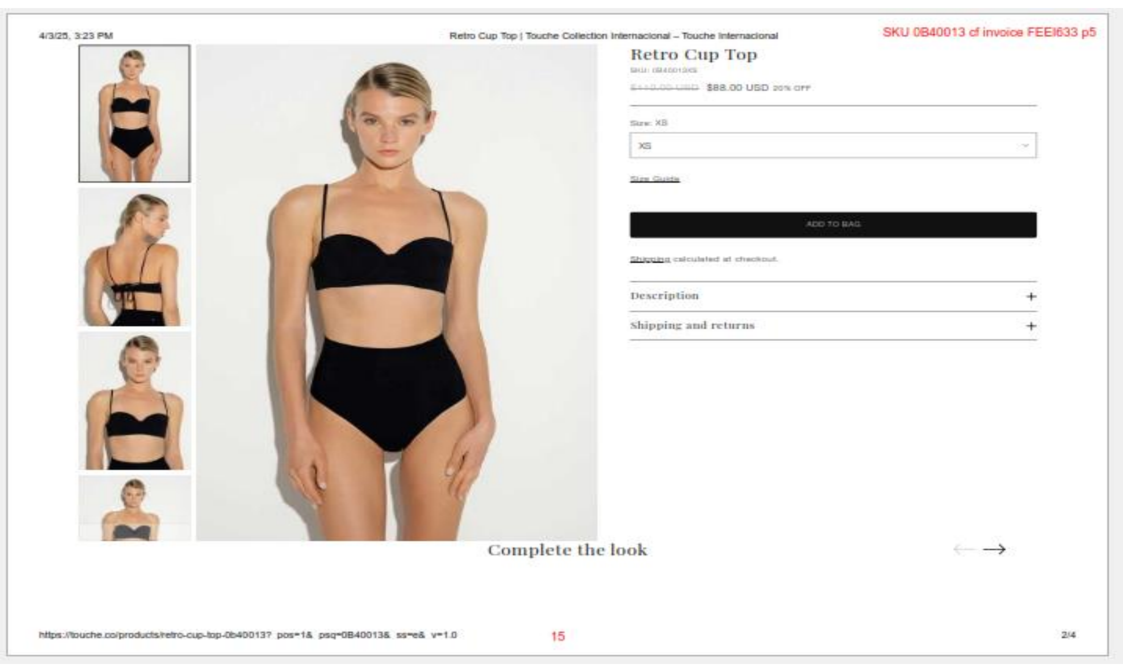
- Extracts from the opponent's catalogue and website showing seven images of samples of products referred to in the invoices are included in the evidence.[19] However, in five out of the seven images, it is not clear which website or catalogue these images were retrieved from, nor do the images feature the opponent's trade mark at issue or prices for the goods, as can be seen from the following two snapshots:

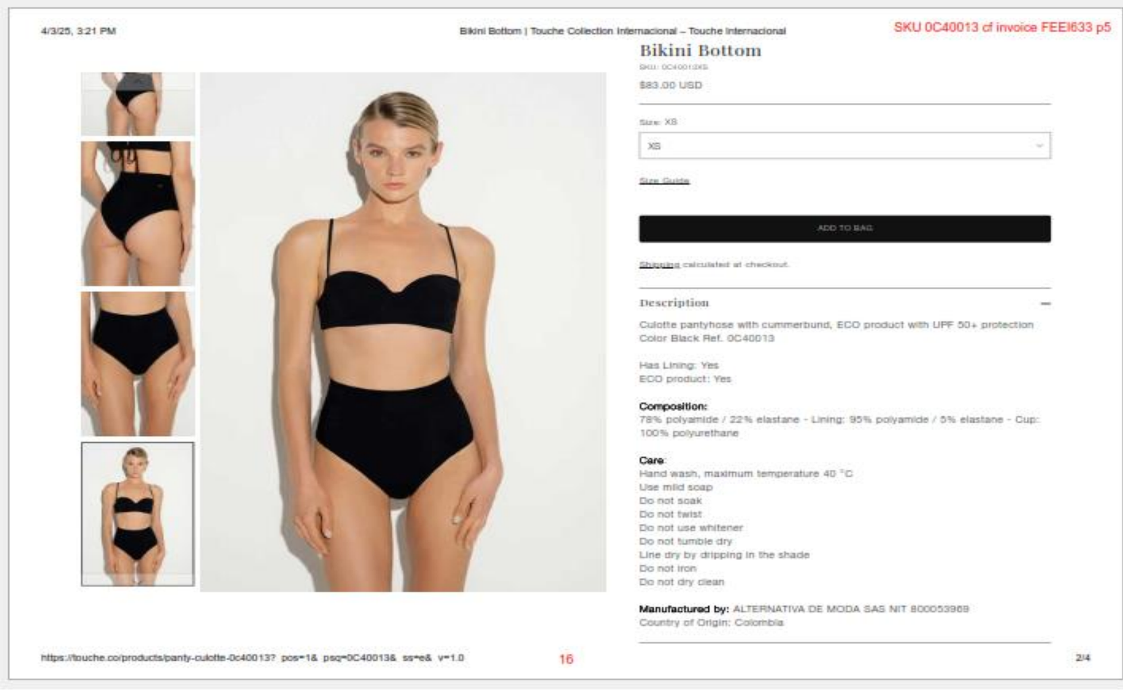
[16] See witness statement of Ms Zuluaga, paragraph 10
[17] Annex ALZ3.
[18] See witness statement of Ms Zuluaga, paragraph 10.
[19] Exhibit ALZ3.





As for the remaining two website/catalogue images, dated 4 March 2025, it is clear that they have been retrieved from the opponent's website. Furthermore, they feature the opponent's TOUCHÉ trade mark, along with the unit price of the goods, albeit shown in US dollars, as the following shows:





- Ms Zuluaga states that the opponent's sales figures and its ability to reach a wider audience and expand its international customer base was impacted by the Covid pandemic.[20] She explains that, for many years, the opponent attended several international exhibitions of lingerie and swimwear (such as *Mode city* or *Miami swimshow*), which were subsequently cancelled because

[20] See witness statement of Ms Zuluaga, paragraph 12

of the pandemic. Ms Zuluaga states that, prior to cancellation, the exhibitions had proved useful to show the opponent's brand, garner new clients, and secure space in industry publications such as magazines, to advertise and promote its brand. However, I have no evidence before me to demonstrate that the opponent attended such exhibitions, where the exhibitions took place or the geographical origin of those who attended the exhibitions. Further, I have no evidence before me to demonstrate that the opponent had secured space in industry publications such as magazines, in order to promote its brand in the relevant territories prior to or following the Covid pandemic.

Assessment of genuine use

38. With regard to the evidence of use submitted, I must now consider if it sufficiently demonstrates genuine use, whilst reminding myself that use does not have to be quantitively significant to be genuine.

39. The burden is on the opponent to prove that it has used its mark within the relevant period. Therefore, it was the opponent's responsibility to provide proof that the mark was used in the EU/UK during the five-year relevant period. In my analysis above, I have highlighted numerous shortcomings in the evidence.

40. Allowing for favourable assumptions, it is clear from the evidence that the opponent has used its earlier mark on the class 25 goods relied upon. However, I find that there are numerous deficiencies within the opponent's scant proof of use evidence comprising a witness statement and only three exhibits. Notably, turnover figures resulting from relevant sales during the relevant period are absent.

41. That said, I acknowledge that ten invoices have been included, dated between 5 November 2020 to 11 September 2023, showing the purchase of some of the goods at issue, by UK based consumers. However, the unit amounts and invoice totals are shown in US dollars. The invoices appear to relate to relatively small orders which is reflected in the fact that the ten invoices at issue only amount to $2430,19 (US dollars) in total. Whilst I have not been provided with any details of the size of the relevant clothing/swimwear market in the EU/UK, or the percentage share enjoyed by the

opponent within the relevant market, I would expect such a market to be substantial. Therefore, in my view, the invoices relating to UK revenue generated by the opponent seems low. As such, I find that the invoice evidence indicating sales generated within the relevant period remains inconclusive.

42. Additionally, with regards to the opponent's Instagram followers, whilst I take note that in February 2024, 0.32% (equating to 426), out of a total of 133,045 followers were from the UK, I remain alert to the fact that the end of the relevant period was 14 February 2024, and that Instagram 'follower' data has not been provided for the relevant period prior to February 2024.

43. Furthermore, neither Ms Zuluaga's witness statement nor the three exhibits provide any information with regards to the amount spent on the promotion and advertising of the goods relied upon under the earlier mark in the EU/UK during the relevant period. Whilst I note from Ms Zuluaga's witness statement that, prior to the Covid pandemic, the opponent attended several international exhibitions of lingerie and swimwear, I have no evidence before me demonstrating the opponent's attendance at exhibitions, or its presence in industry publications such as magazines, prior to or following the Covid pandemic. Therefore, it is impossible to ascertain how many EU/UK consumers were exposed to the opponent and its TOUCHÉ mark in relation to the class 25 goods relied upon, during these events or when seeing the opponent's advertisements in publications.

44. Additionally, whilst I acknowledge from Ms Zuluaga's witness statement that the opponent has produced and offered lingerie, swimwear and other clothing under the brand name TOUCHÉ for nearly 40 years, it is noted that the opponent is based in Colombia, South America, and I have no evidence before me to suggest that any of the opponent's stores or administrative offices are based in the EU/UK. Further, whilst I acknowledge that the opponent is a global brand with sales to their international consumers made through their international website 'www.touche.co', it is not possible to ascertain from the evidence before the proportion of EU/UK consumers that visited the opponent's website during the relevant period.

45. Accordingly, taking all the above into account and bearing in mind not only section 100 of the Act but also the respective comments of Mr Alexander QC (as he then was) and Mr Hobbs QC (as he then was) in *Plymouth Life* and *Dosenbach*, I find that the evidence of use is insufficiently solid to adequately allow me to find that the opponent has demonstrated real commercial exploitation of the earlier mark in relation to the goods for which use is claimed in the EU/UK, during the relevant period. Put simply, the nature of the evidence and the issues discussed throughout my assessment of the same, do not, in my view allow me to make the reasonable inferences necessary in order to find in favour of the opponent.

46. Case law does not specify particular types of documentation that must be adduced in evidence. However, when considering the evidence, I am entitled "to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive": (see *PLYMOUTH LIFE CENTRE*, BL O/236/13, paragraph 22).

Conclusion

47. The opponent has failed to establish genuine use of its earlier mark within the relevant territories, during the relevant period. Where the proof of use provisions apply, an opponent cannot rely on its earlier mark unless those provisions are satisfied. Consequently, as the opponent has not proved genuine use of its mark, it cannot rely on its earlier mark for the purposes of this opposition. Accordingly, the opposition under Section 5(2)(b) of the Act falls at the first hurdle and is dismissed accordingly. Subject to appeal, the IR will proceed to protection for the full range of goods applied for.

Costs

48. The holder has been successful and is, therefore, entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the holder the sum of £250 as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Considering the notice of opposition and preparing the counterstatement	£250
Total	**£250**

49. I therefore order Alternativa de Moda S.A.S. to pay TOUCHE TEKSTİL ANONİM ŞİRKETİ the sum of £250. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 20th day of February 2026

Sam Congreve
For the Registrar

Annex

Class 25 Clothing, including underwear and outerclothing, other than special purpose protective clothing; socks, mufflers [clothing], shawls, bandanas, scarves, belts [clothing]; footwear, shoes, slippers, sandals; headgear, hats, caps with visors, berets, caps [headwear], skull caps.