# O/0490/26

**TRADE MARKS ACT 1994**

**IN THE MATTER OF THE UK DESIGNATION OF INTERNATIONAL REGISTRATION NO. 1802957**
**IN THE NAME OF**
**ANTHEM WORKWEAR PTY LTD**

**IN RESPECT OF THE TRADE MARK**

ANTM

**IN CLASSES 18, 25 & 35**

**AND**

**IN THE MATTER OF OPPOSITION THERETO**
**UNDER NUMBER 451931**
**BY ANTHEM CLOTHING LIMITED**

## BACKGROUND AND PLEADINGS

1. On 22 March 2024, International Registration ("IR") No. 1802957 was registered for the figurative mark shown on the cover page of this decision, based on Australian Trade Mark No. 2406867, with a priority date of 20 November 2023. With effect from the same date, ANTHEM WORKWEAR PTY LTD ("the holder") designated the United Kingdom for protection of the mark. The designation was accepted and published for opposition purposes on 15 November 2024, in respect of the following goods and services in classes 18, 25 and 35:

Class 18: *Backpacks; duffel bags; luggage; satchels; suitcases; toilet bags; wallets.*

Class 25: *Active wear; baseball caps; beanies; belts (clothing); casual clothing; clothing; apparel (clothing, footwear, headgear); footwear; hats; headwear; hooded sweatshirts; jackets (clothing); pants (clothing); shorts; socks; T-shirts.*

Class 35: *On-line retail store services connected with the sale of men's and women's clothing; retail store services connected with the sale of clothing.*

2. The designation is opposed by Anthem Clothing Limited ("the opponent"). The opposition was filed on 15 January 2025 and is based upon section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opposition is directed against all of the goods and services in the application. The opponent relies upon the following four marks:

**ANTHEM**
UK trade mark registration number 2145790
Filing date: 19 September 1997
Registration date: 13 March 1998
Registered in Class 25
Relying on all goods, namely:
*Articles of clothing; footwear, legwear and headwear*.
(the '790 mark); and

**ANTHEM**

UK trade mark registration number 3961992

Filing date: 28 September 2023

Registration date: 29 December 2023

Registered in Class 35

Relying on all services, namely:

*Retail, wholesale and mail order retail services connected with the sale of clothing, casual wear, bags, holdalls, rucks sacks, sportswear, footwear and headgear; online retail services connected with the sale of clothing, casual wear, bags, holdalls, rucks sacks, sportswear, footwear and headgear; information, advisory and consultancy services relating to the aforesaid services*.

(the '992 mark); and


UK trade mark registration number 3962545

Filing date: 29 September 2023

Registration date: 29 December 2023

Registered in Classes 25 and 35

Relying on all goods and services, namely:

Class 25: *Clothing, casual wear, sportswear, footwear and headgear*.

Class 35: *Retail, wholesale and mail order retail services connected with the sale of clothing, casual wear, bags, holdalls, rucks sacks, sportswear, footwear and headgear; online retail services connected with the sale of clothing, casual wear, bags, holdalls, rucks sacks, sportswear, footwear and headgear; information, advisory and consultancy services relating to the aforesaid services*.

(the '545 mark); and

**ANTHEM**

UK trade mark registration number 915293806

Filing date: 30 March 2016

Registration date: 2 August 2016

Registered in Class 25

Relying on all goods, namely:

*Articles of clothing; footwear, legwear and headwear*.

(the '806 mark).

3. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable UK trade marks for all right holders with an existing registered European Trade Mark ("EUTM") or International Registration designating the EU. As a result, the opponent's '806 mark was converted into a comparable UK trade mark. Comparable UK marks are now recorded in the UK trade mark register, have the same legal status as if they had been applied for and registered under UK law, and the original filing dates remain the same.[1]

4. The above marks all qualify as an earlier mark under section 6(1) of the Act. As the earlier '790 and '806 marks were each registered more than 5 years before the priority date of the holder's mark, they are, in principle, subject to the provisions on use under Section 6A of the Act. The opponent made a statement of use in relation to all of the goods relied upon under each of the marks. As the remaining '992 and '545 marks relied upon had not completed their registration procedure more than five years before the date of designation for the contested mark, they are not subject to the use provisions contained in section 6A of the Act.

5. The opponent submits that, given the similarity of the trade marks and identity and similarity of the goods and services, it is highly likely that consumers encountering the respective trade marks would confuse the marks and assume that the holder's goods and services originate from the opponent or an economically-linked undertaking. It submits that the application contravenes the provisions of section 5(2)(b) of the Act. The opponent therefore requests that the application is refused in its entirety and that an award of costs is issued in its favour.

[1] See also Tribunal Practice Notice ("TPN") 2/2020 End of Transition Period – impact on tribunal proceedings.

6. The holder filed a counterstatement denying the claim that the marks are similar, but admits that the goods and services at issue are identical, or at least similar. However, it submits that there is no likelihood of either direct or indirect confusion and therefore the opposition should fail. The holder requests an award of costs be made in its favour.

7. Only the opponent filed evidence in chief; both parties filed written submissions during the evidence rounds. The opponent also filed evidence in reply to the holder's written submissions. Neither party requested a hearing; both parties filed written submissions in lieu of a hearing. This decision is taken following careful consideration of the papers on file.

8. In these proceedings, the holder is represented by Wilson Gunn and the opponent is represented by Mathys & Squire LLP.

**EVIDENCE AND SUBMISSIONS**

9. The opponent filed evidence in support of the opposition in the form of the witness statement of Kirsten Ferrol, dated 30 May 2025, which is accompanied by six exhibits, labelled KF3 to KF6. Ms Ferrol is the Head of Brands of the opponent. The main purpose of the evidence is to demonstrate that the ANTHEM trade mark has been put to genuine use in the UK in relation to clothing, footwear, legwear and headwear since 2019, with continuous use in the EU and UK since at least 2020.

10. The holder filed written submissions dated 4 August 2025, and written submissions in lieu of a hearing dated 15 November 2025.

11. The opponent also filed written submissions in reply to the holder's written submissions of 4 August 2025, alongside the witness statement of Emma Pallister of Mathys & Squire LLP, acting as the opponent's representative. This witness statement is dated 3 October 2025, and is accompanied by three exhibits, labelled EP1 to EP3. The evidence relates to brand names (i.e. trade marks) which 'drop vowels'. In addition, the opponent filed written submissions in lieu of a hearing, dated 15 November 2025.

12. I have taken the evidence and submissions of both parties into account in reaching my decision and I will refer to them during the decision to the extent I consider necessary.

**DECISION**

13. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

**My approach**

14. The evidence of use provided relates to the '790 mark and the '806 mark, which are subject to the use conditions in accordance with section 6A of the Act. Both marks comprise the identical word "ANTHEM", with the opponent relying on identical goods in class 25 under both marks. In relation to the two marks which are not subject to the use conditions, I note that the '992 mark also consists of the identical word "ANTHEM", but for services in class 35; meanwhile, the '545 mark is a figurative mark for a stylised version of the same word "ANTHEM", as shown earlier under paragraph 2 of this decision, relying on goods and services in classes 25 and 35.

15. For reasons that will become apparent later in this decision, I do not consider that the issue of genuine use of the '790 mark and the '806 mark will be determinative in these proceedings. As such, I will conduct my assessment on the basis that the opponent can rely upon the full breadth of its class 25 specifications under each of the marks.

16. I also note that in relation to the goods at issue, the holder's goods in class 25 are either self-evidently identical to the opponent's goods in class 25, or they are identical

as per the principles outlined in *Meric*[2]. The same can be said of the competing services in class 35. Given that the holder admits that the goods and services at issue are identical, or are at least similar (although it has not said to what degree it considers them to be similar), I do not intend to undertake a full comparison of the respective goods and services. I will instead proceed on the basis most favourable to the opponent, i.e. that the contested goods and services are identical or highly similar to those covered by the earlier marks. If there is a finding of no likelihood of confusion for the marks on identical goods or services, then it follows that there will be no confusion between the marks for goods or services which are found to be similar to a lesser degree, or which are considered to be dissimilar.[3] However, if a likelihood of confusion is found, I will proceed to assess the goods and services at issue in full.

17. I will now move to consider the 5(2)(b) ground of the opposition. If required, I will address the above points further when considering any final remarks at the conclusion of this decision.

**Section 5(2)(b)**

18. Section 5(2)(b) is relied on and reads as follows:

> "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,

[2] Goods and/or services can be considered as identical when the goods/services designated by the earlier mark are included in a more general category designated by trade mark application, or vice versa: *Gérard Meric v OHIM,* Case T-133/05, at [29].

[3] Under section 5(2)(b), a degree of similarity between the goods is essential for there to be a finding of likelihood of confusion: see paragraph 49 of *eSure Insurance v Direct Line Insurance,* [2008] ETMR 77 CA.

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

19. Section 5A states:

> "Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

20. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*, [2025] UKSC 25:

> (a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;
>
> (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, 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, and whose attention varies according to the category of goods or services in question;
>
> (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
>
> (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings to mind the earlier mark, is not sufficient;

(j) 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; and

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

**The average consumer and the nature of the purchasing act**

21. The average consumer is a legal construct, deemed to be reasonably well informed and reasonably circumspect. In *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*, [2025] UKSC 25, the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where he pointed out that, inter alia, the average

consumer's level of attention is likely to vary according to the category of goods or services in question.

22. In my view, the average consumer for the competing goods will most likely be the general public. During the selection of the goods, considerations such as quality, material and the fit of the goods will all play a part, as well as the “look” of the goods, the cost, and the suitability according to the occasion for which they are being purchased. The goods may be purchased from physical stores, by predominantly visual means, although I do not discount aural considerations, and from catalogues and via the internet, where they will be viewed and self-selected by the consumer. In *New Look Limited v OHIM,* joined cases T-117/03 to T-119/03 and T-171/03, the General Court (“GC”) stated that:

> “50..... Generally in clothes shops customers can themselves either choose the clothes they wish to buy or be assisted by the sales staff. Whilst oral communication in respect of the product and the trade mark is not excluded, the choice of the item of clothing is generally made visually. Therefore, the visual perception of the marks in question will generally take place prior to purchase. Accordingly the visual aspect plays a greater role in the global assessment of the likelihood of confusion.”

23. I consider that the level of attention during the selection of the goods will vary, from medium for everyday wear, to slightly higher for luxury and special occasion items of clothing, footwear and headgear.

24. When using the retail services at issue, the average consumer will make their choice based on, for example, the range of goods available from the retailer, the prices charged, and the customer services offered. In the case of physical stores, the location of the retailer will also play a part. The visual element will be important as the mark will be displayed on signage and advertising, as well as on the web pages of online retailers. However, I do not discount the aural element, as word-of-mouth recommendations may contribute to the decision on which retailer to choose. Overall, it is my view that the average consumer will pay a medium degree of attention when choosing the retail services in common.

**Comparison of marks**

25. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM* Case C-591/12P, that:

> "34. ....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion."

26. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

27. The respective trade marks are shown below:

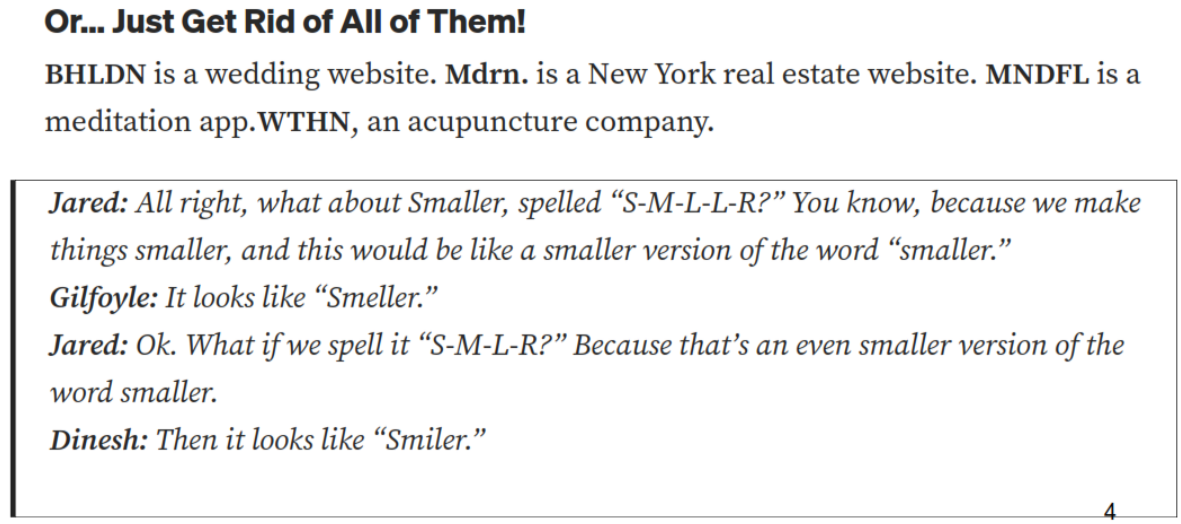
| **Opponent's trade marks** | **Holder's trade mark** |
|---|---|
| The '790 mark, the '992 mark and the '806 mark:<br><br>**ANTHEM**<br><br>The '545 mark:<br><br>ANTHEM® | ANTM |

28. At point 4 of its statement of grounds, the opponent submits that "… The Applicant's ANTM mark contains only a two-letter difference to the Opponent's ANTHEM trade mark, namely the letters "HE" are omitted in the middle of the word ANTM compared to ANTHEM. The trade marks are therefore visually similar and phonetically and conceptually identical." In the written submissions in reply which accompany the witness statement and supporting exhibits of Emma Pallister, the opponent submits that exhibit EP2 demonstrates that where a name is spelled without any vowels, the intention is to pronounce the name as if the vowels were still contained within the word. It further submits that "Because of this widespread trend, consumers are now accustomed to brands creating trade marks that represent shortened versions of known words, and will perceive the Applicant's mark as a shortened version of the word ANTHEM".[4] In its written submissions in lieu of a hearing, the opponent refers to a previous decision issued by this Tribunal whereby the Hearing Officer found a medium to high degree of visual similarity between the marks "TOHAPI" and "TOWPI". In a separate decision, the Hearing Officer found that in the case of the word "STACKD", the relevant consumer, when reading the mark, would be likely to fill in the gaps (i.e. the missing "e") and understand it as "stacked". The opponent submits that the same is true of the holder's ANTM, which it claims will remind the consumer of the known word "ANTHEM". To be clear, I do not consider either case to be on all fours with the circumstances of the matter at hand, and further, neither am I bound by the previous decisions issued by this Tribunal. Therefore, my decision will rest on the evidence before me. I will now consider in turn the opponent's evidence by way of the three exhibits (EP1 to EP3) in support of its argument that "ANTM" will be perceived by the average consumer as "ANTHEM", before I make my own comparison of the marks at issue.

29. Exhibit EP1 comprises an article published on 13 September 2019 on the social publishing platform 'Medium' titled "Why Do Brands Keep Dropping Vowels?". As the platform has a .com domain, it is unclear whether this is targeted towards a UK, or other English-speaking, audience (such as the USA or Australia). Further, there are examples within the text of the ambiguity of some words which have dropped the

[4] At point 8 of the written submissions in reply.

vowels, which serves to refute rather than support the opponent's submissions in this sense:



**Or... Just Get Rid of All of Them!**

**BHLDN** is a wedding website. **Mdrn.** is a New York real estate website. **MNDFL** is a meditation app.**WTHN**, an acupuncture company.

> ***Jared:*** *All right, what about Smaller, spelled "S-M-L-L-R?" You know, because we make things smaller, and this would be like a smaller version of the word "smaller."*
> ***Gilfoyle:*** *It looks like "Smeller."*
> ***Jared:*** *Ok. What if we spell it "S-M-L-R?" Because that's an even smaller version of the word smaller.*
> ***Dinesh:*** *Then it looks like "Smiler."*
>
> 4

https://medium.com/better-marketing/who-needs-vowels-anyway-5424abaa9ca3

30. Exhibit EP2 contains an introduction to a research paper on ScienceDirect titled "Evaluating brand names without vowels", published April 2022. While it states that the Institutional Review Board of a large northern university in the UK approved the research, I note that the participants were recruited from the USA and that a total of only 69 participants completed the study. The research is directly related to food brands, rather than in the context of clothing brands and so is not commensurate with how the UK consumer would perceive the mark in relation to the goods and services of the application. The paper also mentions that while the use of vowel-less words is common in social media, whether there are differences in the perception of vowel-less brand names for firms belonging to different sectors is yet to be seen. It adds that to date, (which I understand to refer to the time the introduction paper was published), research has not investigated how consumers evaluate such names. Overall, given the extremely small number of (US-based) participants in the study, and the fact that the study was made in the context of food brands, I consider the exhibit to be extremely limited in probative value in relation to the mark before me.

31. The third exhibit, labelled Exhibit EP3, is a screenshot from the Wayback Machine dated 27 May 2022, which the opponent describes as being from the holder's website. I note that the website has a .com.au domain name which I understand to be pertinent

to Australia. While the screenshot shows use of an "ANTHEM" mark, alongside the word WORKWEAR and a figurative device, I see no relevance of this exhibit to support the opponent's submissions in relation to the contested UK designation.

**Overall impression**

32. The opponent's '790 mark, the '992 mark and the '806 mark identically consist of the single, dictionary defined word "ANTHEM", presented in a standard typeface in capital letters, without any other elements to contribute to the overall impression. The overall impression conveyed by the marks therefore rests in the word itself.

33. The opponent's '545 mark consists of the word "ANTHEM", presented in a slightly stylised white typeface in capital letters, on a black, rectangular background.[5] I consider the stylisation of the word to be minimal, and that the background has been included merely in contrast to the white lettering. The background does not add to the trade mark message conveyed by the word and, as such, does little to contribute to the overall impression of the mark, which lies in the word as presented.

34. The holder's mark consists of the slightly stylised letters "ANTM", presented in capital letters in a black font. While the letter "A" at the start of the mark does not contain the usual crossbar, and could be construed as an inverted letter "V", I consider that a significant proportion of the average consumer would still perceive it as representing the letter "A". I do not consider the typeface to depart greatly from a standard typeface and, as such, with no other elements to add to the overall impression, I consider that the overall impression of the mark lies in the letters as presented.

35. In *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, the GC noted that the beginning of words tend to have more visual and aural impact than the ends. However, I accept that this is not always the case, and it is not a "hard and fast rule of

[5] I note that the mark includes the ® symbol at the end of the word which is conventionally used to designate that a trade mark has been registered. The symbol does not form part of the mark itself and as such, I take no account of it in my comparison of the marks at hand.

law", but rather "a practical rule of thumb".[6] Meanwhile, although I note that there is no special test which applies to the comparison of "short" marks,[7] in *dm-drogerie markt GmbH & Co. KG v OHIM,* Case T-304/10, the GC noted that, in the case of word signs which are relatively short, the differences between marks of different lengths will be more easily grasped by the average consumer.[8]

**Visual comparison**

36. Each of the opponent's marks contain the same six-letter word "ANTHEM", while the holder's mark consists of four letters, "ANTM", as previously described. The marks therefore all share the same first three letters, "ANT", in the same order, and also have in common the letter "M", being the last letter of each of the signs. While the stylisation of the holder's mark and the earlier '545 mark are different, overall, I consider them visually similar to a low to medium degree. Given the brevity of the marks, I consider the remaining word marks and the holder's mark to be visually similar to no more than a medium degree.

**Aural comparison**

37. The identical verbal element "ANTHEM" in each of the opponent's earlier marks will be pronounced as two syllables, AN -THUM (although I acknowledge there will be slight variations in the pronunciation depending on regional accents). There are no other elements within the marks which will be articulated. I do not agree with the opponent's submissions that consumers will perceive and pronounce the holder's mark as the word "anthem", meaning that the respective marks are aurally identical.[9] I take into account the opponent's evidence in this regard, as considered above in paragraphs 28 to 31. I acknowledge that there may be a small proportion of consumers who would articulate the holder's mark as two syllables, ANT-EM, and to those consumers, the marks are aurally similar to no more than a medium degree. However, given the lack of the letters "H" and "E", in my view, the holder's mark would

[6] See the appeal decision of Dr Brian Whitehead, sitting as the Appointed Person, in case BL O/0648/24, at [21].
[7] *Robert Bosch GmbH v Bosco Brands UK Limited*, Case BL O/301/20, at [44].
[8] At [42].
[9] At point 10 of the opponent's written submissions in reply.

be perceived by a significant proportion of the average consumer as an initialism, rather than as an acronym. As such, I do not consider that the consumer would try to pronounce "ANTM" as a word, rather the individual letters will each be voiced, as four syllables, EH-EN-TEE-EM (regional accents notwithstanding). Overall, I consider the marks to be aurally dissimilar.

**Conceptual comparison**

38. For a conceptual message to be relevant, it must be capable of immediate grasp by the average consumer - Case C-361/04 P *Ruiz-Picasso and others v OHIM* [2006][10].

39. I agree with the holder's submissions that the word "ANTHEM" in the opponent's earlier marks is a dictionary-defined word with a clearly recognisable concept, meaning "a song which is used to represent a particular nation, society or group and which is sung on special occasions".[11] In my view, it would also be recognised by many as a popular rock or pop song. I also agree with the holder that, in many cases, the dropping of letters from brands does not result in immediately obvious words, and instead, some degree of use to educate the average consumer may be required for the brand to be recognised as the complete word.[12] This is, in part, supported by the opponent's exhibit EP1, as shown in the extract above in paragraph 29. I disagree with the opponent that the contested mark would be (immediately) perceived by (a significant proportion of) the average consumer as the word "ANTHEM", which it submits renders the marks conceptually identical.[13]

40. In my view, a significant proportion of the average consumer will instantly perceive the holder's mark as comprising a string of arbitrary letters which form an initialism. As discussed earlier in this decision, I take into account the evidence provided by the opponent. However, while I accept that acronyms and initialisms may provide different meanings depending on the context in which they are used, I do not consider the

[10] Paragraph 56.
[11] At point 6 of the holder's counterstatement.
[12] At point 8 of the holder's written submissions in lieu.
[13] At point 22 of the opponent's written submissions in lieu.

evidence sufficient to support that the combined letters “ANTM” in the holder’s mark would be immediately perceived as an abbreviation of the word “ANTHEM”, or that the letters have any singular clear significance for the average UK consumer. As such, I consider the opposing marks to be conceptually dissimilar.

**Distinctive character of the earlier marks**

41. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. The factors I must take into account in assessing the level of distinctive character were set out by the CJEU in *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97:

> “23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

42. Registered trade marks possess varying degrees of inherent distinctive character, being lower where they are allusive or suggestive of a characteristic of the goods and services, ranging up to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use made of it. The opponent has not claimed that its marks enjoy enhanced distinctiveness, however, evidence of use of the ‘790 and ‘806 marks has been filed. I note that the opponent submits that “it is apparent from the enclosed evidence that the ANTM trade mark has been subject to extensive use throughout the

UK and EU …".[14] The territory relevant to the assessment of enhanced distinctiveness is the United Kingdom only.

43. I will first consider the inherent distinctiveness of the opponent's marks. The marks all contain the same word "ANTHEM", while the '545 mark is presented as a figurative mark. As mentioned earlier in paragraph 33 of this decision, the background does not add to the trade mark message conveyed by the word, and to my mind, does nothing to enhance the distinctive character of the '545 mark. My findings on the degree of inherent distinctiveness therefore apply equally to all four earlier marks. In my view, the ordinary, dictionary defined word "ANTHEM" refers to a song which is used to represent a particular group and which is sung on special occasions, or as a popular rock or pop song. The marks do not, however, describe the goods and/or services for which they have been registered, and neither are they allusive of such goods or services. Therefore, I find the earlier marks to be inherently distinctive to a medium degree.

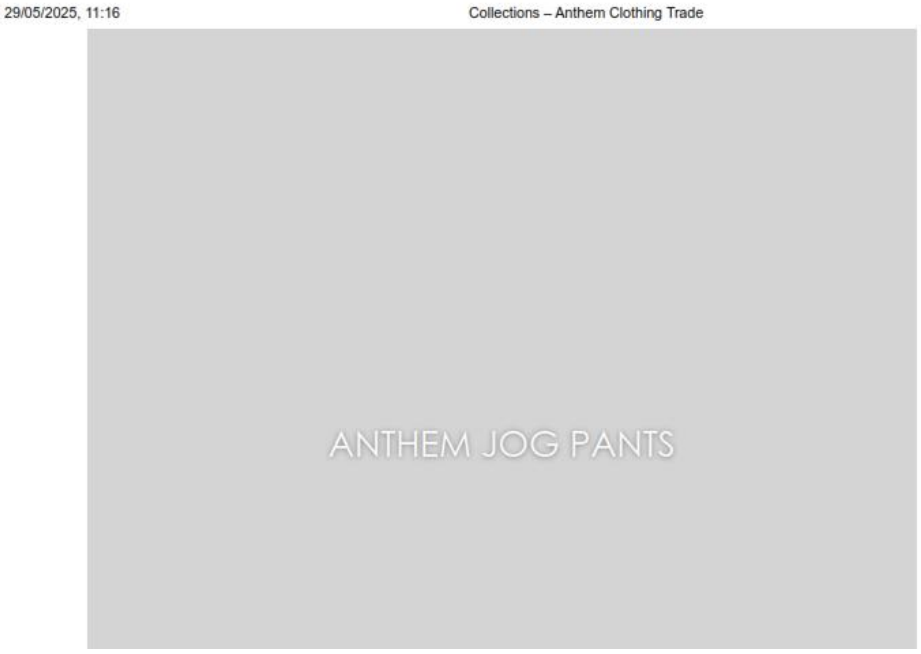
44. The case for enhanced distinctiveness does not need to be expressly pleaded. As such, I will now proceed to assess if the evidence demonstrates whether, at the priority date of the contested IR, being 20 November 2023, the earlier '790 and '806 marks (both being "word" marks) enjoyed an enhanced degree of distinctive character for *Articles of clothing; footwear, legwear and headwear* by virtue of the use made of the marks in relation to the UK market.

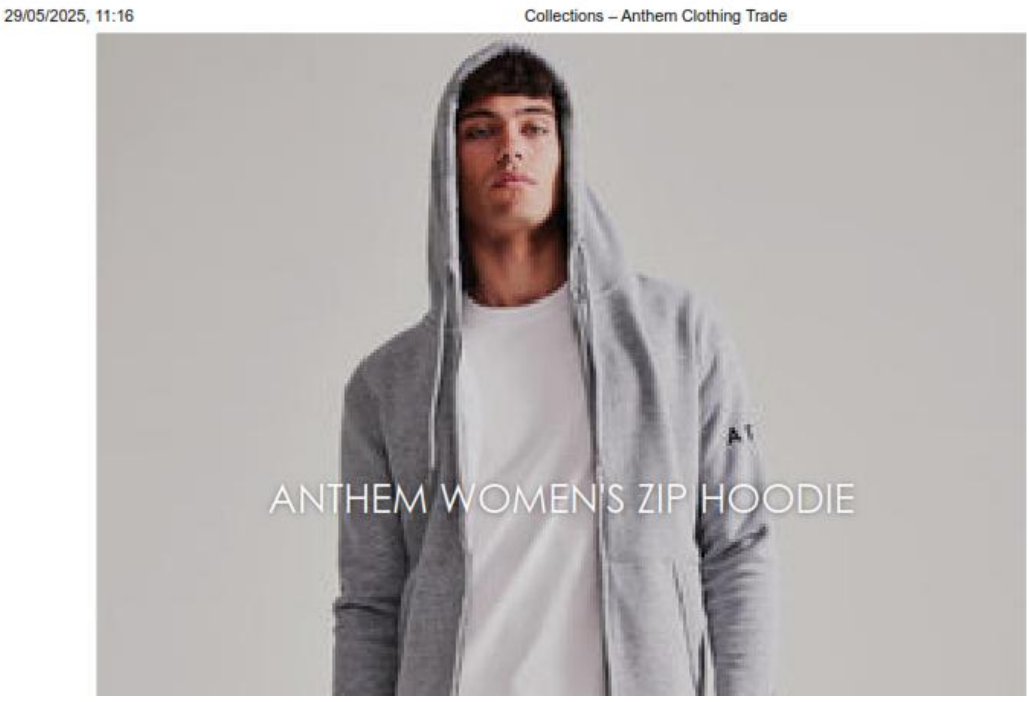
45. In brief, I note the following from the witness statement of Kirsten Ferrol and the accompanying exhibits:

- Exhibit KF1 contains extracts taken from the Wayback Machine, which Ms Ferrol describes as advertising the range of products sold under ANTHEM on Anthem Clothing's website during the 2021 to 2024 period. Ms Ferrol states that the extracts show use of the mark in relation to t-shirts, hoodies, sweatshirts and jog pants, and adds that the website is accessible from the UK

[14] At point 6 of the opponent's written submissions dated 3 June 2025. I acknowledge the reference to the ANTM mark, rather than the ANTHEM mark, which I take to be a typographical error.

and the EU.[15] I note that the ANTHEM mark is not clearly visible on any of the goods shown in this exhibit, although the words "ANTHEM… (T-SHIRT; WOMEN'S HOODIE; JOG PANTS, etc)" are superimposed in white over the appropriate image. I note that some of the descriptions do not show a corresponding image, while the descriptions on other images do not seem to match the respective illustration:




[15] At point 6 of the witness statement.


The pages do not show the goods actually being offered for sale, although at the top of some of the pages there are what I assume to be links (in English) to allow the viewer to find further information on the goods (such as “OUR PRODUCTS” and “HOW TO BUY”). I also note that the website has a .com domain address and, as such, it does not show that the UK consumer has been specifically targeted. Overall, I find the exhibit to be of little probative value in the assessment of enhanced distinctiveness.

- Exhibit KF2 is described in the witness statement as containing examples of invoices sent to UK distributors for the sale of ANTHEM goods. Of the nine invoices provided, only four are pertinent to the UK (the fourth invoice shown in the exhibit being a duplicate of the second invoice provided). Further, one of the four UK-related invoices is dated after the relevant date.
- Exhibit KF3 is described in the witness statement as containing promotional brochures from 2021, 2022 and 2023 for the relevant goods sold under ANTHEM. I note that the brochures mention the “Anthem” brand within the text and that there is an example of the branding on a label inside the clothing:

Side seam label

While many of the goods shown in the brochures do not visibly bear the ANTHEM trade mark, there are some examples which show use of the mark on the goods themselves, albeit for a variety of stylised marks:


ANTHEM


WORN EVERYWHERE
Our hoodies, sweats and tees look as good on the university campus as they do in the workplace. Hardworking fashion items that can be worn anywhere and everywhere.
ANTHEM
MUSIC FESTIVAL
ANTHEM
ANTHEM

- Exhibit KF4 is described as comprising two articles from 2022 and 2023 which list ANTHEM as an exhibitor at the P&P[16] trade show in those years, while exhibit KF5 contain a number of photographs of the ANTHEM stall at the show itself.
- Exhibit KF6 is described in the witness statement as a selection of posts taken from Anthem Clothing's Instagram account, promoting the ANTHEM trade mark in relation to the relevant goods. I note that one post mentions that Anthem is available to order from three UK distributors.
- Ms Ferrol has provided a table containing a breakdown of total sales figures for ANTHEM goods in the UK for the years 2021 to 2025. I note that UK sales in 2021 amounted to £4,057,935; in 2022 the figure was £817,011; and in 2023 it was £741,105.[17]

46. I accept that the evidence shows some use of the marks as trade marks. However, although the opponent relies on "clothing" at large, it seems to be limited to *t-shirts, hoodies, sweatshirts and jog pants* and there is nothing to show use on the full breadth of the goods relied upon, such as *footwear, legwear and headwear*. I also acknowledge that the two relevant invoices provided under exhibit KF2 show supply to a UK distributor of t-shirts (tees) only. While the sales figures contained within the evidence are considerable, I have nothing to compare the figures against as I have not been provided with the size of the corresponding clothing market in the UK, which I would expect it to be substantial, or the market share enjoyed by the opponent under the mark for the goods relied upon. Further, although the website and the brochures are written in English, aside from the one Instagram post, there is nothing to show how or where potential customers were able to access the goods under the marks in the UK. Although there is some evidence to support the promotion of the mark, there is an absence of any relevant advertising figures in relation to the marks being promoted and used on the pertinent goods within the UK market. Overall, I do not consider the evidence sufficient to establish that the distinctive character of the marks has been

[16] Which I understand from the evidence relates to the Printwear & Promotion Live! Event held in Birmingham.
[17] I assume that the figure for 2023 relates to the whole year, however, I take into account that the relevant period ends on 20 November 2023.

enhanced through use, in the UK, for the goods being relied upon, during the relevant period.

**Likelihood of confusion**

47. There is no simple formula for determining whether there is a likelihood of confusion. It is clear that I must make a global assessment of the competing factors (*Sabel* at [22]), keeping in mind the interdependency between them i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa (*Canon* at [17]). I must consider the various factors from the perspective of the average consumer, bearing in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

48. There are two types of possible confusion: direct, where the average consumer mistakes one mark for the other, or indirect, where the average consumer recognises that the marks are different, but assumes that the goods and/or services are the responsibility of the same or connected undertakings. The distinction between these was explained by Mr Iain Purvis Q.C. (as he then was), sitting as the Appointed Person, in *L.A. Sugar Limited v Back Beat Inc*, Case BL-O/375/10. He said:

> "16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: "The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark."

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ("26 RED TESCO" would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as "LITE", "EXPRESS", "WORLDWIDE", "MINI" etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ("FAT FACE" to "BRAT FACE" for example)."

49. The above are examples only which are intended to be illustrative of the general approach. These examples are not exhaustive but provide helpful focus.

50. As explained at paragraphs 15-16 of this decision, I did not consider that the issue of genuine use of the '790 mark and the '806 mark would be determinative in these proceedings and I have conducted my assessment on the basis that the opponent can rely upon the full breadth of its class 25 specifications under each of the marks. Given the holder's admissions on identity/similarity, I have also proceeded on the basis that the goods and services at issue are either self-evidently identical/*Meric* identical or that they are highly similar. I considered the average consumer of the overlapping goods and services to be the general public who would pay a medium degree of attention as a minimum[18] during the predominantly visual selection of those goods and services, although I did not discount aural considerations.

[18] I note that in relation to the assessment of the likelihood of confusion, it is the section of the public with the lowest level of attention which must be taken into consideration - Case T-247/12, *Argo Group International Holdings Ltd. v OHIM*.

51. I found the competing marks to be visually similar to no more than a medium degree, and to be aurally and conceptually dissimilar. I found the earlier marks to be inherently distinctive to a medium degree. On consideration of the evidence of use of the marks within the UK market, I found it insufficient to find that the distinctive character of the marks had been enhanced through use.

52. I have made a multi-factorial assessment of the various considerations in play. I take into account that the average consumer is unlikely to see the marks side-by-side and will therefore be reliant on the imperfect picture of them they have kept in their mind. I bear in mind the predominantly visual nature of the selection process, as well as the aural and conceptual dissimilarity between the marks and the medium degree of attention (at its lowest) paid by the general public. I consider the overall differences between the marks are such that they are unlikely to be mistakenly recalled as each other. I therefore find that there is no likelihood of direct confusion. I find this even for identical goods and services, which offsets a lesser degree of similarity between the marks.

53. Taking into account the previously outlined guidance of Mr Iain Purvis Q.C. (as he then was), in *L.A. Sugar*, I will now consider whether there might be a likelihood of indirect confusion. In *Duebros Limited v Heirler Cenovis GmbH,* BL O/547/17, Mr James Mellor Q.C. (as he then was), as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

54. In *Liverpool Gin Distillery Ltd and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207, Lord Justice Arnold referred to the comments of James Mellor QC (as he then was) sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said (at [16]) that "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion". Lord Justice Arnold added that there must be “a proper basis” for concluding that there is a likelihood of indirect confusion when there is no likelihood of direct confusion.

55. Keeping in mind the global assessment of the competing factors, it is my view that it is unlikely that the average consumer would assume that there is a connection between the parties. I acknowledge that the categories listed by Mr Iain Purvis Q.C. (as he then was), are not exhaustive. However, although sight of one mark may bring to mind the other mark, and consumers may consider that the marks coincidentally share four of the six letters contained in the earlier marks, in my view, there is no 'conceptual hook'. I do not see anything which would lead the average consumer into believing that one mark is a sub-brand of the other, or assume that there is an economic connection between the undertakings. I therefore find no likelihood of indirect confusion.

56. The opposition under section 5(2)(b) of the Act fails in its entirety.

**Final Remarks**

57. I bear in mind the finding of a no more than medium degree of visual similarity between the marks, as well as the aural and conceptual dissimilarity, and the medium degree of inherent distinctiveness of the earlier marks. For the avoidance of doubt, I would have reached the same conclusion on the likelihood of confusion even had I made a full comparison of the goods and services and found them *all* to be identical. In light of my findings, it is unnecessary for me to return to undertake an assessment in relation to either the goods and services, or in relation to the genuine use of two of the earlier marks. I have already proceeded on the basis which best represents the opponent's interests: I do not consider that any further assessment would alter my decision in the opponent's favour.

**CONCLUSION**

58. The holder has been successful. Subject to any successful appeal, the IR may be granted protection in the UK in respect of all goods and services.

## COSTS

59. The holder has been successful, and is therefore entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice ("TPN") 1/2023. Applying the guidance in that TPN, I consider the following to be fair:

| | |
|---|---|
| Considering the notice of opposition and filing a counterstatement: | £300 |
| Considering the opponent's evidence,<br>and filing written submissions in reply, and in lieu of a hearing: | £800 |
| **Total:** | **£1,100** |

60. I therefore order Anthem Clothing Limited to pay ANTHEM WORKWEAR PTY LTD the sum of £1,100. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

**Dated this 10th day of June 2026**

**Suzanne Hitchings**
**For the Registrar,**
**the Comptroller-General**