

O/0009/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NUMBER UK00003867701

BY PERATECH IP LTD

TO REGISTER THE FOLLOWING TRADE MARK:

FUSIONPAD

IN CLASS 9

AND

AN OPPOSITION THERETO UNDER NO. OP000440720

BY XFUSION DIGITAL TECHNOLOGIES CO., LIMITED

BACKGROUND AND PLEADINGS

1. On 13 January 2023, Peratech IP Ltd (“the applicant”) applied to register in the UK the trade mark shown on the cover page of this decision (“the contested mark”). The application was accepted and published for opposition purposes on 10 March 2023 and registration is sought for the following goods:

Class 9 Computer trackpads; integrated trackpads; computer touchpads; integrated touchpads; touchpads [electronic]; integrated touchpads [electronic]; haptic force-enhance trackpads; integrated haptic force-enhance trackpads.

2. On 10 May 2023, the Tribunal received a Form TM7 and statement of grounds from xFusion Digital Technologies Co., Limited (“the opponent”) opposing the application in full under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon the three earlier trade marks set out below and is reliant upon the Class 9 goods for which they are registered in each case.

UK00003740733 (“the first earlier mark”)

XFUSION

Filing date: 7 January 2022

Registration date: 19 August 2022

Class 9 Computer memory devices; Electronic memory devices; hard discs; Disc drivers; Computer servers; Network servers; Computer network server; Video display units; Audio- and video-receivers; Electric and electronic video surveillance installations; Video monitors; Video multiplexers; Video circuit boards; Radio monitors for reproduction of sound and signals; security surveillance robots; Chips [integrated circuits]; Large scale integrated circuits; Computers; Computer software for computer

networks and servers, recorded; computer hardware; Mouse[computer peripheral]; Computer keyboards; USB flash drives; CD ROMs; Programmable logic controllers; Computer programs for enabling access or entrance control; Power controllers; identity cards, encoded; security tokens [encryption devices]; network communication apparatus; Optical communications instruments; Smartphones; Communications cables; Optical cables; Telecommunications transmitters; computer chatbot software for simulating conversations; Aerials; satellite transceivers; computer software platforms for computer networks and servers, recorded or downloadable; smartwatches; interactive touch screen terminals; facial recognition apparatus; Fingerprint scanners; Pedometers; set-top boxes; Batteries, electric; wireless chargers; wearable computers; wearable activity trackers; wearable video display monitors; telecommunication apparatus in the form of jewellery; Pocket calculators; processors [central processing units]; Central processing units for processing information, data, sound or images; Digital sound processors; Multiprocessor chips; Routers; Ethernet switches; Sensors; Inverters [electricity]; Plugs, sockets and other contacts [electric connections]; Touch screens; Semi-conductors; Diodes; Remote control apparatus; Optical fibers; Public address systems; Camcorders; Machine learning software for analysis; Earphones; Digital projectors; Digital door locks; Theft prevention installations, electric; Modems; digital weather stations; Computer printers; Photocopiers; Scales; Measures; digital signs; Surveying apparatus and instruments; Optical lenses; Electric control devices for energy management; Electrolysers; Protection devices for personal use against accidents; smartglasses; TV and computer all-in-one; none of the foregoing in relation to computer software for visual effects or video editing.

UK00003740212 (“the second earlier mark”)

FusionPod

Filing date: 6 January 2022

Registration date: 19 April 2024

Class 9 Computer memory devices for computer servers and computer network servers; Computer servers; Network servers; Computer network server; Computer software, recorded for computer servers and computer network servers; computer hardware for computer servers and computer network servers.

UK00003673232 (“the third earlier mark”)

xFusion

Filing date: 26 July 2021

Registration date: 31 December 2021

Class 9 Server software; Computer servers; Network servers; Communications servers; Cloud servers; Database server software; Memory storage devices; Data storage apparatus; Data storage programs; Data management software; Database server software; Computer software for accessing databases.

3. By virtue of their earlier filing dates, the above marks constitute earlier marks in accordance with section 6 of the Act. The marks are not subject to proof of use in accordance with section 6A of the Act.
4. The opponent claims that the marks are similar, and the goods are “at least”¹ similar. As such, it is claimed that there exists a likelihood of confusion on the part of the public, which includes a likelihood of association.

¹ Paragraph 7 of the opponent’s statement of grounds.

5. The applicant filed a Form TM8 and counterstatement denying the claims made.
6. The applicant filed evidence and submissions detailed below. The opponent filed neither evidence nor submissions.
7. The applicant is represented by HGF Limited, and the opponent is represented by Handsome I.P. Ltd.
8. A hearing was held before me on Thursday 18 September 2025. The opponent did not attend the hearing, and they did not file submissions in lieu. The applicant was represented by Rigel Moss McGrath, a Chartered Trade Mark Attorney at HGF Limited, who filed skeleton arguments prior to the hearing.

Evidence and submissions

9. The applicant filed a witness statement from Rigel Moss McGrath, the representative of the applicant, signed and dated 16 September 2024, together with exhibits RMM1 – RMM3. Exhibits RMM1 and RMM2 seek to show that the word “FUSION” is in widespread use within the commercial sectors relevant to these proceedings. Exhibit RMM3 endeavours to demonstrate that the parties’ products are specialised goods.
10. The applicant also filed submissions dated 16 September 2024.

DECISION

11. 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.

Section 5(2)(b)

12. Sections 5(2)(b) and 5A of the Act reads as follows:

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

[...]

(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.

5A 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.”

Relevant law

13. The following principles are gleaned from the decisions of the Court of Justice of the European Union (“CJEU”) in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

The principles

(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 be dominated by one or more of its components;

(f) however, it is also 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 great 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 the earlier mark to mind, 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;

(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.

Comparison of the goods

14. In comparing the respective specifications, all relevant factors should be considered, as per *Canon*, where the CJEU stated at paragraph 23 of its judgment:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.”

15. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

16. In *Gérard Meric v OHIM*, Case T- 133/05, the General Court (“the GC”) stated that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

17. I bear in mind that it is permissible to group goods together for the purposes of assessment: *Separode Trade Mark*:²

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”

² BL O/399/10

18. The goods to be compared are shown in the table below:

Opponent's goods	Applicant's goods
<p><u>The first earlier mark</u></p> <p><u>Class 9</u></p> <p>Computer memory devices; Electronic memory devices; hard discs; Disc drivers; Computer servers; Network servers; Computer network server; Video display units; Audio- and video-receivers; Electric and electronic video surveillance installations; Video monitors; Video multiplexers; Video circuit boards; Radio monitors for reproduction of sound and signals; security surveillance robots; Chips [integrated circuits]; Large scale integrated circuits; Computers; Computer software for computer networks and servers, recorded; computer hardware; Mouse[computer peripheral]; Computer keyboards; USB flash drives; CD ROMs; Programmable logic controllers; Computer programs for enabling access or entrance control; Power controllers; identity cards, encoded; security tokens [encryption devices]; network communication apparatus; Optical communications instruments; Smartphones; Communications cables; Optical cables; Telecommunications transmitters; computer chatbot</p>	<p><u>Class 9</u></p> <p>Computer trackpads; integrated trackpads; computer touchpads; integrated touchpads; touchpads [electronic]; integrated touchpads [electronic]; haptic force-enhance trackpads; integrated haptic force-enhance trackpads.</p>

software for simulating conversations; Aerials; satellite transceivers; computer software platforms for computer networks and servers, recorded or downloadable; smartwatches; interactive touch screen terminals; facial recognition apparatus; Fingerprint scanners; Pedometers; set-top boxes; Batteries, electric; wireless chargers; wearable computers; wearable activity trackers; wearable video display monitors; telecommunication apparatus in the form of jewellery; Pocket calculators; processors [central processing units]; Central processing units for processing information, data, sound or images; Digital sound processors; Multiprocessor chips; Routers; Ethernet switches; Sensors; Inverters [electricity]; Plugs, sockets and other contacts [electric connections]; Touch screens; Semi-conductors; Diodes; Remote control apparatus; Optical fibers; Public address systems; Camcorders; Machine learning software for analysis; Earphones; Digital projectors; Digital door locks; Theft prevention installations, electric; Modems; digital weather stations; Computer printers; Photocopiers; Scales; Measures; digital signs; Surveying apparatus and instruments;

<p>Optical lenses; Electric control devices for energy management; Electrolysers; Protection devices for personal use against accidents; smartglasses; TV and computer all-in-one; none of the foregoing in relation to computer software for visual effects or video editing.</p>	
<p><u>Second earlier mark</u> <u>Class 9</u> Computer memory devices for computer servers and computer network servers; Computer servers; Network servers; Computer network server; Computer software, recorded for computer servers and computer network servers; computer hardware for computer servers and computer network servers.</p>	
<p><u>Third earlier mark</u> <u>Class 9</u> Server software; Computer servers; Network servers; Communications servers; Cloud servers; Database server software; Memory storage devices; Data storage apparatus; Data storage programs; Data management software; Database server software; Computer software for accessing databases.</p>	

19. In respect of the first earlier mark, I compare the opponent's "computer hardware" to the applicant's goods. Even where not explicitly described as integrated, the applicant's trackpads and touchpads are typically integral parts of laptops, albeit they can also be sold as peripheral devices. Either way, I consider them to be computer hardware. Noting that the opponent has argued that the respective goods are "at least"³ similar, I find the goods to be *Merit* identical.

20. Regarding the second and third earlier marks, I consider the closest comparators to the applicant's goods to be "computer hardware for computer servers and computer network servers" and "computer servers". While I consider both computer servers and trackpads/touchpads to be computer hardware, trackpads/touchpads form no part of computer servers. Their specific natures, purposes and methods of use differ, and they are neither complementary nor are they in competition. The users of computer servers are companies needing to network their computers, whereas the users of trackpads/touchpads are companies that assemble laptops or members of the public buying peripheral trackpads/touchpads. As such, the trade channels for the respective goods are not particularly close: while it is possible that some undertakings that produce and sell servers would also produce and sell trackpads/touchpads, I have no evidence to confirm that this is common in the trade and, even if it were, such an overlap in trade channels alone is not sufficient to warrant a finding of similarity. Overall, I find the respective goods to be dissimilar.

21. As some degree of similarity between the goods is required for there to be a likelihood of confusion⁴, the opposition must fail in respect of the second and third earlier marks and so the opposition only proceeds in respect of the first earlier mark.

³ Paragraph 7 of the opponent's statement of grounds.

⁴ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

The average consumer and the purchasing act

22. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which the goods are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The word “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

23. At paragraph 6 of its witness statement, the applicant submits “that the relevant consumers of either Parties' goods are not members of the general public but are specialised in their field and have a very high level of attention to detail when purchasing either Parties' product.” It then refers me to Exhibit RMM3 which shows some of the opponent's server products and one of the applicant's trackpad products. However, I must consider the purchasing process for competing goods and services on a notional basis and in any event, I have already found servers and trackpads/touchpads to be dissimilar. I must now consider the purchasing process for computer hardware at large on a notional basis.

24. The average consumer of computer hardware will be an individual member of the public or a company. The practical capability of the hardware that they are buying will be an important consideration. Cost will also be a factor and could be significant for the corporate customer buying in bulk. Overall, the level of attention paid by the average consumer would be at the higher end of the medium range.

25. The purchasing process will be primarily a visual one as customers peruse computer hardware goods online or on display in a physical shop. However, verbal considerations will come into play when customers have technical queries.

Comparison of trade marks

26. It is clear from *Sabel* that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU states at paragraph 34 of its judgment in *Bimbo*, that:

“...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 relevant 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.”

27. It would be wrong, therefore, to dissect the trade marks artificially, although it is necessary to take into account the distinctive and dominant components of the trade 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.

28. The marks to be compared are as follows:

The first earlier mark	Applicant's mark
αFUSION	FUSIONPAD

Overall impression

29. The first earlier mark is a figurative mark that begins with a device element and is followed by the word “FUSION” in bold block capitals.
30. In paragraph 4 of its statement of grounds, the opponent says that the device element of the mark is “a fish-like element, or Greek alpha symbol”. At paragraph 12 of its skeleton arguments, the applicant argues that it is “a stylised letter ‘X’”. While the company that owns the mark is called xFusion Digital Technologies Co., Limited, that would not be known to the average UK consumer and I consider that, on encountering the mark, they would see the device element as a symbol of indeterminate meaning.
31. The device plays a minor role in forming the overall impression made by the mark, the word “FUSION” being the dominant element within it.
32. The applicant’s mark is a word mark consisting of the conjoined words “FUSION” and “PAD” which form the word “FUSIONPAD” in block capitals that could be rendered in bold through normal and fair use. The word “FUSION” is the slightly more dominant of the conjoined words in forming the overall impression made by the mark as the word “PAD” is descriptive of the applicant’s goods.

Visual similarity

33. Visually, the first earlier mark begins with a symbol which is absent from the applicant’s mark and the applicant’s mark has three additional letters “-PAD”, but the marks share the word “FUSION”. Overall, the marks are of medium visual similarity.

Aural similarity

34. Aurally, the marks are “FUSION” v “FUSION-PAD”, both of which will be pronounced in the ordinary way. They are of medium aural similarity.

Conceptual similarity

35. I have already said that I do not consider that the average UK consumer would derive a particular meaning from the device in the first earlier mark. Therefore, the only concept that the mark gives rise to is that of fusion – the joining together of one or more things. The same concept appears in the applicant's mark, but that mark also evokes the secondary concept of a pad, as in a trackpad, that word being descriptive of the applicant's goods. Overall, the marks are of at least a medium level of conceptual similarity.

Distinctive character of the earlier mark

36. In *Lloyd Schuhfabrik Meyer* the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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).”

37. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities.
38. The applicant has argued, via a witness statement and supporting evidence in the form of Exhibits RMM1 and RMM2, and through its skeleton arguments articulated before me, that the word “FUSION” “must be considered to have a very low degree of inherently distinctive character in connection with the goods and services claimed in the earlier registrations and that even it could actually be considered to be an origin-neutral term.”
39. At the hearing, Ms Moss McGrath commented on all but one of the seventeen examples in Exhibit RMM1 which feature extracts from IT company websites who market their goods and services in the UK and who use the word “FUSION” when trading. These were “Fusion 360”, for design software, “Fusion 2”, for navigational and positioning software, “Fusion Systems”, in relation to consultancy for hardware and software services, “Fusion Risk Management” and “Fusion Framework System”, for business analysis software, “Fusion Consulting”, for software services to businesses, “Fusion IT Services”, for repair and maintenance services, “Fusion Computer Services”, also for repair and maintenance services, “Nexus Fusion”, offering hardware, software and networking and data centre solutions, “Fusion 5”, a retailer of laptops and tablets, “Fusion eCare”, for business management software, “Forfusion” and “FusionCare”, for IT solutions and network operation services and consultancy and technical services, “FUSION”, for gaming software (but Ms Moss McGrath conceded at the hearing that this example did not show that this company trades in the UK), Huawei’s “family” of “FUSION” trade marks – “FusionDirector” and “FusionSolar” “FusionSphere”, “FusionHub” and “SpeedFusion for hardware and software, and “FusionServers” for servers, “Fusion IT” and “Fusion Cloud”, for IT and cloud hosting services, “Fusion Practices”, offering IT consultancy and advisory solutions”, and “Fusion Consulting” which offers IT services such as data asset services.

40. Ms Moss McGrath also referred me to Exhibit RMM2 which is an undated list of Google search results for the term “fusion servers” said to be “limiting the results to the UK”. She said, “amongst the results we have references to fusion servers from Tranquil IT Solutions, Peplink FusionHub from Grapevine, Fusion Edge server, Fusion Host ... we say that this demonstrates that a consumer in the UK that is searching for FUSION products in the relevant sector is faced with a wide range of FUSION trade marks and, therefore, we would say that it is appropriate to infer that because of the scale of use of FUSION trade marks in the UK, it is such that consumers are unable to associate the term "fusion" with any one particular supplier and that, as a result, consumers are used to relying on additional elements to distinguish between trade marks in the marketplace.”

41. Later in the hearing, Ms Moss McGrath went on to say, “I think it would be really hard, given how many “FUSION” marks there are in the marketplace, for a consumer to get a real feel. It is almost like the "Easy" element, possibly a different scale again, but the consumer would almost get to the point where you just dismiss it. There are so many software and hardware solutions that incorporate "FUSION" that it just becomes part of the norm ... to the extent that the word "fusion" could become origin neutral when you are looking at these kinds of goods.”

42. Although the applicant has exhibited sixteen examples of IT companies who market their goods and services in the UK and who use the word “FUSION” when trading, very few of these uses are confirmed from the evidence to be registered trade mark use and the evidence does not show the sales or market share that these companies have achieved. Even if these examples of the use of the word “FUSION” were shown to be on the UK trade mark register, I am reminded of *Zero Industry Srl v OHIM*, Case T-400/06, where the GC stated that:

“73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word ‘zero’, it should be pointed out that the Opposition Division found, in that regard, that ‘... there are no indications as to how many of such trade marks are effectively used in the market’. The applicant did not dispute that finding before the Board of Appeal but none the less

reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word 'zero' is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy, Case T 135/04 *GfK v OHIM – BUS(Online Bus)* [2005] ECR II 4865, paragraph 68, and Case T 29/04 *Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH)* [2005] ECR II 5309, paragraph 71).”

43. Having assessed the evidence in Exhibits RMM1 and RMM2, I do not consider the applicant to have shown that the word “FUSION” is so widely used in the UK market for computer hardware as to weaken that word’s distinctive character.

44. The symbol in the first earlier mark is of indeterminate meaning and so it does not allude to the goods for which the mark is registered. The word “FUSION” is a dictionary word, but while the evidence put forward by the applicant may hint at its occasional use in the context of computer hardware with a view to implying that such goods function seamlessly, I do not consider the word to be generally recognised as suggestive of the goods for which the mark is registered. The mark is of a medium level of inherent distinctive character.

Likelihood of confusion

45. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle 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 vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive

character of opponent's trade mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact 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 that he has retained in his mind.

46. The goods are *Meric* identical.

47. I have found the marks to be visually and aurally similar to a medium degree and to be of at least a medium level of conceptual similarity.

48. I have found the first earlier mark to possess a medium level of inherent distinctive character.

49. I have found that the average consumer of computer hardware will be an individual member of the public or a company paying a level of attention during the purchasing process at the higher end of the medium range. The purchasing process will be primarily a visual one, but verbal considerations will come into play when customers have technical queries.

50. The average consumer will regard the symbol in the first earlier mark to be of indeterminate meaning, and so it could easily be overlooked. Further, the respective marks share the word "FUSION", and the addition of the word "-PAD" in the applicant's mark could also be disregarded because it is descriptive of the applicant's goods. On this basis, there is a likelihood of direct confusion. However, if I am wrong, I will also consider the likelihood of indirect confusion.

51. Indirect confusion was described in the following terms by Iain Purvis QC (as he then was), sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc.*⁵

"16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that

⁵ BL O/375/10

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 recognised 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).”

52. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ 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”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

53. As I said previously, the average consumer could overlook the presence of the symbol in the first earlier mark. However, if they noticed it, this would not prevent the mark from functioning as the “FUSION” house mark in the consumer’s eyes.

54. The presence of the word “FUSION” in both marks would not be seen as a coincidence. Rather, the average consumer would see an economic connection. Along the lines of category (b) of *L.A. Sugar* (cited above), they will regard “FUSIONPAD” as a sub-brand of the opponent’s “FUSION” computer hardware company, “-PAD” signifying that this is the tablet, trackpad or mouse mat range of the “FUSION” brand. Therefore, there is a likelihood of indirect confusion.

CONCLUSION

55. Subject to appeal, the opposition has succeeded in full in respect of the first earlier mark and the application is refused.

COSTS

56. The opponent has been the successful party in this case and so I make a costs award in line with Tribunal Practice Notice 1 of 2023. I note that the opponent made no comment in respect of the applicant’s submissions and evidence and filed no submissions or evidence of its own, nor did it attend the hearing.

57. I award costs as follows:

Official fees:	£100
Preparing a statement and considering the other side’s statement:	£250

58. I order Peratech IP Ltd to pay xFusion Digital Technologies Co., Limited the sum of £350. This 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 8th day of January 2026

John Williams
For the Registrar