

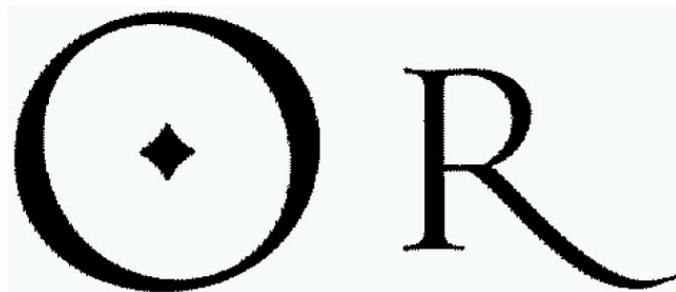
O-194-05

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 2318815
IN THE NAME OF AMBROSE (GB) LIMITED
TO REGISTER A TRADE MARK IN CLASS 33**

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 91702 IN THE NAME OF
THE OR ORGANISATION LIMITED**



Trade Marks Act 1994

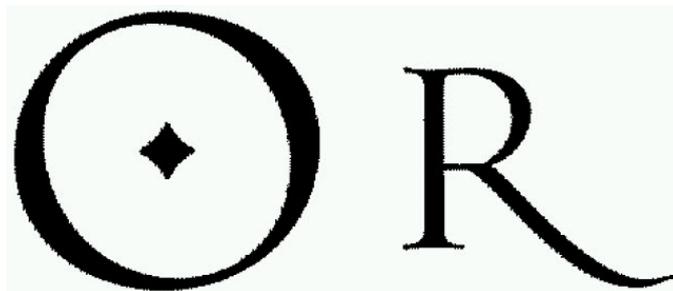
**IN THE MATTER OF Application No. 2318815
in the name of Ambrose (GB) Limited
to register a trade mark in Class 33**

And

**IN THE MATTER OF Opposition thereto
under No. 91702 in the name of The OR Organisation Limited**

BACKGROUND

1. On 16 December 2002, Ambrose (GB) Limited applied to register a trade mark in Class 33 in relation to **ALiqueurs®**.
2. The mark applied for is as follows:



3. On 20 May 2003, Bawnor Limited which later changed its name to The Ór Organisation Limited filed notice of opposition to the application. Relying on one earlier mark, details of which can be found as an annex to this decision, the ground of opposition is as follows:

Under Section 5(2)(b) because the mark applied for is similar and is sought to be registered in respect of goods that are identical or similar to those for which the opponents= earlier mark is registered such that there exists a likelihood of confusion.

4. The applicants filed a counterstatement in which they admit that the goods covered by their application fall within the description of **Alcoholic beverages®** for which the opponents= mark is registered. However, they dispute that the respective marks are similar and deny the ground on which the opposition is based.
5. Both sides ask that an award of costs be made in their favour.
6. Neither side requested to have an oral hearing on the case, electing instead to make written submissions and to have a decision taken from the papers on file. After a careful study of the submissions and the evidence I now go on to make my decision.

OPPONENTS= EVIDENCE

7. This consists of a Witness Statement dated 31 March 2004 from Lucienne Purcell, previously Managing Director of The Ór Organisation Limited that began trading under the name Bawnor Limited. Ms Purcell says she has been connected with the company for a total of six years. Much of Ms Purcell's Statement consists of submissions on the applicants= Counterstatement and the merits of this case. Whilst I do not consider it necessary to summarise these submissions I will take them fully into account in my determination of the case. Insofar as the Statement does introduce evidence I have summarised it below.

8. Ms Purcell says that her company produces a drink based on a blend of grain spirit and fruit extracts that she describes as being schnapps. She says that the drink has a golden colour, the name ÓR being chosen as the brand because it is the word for gold in the Irish language. Ms Purcell says that the beverage has been displayed at the London Wine Fair, and various other trade fairs and exhibitions outside of the UK. She asserts that although the brand was launched in Eire there will have been spillover of recognition into the UK by the visits of UK consumers. Exhibit LP1 consists of extracts from editions of the Irish Examiner, Sunday Business Post and Evening Herald published in 2000 and 2001. The Sunday Business Post article refers to the drink being stocked, inter alia, by Tesco, the Herald says that ALondoners are Aschnapping up@the latest Irish-made beverage to become a hit abroad@

9. Exhibit LP2 consists of a press release endorsed as dating from 2001, stating that AÓr is the word for gold in the Irish and French languages, and that the drink is currently available in London@. The press release gives the name of a US importer which leads me to believe that it was aimed at the US market. Ms Purcell refers to the awards achieved by the drink at various International competitions and events, exhibit LP2 containing photographs and other matter referring to Ór, including in a menu although none can be seen to be UK events. Exhibit LP3 consists of an advertisement relating to a promotional event at a bar in Covent Garden in 2001, an article from the 3 March 2001 edition of The Grocer magazine referring, inter alia, to the opponents= Ór Irish schnapps, and an article from the May 2000 edition of the Irish Times referring to the success of the drink at the London Wine Fair. Exhibit LP4 consists of an extract from the June 2001 edition of Harpers On Trade magazine that Ms Purcell says is published in the UK, that refers to Ór schnapps, and an article endorsed as originating from the publication Elle UK in 2001 that refers to the opponents= schnapps being available at a bar in Dublin. The exhibit also includes a copy of the certificate won by the schnapps at an International wine and spirit competition.

APPLICANTS= EVIDENCE

10. This consists of two Witness Statements. The first is dated 23 August 2004 and comes from Ann Lynch, a Trade Mark Attorney at Rouse & Co, the applicants= representatives in these proceedings. Ms Lynch's Statement consists of submissions on the relative merits of this case. Whilst I do not consider it necessary or appropriate to summarise these submissions I will take them fully into account in my determination of the case. The Exhibits ABL1, ABL2 and ABL3 consists of examples of marks taken from the OHIM and UK trade mark registers. Exhibit ABL4 consists of an extract from the website of ivenus.com, Ms Lynch highlighting that it refers to the opponents= schnapps as AR Irish schnapps@

11. The second Witness Statement is dated 23 August 2004 and comes from Michael Amvrosiou, Managing Director of Snova International, a position he has held since 30 April 2001, and Managing Director of Ambrose (GB) Limited, a position held since 28 January 1999.

12. Mr Amvrosiou says that the mark that is the subject of the application was introduced into the UK in May 2002 and is used in relation to liqueur. He says that some 20,548 bottles have been sold through various wholesalers and distributors to the licenced trade, retailers, hotels, bars and restaurants throughout the UK, although he does not say how many had been sold as at the relevant date. Mr Amvrosiou says that the product has received wide promotion by way of press advertising in publications which he lists, and at trade and consumer shows. All appear to be related to the various food and drink trades. Exhibit MA1 consists of copies of advertisements that appeared in trade publications, all well after the relevant date.

OPPONENTS= EVIDENCE IN REPLY

13. This consists of two Witness Statements. The first is dated 26 October 2004 and comes from Vivienne Renée Noyle, a secretary at Urquhart-Dykes & Lord LLP. Ms Noyle says that she is a UK citizen currently residing in the UK, but had previously had residence in the Republic of Ireland for some 10 years. Ms Noyle says that whilst in Eire she became familiar with the Irish accent and based on this, agrees with Lucienne Purcell's assertion that the letter R in isolation would be pronounced in a very similar way to OR by the majority of Irish people.

14. The second Witness Statement is dated 26 October 2004 and comes from Susan Margaret Ratcliffe, a Trade Mark Attorney at Urquhart-Dykes & Lord LLP, a position she has held since February 2004. Much of Ms Ratcliffe's Statement consists of no more than submissions on the evidence filed by the applicants, and the substantive issues in this case. Whilst I have summarised information that may be of evidential value, I do not consider it to be appropriate or necessary to summarise the submissions in detail. I will take them fully into account in my determination of this case.

15. Ms Ratcliffe says that London has a large and diverse population, and as shown by the extract taken from the BBC News website (exhibit SMR1) 14 million Britons claim Irish descent, but that the figure is probably nearer 5 million, with more than three-quarters of the population of London claiming Irish ancestry. Exhibit SMR2 consists of details of the London Wine Fair 2000, the article referring to the event as 'this big fair' and stating that 'people come from all over the world'. Exhibit SMR3 consists of details of the opponents' Community Trade Mark. Exhibit SM4 consists of an advertisement for the opponents' schnapps, Ms Ratcliffe mentioning the 'fada' embossed above the 'AO' on the bottle, stating that it is her understanding that people with a knowledge of Irish would hence pronounce the brand as OR because of the Irish accent. Ms Ratcliffe agrees that the most prominent part of the mark is the R and circle. In answer to Ms Lynch's statement that both OHIM and the UK Trade Marks Office had identified the opponents' earlier mark as 'R Irish Schnapps', Ms Ratcliffe refers to Exhibit SMR5. This consists of details taken from the UK Trade Marks Registry database relating to the mark SV, Ms Ratcliffe saying that the reference used by the Registry is very different to the mark that was advertised.

16. That concludes my summary of the evidence insofar as it is relevant to these proceedings.

DECISION

17. The opposition stands under Section 5(2)(b) alone. That section reads as follows:

A5.-(2) A trade mark shall not be registered if because -

(a) **YYYYYYYY.**

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark. @

18. An earlier trade mark is defined in Section 6 of the Act as follows:

A6.- (1) In this Act an **A**earlier trade mark@ means **B**

(1) a registered trade mark, international trade mark (UK) or Community trade mark which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,@

19. I take into account the well established guidance provided by the European Court of Justice (ECJ) in *Sabel BV v. Puma AG* [1998] E.T.M.R. 1, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc* [1999] E.T.M.R. 1, *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v. Adidas AG* [2000] E.T.M.R. 723. It is clear from these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v. Puma AG*, paragraph 22;

(b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v. Puma AG*, paragraph 23, who is deemed to be reasonably well informed and reasonably circumspect and observant - but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.* paragraph 27;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v. Puma AG*, paragraph 23;

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v. Puma AG*, paragraph 23;

(e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17;

(f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v. Puma AG*, paragraph 24;

(g) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v. Puma AG*, paragraph 26;

(h) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV v. Adidas AG*, paragraph 41;

(i) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 29.

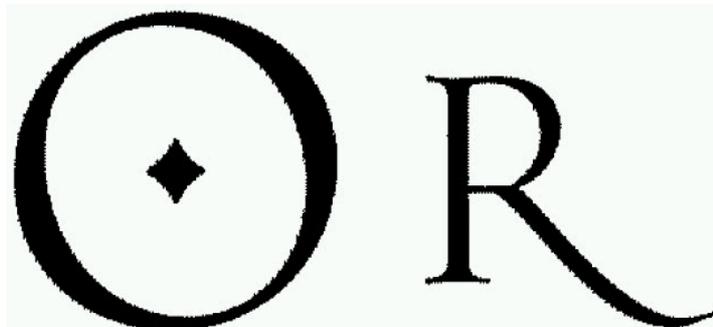
20. In any comparison it is inevitable that reference will be made to the elements of which a mark is composed, and rightly so, for in determining the likely perception of marks upon the consumer the case law requires that consideration be given to the distinctiveness and dominance of the component parts. However, this must be balanced against the fact that the consumer does not embark on an analysis and it is the marks as a whole that must be compared.

21. The opponents rely on one earlier registration for the following mark:



22. The colours black, gold and grey are claimed as a feature of the mark. The words **PRODUCT OF IRELAND AND IRISH SCHNAPPS** are clearly non-trade mark matter. Single letters are considered to be devoid of distinctive character unless presented in a distinctively stylised way. The letter **R** in this mark is in a plain font and accordingly should also be regarded as individually lacking a distinctive character. The circle surrounding the letter is said to be a letter **O**, but to me it gives the impression of being no more than a circular border particularly given that the upper portion extends beyond the outer line of the rest of the shape. The bands with the circle, particularly as represented in colour, combine to create a distinctive whole, and even though it is not distinctive in itself, the letter **R** adds to the distinctiveness of the mark as a whole. Overall, I would say that the graphical elements in combination with the descriptive words and the manner in which they have been used, creates the impression of a label.

23. The mark applied for is as follows:



24. The mark is said to be the letters **AOR** which is how I see it. I am, however, conscious that with the **O** being larger than the following letter **R**, having a graphical element in the middle and the spacing between it and the **R**, some consumers may not see it as a letter. That the letter **R** is in upper case adds to this possibility. Taking into account my comments on the lack of distinctive character of single letters, if there is a distinctive and dominant component in this mark it is either the circular device, or if that is taken to be a letter **O**, the letters **OR** in combination. Unlike the opponents' mark this does not give the idea of a label, so conceptually they send different messages.

25. On my analysis I consider the dominant, distinctive components of the respective marks to be visually distinct, and apart from both containing the letter **R**, as a whole they have a noticeably different appearance.

26. The selection of a beverage in establishments such as supermarkets and off licences, and from a drinks list in restaurants, will primarily be a visual act, which means that similarity in the appearance of the marks will be of some significance. The selection may also be made orally, such as through an enquiry made of a sales assistant, waiter or at a bar. I am aware that when alcoholic beverages such as spirits or liqueurs are purchased by request there are several

ways in which this might be done. If they are of a particular speciality or quality the likelihood is that the consumer will ask for it by brand name. Those that are available from a number of sources under various trade names may be requested either by the brand, or the generic name, for example, brandy, whisky, gin. If consumed with a mixer they may be asked for by the brand in conjunction with the name of the addition, or simply by use of the generic description alone, for example, Agin and tonic. I have already given my view that the letter element of the opponents' mark as registered would be seen as AR and not AOR, so insofar as A words speak in trade marks, it seems to me that when referring to the opponents' mark as it is registered the consumer will do so by use of the letter AR, as R Irish schnapps, or if it is a unique product, as Irish schnapps.

27. The applicants' mark is most likely to be enunciated as the letters AOR, and being that notionally identical goods are involved, the manner in which this will be referred to in speech will be in the same variations as the opponents' mark. In their submissions relating to the phonetic similarity of AR and AOR the opponents refer to the high incidence of consumers having Irish ancestry, primarily in London, and the manner in which an Irish speaker would pronounce the letter AR. There may be a significant number of persons in the UK that have Irish ancestors, but they will have their own regional, not Irish accents and will not necessarily be familiar with the Gaelic language. Those consumers that are from Ireland, had a knowledge of Gaelic and retain their accents do not represent the vast majority of the notional average consumer. But even if they did, the evidence goes nowhere near to establishing that their pronunciation of AR would be as AOR or anything similar. I do not consider the statement of one person, not a qualified linguist but who just happened to have lived in Ireland to be convincing. To the normal English speaking consumer the sound of AR and AOR will be easily distinguishable.

28. The opponents say that although the opponents' schnapps was launched in Eire there will have been spillover of recognition into the UK through visits from UK citizens, but beyond this assertion there is no evidence on which I can say this is or is not the case. I therefore do not see how I can gauge, whether, and to what extent this may have established a reputation in the UK. The opponents evidence shows that Ór schnapps has won an award at various drinks competitions, including the London Wine Fair, and has featured in several press articles that refer to the drink having become popular in London. Many of the press articles are from what would be called trade publications for the food and drink industries and give little insight into the likely knowledge of the consumer. A statement that the schnapps has become popular in the London area, one-off promotional events such as at the Porterhouse bar, and that the schnapps has been sold in Tesco could have provided some support to a claim to a reputation in the UK. However, as they stand they do not provide sufficient information on which to say the mark has a reputation, or has become more distinctive and deserving of wider protection.

29. The applicants concede that the liqueurs for which they seek to register their mark are covered by the term Alcoholic beverages appearing in the specification of the opponents' earlier mark, and I therefore do not need to determine whether there are identical or similar goods involved. There is nothing in the wording of the respective specifications that would separate them in the market or course of trade. Accordingly, I must notionally assume that they operate in the same sector, and share the same channels of trade, from manufacture to retail. I see no reason why the consumer of the registered proprietors' goods should be any different to those that would buy the applicants' goods, so the same consumers are involved.

30. Adopting a global approach and weighing the similarities against the differences, I find that use of the marks applied for in a trade in respect of the goods for which the applicants seek registration would not cause the public to wrongly believe that the goods are those of the opponents or come from some economically linked undertaking. Consequently, there is no likelihood of confusion and the opposition under Section 5(2)(b) fails accordingly.

31. The opposition having failed the applicants are entitled to their costs. I order the opponents to pay the applicants the sum of , 1,100 as a contribution towards their costs. 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 6th day of July 2005

**Mike Foley
For the Registrar
the Comptroller-General**

