O-0169-25

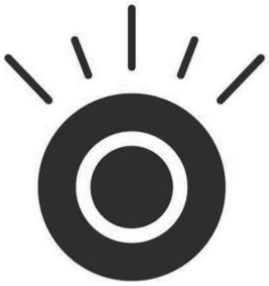
TRADE MARKS ACT 1994

IN THE MATTER OF

TRADE MARK APPLICATION NO. 3698996

BY WUHAN MAOREN YUNSHANG TECHNOLOGY CO., LTD.

TO REGISTER



AS A TRADE MARK

IN CLASSES 25 & 35

AND OPPOSITION THERETO (UNDER NO. 431981)

BY

TARGET BRANDS, INC.

Background & pleadings

1. Wuhan Maoren Yunshang Technology Co., Ltd. ("the applicant") applied to register the trade mark shown on the title page of this decision on 22 September 2021. The mark was published in the Trade Marks Journal on 17 December 2021 for goods and services in classes 25 and 35.

2. Target Brands, Inc ("the opponent") opposed the application in full on 17 March 2022 under sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 ("the Act"). The opponent relied on the following UK trade marks under section 5(2)(b).

UK TM No. 3506029  Class 25 Filing date: 29 June 2020 Registration date: 12 March 2021 ("the '029 mark")
UK TM No.3207260  Class 35 Filing date: 18 January 2017 Registration date: 25 August 2017 ("the '260 mark")

UK TM No.3301115

Class 35

Filing date: 3 April 2018

Registration date: 2 November 2018

("the '115 mark")

3. In my decision, BL O/0505/24, dated 3 June 2020, I found that the grounds of opposition failed to succeed, and I awarded contributory costs to the applicant.

4. The opponent appealed my decision to the Appointed Person, Professor Phillip Johnson, under two grounds, namely:

> "The Appellant challenges the Hearing Officer's decision on two grounds. The first ground of appeal is that the Hearing Officer erred by failing to take into account all the evidence before her when she made her assessment of the reputation of the earlier marks for the purposes of section 5(3). The second ground of appeal was that the Hearing Officer erred in her assessment of the similarity of the marks".[1]

5. The first ground of appeal was dismissed by the Appointed Person. For the second ground of appeal, the opponent made detailed submissions that I did not clearly set out my reasoning in relation to the conceptual comparison of the marks at issue. This ground was upheld by the Appointed Person, in his decision BL O/1204/24, dated 18 December 2024. The Appointed Person remitted the case back to me and directed that I should "elucidate [my] reasoning in respect of the conceptual understanding that

[1] BL O/1204/24, paragraph 9

"other consumers" have of the Respondent's mark and to complete any assessment that follows".[2]

6. Following receipt of the Appointed Person's decision, both parties were invited by the Tribunal, in a letter dated 19 December 2024, to either request a hearing or to file further written submissions in lieu of a hearing. Only the opponent filed written submissions in lieu dated 16 January 2025. I confirm that I have read these submissions and taken them into account in my decision.

7. Both sides have remained represented in these proceedings. The applicant is represented by Handsome I.P. Ltd and the opponent by Cleveland Scott York.

Decision

8. I remind myself that the respective marks to be compared are:

Opponent's marks	Applicant's mark
 	

9. In my previous decision, at the comparison of marks stage, I found that the marks could not be aurally compared being figurative marks. For the remaining comparisons, I found that the marks were visually similar to a medium degree and for the conceptual comparison, at paragraph 58, I made the following finding, namely:

[2] BL O/1204/24, paragraph 28

58. In a conceptual comparison, the opponent states in its skeleton argument[3] that "the marks convey an impression of an archery or rifle target". I accept that this is the case for the opponent's marks. The devices appear to be the visual representation of the opponent's name, i.e. Target Brands. The opponent notes the additional five lines element of the applicant's mark and states that the impression of a target may be "lessened" but states a target concept is still "clearly understood". I do not agree that the concept of the applicant's mark will be clearly understood as a target. The additional five lines, in my view, give a different concept to the applicant's mark. The applicant states in its counterstatement,[4]

> "[its] mark resembles an eye, with the black circle being a pupil, the outer annulus outlining an eyeball, and the black, radiating lines defining the eyelashes. In fact, the eye is open wide and consequently conveys a surprised look."

It is settled case law that for a conceptual message to be relevant it must be capable of immediate grasp by the average consumer.[5] I acknowledge that the additional five lines element may give the applicant's mark an impression of an eye to some consumers. However it is doubtful that all consumers will immediately perceive the applicant's mark in this way. Taking these factors into account I find the respective marks are conceptually different."

10. The Appointed Person drew the following conclusion on my finding, namely:

"25. In essence, it is suggested by Mr Norris that the Hearing Officer's reasoning did not explain how the middle group of average consumers would see the mark. In that, the Hearing Officer rejected the Appellant's argument that the Respondent's mark would be seen as a target. And it is clear that she thought "some consumers" would see the mark as an eye. Yet, as Mr Norris

[3] Paragraph 7
[4] Paragraph 14
[5] This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM [2006]* e.c.r.-I-643; [2006] E.T.M.R. 29.

points out, it is not clear how “other” consumers would see the mark (as they would see it neither as a target nor an eye).

26. It may well be that the Hearing Officer believed that “other” consumers would consider the Respondent’s mark to have no concept at all. But she did not say so. Her failure to set out her finding cannot be seen as an example of reasoning in a “highly compressed form” (see Extreme Networks Ltd v Extreme E Ltd [2024] EWCA Civ 1386, [31]), rather it is the case that an important factual finding is absent. Accordingly, I think Mr Norris is right and, in this respect, the Hearing Officer’s decision fell into error.”

11. In its most recent written submission the opponent states the following:

“8. Each one of the relevant marks (i.e. the Opponent's and Applicant's marks) includes three concentric circles in the same colours (or colour shading in the case of earlier mark '115).

9.The mark in the application contains some added matter on top of the concentric circles by means of straight lines, as the Applicant itself described them (noted at paragraph 58 of the first decision), "radiating lines [defining the eyelashes]".

10. The dominant element in terms of size and prevalence across all marks are the concentric circles. The straight lines on top of the mark in the application would either be seen merely as added matter or they would be seen as "radiating" lines i.e. lines that would signify that the target symbol is bright or flashing. Eyelashes do not "radiate", they curl. Lines signifying brightness or flashing radiate.

11. Consequently, the majority of the average consumer group will see the marks as targets because of (1) the significance of the three concentric circles present in all of them or (2) the radiating lines on top of the application will be seen as representing a shining or flashing target (which is conceptually similar to a target per se).

12. The fact that all marks include three concentric circles, irrespective of whether the marks are identified as targets or simply as three concentric circles, means that the average consumer will understand the marks similarly if not identically.

13. Further, in the Opponent's submission, and excepting the sub-group of consumers who may perceive the mark as representing an eye, the mark in the application does not look like an eye (and will not be perceived as such by the majority of consumers). Eyes are oval in shape and do not have the same dimensions and shape (as the concentric circles in the application) for the pupil, iris and eyeball.

14. The Hearing Officer must take account of notional and fair use of each party's mark in the comparison (which might envision different backgrounds or contexts e.g. on webpages, company letterheads etc). Our submission in respect of the conceptual impression of the Opponent's mark is supported by its company and trading name TARGET. Conversely, our submission is that majority of consumers will not perceive the Applicant's mark as an eye without some other context or prompt to suggest or support that conclusion.

15. In conclusion, the Opponent's position is that the dimensions and shape of the "target" in the Applicant's mark and presence of radiating lines will not be perceived by the majority of consumers as an eye with eyelashes but as a radiating or flashing target."

12. In my original finding, I stated that that some consumers would perceive the applicant's mark as an eye. This has been accepted to an extent by the opponent. However in its submissions the opponent is inviting me to consider that the 5 lines element could be considered as an indication of a shining or flashing target and therefore as a target. I feel this to be a stretch. It is undoubtedly difficult to convey a shining or flashing action by means of a flat 2D drawing. But, in my view, a shining or flashing action is more likely to be perceived by a consumer if the lines radiated

outward from the full circumference of the outer circle in the applicant's mark rather than 5 lines at the top of the device.

13. This leaves me to consider what, if anything, a consumer would perceive the applicant's mark to be if they do not see an eye or a target. It is my view that this "other group" of consumers would not ascribe any concept to the mark at all, simply regarding it as a configuration of geometric shapes. As such I do not find the respective marks to be conceptually similar as the opponent's marks have a clear concept and the applicant's mark does not.

14. As I have not found the marks to be conceptually similar, I do not believe this has any consequential application to my previous overall finding on the section 5(2) ground in which I found there was no likelihood of either direct or indirect confusion.

15. Subject to any further appeal of this decision, the application may proceed to registration.

16. As this decision confirms my previous decision that the opposition failed to succeed and given that the applicant took no further part in these proceedings, I will not award any additional costs. Therefore the cost award remains as before, namely that I order Target Brands, Inc. to pay Wuhan Maoren Yunshang Technology Co.,Ltd. the sum of £1200. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 25th day of February 2025

June Ralph
For the Registrar
The Comptroller-General