

O-133-14

TRADE MARKS ACT 1994

IN THE MATTER OF AN APPLICATION UNDER NO CA000500043
BY D C COMICS (A GENERAL PARTNERSHIP)
AND MARVEL CHARACTERS, INC JOINTLY

TO REVOKE REGISTRATION NO 2381932
STANDING IN THE NAME OF BIO-SYNERGY LTD

Background

1. The trade mark FUEL THE SUPERHERO INSIDE was entered into the register on 16 September 2005 under no 2381932 and stands in the name of Bio-Synergy Ltd (“the registered proprietor”). It is registered in respect of the following goods:

Class 5
Vitamin supplements

Class 29
Milk based drinks for children

Class 32
Fruit based drinks for children

2. An application seeking to revoke the registration on the grounds that it has not been put to genuine use was filed by DC Comics (A Partnership) and Marvel Characters, Inc, jointly (“the applicants”). The application is brought on grounds under section 46(1)(a) and (b) of the Trade Marks Act 1994 (“the Act”). Revocation is sought under section 46(1)(a) from 17 September 2010 and, in the alternative, under section 46(1)(b) from either 21 February 2013 or 20 May 2013.

3. The registered proprietor filed a counterstatement in which it claims that the mark has been used, with that use being made in respect of *sports nutrition supplements* and *sports drinks*.

4. The matter came before me for a hearing on 27 February 2014. Ms Fox of RGC Jenkins & Co represented the applicants and attended by video link. Mr Daniel Herman represented the registered proprietor and attended by telephone.

5. In explaining the basis of its defence, in its counterstatement, the registered proprietor claims:

“We would like to refute the the (sic) request for cancellation based on the following:

1. The applicants could have appealed the registration at date of registration but failed to do so.
2. We have supplied them of (sic) evidence of use dating back to 2008 at the Oval, the fact that they have not found something on Google is not relevant, please see attached.
3. We have supplied links to the Super7 products using the mark “fuel the super hero inside” on websites including but not restricted to Very, Littlewoods & Studio 24.
<http://www.littlewoods.com/super-7-super-fat-burner-60/1235950848.prd;jsessionid=74D58B94D864FCAFF6A828C21D3CD04B.fts050:-9?browseToken=%2fb%2f42949167652%2c5%2c6824%2fpromo%2f159800017>
<http://homeshopping.24studio.co.uk/search/super7>”

6. At the appropriate part of the counterstatement, the registered proprietor indicated that it was filing evidence with the form. Having reviewed the material, which had been filed electronically, the registrar sent a letter, dated 19 July 2013, to the registered proprietor advising it that the registry was unable to accept it. The letter advised the registered proprietor that the material could not be accepted unless it was sent as 'evidence' and explained that:

“evidence is information provided to prove the facts of a case and is submitted in the form of either, a Witness Statement, Statutory Declaration or Affidavit. This is in accordance with Rule 64. Further guidance can be found on our website at <http://www.ipo.gov.uk/tmmanual-chap7-law.pdf>. ”

The letter further advised the registered proprietor that the material filed was of poor quality and a clear and legible copy should be sent by ordinary post. It also advised that evidence must be filed in physical rather than virtual form and be capable of being copied and that a mere link to a website would not be admissible.

7. The registered proprietor subsequently filed a witness statement by Daniel Herman who states he is a Company Director. Whilst he does not specify, within his statement, the name(s) of the company(ies) of which he is a director and whilst he does not state his relationship to the registered proprietor, Mr Herman confirmed at the hearing that he is the Company Director and founder of the registered proprietor. As it is the only evidence which has been filed on behalf of the registered proprietor and given its brevity, I reproduce the text of Mr Herman's statement in full. It states:

“1. The trade mark UK00002381932 was first used in the United Kingdom in 2005 by Bio-Synergy Ltd.
2. The goods/services on which the mark has been used, and the date of first use are as follows:- 2005 for health/sports drinks, vitamins and sports nutrition products.
3. I refer to a copy of the poster sited at the Oval, marked exhibit 1 showing indicative use of the mark in relation to these goods prior to these proceedings in 2012. It was advertising the first sports drink suitable for children as it was free from artificial colours & flavours.
4. I refer to the copy of the contract with Surrey County Cricket, exhibit 2, which confirms the fact that we had advertising at the Oval and further demonstrates investment in the marketing of the Mark of at least £75,000 over 3 years.
5. I refer to exhibit 3 a screen grab of the Super7 facebook page where we continue to use the Mark in relation to drinks and supplements.
6. I refer to exhibit 4 a copy of the labels for our chocolate flavoured milk/protein drink, which also bears the Mark.
7. I refer to this link, exhibit 5 where products bearing the Mark are being sold by Shop Direct & Amazon among others nationally*
8. The Mark has been in use since 2005 and continues to be so and the goods are available nationally throughout the United Kingdom and have been promoted above and below the line.”

8. Accompanying this witness statement was the following material:

1: Whilst there is no indication of such on it, I assume this to be exhibit 1 as referred to by Mr Herman. It appears to be a copy of a poster which Mr Herman states was advertising “the first sports drink suitable for children”. The picture shown is of an adult male in a sports-type top and who is drinking from a pop-top container. I cannot see what might be on the container though it appears not to include any wording. Above the picture is a logo made up of the words Bio-Synergy and below it is the bio-synergy website address. At the top of the picture itself are the words “FUEL THE SUPER-HERO INSIDE. Mr Herman states the poster was “sited” at the Oval. The poster is not dated.

2: Headed “Exhibit 2” and entitled “Bio-Synergy Contract” it bears the Bio-Synergy, Surrey Cricket and Oval logos. Subtitled “Sponsorship benefits” the first paragraph states:

“Kennington Oval Limited (KOL) to guarantee Bio-Synergy ‘Official Nutritional supplier to Surrey County Cricket Club (SCCC)’ status for the duration of the term”.

The document goes on to set out various terms and conditions and indicates that the agreement covers the period from 1st April 2008 until 31st March 2011. The document refers to the registered proprietor agreeing to “provide KOL/SCCC with £25,000 worth of product per annum” as well as drinks bottles and carriers. Whilst providing appropriate places for the signatures of both parties, the document has not been signed by either Kennington Oval Limited/Surrey Cricket Club or the registered proprietor.

3: Headed Exhibit 3, this appears to be a screen print taken from a ‘Facebook’ site which Mr Herman refers to as the Super 7 page. The print is of very poor quality but it is possible to see the words SuperSeven in large font above the smaller words FUEL THE SUPER-HERO INSIDE as well as text which reads: “Super 7 Nutrition” and a super 7 logo. Whilst there are some other lines of text and some pictures, none of it is legible. The print is not dated.

4: Headed Exhibit 4, this is another print of very poor quality but appears to be a product label. On the right hand side of the print is what appears to be a nutritional table (it is headed “Supplement Facts” but I cannot make out any of the text below it). Elsewhere on the print, I can see a Super 7 logo and a QR code as well as the words “strawberry flavour” (not chocolate as stated by Mr Herman). The print bears no dates and I can see no reference to the registered proprietor’s trade mark the subject of these proceedings on any part of this print.

5: Headed Exhibit 5, and “*screen grab” this single page document bears the Bio-Synergy logo and appears to show a screen shot taken from the ‘very’ website above another screen shot taken from the ‘amazon’ website. The former appears to be an undated page found as a result of a search on that site and it shows the search term used was “super 7”. It shows what I take to be four containers and, though the poor quality of the print means that I

cannot see what might be on any of them or what the products are, I can see that underneath each of them they are described as Super 7 Super Burn, Super 7 Super Max(?), Super 7 Super Charge and Super 7 Super Lean respectively.

The latter screen shot shows the search term used to find it to be “super 7 supplements”. It shows a single container. Whilst I cannot make out anything that might be printed on that container or much that appears on the rest of the print, I can see that the product is said to be “Super 7 906g(?) Super Fuel Intra Workout Blackcurrant by Super 7”.

I can see no reference to the registered proprietor’s trade mark the subject of these proceedings on any part of this undated exhibit.

9. No further evidence was filed by either party to these proceedings.

Decision

10. The application for revocation is brought on grounds under sections 46(1)(a) and (b) of the Act. This reads:

“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;

(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 either 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.”

11. Section 100 of the Act is also relevant, this 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.”

12. The application seeks revocation of the registration from either 17 September 2010 (under section 46(1)(a) of the Act) or 21 February 2013 or 20 May 2013 (under section 46(1)(b) of the Act). The time periods within which the registered proprietor must show use of its mark are therefore 17 September 2005 to 16 September 2010, 21 February 2008 to 20 February 2013 or 20 May 2008 to 19 May 2013. Clearly, these periods overlap.

13. In *Stichting BDO and others v BDO Unibank, Inc and others* [2013] EWHC 418 (Ch) Arnold J commented on the case law of the Court of Justice of the European Union (CJEU) in relation to genuine use of a trade mark:

“In *SANT AMBROEUS Trade Mark* [2010] RPC 28 at [42] Anna Carboni sitting as the Appointed Person set out the following helpful summary of the jurisprudence of the CJEU in 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 and Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759 (to which I have added references to Case C-416/04 P *Sunrider v OHIM* [2006] ECR I-4237):

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

(2) The use must be more than merely 'token', which means in this context that it must not serve solely to preserve the rights conferred by the registration: *Ansul*, [36].

(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, without any possibility of confusion, to distinguish the goods or services from others which have another origin: *Ansul*, [36]; *Sunrider*, [70]; *Silberquelle*, [17].

(4) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, i.e. exploitation that is aimed at maintaining or creating an outlet for the goods or services or a share in that market: *Ansul*, [37]-[38]; *Silberquelle*, [18].

(a) Example that meets this criterion: preparations to put goods or services on the market, such as advertising campaigns: *Ansul*, [37].

(b) Examples that do not meet this criterion: (i) internal use by the proprietor: *Ansul*, [37]; (ii) the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle*, [20]-[21].

(5) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including in particular, the nature of the goods or services at issue, the characteristics of the market concerned, the scale and frequency of use of the mark, whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them, and the evidence that the proprietor is able to provide: *Ansul*, [38] and [39]; *La Mer*, [22]-[23]; *Sunrider*, [70]-[71].

(6) Use of the mark need not always be quantitatively significant for it to be deemed genuine. There is no *de minimis* rule. Even minimal use may qualify as genuine use if it is the sort of use that is appropriate in the economic sector concerned for preserving or creating 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: *Ansul*, [39]; *La Mer*, [21], [24] and [25]; *Sunrider*, [72]".

14. In her skeleton argument filed in advance of the hearing, Ms Fox remarked on the witness statement filed by Mr Herman and sought for parts of it to be ruled inadmissible as being filed out of time. I have set out above the content of Mr Herman's witness statement. It is not a lengthy or complex document. At the hearing

itself, she withdrew that objection but commented that it was not helpful for a witness to file a revised witness statement and backdate it. Whilst I take note of her comments and the withdrawal of the objection, I indicated at the hearing that it is not appropriate for a request that evidence be deemed inadmissible to be made for the first time in skeleton arguments and had she not withdrawn the objection, I would have disallowed it.

15. I pause here to mention one further issue. At the start of the hearing, Mr Herman indicated that he had sought to postpone the hearing because he was attending a promotional event the previous day. That request had been refused which he had accepted but he went on to say that his attendance at that event meant that whilst he had briefly read Ms Fox's skeleton arguments, he had not had time to properly review them and prepare any submissions on them. He later indicated that, given his lack of legal knowledge, he did not think he could have better represented the registered proprietor at the hearing but he felt at a disadvantage and somewhat prejudiced because of the lack of time. Whilst I considered that Mr Herman had had adequate notice of the hearing itself and time to prepare for it, in the circumstances of this case, I indicated that I would allow Mr Herman a period of seven days following the hearing to review the skeleton arguments which Ms Fox had filed and make any further submissions in writing. If any such submissions were received, the applicants would be allowed an equal period to respond to them. Further submissions were made by Mr Herman which I have read and will refer to as appropriate.

16. At the hearing, Ms Fox made a number of submissions on Mr Herman's evidence. She submitted that it does not include any evidence of: any sales having been made under the mark of any of the goods for which the mark is registered, there is no evidence of what turnover may have been achieved under it, no invoices had been filed and there was no evidence from any third party. Whilst she accepted that there is no de minimis threshold as to the amount of use that is needed to show genuine use, given the likely size of the markets in the UK in vitamin supplements and drinks for children, such evidence as had been filed was suggestive, at best, of tokenism. That said, she also submitted that the evidence which had been filed did not show use of the mark in relation to the goods for which it is registered nor did it show use within the relevant periods.

17. In his submissions, Mr Herman indicated his view that this was a David v Goliath situation. As a small but growing business (he indicated the registered proprietor had just taken on a third staff member) he felt that it was unfair that the "huge effort" that had been put into using the mark could be challenged though he stated that he was happy he would be treated fairly insofar as these proceedings were concerned. He also expressed his view that intellectual property is a right that every business, whatever its size, should be allowed to use "unmolested". The registered proprietor is, he submitted, a busy and successful company which has been trading for twenty years but it does not keep every piece of historical paperwork. He stated that his knowledge of trade mark law is very limited and accepted that the evidence filed could have been more extensive but stated he filed what he thought was appropriate and further thought that the applicants and registrar could have accessed the internet to find out more for themselves.

18. As I pointed out at the hearing, it is up to a party to file whatever evidence it considers appropriate to best support its case and, given his role, it would seem that Mr Herman is ideally placed to know the trading activities of the registered proprietor and provide evidence of it or identify others who can do so.

19. As I indicated above, the letter dated 19 July 2013 had advised Mr Herman/the registered proprietor that evidence must be filed in physical form and that a link to a website was not sufficient. I am satisfied that he was aware of the need to file evidence in an acceptable form and advised him that neither the registrar nor the other side would be expected to carry out its own research for evidence in support of his case because of the provisions of section 100 of the Act. In any event, to do otherwise would mean that there was no way of knowing that everyone would be looking at the same material. Section 100 makes it clear that it is for the registered proprietor to 'show' the use made of the mark. In *Plymouth Life Centre, O/236/13*, Mr Daniel Alexander Q.C., sitting as the appointed person, observed that:

"Providing evidence of use is not unduly difficult. If an undertaking is sitting on a registered trade mark, it is good practice in any event from time to time to review the material that it has to prove use of it."

20. In addition, in *Dosenbach-Ochsner AG Schuhe und Sport v Continental Shelf 128 Ltd ('CATWALK')*, BL O/404/13, Mr Geoffrey Hobbs Q.C., sitting as the appointed person, stated:

"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:

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 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.”

21. In answer to Ms Fox’s criticisms of his evidence, Mr Herman stated his view that it was morally wrong to market goods direct to children but the poster at Exhibit 1 was advertising drinks for children and was intended to do so by endearing the product to adults in a responsible way for them to buy them for their children. He stated that he did not have a signed physical copy of the contract made between KOL/SCCC and the registered proprietor but that all parties have electronic copies of it and submitted that “there is lots of evidence online showing our dealings” with them. He submitted that the person he had dealt with at the club no longer worked there. He accepted that he had not provided evidence of turnover but stated that his view was that turnover was a confidential matter. He also accepted he had not provided any detail of advertising expenditure but submitted that “it isn’t necessary to spend thousands on advertising” as there are other ways to carry out marketing. As to Ms Fox’s submission that there was no evidence of sales in the UK, he referred to Exhibit 3 and said that the Facebook page shown included the words Las Vegas, London and Sydney and so it should be accepted that sales and been made in London. He did not demur from Ms Fox’s submissions that some of the internet material he had exhibited was “current” rather than dating from the relevant periods but submitted that “you can’t go back in time regarding website content”. As Ms Fox responded, the Internet Archive through the ‘waybackmachine’ is one well-known way of doing just such a thing.

22. Whilst I accept that Mr Herman may have limited knowledge of trade mark legislation, he was aware enough to apply for the registration of the trade mark the subject of these proceedings (later assigned to his company) and acquired rights to it. With that right comes responsibilities and if, as the Act allows, another seeks to challenge a registration, it is the responsibility of the registered proprietor to decide whether, and if so how, to defend its registration from that challenge, seeking professional advice if necessary to supplement both its own knowledge and that available elsewhere including publicly available material from the IPO itself.

23. With all of the various submissions in mind, I go on to review the evidence filed by Mr Herman. I remind myself that the period within which the registered proprietor must show use of its mark is 17 September 2005 to 16 September 2010 and, in the alternative, 21 February 2008 to 20 February 2013 or 20 May 2008 to 19 May 2013. In the counterstatement, the registered proprietor claims to have used the mark on *sports nutrition supplements & sports drinks*. In his witness statement, Mr Herman has stated that the mark has been used since 2005 on *health/sports drinks, vitamins and sports nutrition products*. The mark is, of course, registered in respect of vitamin supplements and milk and fruit based drinks for children. No evidence has been filed to show the volumes of any sales which may have taken place under the mark at any time in respect of any of the goods for which the mark is registered nor is there any evidence of what turnover, if any, has been achieved for any of the goods, under the mark. There is no evidence in the form of e.g. order forms, delivery notes or invoices and no evidence from third parties to whom such goods may have been sold or supplied. Neither is there any evidence of advertising under the mark. Evidence of

this nature should have been relatively easily available to the registered proprietor particularly if, as Mr Herman submitted, a “huge effort” had been put into using the trade mark the subject of these proceedings.

24. In its counterstatement, the registered proprietor indicates the mark has been promoted “above and below the line”. Exhibit 1, is a poster which is said to be advertising a drink for children. As I set out above, the poster is said to have been sited at Surrey County Cricket Club ground and shows a picture of an adult male in a sports-type top drinking from a pop-top container. No information is given as to when or where, specifically, within the ground the poster may have been displayed or who and how many people may have seen it nor is the poster itself dated but even if this information had been provided and given its style, I am not persuaded that the poster is indicative of use either in relation to milk or fruit based drinks for children or, for that matter, vitamin supplements.

25. Mr Herman states that the document at exhibit 2 shows there was a contract with KOL and SCCC which demonstrates “investment in the marketing of the mark” of some £75,000 over a period of three years. Whilst the document itself refers to the supply of “products” worth £25,000 p.a. and indicates the period of agreement as being from 1 April 2008 to 31 March 2011, a period which would fall within the relevant periods in which use must be shown, the document has not been signed and so I cannot be certain that it was ever in force. The lack of signatures does not, of itself, lead me to reject the document as having no evidential relevance. What is of relevance is that whilst there are multiple references within the document to the registered proprietor and its Bio-Synergy logo, the document makes no mention of the trade mark the subject of these proceedings nor is there any mention of what goods are to be supplied as part of that contract and certainly there is no mention of the supply under the mark of any goods for which that mark is registered. Mr Herman submits that he has “witnessed the documents as being factual and the agreement was with the company, therefore (sic) would not be common practice to list each brand we intend to use” but I reject this. The material filed by Mr Herman appears to make use of various Bio-Synergy and Super 7 marks but what has to be shown is use of the mark the subject of these proceedings-FUEL THE SUPERHERO INSIDE in relation to the goods for which it is registered and within the relevant periods. The material at exhibit 1 and exhibit 3 show this mark (albeit with the word super-hero hyphenated) but make no reference to the goods for which it is registered and are not dated. The material at exhibits 2, 4 and 5 are not dated either nor do they show the mark or make clear what goods are involved.

26. In *Corgi* [1999] RPC 549, Mr Geoffrey Hobbs Q.C. sitting as the appointed person stated:

“I appreciate that the Registrar is frequently required to act upon evidence that might be regarded as less than perfect when judged by the standards applied in High Court proceedings. Even so, it is necessary to remember that there is a distinction to be drawn between inference and conjecture.”

He referred to the case of *Jones v Great Western Railway Co* [1931] 144 LT 194 wherein it was stated:

“The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence and, if it is a reasonable deduction, it may have the validity of legal proof”.

27. Whilst I have no reason to doubt that the registered proprietor, through Mr Herman, has a successful business, his case as presented would require me to make a decision in his favour based on conjecture. I cannot do so.

28. In short, no evidence has been filed of any sales under the trade mark FUEL THE SUPERHERO INSIDE within the relevant periods (or at any time) and in relation to the goods for which it is registered which are vitamin supplements and milk or fruit based drinks for children. No evidence has been filed of direct, paid for (above the line) or other indirect (below the line) promotion of the trade mark in relation to these goods. Whilst I take note of Mr Herman’s submission that the registered proprietor only keeps certain records, he is, on his own admission, the founder and leading force behind the registered proprietor and thus should be well placed to provide relatively detailed information of the use made of the trade mark or to identify others who can. He has failed to do so. Such evidence as has been filed is not the sort which goes anywhere near proving the type of use that is appropriate in the economic sectors concerned for preserving or creating market share for the goods for which the mark is registered and is wholly insufficient to show any genuine use of the mark as registered at any time in respect of these goods as is required by the Act.

29. The application for revocation of the trade mark succeeds in full.

Summary

30. The application succeeds in full and the trade mark is revoked with effect from 17 September 2010.

Costs

31. The applicants have succeeded and are entitled to an award of costs in their favour. The pleadings filed by both parties were brief and not complicated and the evidence filed by the registered proprietor was minimal and would not have taken any significant time or effort for the applicants to review. The applicants did not file evidence. Whilst, in light of the evidence filed, it is, perhaps, somewhat surprising that the applicants requested a hearing, they had the right to do so. The hearing was not particularly lengthy and the submissions made on behalf of the applicants were not complex but would have taken some, though not any significant, time to prepare. The supplementary submissions made by Mr Herman following the hearing, were brief and would not have required any significant consideration by the applicant who chose not to respond to them.

32. Taking all matters into account, I make the award on the following basis:

For filing a statement and reviewing the other side's statement:	£300
For reviewing and commenting on the registered proprietor's evidence:	£300
For preparation for and attendance at the hearing:	£200
Fee:	£200
Total:	£1000

33. I order Bio-Synergy Ltd to pay DC Comics (A General Partnership) and Marvel Characters, Inc jointly, the sum of £1000 as a contribution towards their costs. This sum is to be paid within seven days of the expiry of the period for appeal against this decision or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 21st day of March 2014

**Ann Corbett
For the registrar
The Comptroller-General**