

O-229-19

**TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATION Nos. 3288748 & 3288758
BY FULLER SMITH & TURNER PLC
TO REGISTER THE TRADE MARKS**

FRUIT LOOP

And



IN CLASS 32

AND

**IN THE MATTER OF CONSOLIDATED OPPOSITIONS THERETO
UNDER Nos. 412633 & 412678BY
KELLOGG COMPANY.**

BACKGROUND

1) On 8 February 2018, Fuller Smith & Turner plc (hereinafter the applicant) applied to register the two trade marks FRUIT LOOP and the device mark shown on the front page in respect of identical specifications in Class 32 of: Beer, ale, lager, stout and porter; non-alcoholic beers.

2) The applications were examined and accepted, and subsequently published for opposition purposes on 2 March 2018 in Trade Marks Journal No.2018/009 and 9 March 2018 in Trade Marks Journal No. 2018/010 respectively.

3) On 4 June 2018 and 7 June 2018 Kellogg Company (hereinafter the opponent) filed notices of opposition. The opponent is the proprietor of the following trade mark:

Mark	Number	Dates of filing & registration	Class	Specification relied upon
FROOT LOOPS	EU 145325	29.12.99 27.02.01	30	Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and non-frozen confectionery; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); spices.

- a) The opponent claims that it has reputation under the above mark in respect of “preparations made from cereals”. It claims that use of the mark in suit would take unfair advantage of its mark and use of it would ride upon the coat tails of the opponent’s reputation and marketing efforts which would provide an unfair advantage. Use of the mark in suit would also dilute the distinctiveness of its mark, and the association of the opponent’s product with use on alcoholic beverages is likely to cause detriment to its reputation. As such the mark in suit offends against section 5(3) of the Act.

4) On 30 July 2018 the applicant filed two counterstatements basically denying all the ground of opposition. It puts the opponent to strict proof of use of its mark.

5) Both parties filed evidence, and both also seek an award of costs in their favour. Neither side wished to be heard. Both parties provided written submissions which I shall refer to as and when necessary in my decision.

OPPONENT'S EVIDENCE

6) The opponent filed two witness statements. The first, dated 5 November 2018, is by Gareth Maguire, the Marketing Director of the opponent. He states that the opponent first launched FROOT LOOPS as a multi-coloured cereal in 1963. He states that the brand is not always available nationally in the UK to the same extent as other Kellogg cereals. The most recent major promotion being the limited edition "Unicorn Froot Loops" launched in September 2017 which was first available only in Asda stores, but more widely available from other retailers a few weeks later. A picture of the box is provided at exhibit GM1 which shows the words "UNICORN FROOT LOOPS" above an image of the head and back of a Unicorn standing behind a bowl of multi coloured cereal hoops with milk splashing upon them. The story of the launch was covered by the national and local press such as the Sun, the Manchester Evening News and Cosmopolitan. The spend on advertising and promotion totalled £19,205 and Kellogg also carried out a social media campaign, but the promotion was said to be restricted due to the laws on advertising to children in the UK.

7) The second witness statement, dated 2 November 2018, is by Christopher Norris the opponent's Trade Mark Attorney. He provides the following exhibits:

- CM1: A photograph of a box of Froot Loops cereal and a copy of the receipt for £3.50. The cereal was purchased in Bristol on 24 October 2018.
- CM2: A photograph of a small tub of Froot Loops cereal and a copy of the receipt for £1.39. The cereal was purchased from a petrol station in Abergavenny on 9 October 2018.
- CM3: Website listings from Asda and Iceland (dated 18 September 2018) which show an image of Froot Loops cereal, but state it is unavailable, and the same image on the website of a company called Partridges in London (dated 30 October 2018) which does have the product available.

- CM4: Undated printouts from the Cereal Killer Café in London which has available to eat in its two cafes, Froot Loops amongst cereals from around the world.
- CM5: Copies of pages from fashion commentators, dated 22 August 2018, regarding a UK based fashion company AwayToMars designing a range of ten clothing, footwear and headgear items featuring images of Froot Loops. It states that these will be available from the company website and Kellogg's New York café at prices between US\$30-180.
- CM6: A copy of a page of reviews of the applicant's beer from the website www.ratebeer.com dated 11 September 2018, which states "Aroma is juicy fruits, perfumey hops, light toffee malt base. Taste is juicy fruits, green Haribo apple rings, gummy bears. Oily mouthfeel, flat. A bit funny in its Haribo character and in that sense a bit overperfumed, but quite alright – it does really taste like Fruit Loop I guess."

APPLICANT'S EVIDENCE

8) The applicant filed two witness statements. The first, dated 18 January 2019, is by Severine Pascale Bequin, the applicant's Company secretary a position she has held since July 2014. She provides brief details of the company's history and the fact that it owns numerous pubs, inns and hotels in the UK. She points out that the company always uses its "house" mark "Fullers" on bottles, cans and on draught beers (via pump clips). The applicant, like other brewers, produces seasonal beers, and it decided to produce a fruity summer beer. The company came up with a number of potential names and decided that the artwork should feature a spiralling loop of fruit juice. The beer went on sale in the UK on 7 June 2018. She states "Neither the word mark nor the Label Mark were created with any reference to the FROOT LOOPS trade mark ("the opponent's mark") belonging to the opponent,"

9) The second witness statement, dated 30 January 2019, is by Hugh Christian Finn, the applicant's Trade Mark Attorney. He provides a number of exhibits which state that the opponent's Froot Loops cereal contain a large amount of sugar (approximately 41%) whereas other exhibits show there is little sugar in beers. He also provides exhibits which show the layouts of supermarkets where alcohol and beer are not usually placed near each other. I have not detailed the exhibits as neither statement is contentious.

10) That concludes my summary of the evidence filed, insofar as I consider it necessary.

DECISION

13) The only ground of opposition is under section 5(3) which reads:

“5(3) A trade mark which-

(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

14) The opponent relies upon its trade mark listed in paragraph 3 above which is clearly an earlier trade mark. The applicant requested that the opponent provide proof of use and, given the interplay between the date that the opponent’s mark was registered and the date that the applicant’s marks were published (2 March 2018 and 9 March 2018), the proof of use requirement bites on the opponent’s mark. Section 6A of the Act states:

“6A Raising of relative grounds in opposition proceedings in cases of non-use.

(1) This section applies where-

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

(b) there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if-

(a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) For these purposes-

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

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5) In relation to a Community trade mark, or International trade mark (EC) any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Union.

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.

(7) Nothing in this section affects –

(a) the refusal of registration on the grounds mentioned in section 3 (absolute grounds for refusal) or section 5(4) (relative grounds of refusal on the basis of an earlier right), or

(b) the making of an application for a declaration of invalidity under section 47(2) (application on relative grounds where no consent to registration).”

15) I must first consider whether the opponent has fulfilled the requirement to show that genuine use of its marks has been made. In the instant case the publication dates of the applications were 2 March 2018 and 9 March 2018, therefore the relevant period for the proof of use is 3 March 2013 – 2 March 2018 and 10 March 2013 – 9 March 2018. In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited*, [2016] EWHC 52, Arnold J. summarised the case law on genuine use of trade marks. He said:

“I would now summarise the principles for the assessment of whether there has been genuine use of a trade mark established by the case law of the Court of Justice, which also includes Case C-442/07 *Verein Radetsky-Order v Bunderversvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223 and Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR 7, as follows:

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

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

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29].

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

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

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

(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]; *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].”

16) In *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Mr Daniel Alexander Q.C. as the Appointed Person stated that:

“22. The burden lies on the registered proprietor to prove use..... However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of

use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

and further at paragraph 28:

“28. I can understand the rationale for the evidence being as it was but suggest that, for the future, if a broad class, such as “tuition services”, is sought to be defended on the basis of narrow use within the category (such as for classes of a particular kind) the evidence should not state that the mark has been used in relation to “tuition services” even by compendious reference to the trade mark specification. The evidence should make it clear, with precision, what specific use there has been and explain why, if the use has only been narrow, why a broader category is nonetheless appropriate for the specification. Broad statements purporting to verify use over a wide range by reference to the wording of a trade mark specification when supportable only in respect of a much narrower range should be critically considered in any draft evidence proposed to be submitted.”

17) Whilst in *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL 0/404/13, Mr Geoffrey Hobbs Q.C. as the Appointed Person stated that:

“21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed in *Matsushita Electric Industrial Co. v. Comptroller General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be

required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘*show*’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services 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.”

18) Whilst the opponent claimed to have launched its product in 1963 it was not clearly stated that this was in the UK. The opponent failed to provide any sales figures for the UK, and the only marketing figures were in relation to a special edition “Unicorn Froot Loops”. It is unclear how many packets were offered for sale under this limited edition, let alone how many packets were sold. It is not clear they were available in all Asda stores throughout the UK. The opponent must be aware of how many boxes of cereal under its mark it sells in the UK each year. Alternatively it could have simply provided the figures for sales to Asda which may have shown bursts of activity during the five year period, given the apparent sporadic availability of the product. For whatever reason the opponent chose not to provide such evidence. Whilst the opponent managed to find packets of the cereal available at specialist stores, **I do not consider the evidence sufficient to get past the proof of use requirements.** Even if the opponent had passed the proof of use test it would then have to show reputation in the UK.

19) The question of reputation was considered in *General Motors*, Case C-375/97, where the CJEU held that:

“25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.

28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation 'in the Member State'. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation 'throughout' the territory of the Member State. It is sufficient for it to exist in a substantial part of it."

20) As set out earlier the opponent has failed to show evidence of the extent of sales of the product in the UK, whether the goods were sold throughout the UK, the marketing of the product (other than the limited-edition version) which will probably be more remembered for its link to a Unicorn than the name of the product. In my view, the opponent has singularly failed to show that its mark is known by a significant part of the UK population. **As such it fails to get over the first hurdle.**

21) Ordinarily, my findings at paragraphs 18 & 20 would mean that the section 5(3) ground must fail. However, in its submissions dated 30 January 2019, the applicant's legal representatives made the following surprising statement:

"6. Whilst it is accepted that consumers of the applicant's ale sold under the word mark and the label mark would likely be aware of the opponent's mark for breakfast cereal by reason of the opponent's long standing usage of the opponent's mark ..."

22) The applicant's representatives make no mention of the issue of proof of use or reputation other than this single sentence. I am aware that the opponent's product is basically an American one, however nowhere is this mentioned in the evidence and so the applicant's comments must be seen as their view of the evidence or their personal knowledge of use in the UK. Whichever, it is an admission against interest that means that the proof of use and reputation requirements as set out

above must be considered to have been met. The reputation hurdle is very low these days and the admission is sufficient for the opponent to scrape over it. As such I will continue on with the question of whether a significant part of the public will form a link between the two marks. The relevant case law for section 5(3) can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, Case 252/07, *Intel*, Case C-408/01, *Adidas-Salomon*, Case C-487/07, *L'Oreal v Bellure* and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows.

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman*, paragraph 29 and *Intel*, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel*, paragraph 42

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel*, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel*, paragraphs 76 and 77.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV, paragraph 40*.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora, paragraph 74 and the court's answer to question 1 in L'Oreal v Bellure*).

23) In determining whether the public will make the required mental 'link' between the marks I must take account of all relevant factors. The factors identified in *Intel* are:

- i) The degree of similarity between the conflicting marks
- ii) The nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public
- iii) The strength of the earlier mark's reputation
- iv) The degree of the earlier mark's distinctive character, whether inherent or acquired through use.

24) Regarding the similarity of the marks I take into account case C-408/01, *Adidas-Salomon*, where the CJEU held that:

“28. The condition of similarity between the mark and the sign, referred to in Article 5(2) of the Directive, requires the existence, in particular, of elements of visual, aural or conceptual similarity (see, in respect of Article 5(1)(b) of the Directive, Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 23 in fine, and Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraphs 25 and 27 in fine).

29. The infringements referred to in Article 5(2) of the Directive, where they occur, are the consequence of a certain degree of similarity between the mark and the sign, by virtue of which the relevant section of the public makes a connection between the sign and the mark, that is to say, establishes a link between them even though it does not confuse them (see, to that effect, Case C-375/97 *General Motors* [1999] ECR I-5421, paragraph 23).”

25) Whilst in *Intra-Press SAS v OHIM*, Joined cases C-581/13P & C-582/13P, the Court of Justice of the European Union stated (at paragraph 72 of its judgment) that:

“The Court has consistently held that the degree of similarity required under Article 8(1)(b) of Regulation No 40/94, on the one hand, and Article 8(5) of that regulation, on the other, is different. Whereas the implementation of the protection provided for under Article 8(1)(b) of Regulation No 40/94 is conditional upon a finding of a degree of similarity between the marks at issue so that there exists a likelihood of confusion between them on the part of the relevant section of the public, the existence of such a likelihood is not necessary for the protection conferred by Article 8(5) of that regulation. Accordingly, the types of injury referred to in Article 8(5) of Regulation No 40/94 may be the consequence of a lesser degree of similarity between the earlier and the later marks, provided that it is sufficient for the relevant section of the public to make a connection between those marks, that is to say, to establish a link between them (see judgment in *Ferrero v OHMI*, C-552/09 P, EU:C:2011:177, paragraph 53 and the case-law cited).”

26) In short, the similarity of signs under Section 5(3) must be assessed in the same way for section 5(2). The level of similarity required for the public to make a link between the marks for the purposes of 5(3) may be less than the level of similarity required to create a likelihood of confusion, but there must be similarity when the marks are compared overall.

27) For ease of reference the marks to be compared are as follows:

Opponent's mark	3288748	3288758
FROOT LOOPS	FRUIT LOOP	

28) I shall first compare the applicant's word only mark 3288748 to the opponent's mark. There are obvious visual similarities between the marks with the only difference being that the opponent's mark has two "o"s instead of the letters "ui" in an obvious misspelling, presumably to form more of a visual link to the word "loop" which is itself descriptive of the loops of cereal found in the packet, and the use of the plural version of the word LOOPS in the opponent's mark, where the applicant's mark is the singular version. The opponent contends that the misspelling of the word FRUIT as FROOT in its mark may not be noticed by the average consumer. To aid this point it relies upon a few occasions on social media and also upon a receipt where the public refer to the opponent's product as "Fruit loops". Whether this is because the individuals genuinely have not noticed how the opponent spells its product or whether it is simply the function of autocorrect is not clear. To my mind, the marks are visually similar to a medium degree. Aurally, the marks are identical other than the plural ending to the word "loops" which will go largely unnoticed in conversation. Conceptually, the opponent contends that he marks are identical with both evoking loops of fruit. I agree that because of the plural version of the word "loops" this is precisely the image that the opponent's mark conjures up, especially as the product is coloured to try to imply that the product is linked to actual fruit. However, the words "fruit loop" as used in the applicant's mark is a well-known term in English for someone who is a bit mad, dippy or crazy. When used on a beer the image perhaps conjures up what the beer will do to the imbiber. **Overall, the applicant's mark 3288748 is similar to the opponent's mark to a medium degree.**

29) Turning to the applicant's mark 3288758 and comparing it to the opponent's mark, there are the same similarities / differences between the words FROOT LOOPS and FRUIT LOOP, but there are also a number of other visual differences such as the dragon device and the word FULLERS at the top of the mark, the device element of a swirl of fruit similar to that found in a glass of punch, and the words TROPICAL FRUIT PALE ALE and the alcohol proof reading. The opponent contends that the words FRUIT LOOP are the dominant element of the applicant's mark. Even if I were to accept this view, one cannot simply ignore the rest of the mark, even though this would be convenient for the opponent. To my mind, visually the marks are only similar to a low degree. Aurally I accept the opponent's contention that if ordering a bottle of beer or a glass of draught beer typically the purchaser does not refer to the actual brewer but simply to the name of the beer, in this case FRUIT LOOP. However, as the opponent pointed out in its submissions regarding the matter upon the packaging of its cereal, this comparison is not how the mark is used but it is a comparison of what is sought to be registered. Aurally the marks are similar to a low degree. Conceptually, the same views as set out in the previous paragraph apply, but with even more added matter causing differences.

Overall the applicant's mark 3288758 is similar to the opponent's mark to a low degree.

30) The opponent contends that its mark has been "in existence" for over fifty years. However, it has shown no real use in the UK. It refers to the use of words such as "classic" and "iconic" by newspapers and others covering the launch of the limited edition Unicorn version in 2017. Typically, such writers use copy provided by the company sending out the press release, or in this case they may well have looked online and found references to FROOT LOOPS, particularly from the USA where I believe that it truly is iconic. In the absence of proven use in the UK I do not accept that the opponent's mark has a strong reputation. Whilst I accepted that the applicant's legal team had accepted that the opponent had long standing use it stated that consumers of the applicant's beer "would likely be aware" of the opponent's mark. All the other exhibits in the opponent's evidence are dated after the relevant date, 8 February 2018. **To my mind, the opponent's mark has a low degree of reputation in the UK.**

31) I must also consider the distinctive character of the opponent's mark. The opponent's mark is used upon cereal which is the form of loops, which are themselves fruit flavoured. As such the mark, if the correct spelling were used would be of very low or negligible distinction. However, the deliberate misspelling of the word Fruit using the invented term FROOT does **provide an average degree of distinctiveness. The lack of evidence of use means that the mark has not acquired distinctiveness.**

32) In its submissions the opponent contends that the degree of similarity between cereals and beer “is not particularly high”. They provide no reasoning for why they are similar other than stating only that they are both bought by the general public who will pay an average degree of attention when purchasing the goods. To my mind, there is no similarity between the goods other than the fact that both use actual cereals such as wheat, corn and barley amongst other things in their manufacture. The opponent also claims that the average consumer which it claims would be an adult is used to alcoholic beverages being used in foodstuffs such as whisky fudge or chocolate or pies with ale or stout as part of the gravy; they point out that non alcoholic drinks such as Irn-Bru have been made into confectionery bars, whilst confectionery bars such as Mars have been made into drinks. Whilst I accept that there is considerable overlap between alcohol and confectionery, pastries and other cooked dishes, and there has recently been a spate of confectionery products being made into ice-cream and drinks I am unaware of any such link between breakfast cereals and beers (alcoholic and non-alcoholic). The opponent has not been able to show any link between the two products. I cannot envisage many people being willing to try beer on their morning cereal or porridge, or conversely many queuing to try sugar saturated beer. **I conclude that the goods are not similar but will both be purchased by the general public.**

33) I have found that:

- **mark 3288748 is similar to the opponent’s mark to a medium degree.**
- **mark 3288758 is similar to the opponent’s mark to a low degree.**
- **the opponent has a low degree of reputation in the UK.**
- **the opponent’s mark has an average degree of distinctiveness, but cannot benefit from any acquired distinctiveness.**
- **the goods of the two parties are not similar although both will be purchased by the general public.**

34) These findings mean that I conclude that there is no possibility of the average consumer making a link between the marks of the two parties. **The opposition under section 5(3) therefore fails.**

35) Whilst the matter has been determined by this finding I will set out briefly my views on the other aspects of the opposition. The opponent contended that the applicant would be able to ride on the coat tails of its reputation and marketing efforts. I have found that it has no real reputation in the UK and has barely marketed its product. The opponent contends that although purchased by adults its

product is aimed at children and therefore any association with alcohol would be detrimental as it might be perceived that children were being exposed to the brand in order to ensure brand loyalty in adulthood. This would appear to be a similar contention to that raised in the case of *Claeryn / Klarein* [Benelux Court of Justice 1.3.1975 NJ 1975,472] where a mark for gin was said to be damaged by an identical sounding mark for detergent. Similarly, in *Hack’s application* (1941 RPC 91) the proprietors of a well known mark (BLACK MAGIC) which was registered for chocolate and chocolates succeeded in opposing an application to register the same mark for “laxatives other than laxatives made with chocolate”. In the latter case Morton J. found in favour of the proprietors of the earlier mark under Section 11 of the Trade Marks Act 1938 on the basis that there might be confusion in the sense that people might be ‘caused to wonder’ whether there was a connection in trade between the parties. The circumstances appear similar to those in the *Claeryn / Klarein* case. In both cases the potential for damage to the reputation of the earlier trade mark with consequent damage to its ability to add value to the goods in respect of which the mark had been used is manifest. In the instant case I found earlier that the consumer would not be “caused to wonder”, and in any case I do not accept the contention that anyone would consider that children eating a fruit flavoured, highly coloured, intensely sweet cereal would grow up to have a brand loyalty which would extend to drinking pale ale or any other form of beer. The last contention was that children could believe that the beverage was aimed at them, and in the same manner as alcopops would damage the reputation of the opponent. Alcopops were sought after by youngsters because they did not taste of alcohol consisting of carbonated drinks such as lemonade laced with vodka. Beers provide a significantly different taste and so there is no likelihood of transfer of brand loyalty from a sugar intense cereal to beer.

CONCLUSION

36) The opposition based upon section 5(3) fails.

COSTS

37) As the applicant has succeeded in it is entitled to a contribution towards its costs.

Preparing a statement and considering the other side’s statement x2	£600
Preparing evidence	£800
Providing submissions	£1000
TOTAL	£2,400

38) I order Kellogg Company to pay Fuller Smith & Turner plc the sum of £2,400. This sum to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

2nd May 2019

**George W Salthouse
For the Registrar,
the Comptroller-General**