

O/109/22

TRADE MARKS ACT 1994

IN THE MATTER OF
APPLICATION NO. 503714

TO REVOKE ON THE GROUNDS OF NON-USE
TRADE MARK REGISTRATION NO. UK0081128694
OF THE TRADE MARK:



OWNED BY
DESTILERIAS M.G., S.L.
AND
IMPORTACIONES Y EXPORTACIONES VARMA, S.A.

BACKGROUND AND PLEADINGS

1. These proceedings concern the trade mark shown on the cover page of this decision (“the proprietors’ mark”) which stands registered in the name of Destileras M.G., S.L and Importaciones y Exportaciones Varma, S.A. (“the proprietors”). The proprietors’ mark was initially registered as an international registration on 3 July 2012. On 21 June 2013, the proprietors’ designated the EU as a territory in which they sought to protect the mark under the term of the Protocol to the Madrid Agreement. The request was accepted and the proprietors’ mark was entered into the register on 8 July 2014. The proprietors’ mark is registered for the following goods:

Class 33: Gin, namely London Dry Gin.

2. On 1 January 2021, the UK left the EU. 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 international registration designating the EU. As a result of the proprietors’ mark being registered as an international registration designating the EU at the end of the Implementation Period, it was automatically converted to a comparable UK trade mark. The comparable UK mark is now recorded on the UK trade mark register and has the same legal status as if it had been applied for and registered under UK law, and the original international filing dates remain.

3. On 18 March 2021, Inver House Distillers Limited (“the applicant”) sought revocation of the proprietors’ mark on the grounds of non-use. Under section 46(1)(a) the applicant claims non-use in the five-year period following the date on which the mark was registered, i.e. 9 July 2014 to 8 July 2019, with revocation sought from 9 July 2019. Under section 46(1)(b) the applicant claims non-use in respect of the proprietors’ mark for the period between 17 March 2016 to 16 March 2021, with revocation sought from 17 March 2021.

4. The proprietors filed a counterstatement defending their registration for all goods for which it is registered, on the basis that they had been used during the relevant period.

5. The proprietors are represented by Serjeants LLP; the applicant is represented by Sipara Limited. Only the proprietors filed evidence in chief and, during the evidence rounds, both parties filed written submissions. No hearing was requested. Both parties filed written submissions in lieu of a hearing. This decision is taken following a careful perusal of the papers.

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

EVIDENCE

7. As set out above, only the proprietors filed evidence. This was in the form of a witness statement of Enric Manresa Medina dated 26 July 2021. The witness statement is accompanied by 6 exhibits. Mr Medina is a Trade Mark Attorney at Manresa Industrial Property, a position he has held since 1986. Mr Medina confirms that Manresa Industrial Property is the EU and International representative for the proprietors and is, therefore, authorised to make a statement on the proprietors' behalf.

8. As noted above, both parties filed written submissions during the evidence rounds and the proprietors filed written submissions in reply. Both parties filed written submissions in lieu of a hearing. I do not propose to summarise the evidence or the parties' submissions in full at this stage. However, I have taken them into consideration in reaching my decision and will refer to them below, where necessary.

Preliminary issues

9. It is noted that the applicant, in its written submissions, submits that:



2.6 The applicant argues that the UK IPO has to treat the trade mark as a figurative image mark, since to hold otherwise would be to give the trade mark a wider scope of interpretation than was encompassed by the parent EU trade mark, and would be making significant alterations to the inherent nature of the trade mark as granted by the EU IPO.

2.7 The applicant believes this point is important since it impacts directly on the nature of the evidence of use filed by the proprietor.”

10. I agree with the applicant’s submissions in that the proprietors’ mark should be treated as a figurative mark rather than a shape mark. This is on the basis that the proprietors’ mark was originally registered by the WIPO, as a figurative mark. This classification was maintained by the EUIPO when it accepted the request to designate the international registration in the EU. Following the end of the completion period, the mark was automatically converted into a comparable trade mark, the details for the proprietors’ mark match the corresponding IR (EU). This is inclusive of the type of mark and indicates that the mark should be interpreted as a figurative mark. While on the issue of the interpretation of the proprietors’ mark and its potential impact upon the form of the mark assessment I am required to make in this decision, I note the decision of the Court of Justice of the European Union (“CJEU”) in *Storck v OHIM*, Case C-25/05 P. This case demonstrates that the assessment of distinctive character for a 2D ‘shape’ mark is the same for the 3D shape shown in 2D. Therefore, the proprietors’

mark will be interpreted as a figurative 2D mark depicting 3D bottles throughout this decision. I will say no more about the submissions by both parties on whether the proprietors' mark should be interpreted as a figurative or shape mark.

11. The applicant also submits that:

“3.1 The evidence of use is provided by virtue of a Witness Statement of Enric Manresa, who is a trade mark attorney at the Spanish law firm Manresa Industrial Property in Barcelona. Mr Manresa states that the contents of the witness statement are made from his own knowledge. Mr Manresa does not explain how he has acquired this knowledge, nor where some of the evidence has originated from. What is clear is that Mr Manresa is neither a director or employee of the proprietor who would be expected to have direct access to this kind of evidence and information, and nor is he an independent third party who can be relied upon to provide any form of quasi “expert” evidence.

3.2 The applicant therefore argues that the UK IPO should treat the witness statement with care, since much of what is stated is actually much closer to hearsay evidence than to categorical evidence of fact.

3.3 As a result, the applicant argues that the UK IPO has to apply a higher than usual level of scrutiny to the attachments to the witness statement, and reach a reasoned decision on whether these actually substantiate the claims made.”

12. For the avoidance of doubt, I am of the view that the applicant has not invited the Tribunal to disbelieve Mr Medina's evidence but has instead, raised concerns with the sufficiency of the evidence provided, which it is entitled to do. This decision will be made on the balance of all the relevant factors and the weight of the evidence that has been provided by the proprietors.

13. I note that Mr Medina's statement confirmed that he had the proprietors' authorisation to give evidence and that this was accompanied by a statement of truth. Further, I note that the proprietors submit that Mr Medina has worked alongside them

for a number of years and has knowledge and understanding of their business. Bearing the above in mind and the information in paragraph 7, I am content to conclude that Mr Medina has the authorisation and knowledge to provide this evidence.

DECISION

14. Section 46 of the Act states:

“(1) The registration of a trade mark may be revoked on any of the following grounds

(a) that within the period of five years following the date of completion of the registration procedure it has not 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, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c) [...]

(d) [...]

(2) For the purpose of subsection (1) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and 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.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) An application for revocation may be made by any person, and may be made to the registrar or to the court, except that –

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and

(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from –

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date.”

15. Section 100 is also relevant, which 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. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J summarised the law relating to genuine use as follows:

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), 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 Kamaradschaft ‘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], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, 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] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases 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]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(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]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods

come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(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] and [22]. 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]; *Reber* at [29].

(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]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(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 goods or services. For example, use of the mark by a single client which imports the relevant goods 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] and [76]-[77]; *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].”

17. Proven use of a mark which fails to establish that “the commercial exploitation of the mark is real” because the use would not be “viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark” is not, therefore, genuine use.

Form of the mark

18. In *Nirvana Trade Mark*, BL O/262/06, Mr Richard Arnold Q.C. (as he then was) as the Appointed Person summarised the test under s.46(2) of the Act as follows:

"33. The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period...

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter’s distinctive character. As can be seen from the discussion above, this second question breaks down in the sub-questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all."

19. Although this case was decided before the judgment of the CJEU in *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, it remains sound law so far as the question is whether the use of a mark in a different form constitutes genuine use of the mark as registered.

20. Throughout its evidence, the proprietors have used the mark in a number of ways. These are shown below:

		
Example 1	Example 2	Example 3

21. The applicant submits that the proprietors' use of these examples does not constitute genuine use of the proprietors' mark. To assess whether the examples constitute use, as per *Nirvana* (cited above), I must consider what is the distinctive character of the proprietors' mark as registered, what are the differences between examples 1 to 3 and the proprietors mark as registered and whether or not those differences alter the distinctive character of the proprietors' mark.

22. The proprietors' mark, as seen on the cover page of this decision, comprises an image of two blue bottles which, in my view, will be seen as receptacles for the goods. One bottle is face on and the other is positioned to its side. The word 'MASTER'S' appears in the largest text to the right side of the bottles, with the word 'SELECTION' presented in a smaller text below. To the left of the bottles, is the device of a lion, situated above the text 'LONDON DRY GIN'. 'DRY' appears in a smaller text and is underlined. Below the aforementioned text are a series of words that due to their sizing are unidentifiable. At the bottom of the bottles are the words 'TRIDISTILLED GIN'.

23. The distinctive character of the mark lies in the word 'MASTER'S', the lion device and the bottles. In relation to the bottles, it is my view that the sharply cut-off sides of the bottles, the raised 'fold' running vertically down the bottles, and the

indented side (visible on the left-bottle) have, at least together, some distinctive character in relation to spirits. The words 'LONDON DRY GIN' and 'TRIDISTILLED GIN' are negligible to the distinctive character of the proprietors' mark as they are descriptive of the proprietors' goods. Further, I also consider that the unidentifiable text, the word 'SELECTION' and underlining of the word 'Dry' are negligible elements. The negligible elements will not contribute towards the distinctive character of the mark.

24. I will now deal with the use of the various examples, referenced above, in turn. Example 1 is a blue bottle presented face on. The word 'MASTER'S' appears in the largest text, below a lion device, and above the word 'GIN' which appears in a smaller text. Towards the bottom of the bottle are the words 'LONDON DRY GIN'. The example differs from the mark as registered in that it is a single bottle and the words 'TRIDISTILLED GIN' and 'SELECTION' are absent. On this point, I note the case of *Hyphen*,¹ wherein the GC clarified that where a mark is composed of a number of elements and one or more of them is not distinctive, their omission is not such as to alter the distinctive character of that mark. As referenced in paragraph 23 above, I consider that the aforementioned differences are descriptive and, therefore, negligible. It is, therefore, my view that their omission does not alter the distinctive character of the proprietors' mark. The elements that make up the distinctive character in the proprietors' mark, referred to in paragraph 23, are present in this example but have a minor difference in the arrangement. However, I do not consider that these changes alter the distinctive character of the proprietors' mark. As per the case of *Nirvana*, this is an acceptable variant of the proprietors' mark.

25. Example 2 is a blue bottle presented face on. The elements that make up the distinctive character of the proprietors' mark are all present in this example and the arrangement of the elements replicates the proprietors' mark. However, the example differs from the registered mark in that it is a single bottle, rather than two. I do not consider that these changes alter the distinctive character of the proprietors' mark. As per the case of *Nirvana*, this is an acceptable variant of the proprietors' mark.

¹ *Hyphen GmbH v EU IPO*, Case T-146/15.

26. Example 3 is three bottles of various sizes that are positioned to the side. This example differs from the registered mark in that there are three bottles, rather than two, and none of the bottles presented appear face on. The elements that make up the distinctive character of the proprietors' mark are all present in this example and replicate the same arrangement as the proprietors' mark. I note that one of the three bottles is a smaller version of the bottle presented on its side in the proprietors' mark. Bearing all the above in mind, I do not consider that these changes alter the distinctive character of the proprietors' mark. As per the case of *Nirvana*, this is an acceptable variant of the proprietors' mark.

Genuine use

27. I am mindful that the applicant is relying on both section 46(1)(a) and 46(1)(b) grounds, therefore resulting in two different periods. Given the overlap between the relevant periods, a substantial amount of the same evidence will apply to both. I will, therefore, assess the entirety of both periods collectively, being 9 July 2014 to 16 March 2021.

28. I note that as the proprietors' mark is a comparable mark it is possible for the proprietors to rely on evidence of use in the EU as set out in Tribunal Practice Notice 2/2020.²

29. The evidence shows that during the relevant periods, the proprietors sold their goods wholesale to two retailers in the UK, namely Le Bon Vin and Bluesky Drinks Ltd ("Bluesky"). The proprietors' evidence sets out that, as of April 2018, Le Bon Vin was appointed the new exclusive UK distributor of the proprietors' goods.³ Given that I will come to discuss further evidence of use by Le Bon Vin, I am content to conclude that the relationship between the proprietors and Le Bon Vin was such that any use by Le Bon Vin constitutes use with the proprietors' consent.

30. The proprietors have provided evidence in respect of invoices, press releases, images of the products and, website and social media extracts. I note the following, in regard to the evidence:

²<https://www.gov.uk/government/publications/tribunal-practice-notice-22020-end-of-transition-period-impact-on-tribunal-proceedings/tribunal-practice-notice-22020-end-of-transition-period-impact-on-tribunal-proceedings> accessed 1/2/2022.

³ Exhibit EM6

- a. 17 invoices that pertain to the sale of products from the proprietors to Le Bon Vin Ltd and Bluesky.⁴ The invoices are dated between 16 July 2015 and 1 October 2020, which is within the relevant periods.
- b. Extracts from Le Bon Vin's activity on Twitter with posts relating to the proprietors' products.⁵ The posts are dated between 23 April 2018 to 3 December 2020, which is within the relevant periods.
- c. Extracts from the Le Bon Vin website with images from the trade and public websites.⁶ The screenshots of these images appear to have been captured on 21 July 2021, being outside the relevant period.

31. Of the social media evidence, I note that screenshots of Le Bon Vin's Twitter account show tweets from 3 December 2020, 17 November 2020, 13 June 2020, 16 January 2019, 19 December 2018 and 25 April 2018. Most of the tweets contain images of bottles of the proprietors' goods, either as part of a display of some of the alcoholic beverages on sale by Le Bon Vin or as a promotion focussing specifically on Master's London Dry Gin. The post dated 25 April 2018 is the image that can be seen in example 3 of paragraph 20 above. The remaining images are not strictly the examples of bottles addressed in my form of the mark section above but make use of the same types of bottles as the aforementioned examples. However, I note that the tweets do not show how many followers the Twitter handle has meaning that I am unable to determine the distribution of this evidence. Only some of the tweets display the number of likes and retweets, of those the maximum amount of interaction is on the post dated 19 December 2019 where there are 2 retweets and 5 likes. I note that while the social media evidence is of no assistance to the proprietors as marketing and advertising evidence, it is of assistance in determining what goods were sold; I will address this below in paragraph 33.

32. The proprietors also submit that they received press coverage when Le Bon Vin was taken on as the new UK distributor for its goods. The article states that the proprietors' gin was officially launched in conjunction with Le Bon Vin at the 'Think Gin event', which it is submitted is a business focussed interactive drinks trade event. This

⁴ Exhibit EM1 of the Witness Statement of Enric Medina

⁵Ibid, Exhibit EM5

⁶ Ibid, Exhibit EM4

article is dated 7 April 2018 and was published by Agile Media Ltd. However, I note that no information on the scale of the audience of Agile Media has been provided, nor do I have any indication of the article's distribution. As for the 'Think Gin' event itself, which took place on 30 April 2018 in London, no further information has been provided by the proprietors such as how many people were in attendance, for example. As a result, I do not consider that this evidence is of much assistance to the proprietor in respect of advertising or marketing.

33. As set out above, the evidence contains a number of invoices. The invoices are for sales to two companies within the United Kingdom, namely Le Bon Vin and Bluesky located in Sheffield and Reading, respectively. The invoices show sales of products described as 'Master's Dry Gin' and 'Master's Dry Gin Mini' in various quantities. When cross-referencing the invoices to the proprietors' Twitter evidence, I note that some of the Twitter posts in 2018 and 2020, as referred to in paragraph 31, show the proprietors' gin bottle. In my view, this is evidence that indicates that the products referenced on the invoices are products of the proprietors' mark. On this point, the screenshots from Le Bon Vin's online store, while dated after the relevant periods, may still be reflective of the goods that were sold during the relevant periods. I make this finding on the basis that the bottles shown in this evidence reflect the same bottles as the Twitter evidence. This suggests that the images are likely to have been reflective of the online store's position during the relevant periods.

34. I note the invoices also show sales of a product described as 'Master's Green Apple'; I have no reference to images or submissions regarding this product. The invoices also refer to 'Master's Pink' gin. The only references I have to this product are undated photos⁷ and a printout of the product outside of the relevant periods.⁸ I have no further evidence within the relevant periods that I can cross reference to ascertain the receptacles that 'Master's Pink' were transported in. While I appreciate that it may have been in the same receptacles as these photos, I do not have any solid evidence to support such a finding. Further, I note the case of *Awareness Limited v Plymouth City Council*,⁹ wherein Mr Daniel Alexander Q.C., sitting as the Appointed Person, stated that the burden lies on the registered proprietor to prove use and if it is likely

⁷ Exhibit EM3, pages 1 -2

⁸ Exhibit EM4, page 2

⁹ Case BL O/236/13

that evidence would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. In my view, the evidence is insufficient to prove that reference to 'Master's London Dry Gin' is meant to be inclusive of 'Master's Pink' and 'Master's Green Apple'. Therefore, references to the aforementioned products or any invoices that do not include references to 'Master's Dry Gin' or 'Master's Dry Gin Mini' will not be considered.

35. I note that the proprietor has not provided evidence regarding its turnover during the relevant periods other than the 17 invoices referenced above, nor did they provide any summary of the invoices. However, I have calculated that the invoices demonstrate evidence of the sale in the UK of 7,362 bottles of 'Master's London Dry Gin' and 'Master's Dry Gin Mini' for a total of €28,563 over the entirety of the relevant periods. In respect of each relevant period, I have broken it down as €20,355 for 5,652 bottles for the second relevant period and €24,779.64 for 6,468 for the first relevant period.

36. Although I do not have evidence or submissions from the parties to assist me on the matter of the size of the UK market for the goods concerned, I believe the market to be substantial, numbering in hundreds of millions of pounds per annum. In my view, when compared against the size of the relevant market, the total sales figures of €28,563 is low. While the sales appear to have taken place over the entirety of the relevant periods, I note that there is no evidence of sales in 2016. The figures provided are very small taking into account the likely size of the market for the goods and the number of bottles sold. Further, I have considered that the market for gin across the UK is likely to be extremely competitive with a vast number of producers competing with one another. I have also considered that for some producers of gin the product is not likely to be mass produced.

37. Although the evidence is sufficient to establish that there have been some sales of the proprietors' goods in the UK in the relevant periods, the relevant test is whether the use shown is sufficient to qualify as genuine. As indicated in the case law cited above, use does not need to be quantitatively significant in order to be genuine. The assessment must take into account a number of factors in order to ascertain whether there has been a real commercial exploitation of the mark which can be regarded as

“warranted in the economic sector concerned to maintain or create a share in the market for the goods and services protected by the mark”.

38. 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.¹⁰

39. There are some clear deficiencies in the evidence provided by the proprietors. There is a lack of evidence in relation to the distribution of marketing and advertising evidence. However, as noted above genuine use requires a global assessment of the evidence as a whole. The evidence has demonstrated sales of the proprietors' goods to two companies in the UK. These companies are situated in the south-east and north-central regions of England respectively and are distant from one another. Whilst the use of the mark is not particularly widespread across the entirety of the UK, this is due to an exclusive agreement with Le Bon Vin formed in 2018 which established Le Bon Vin as the new and exclusive retailer of the proprietors' products. The figures in relation to the sales from the proprietors are far from overwhelming. Despite this, the sale of 6,468 bottles of gin during the first relevant period and 5,652 bottles of gin during the second relevant period, for a total of 7,362 bottles of gin from the proprietors to the UK retailers constitute a genuine attempt to create a market for its goods under their mark. While I note that the cost per bottle is low, the evidence indicates that this is due to a significant number of 'mini' 5cl bottles being sold which constitute a larger volume of sales despite the low sales figures. The sales are not simply attributable to a one-off sale but, instead, the proprietors have demonstrated a consistent and repeated pattern of sales to an exclusive retailer throughout the relevant periods. Taking into consideration the above, I am of the view that the proprietors have attempted to create and maintain a market for their goods under their mark. Therefore, I am satisfied that the proprietors have demonstrated genuine use of its mark during the relevant periods in the UK.

40. The evidence shows that the proprietors have used their mark in relation to London Dry Gin. Consequently, I consider that the proprietors have shown genuine use of all of the goods upon which they rely.

¹⁰ *New York SHK Jeans GmbH & Co KG v OHIM*, T-415/09

CONCLUSION

41. The application for revocation on the grounds of non-use fails under both sections 46(1)(a) and 46(1)(b). Therefore, the mark remains registered for all the proprietors' goods.

COSTS

42. The proprietors have been successful and are entitled to a contribution towards their costs, based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award the proprietors the sum of £900 as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Preparing a statement and considering the applicant's statement	£200
Preparing evidence	£500
Preparing written submissions in lieu	£200
Total	£900

43. I, therefore, order Inver House Distillers Limited to pay DESTILERIAS M.G., S.L. and Importaciones y Exportaciones Varma, S.A. the total sum of £900. The sum is to 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 8th day of February 2022

A Klass

**For the registrar,
the Comptroller-General**