

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2237453
BY KRAFT FOODS SCHWEIZ HOLDING AG
TO REGISTER THE TRADE MARK REVERIES IN CLASS 30**

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER No. 51767
BY MARS U.K. LIMITED**

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by Kraft Foods Schweiz Holding AG
to register the trade mark REVERIES in Class 30**

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by Mars U.K. Limited**

BACKGROUND

1. On 28 June 2000 Kraft Foods Schweiz Holding AG applied to register the mark REVERIES in respect of the following specification of goods:

Coffee, coffee extracts, coffee substitutes, coffee or chocolate beverages and preparations for such, tea, chocolate and cocoa, including beverages made thereof, chocolate and cocoa products, biscuits, wafers, sweets, sugar and sweeteners, flour and nutritional preparations made from cereals, breakfast cereals, pasta and other dough products, pizzas, Russian pastries, pies, bread, bakery, pastry and confectionery products, sugar confectionery, ice-creams, yoghurt ice-cream, frozen yoghurt and ices; salt, mustard, ketchup, vinegar, sauces, condiments, spices, salted snacks, snack products based on corn, rice, barley, rye or pastry.

2. The application is numbered 2237453.

3. On 23 November 2000 Mars U.K. Limited filed notice of opposition to this application. They are the proprietors of the marks shown in the Annex to this decision. The two Community Trade Mark applications were pending at the time these proceedings commenced. One (No. 1420) has since progressed to registration. The other (No. 1636) is still pending at the time of writing this decision. On the basis of these registrations and application the opponents request refusal of the application in suit under the provisions of Section 5(2)(b) of the Act. Their statement of grounds contains a number of what amount to submissions in support of their case. I will take these into account in reaching my decision.

4. The opponents add that they have made extensive use of the REVELS mark predominantly on non-medicated confectionery. Additional grounds are, accordingly, raised under Section 5(3) and 5(4)(a) of the Act having regard to the reputation and goodwill that it is claimed has been generated as a result of this use.

5. The applicants filed a counterstatement denying the above grounds and asking for an award of costs in their favour.

6. Both sides filed evidence as follows:

Opponents' evidence in chief:

Statutory Declaration by Evie Kyriakides with Exhibits EK1 - EK3

Applicants' evidence in support:

Witness Statement by Christopher K Cash with Exhibits CKC1 - CKC5

Opponents' evidence in reply:

Statutory Declaration by Evie Kyriakides

7. In line with current Registry practice I reviewed the papers and notified the parties that I considered a decision could be reached on the basis of the material filed and the standard authorities. The parties were nevertheless reminded of their right to be heard or to make written submissions. No request for a hearing was received. Nor were any written submissions received beyond what are already contained in the statement of grounds, counterstatement and evidence. Acting on behalf of the Registrar and after a careful study of the papers I give this decision.

Section 5(2)(b)

Section 5(2)(b) reads:

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

- (a)
- (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.”

8. I take into account the 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.

Similarity of goods

9. The parties have not offered submissions on what are similar and what are dissimilar goods. It is clear, however, that there is a very substantial overlap between the respective sets of goods. Thus the non-medicated confectionery of No. 834508 must be contained within the term confectionery products in the applicants' specification. The latter broad term must in turn encompass the specific items of confectionery such as cakes, pastry and biscuits to be

found in No. 834508. Identical and/or closely similar goods are involved. The specification of CTM No. 1420 contains an even wider selection of Class 30 goods. Many of these find precise counterparts in the applied for specification. If the opponents do not succeed on the basis of identical or similar goods they cannot fare any better to the extent that their case may be based on goods that are less closely similar. No further analysis of the respective goods specifications is called for at this point.

Distinctive character of the opponents' mark(s)

10. REVELS is the only or the dominant element of each of the opponents' marks. The distinctive character of an earlier trade mark is a factor to be borne in mind in coming to a view on the likelihood of confusion (*Sabel v Puma*, paragraph 24). That distinctive character can arise from the inherent nature of the mark or be acquired through use.

11. The opponents' evidence is relevant to this inquiry. Ms Kyriakides is the Marketing Property Manager for the European region of the Mars Group of Companies. She says that the opponents have used the mark REVELS continuously in the UK since 1967. The product sold under the mark is a range of chocolate confectionery with a variety of centres. It was first introduced as what was regarded as a value for money alternative to boxed chocolates. The fact that there are an assortment of centres in a single bag of chocolates is considered a strong selling point making the product comparable to boxed chocolates. Sales figures are given as follows:

Year	£
1994	15,455,764
1995	17,729,515
1996	18,650,121
1997	19,642,394
1998	20,672,197
1999	19,833,740
2000	23,755,054

12. In support of these claims Ms Kyriakides exhibits:

- EK1 - samples of invoices to a major distributor
- EK2 - advertisements featuring the mark
- EK3 - packaging and point of sale material

13. The retail price of the goods in 1999 is said to have been 31p for a standard pack, 75p for a family pack and £1.25 for a large pack.

14. I conclude from this evidence that the mark REVELS has been used in relation to a chocolate product with assorted centres. Whilst I have not been given information on the size of the market for chocolate confectionery of this kind the sales figures are substantial for what amounts to a single product mark. That view is reinforced by the fact the unit price is relatively low. The mark is also one of relatively long standing.

15. I regard the mark REVELS as being an inherently distinctive one for all the goods in question. Although REVELS is a dictionary word it has no obvious descriptive significance in relation to the goods for which it is registered. The opponents also have a strong claim that their mark is highly distinctive in relation to the specific chocolate product described above.

Similarity of marks

16. The visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by those marks bearing in mind their distinctive and dominant components, *Sabel v Puma*, paragraph 23. The matter must be judged through the eyes of the average consumer of the goods/services in question, *Sabel v Puma*, paragraph 23. The average consumer is deemed to be reasonably well informed and reasonably circumspect and observant but rarely has the chance to make direct comparisons between marks. Imperfect recollection must, therefore, be allowed for, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.*

17. There is an attempt in the applicants' evidence to distinguish between the products both in terms of their comparative price and purpose (the applicants suggest that their product may be purchased as a gift for consumption by others in addition to or instead of the buyer). I infer that this is intended to suggest that the respective products serve somewhat different markets and that this needs to be factored into the average consumer test. The opponents dispute that the products are not competing ones and suggest that most people who buy confectionery for others are also very probably consumers of such products themselves. Thus, in their view, the purchasers are the same.

18. There may be some slight force to the applicants' view of the matter based on the parties' existing trades. Even so I am not persuaded that the chocolate confectionery market can be compartmentalised in quite this way or at least it would, I think, require supplementary evidence to satisfy me that the public recognises and takes account of any such differences in their buying habits. In short, if the applicants' case was reliant on distinguishing between the respective sets of consumers, then they would face some difficulty.

19. But there is another, arguably more fundamental, reason why I cannot place any reliance on these submissions. Under Section 5(2)(b) I must consider the full notional breadth of the specification of both the applied for mark and the opponents' earlier trade mark(s). Existing trading patterns and practices are not reflected in those specifications with the result that, as matters stand, either side could move into the particular area of the confectionery market occupied by the other. I, therefore, regard the average consumer (the public at large) to be the same in each case.

20. That brings me to the visual, aural and conceptual similarities between the marks, that is REVERIES and REVELS. The following submissions are contained in the opponents' statement of grounds:

“Specifically, the first four letters of the Applicants mark, and the first syllable are identical to the corresponding parts of the Opponents earlier protected marks. It has frequently been held that the first part of a mark is the most important part, as it is

most likely to be remembered and spoken correctly. The latter part of the mark is often slurred or forgotten and for this reason the Opponent's and the Applicant's marks are closely phonetically similar.

Furthermore, the marks are visually similar as, again, they consist of the same first four letters and in particular contain the letter V as the third letter which is a letter not frequently used, and which, therefore, stands out in both marks.

Finally, conceptually the marks have a similar meaning in that "to REVEL" is to take pleasure while "REVERIE" refers to an act or state of absent minded daydreaming. Therefore, both the words refer to a state of joy or happiness, and this, combined with the likelihood of imperfect recollection, would lead the public to be confused as to the origin of the Applicant's mark, or the Applicant's mark would be likely to be associated with the Opponent's earlier mark."

21. Not surprisingly the applicants take a contrary position and dispute the above view of the matter. In answer to the opponents' submissions on conceptual similarity they comment in particular that:

"According to Webster's Third New International Dictionary (1993), the noun "revels" means "merrymaking, revelry, carousing, conviviality; merry or noisy celebrations". This contrasts with the quite passive nature of "reveries" which is defined as "extravagant or fanciful product of the mind; theories or notions marked by strangeness or impracticality; purely visionary or theoretical concepts; the condition of being lost in thought or abstracted musing; sequence of thoughts or images not purposively directed". Extracts from the dictionary are shown as Exhibit CKC5."

22. The opponents are entitled to point to the elements that the respective marks have in common, notably the first four letters. They are also correct to point out that the first part of words have traditionally been held to be of particular importance not least because of the tendency to slur the endings of words (TRIPCASTROID Trade Mark 42 RPC 264). But that consideration must be balanced against the fact that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (Sabel v Puma, paragraph 23). That is particularly likely to be the case where the marks at issue are dictionary words and small differences can produce words which are visually distinguishable as well as being aurally and conceptually distinct. Whilst I acknowledge certain points of similarity between REVELS and REVERIES they are visually different in my view.

23. They are different too from an aural standpoint. REVELS is a two syllable word and REVERIES a three syllable word. Even allowing for the fact that the first syllable is likely to be stressed in each case I do not find them aurally similar.

24. The opponents have suggested that REVELS and REVERIES have similar meanings and, whilst not disputing the dictionary evidence adduced by the applicants, have cast doubt on whether a substantial percentage of members of the public would be aware of the meaning of the word 'reverie'. Even if their doubts are well founded it does not seem to me to greatly assist unless the public thought the word carried a meaning akin to 'revel'. In my view the

word 'reverie' is not so obscure that the average member of the public would not have some idea of its meaning. It follows that I favour the applicants' view of the matter and can find no conceptual similarity.

Likelihood of confusion

25. The 'likelihood of confusion' must be appreciated globally taking account of all relevant factors (*Sabel v Puma*, paragraph 22). I should mention at this point an additional factor referred to in the opponents' evidence in chief, and developed by the parties in subsequent evidence rounds, namely that the colour used on the applicants' chocolate box is very similar to the colour (orange) used on the opponents' REVELS chocolate packaging. The opponents have not indicated in what context they consider colour to be a relevant consideration. For Section 5(2)(b) purposes, the comparison is a mark for mark one discounting packaging or other added matter save to the extent this is reflected in the earlier trade mark - see *United Biscuits (UK) Ltd v Asda Stores Ltd*, [1997] RPC 513 and *Rygrange Limited v Manchester United Plc*, [2001] ETMR 78.

26. For Section 5(2) purposes the earlier trade mark in relation to which colour is most likely to be a consideration is CTM 1420 which has the appearance of a label/packaging mark. However, the associated colour claim indicates that the proprietors claim a 5 colour combination viz 'brun, rouge, havane, jaune, blanc'. I do not know what colour 'havane' is intended to be and the opponents have not filed a colour copy of the mark.

27. In any case the mark applied for is simply the word REVERIES. If there are other aspects of the applicants' packaging or presentation that give rise to concern they must of necessity fall outside my consideration of the Section 5(2) objection. The most that can be said is that it would be open to the applicants to present the word REVERIES in a colour similar to that used by the opponents (though even here I note that the word REVELS is in practice usually presented in white on an orange background in the colour exhibits available to me). I cannot envisage circumstances where the applicants' use of their word mark in a particular colour would tip the balance of the argument in the opponents' favour. In short I have reached the clear view that there is no likelihood of confusion if the applicants' use their mark on identical or similar goods. The opposition must, therefore, fail under Section 5(2)(b).

Section 5(3)

28. Even accepting that the opponents have a reputation in a particular type of chocolate confectionery sufficient to underpin an action under Section 5(3) I can see no basis for their succeeding in relation to dissimilar goods when they have failed in relation to identical and/or similar goods.

Section 5(4)(a)

29. I have considered the opponents' use in the context of Section 5(2)(b). In practice I do not think this ground adds anything to the ground of objection under Section 5(2). The opponents' claims based on their own packaging colour is probably more appropriate to

Section 5(4)(a) where their own packaging as illustrated in Exhibit EK3 comes into play. But the evidence is limited in scope and inconclusive on the colour point particularly as it is suggested by the applicants that the colour scheme of the opponents' packaging has now changed. More importantly the opponents face the same problem as that encountered in relation to Section 5(2) that the mark applied for is a word mark. I cannot make any assumption as to circumstances of use outside the applied for mark itself. This ground also fails.

Conclusion

30. The opposition as a whole has failed. The applicants are entitled to a contribution towards their costs. I order the opponents to pay them the sum of £1400. This sum is 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 29 day of August 2002

**M REYNOLDS
For the Registrar
the Comptroller-General**

Details of opponents' marks

No.	Mark	Class	Specification
834508 (UK)	REVELS	30	Flour, cereal preparations for food for human consumption, bread, cakes, pastry, biscuits (other than biscuits for animals), non medicated confectionery and ices.
1420 (CTM)		29	Meat, fish, poultry and game, sea foods; fruit and vegetables; all being preserved; dried, cooked or processed; eggs; preparations made from all the aforesaid goods; soups; dairy products; edible oils and fats; jams and jellies; salads; drinks made from dairy products; sweet spreads; savoury spreads; fillings; prepared meals, semi-prepared meals, constituents for meals; proteinaceous substances; dips; all included in Class 29.
		30	Tea, coffee, cocoa; drinking chocolate; coffee essence, coffee extracts, mixtures of coffee and chicory, chicory and chicory mixtures, all for use as substitutes for coffee; non-medicated confectionery; pastries; ices, frozen yoghurt, frozen confections; chilled desserts; bread; pastry; coffee and chocolate based drinks, fillings; sweet spreads, savoury spreads, prepared meals, semi-prepared meals, constituents for meals; chocolates, chocolate; dressings; sauces; pizza bases, sauces and toppings for pizzas; sauces for pasta and rice; salad dressings; mayonnaise; dips; all included in

		Class 30, but not including chilled desserts in powder form.
	32	Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and preparations for making beverages.
1636 (pending CTM) REVELS	29	Meat, fish, poultry and game, sea foods; fruit and vegetables, all being preserved, dried, cooked or processed; eggs; preparations made from all the aforesaid goods; soups; dairy products; edible oils and fats; jams and jellies; salads; drinks made from dairy products; sweet spreads, savoury spreads; fillings; prepared meals, semi-prepared meals, constituents for meals; proteinaceous substances; dips; all included in Class 29.
	30	Tea, coffee, cocoa; drinking chocolate; coffee essence, coffee extracts, mixtures of coffee and chicory, chicory and chicory mixtures, all for use as substitutes for coffee; non-medicated confectionery; pastries; ices, frozen yoghurt, frozen confections; chilled desserts; bread; pastry; coffee and chocolate based drinks, fillings; sweet spreads, savoury spreads, prepared meals, semi-prepared meals, constituents for meals; chocolates, chocolate, dressings; sauces; pizza bases, sauces and toppings for pizzas; sauces for pasta and rice, salad dressings, mayonnaise; dips; all included in Class 30, but not including chilled desserts in powder form.
	32	Beers; mineral and aerated waters

and other non alcoholic drinks;
fruit drinks and fruit juices;
syrups and preparations for
making beverages.