

O-115-04

TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATIONS Nos: 80779, 80780, 80781, 80782 &
80783

BY FLEUROP-INTERFLORA
FOR THE REVOCATION OF TRADE MARKS Nos: 1324053, 1324054,
1324055, 1324056 & 1324057

FLEUROP FTD

IN CLASSES 35, 38, 39, 41 & 42 RESPECTIVELY
STANDING IN THE NAME OF
INTERFLORA (FLORISTS TELEGRAPH DELIVERY ASSOCIATION)
BRITISH UNIT LIMITED

AND IN THE MATTER OF APPLICATIONS Nos: 80784, 80785, 80786,
80787 & 80788

BY FLEUROP-INTERFLORA
FOR THE REVOCATION OF TRADE MARKS Nos: 1324067, 1324068,
1324069, 1324070 & 1324071

FLEUROP

IN CLASSES 35, 38, 39, 41 & 42 RESPECTIVELY
STANDING IN THE NAME OF
INTERFLORA (FLORISTS TELEGRAPH DELIVERY ASSOCIATION)
BRITISH UNIT LIMITED

TRADE MARKS ACT 1994
 IN THE MATTER OF APPLICATIONS Nos: 80779, 80780, 80781, 80782 & 80783
 BY FLEUROP-INTERFLORA
 FOR THE REVOCATION OF TRADE MARKS Nos: 1324053, 1324054, 1324055,
 1324056 & 1324057

FLEUROP FTD

IN CLASSES 35, 38, 39, 41 & 42 RESPECTIVELY
 STANDING IN THE NAME OF
 INTERFLORA (FLORISTS TELEGRAPH DELIVERY ASSOCIATION) BRITISH
 UNIT LIMITED

AND IN THE MATTER OF APPLICATIONS Nos: 80784, 80785, 80786, 80787 &
 80788

BY FLEUROP-INTERFLORA

FOR THE REVOCATION OF TRADE MARKS Nos: 1324067, 1324068, 1324069,
 1324070 & 1324071

FLEUROP

IN CLASSES 35, 38, 39, 41 & 42 RESPECTIVELY
 STANDING IN THE NAME OF
 INTERFLORA (FLORISTS TELEGRAPH DELIVERY ASSOCIATION) BRITISH
 UNIT LIMITED

BACKGROUND

1) The ten trade marks involved in these applications are as follows:

Trade Mark	Number	Registration Date	Class	Specification
FLEUROP FTD	1324053	19.07.91	35	Advertising services provided for florists; all included in Class 35.
FLEUROP FTD	1324054	12.07.91	38	Delivery of letters, message sending and telephone services all provided for florists; all included in Class 38.
FLEUROP FTD	1324055	12.07.91	39	Transportation of flowers, gifts, cargo and of packages by road; all included in Class 39.
FLEUROP FTD	1324056	12.07.91	41	Education and training courses; all relating to florists, floristry and to florists' businesses; all included in Class 41.
FLEUROP FTD	1324057	08.11.91	42	Research, analysis, consultation and project studies, all relating to flowers and to floristry; packaging design services; provision of conference facilities; landscape gardening; wreath making; all included in Class 42.
FLEUROP	1324067	10.08.90	35	Advertising services provided for florists; all included in Class 35.
FLEUROP	1324068	28.08.90	38	Delivery of letters, message sending

				and telephone services all provided for florists; all included in Class 38.
FLEUROP	1324069	10.08.90	39	Transportation of flowers, gifts, cargo and of packages by road; all included in Class 39.
FLEUROP	1324070	29.06.90	41	Education and training courses; all relating to florists, floristry and to florists' businesses; all included in Class 41.
FLEUROP	1324071	22.06.90	42	Research, analysis, consultation and project studies, all relating to flowers and to floristry; packaging design services; provision of conference facilities; landscape gardening; wreath making; all included in Class 42.

2) The applications for registration were made on 14 October 1987 by Interflora (Florists Telegraph Delivery Association) British Unit Limited and the marks were placed on the register as shown above.

3) By its applications dated 28 March 2002, Fleurop-Interflora of Stelzenstrasse 6, CH-8152, Opfikon-Glattbrugg, Switzerland applied for the revocation of the registrations under the provisions of Sections 46(1)(a) & (b). The grounds state that within the five years following the date of completion of the registration procedure the marks have not been put to genuine use in the UK by the proprietor or with his consent in relation to the services in Classes 35, 38, 39, 41 & 42 for which they are registered and that there are no proper reasons for non-use. In the alternative they contend that such use, in respect of services in Classes 35, 38, 39, 41 & 42 has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use.

4) On 9 July 2002 the registered proprietor filed counterstatements denying all the grounds. They also contended that the provisions of Section 46(3) were pertinent and should be applied.

5) Both sides seek an award of costs. Both sides filed evidence.

6) At the hearing, on 28 January 2004, the registered proprietor was represented by Mr Norris of Counsel instructed by Messrs Marks & Clerk. The applicant for revocation was represented by Mr Malynicz of Counsel instructed by Messrs Clifford Chance.

REGISTERED PROPRIETOR'S EVIDENCE.

7) The registered proprietor filed a witness statement, dated 8 July 2002 by Rhys John Hughes the Company Secretary. He states that the marks have been in continuous use, since 14 October 1987, on International Flora Cheques. He states that: "The

International Flora Cheques are available for customers to purchase and exchange flowers at all Interflora florist shops in the UK and throughout the world.” At exhibit RJH1 he provides a sample of such a cheque. This shows an international flora cheque for “10 Fleurin”. It also carries the following device:



8) Mr Hughes states that Interflora Inc. a United States Corporation, of which his company is a constituent member, produces an “International Delivery Directory and Flower Selections Guide” on an annual basis. This has been published since at least the 14 October 1987 and lists all the Interflora shops throughout the world and all locations to which flowers can be delivered. This publication also provides a guide on the availability of floral products in each country. The directory, he states, is distributed to, and used by, all of the company’s member florists in the UK. At exhibit RJH2 he provides copies of the front and back covers from the Directory for 2002 showing use of the trade marks. This also has the above device mark.

9) Mr Hughes states that the marks in suit have been used on two posters. One as part of a Christmas advertising initiative in 1990 the other showing different time zones produced in the 1990's. At exhibits RJH3 and RJH4 he provides examples of each poster. Both have the above device mark. Exhibit RJH3 is dated 1990 whilst RJH4 is undated.

10) Lastly, Mr Hughes states that the marks in suit have been used as a metatag or keyword during two periods on the company’s website which promotes its services and allows on-line floral orders. The periods concerned are February 1998 to June 1999 and 22 February 2002 to date. At exhibit RJH5 he provides an extract claimed to be from the website which lists the large number of metatags used on the website. The marks in suit are amongst those listed, although the document is not dated, nor does it carry any title.

APPLICANT’S EVIDENCE

11) The applicant filed a witness statement, dated 28 October 2002, by Marc Schmid the Managing Director of the applicant company. He confirms that he understands English.

12) Herr Schmid states that:

“Interflora is a non-profit making Trade Association run by its member florists. In 1947, associations in 22 countries formed the worldwide operating

board of Interflora Incorporated. This company was (and still is to this day) managed by three flower exchange groups, namely, Interflora British Unit, Fleurop-Interflora and Florists' Transworld Delivery Associated (commonly abbreviated to FTD). These groups collaborate with each other in the flower exchange business and share the responsibility for the future development and efficient transmission of orders around the globe. Each group is active in its respective markets."

13) Herr Schmid states that his company uses the mark FLEUROP in some European countries (not including the UK). He claims that the mark is exclusively owned by his company and has never been shared with the other two groups. At exhibit 1 he provides an extract from the Interflora website which he states evidences the use of various marks by the three flower exchange groups and shows that the mark used in the UK is Interflora. In fact it states that the trading name in the UK is Interflora whereas in "parts of Europe" it is Fleurop.

14) At exhibit 2 he provides details of National and International registrations owned by his company.

15) Herr Schmid states that "The common trade mark of the three groups consists of the three names (namely INTERFLORA, FLEUROP and FTD) combined with the Mercury logo (the Common mark)." At exhibit 3 he provides a representation of the Common Mark. This is the logo reproduced above in the proprietor's evidence. He states that the Mercury logo is owned by FTD and is licensed to the three groups. He adds:

"It is not permitted for any group to use the Common Mark with the three names to refer to its own local services and to advertise in its own market. The Common Mark can only be used to refer to the common activities of the groups on a worldwide basis and not to the individual services of one of the groups."

16) Regarding the use of the marks in suit on the "floral cheques" referred to by Mr Hughes in the proprietor's evidence Herr Schmid states that these cheques are produced by his company on behalf of Interflora Inc. and sold to various florists' associations belonging to Interflora Inc. The currency used "fleurin" has a value of 1 Swiss Franc. At exhibit 4 Herr Schmid provides copies of documents showing an order from the proprietor to the applicant, an order from the applicant to the printing company and invoices showing payment for same. He contends that use of the marks in suit on such cheques refers to services by his company and not the proprietor. In the alternative he contends that the use on such cheques does not support the services registered in Classes 35, 38, 39, 41 & 42.

17) Herr Schmid states that the use of the marks in suit on the Directory referred to by Mr Hughes should be disregarded because it is use of his company's mark and not the proprietor's marks. He adds that the Directory lists the various worldwide associations and so is clearly use of the Common Mark.

18) Regarding the two posters exhibited by the proprietor, Herr Schmid states that one

was clearly issued and used in 1990 and as such is more than five years prior to the application. Regarding the worldwide time zone poster produced in the 1980s he questions whether the poster is still in use as claimed.

19) On the use of the metatags, he states that these are hidden codes or keywords used to attract Internet traffic and not visible to the public. Even if such use was acceptable he contends that it is not in relation to the services registered. He also contends that such use is unauthorised use of his company's trade mark.

20) At exhibit 5 Herr Schmid provides copies of various documents produced by the proprietor which shows use of the Interflora and/or mercury marks. None show use of the marks "Fleurop" and/or "Fleurop FTD".

PROPRIETOR'S EVIDENCE IN REPLY.

21) The proprietor filed a second witness statement by Mr Hughes, dated 13 March 2003. He states that the marks in suit were registered with the "full knowledge and approval" of the applicant. Mr Hughes states that the registrations of the marks in suit were discussed at Board meetings of Interflora Inc. at which representatives of Fleurop-Interflora were present. He also contends that the applicant was aware of the use of the marks via the advertising campaigns run by the proprietor. Mr Hughes provides a copy of an International Flora Cheque which states on its reverse that the cheque can be used in "every INTERFLORA (FTD +FLEUROP) flowershop".

22) Mr Hughes states that the International Delivery Directory (Flower Selections Guide) is not merely an internal publication but is used to show members of the public the flowers available in the country of their choice.

23) Mr Hughes contends that the metatags are genuine use of the marks in suit as the website "is a vehicle for the ordering and delivery of flowers and related products and promotes the full range of my company's products and services on the Internet".

24) Finally, Mr Hughes states that his company uses a variety of trade marks including "Interflora", "the Mercury logo", "Fleurop" and "Fleurop FTD".

APPLICANT'S ADDITIONAL EVIDENCE

25) The applicant filed a second witness statement by Herr Schmid, dated 24 June 2003. He reiterates many of the points made in his previous evidence. At exhibit 2 he provides extracts from the Trade Mark Usage Manual of Interflora Inc. This provides the trade marks which are authorised for each of the three Members and also the logo to be used for Interflora Inc. business. It is clear from this that the logo mark reproduced earlier in this decision is the mark to be used on Interflora Inc. business whilst the British Unit Constituent Group is authorised only to use the figure of Mercury with the words "Interflora" and "Interflora Flowers Worldwide" only. Whereas the applicant is authorised to use the mercury device with the words "Interflora" and "Interflora Fleurop".

26) The applicant also filed a witness statement, dated 20 June 2003, by Ludwig

Angeli the President of Interflora Inc., a position he has held for two years having been on the board since 1997. He states that he has read the witness statements of both parties. He states that:

“The names FLEUROP and FLEUROP FTD per se are trade marks of Fleurop-Interflora. For its own business activities, British Unit is entitled to combine the name INTERFLORA only with the Mercury logo and the words FLOWERS WORLDWIDE. This is in accordance with my Company’s Trade Mark Usage Manual as referred to in Marc Schmid’s witness statement in reply. This also emphasises that the names FLEUROP or FLEUROP FTD are not approved to refer to British Unit’s local business activities. The use of FLEUROP and/or FLEUROP FTD evidenced in Rhys John Hughes’ witness statements (in the form of International Flora cheques and in the International Delivery Directory) refers to the use of the Common Mark for the common activities of the group as described in Marc Schmid’s statement of 28 October 2002 (paragraph 6) and not British Unit’s own local services.

Referring to paragraph 3 of Rhys John Hughes’ statement of 13 March 2003, I am not aware that the registration of the Trade Mark in suit was made with the knowledge and approval of Fleurop-Interflora or Interflora Inc.”

27) That concludes my review of the evidence. I now turn to the decision.

DECISION

28) At the hearing Mr Norris stated that the proprietor would not be defending certain of the registrations as it was accepted that the evidence filed does not show use in regard to the services for which they are registered. The registrations not being defended are:

Trade Mark	Number	Registration Date	Class	Specification
FLEUROP FTD	1324054	12.07.91	38	Delivery of letters, message sending and telephone services all provided for florists; all included in Class 38.
FLEUROP FTD	1324056	12.07.91	41	Education and training courses; all relating to florists, floristry and to florists’ businesses; all included in Class 41.
FLEUROP FTD	1324057	08.11.91	42	Research, analysis, consultation and project studies, all relating to flowers and to floristry; packaging design services; provision of conference facilities; landscape gardening; wreath making; all included in Class 42.
FLEUROP	1324068	28.8.90	38	Delivery of letters, message sending and telephone services all provided for florists; all included in Class 38
FLEUROP	1324070	29.06.90	41	Education and training courses; all relating to florists, floristry and to florists’ businesses; all included in Class 41.
FLEUROP	1324071	22.06.90	42	Research, analysis, consultation and project

				studies, all relating to flowers and to floristry; packaging design services; provision of conference facilities; landscape gardening; wreath making; all included in Class 42.
--	--	--	--	---

29) The applications for revocation against these registrations are successful. The revocation date for each registration is set out in Annex A.

30) Mr Norris also indicated that in regard to the two registrations (1324069 and 1324055) for services in Class 39 he accepted that the evidence did not support the transportation of cargo or packages. The revised specification he was therefore seeking to defend was “Delivery of flowers and gifts by road; all included in Class 39”.

31) For ease of reference the four registrations being defended are 1324069 & 1324055 in Class 39 and 1324053 & 1324067 in Class 35.

32) The application for revocation was filed on 28 March 2002.

33) There are two periods to be considered. Under Section 46(1)(a) the period is the five years following registration and under Section 46(1)(b) the period in question is the five years prior to the date of the application for revocation. This brings about the following periods:

Trade Mark	Section 46(1)(a)	Section 46(1)(b)
1324053	20.07.91 - 19.07.96	29.03.97 – 28.03.02
1324055	13.07.91 - 12.07.96	29.03.97 – 28.03.02
1324067	11.08.90 - 10.08.95	29.03.97 – 28.03.02
1324069	11.08.90 – 10.08.95	29.03.97 – 28.03.02

34) The period to be considered under Section 46(1)(b) is identical in all four cases. As can be seen from the above table the periods under Section 46(1)(a) differ slightly. For the purpose of the instant case I shall consider the whole period 11 August 1990-18 July 1996; which produces no different result from considering each period separately.

35) The grounds of revocation are based on Section 46(1)(a) and (b) which read:

“46. (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;”

36) The proprietor sought refuge under Section 46(3):

“46.(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.”

37) Where the registered proprietor claims that there has been use of the trade mark, the provisions of Section 100 of the Act makes it clear that the onus of showing use rests with him. It reads:

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

38) The proprietor relies upon use of metatags on its website and use of the “logo” mark upon cheques, a directory and two posters. I shall first consider the question as to whether use of the logo mark constitutes use of the marks in suit, “FLEUROP FTD” and “FLEUROP”. For ease of reference the logo mark is reproduced below:



39) In determining the issue I look to the comments of the Court of Appeal in *BUD / BUDWEISER BUDBRAU* [2003] RPC 24. In particular, I look to the comments of Lord Walker at paragraphs 43-45 where he stated:

“43. The first part of the necessary inquiry is, what are the points of difference between the mark as used and the mark as registered? Once those differences have been identified, the second part of the inquiry is, do they alter the distinctive character of the mark as registered?

44. The distinctive character of a trade mark (what makes it in some degree striking and memorable) is not likely to be analysed by the average consumer,

but is nevertheless capable of analysis. The same is true of any striking and memorable line of poetry:

‘Bare ruin’d choirs, where late the sweet birds sang’

is effective whether or not the reader is familiar with Empson’s commentary pointing out its rich associations (including early music, vault-like trees in winter, and the dissolution of the monasteries).

45. Because distinctive character is seldom analysed by the average consumer but is capable of analysis, I do not think that the issue of ‘whose eyes? - registrar or ordinary consumer?’ is a direct conflict. It is for the registrar, through the hearing officer’s specialised experience and judgement, to analyse the ‘visual, aural and conceptual’ qualities of a mark and make a ‘global appreciation’ of its likely impact on the average consumer, who:

‘Normally perceives a mark as a whole and does not proceed to analyse its various details.’

The quotations are from para [26] of the judgement of the Court of Justice in Case C-342/97 *Lloyd Schuhfabrik Meyer GmbH v Klijsen Handel BV* [1999] E.C.R. I-3819; the passage is dealing with the likelihood of confusion (rather than use of a variant mark) but both sides accepted its relevance.”

40) I also refer to the comments of Sir Martin Nourse, in the same *Bud* case where, at paragraph 12, he said:

“Mr Bloch accepted that, in relation to a particular mark, it is possible, as Mr Salthouse put it, for the words to speak louder than the device. However, he said that it does not necessarily follow that the entire distinctive character of the mark lies in the words alone. That too is correct. But there is yet another possibility. A mark may have recognisable elements other than the words themselves which are nevertheless not significant enough to be part of its distinctive character; or to put it the other way round, the words have dominance which reduces to insignificance the other recognisable elements.”

41) To my mind the device element of the logo mark is striking in design and scale. It is not a trivial embellishment or piece of fancy artwork, it clearly is a depiction of Mercury, the winged messenger, carrying a bouquet of flowers. The device is enclosed in a circle with the words “Interflora”, “Fleurop” and the letters “FTD” arranged around the edge. The word “Fleurop” and the letters “FTD” would convey no meaning to the average consumer, whilst the term “Interflora” would have some resonance as most consumers would identify the term “Flora” as meaning plants as in “flora and fauna”. When compared to the word only marks in suit “Fleurop” and “Fleurop FTD” there are obvious visual, aural and conceptual differences.

42) Whilst the registered trade marks are clearly recognisable, they are not so dominant in the mark as used to reduce the device element or the other word “Interflora” to an insignificant aspect. In my opinion, on a global appreciation, the mark used by the proprietor possesses a different distinctive character from the mark

registered. Therefore any use of the above logo does not constitute use of either of the marks in suit.

43) I now consider the use of the marks in suit as metatags. It is claimed that the metatags direct searchers to the proprietor's website and that the website "is a vehicle for the ordering and delivery of flowers and related products and promotes the full range of my company's products and services on the Internet". It was claimed in the statements made by Mr Hughes that the metatags were used during the period February 1998- June 1999, and 22 February 2002 to date. However, the only corroborating evidence was an undated, untitled sheet which had a long list of words which were said to be the metatags used for the proprietor's website, amongst the list were the two marks in suit.

44) When considering the question of onus of proof I note the comments from the case of *La Mer Technology Inc v Laboratories Goemar SA* [2002] EMTR 34, in which Mr Justice Jacob commented on the issue of the onus of proof on the registered proprietor. He said:

"Those concerned with proof of use should read their proposed evidence with a critical eye- to ensure that use is actually proved- and for the goods or services of the mark in question. All the t's should be crossed and all the i's dotted."

45) Also, Peter Gibson L.J. in the Court of Appeal in the *Philosophy Di Alberta Ferretti* case [2003] RPC 15 accepted the views expressed in the earlier decision where Master Bragge said:

"14. The onus is on the registered proprietor to show what use has been made of the mark. Mr Badioli has adduced evidence which is not for present purposes challenged of a licence agreement of April 7, 2000 and pursuant to that supply into the United Kingdom of a number of relevant items, albeit not a great number as shown by the invoice of December 21, 2000. In *NODOZ Trade Mark* [1962] RPC 1 at 7 Wilberforce J. pointed to the fact that while in a suitable case one single act of use of a mark may be sufficient, such act ought to be established, if not by conclusive proof, by any rate overwhelmingly convincing proof. That statement was accepted in *FLORIS Trade Mark* [2001] RPC 19 at [11]."

46) Given the very specific nature of the revocation actions, the proprietor had no reason not to file clear, unambiguous evidence of use of the mark in relation to the goods under attack. I do not regard the exhibit regarding the metatags as being clear and unambiguous. The proprietor has offered no evidence of proper reasons for non-use. It is my view that the registered proprietor has failed to discharge the onus that is placed on them by Section 100 of the Act.

47) The registered proprietor sought refuge under Section 46(3) detail in paragraph 36 above. However, as I have ruled that the registered proprietor has shown no use at all of the marks in suit then this Section cannot apply.

48) The application for revocation under Sections 46(a) & (b) is therefore successful.

The revocation date for each registration is provided at Annex A. Although only one decision has been issued there are ten cases involved which have statutory fees attached. It was agreed with the two parties that there would be a single costs award covering all ten cases, but at less than the normal scale. I order the registered proprietor to pay the applicant the sum of £10,450. This sum to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 28th day of April 2004

George W Salthouse
For the Registrar
the Comptroller-General

Annex A

Trade Mark	Number	Registration Date	Revocation Date
FLEUROP FTD	1324053	19.07.91	19.07.96
FLEUROP FTD	1324054	12.07.91	12.07.96
FLEUROP FTD	1324055	12.07.91	12.07.96
FLEUROP FTD	1324056	12.07.91	12.07.96
FLEUROP FTD	1324057	08.11.91	08.11.96
FLEUROP	1324067	10.08.90	10.08.95
FLEUROP	1324068	28.08.90	28.08.95
FLEUROP	1324069	10.08.90	10.08.95
FLEUROP	1324070	29.06.90	29.06.95
FLEUROP	1324071	22.06.90	22.06.95