BL O/0037/26

TRADE MARKS ACT 1994

IN THE MATTER OF

INTERNATIONAL REGISTRATION NO. WO1776770

BY CHENGDU YIDUOKE TECHNOLOGY CO., LTD.

IN RESPECT OF THE TRADE MARK:

MikeTouch

IN CLASSES 9, 38 AND 42

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 449347

BY DHI A/S

BACKGROUND AND PLEADINGS

1. Chengdu Yiduoke Technology Co., Ltd. ("the holder"), is the holder of international trade mark registration number 1776770 ("the IR"), shown on the cover page of this decision. The IR is registered with effect from 8 December 2023. The request to protect the IR in the UK was made on 8 December 2023. It was accepted and published for opposition purposes on 24 May 2024 in respect of goods and services in classes 9, 38 and 42, as set out in the Annex to this decision.

2. On 27 August 2024, DHI A/S ("the opponent") partially opposed the protection of the IR in the UK based upon section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opposition is directed at the holder's class 9 goods, namely:

Class 9 Computer software applications, downloadable; downloadable e-wallets; integrated circuit cards [smart cards]; semiconductor memory devices; computer hardware; foldable smartphones; wireless headsets for smartphones; semiconductor wafers; electronic chips for the manufacture of integrated circuits; integrated circuits.

3. For the purposes of its opposition, the opponent relies upon its earlier comparable UK trade mark number 907332554, 'MIKE' ("the earlier mark").[1] The earlier mark filed on 22 October 2008 became registered on 27 May 2009. The opponent relies on all its class 9 goods, namely:

Class 9 Computer software.

4. The opponent claims that the marks are highly similar and that the goods at issue are identical or similar, resulting in a likelihood of confusion on the part of the public.

[1] 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 EUTM or International Registration designating the EU. As a result, the opponent's 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. See also Tribunal Practice Notice ("TPN") 2/2020 End of Transition Period – impact on tribunal proceedings.

5. The holder filed a counterstatement denying the ground of opposition and putting the opponent to proof of use.

6. Neither party requested a hearing, nor did they file written submissions in lieu of a hearing. This decision is taken following a careful review of the papers.

7. The opponent is represented by DLA Piper UK LLP; the holder is represented by Trademarkit LLP.

EVIDENCE

8. Only the opponent filed evidence. This was in the form of two witness statements:

- The witness statement of Marie Emilie Schmiegelow dated 4 February 2025, accompanied by 17 exhibits (MES1 to MES17). Ms Schmiegelow is Senior Legal Counsel for the opponent, a position held since August 2018.

  The main purpose of Ms Schmiegelow's evidence is to demonstrate that the earlier mark has been put to genuine use in the EU and the UK during the relevant period in relation to the goods relied upon.

- The witness statement of Daniel Rhys Cartmell dated 4 February 2025, accompanied by 6 exhibits (DRC1 to DRC6). Mr Cartmell is a trade mark associate acting on behalf of the opponent.

  Mr Cartmell's evidence comprises definitions of the word 'TOUCH' and various screenshots showing the word 'TOUCH' being used in relation to computer software and applications.

RELEVANCE OF EU LAW

9. 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.

DECISION

Section 5(2)(b)

10. Sections 5(2)(b) of the Act 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
>
> there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark."

Proof of use

11. The registration procedure for the earlier mark was completed more than five years prior to the filing date of the contested application. Therefore, it is subject to proof of use pursuant to section 6A of the Act. In its notice of opposition, the opponent made a statement of use in relation to the class 9 goods relied upon. Accordingly, I will begin by assessing whether there has been genuine use of the earlier mark.

12. The relevant statutory provisions are as follows:

> "6(1) This section applies where:

(a) an application for registration of a trade mark has been published,
(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section "the relevant period" means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

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

(3) The use conditions are met if –

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

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

(4) For these purposes –

(a) use of a trade mark includes use in a form (the "variant form") differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

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

(5)-(5A) [Repealed]

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

13. Section 100 of the Act reads:

"If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it."

14. The relevant period during which genuine use must be shown is the five years ending with the application date of the contested IR, being 8 December 2023. Therefore, the relevant period is 9 December 2018 to 8 December 2023. As the opponent's earlier mark is a comparable mark, the territory in which use of the mark must be shown is the EU (including the United Kingdom)[2] prior to IP completion day, being 31 December 2020,[3] and the United Kingdom only thereafter.

15. Consequently, the onus is upon the opponent to prove that genuine use of the earlier mark was made within the relevant territories, during the relevant period, and in respect of the relevant goods as registered.

16. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

"105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *Sunrider*

[2] *Leno Merken BV v Hagelkruis Beheer BV,* Case C-149/11, paragraphs 36, 50 and 55.
[3] See paragraph 7 of Part 1, Schedule 2A of the Act.

Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs) [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:

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

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37];

Verein at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

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

6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant services. For example, use of the mark by a single client which imports the relevant services can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].

107. The trade mark proprietor bears the burden of proving genuine use of its trade mark: see section 100 of the 1994 Act and *Ferrari* at [73]-[83]. The General Court of the European Union has repeatedly held that genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned: see e.g. Case T-78/19 *Lidl Stiftung & Co KG v European Union Intellectual Property Office* [EU:C:2020:166] at [25]. It has also repeatedly held that the smaller the commercial volume of the exploitation of the mark, the more necessary it is for the proprietor to produce additional evidence to dispel any doubts as to the genuineness of its use: see e.g. *Lidl* at [33].

17. Whether the use shown is sufficient for this purpose will depend on whether there has been real commercial exploitation of the earlier mark, in the course of trade, sufficient to create or maintain a market for the goods at issue during the relevant five-year period. In making the assessment, I am required to consider all relevant factors, including:

i) The scale and frequency of the use shown;
ii) The nature of the use shown;
iii) The goods for which use has been shown;
iv) The nature of those goods and the market(s) for them; and
v) The geographical extent of the use shown.

18. Before assessing the opponent's evidence of use, I remind myself of the comments of Mr Daniel Alexander QC, (as he then was) sitting as the Appointed Person, in *Awareness Limited v Plymouth City Council*, where he stated that:[4]

[4] Case BL O/230/13

> "22. The burden lies on the registered proprietor to prove use […]. However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public."

19. I also note Mr Alexander QC's (as he then was) comments in *Guccio Gucci SPA v Gerry Weber International AG*.[5] Although the case concerned revocation proceedings, the principle is the same for proof of use in opposition actions. He stated:

> "The Registrar says that it is important that a party puts its best case up front – with the emphasis both on "best case" (properly backed up with credible exhibits, invoices, advertisements and so on) and "up front" (that is to say in the first round of evidence). Again, he is right. If a party does not do so, it runs a serious risk of having a potentially valuable trade mark right revoked, even where that mark may well have been widely used, simply as a result of a procedural error. […] The rule is not just "use it or lose it" but (the less catchy, if more reliable) "use it – and file the best evidence first time round – or lose it"."

20. The comments of Mr Geoffrey Hobbs QC (as he then was) in *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, where he sat as the Appointed Person, are also relevant.[6] He stated that:

[5] Case BL O/424/14
[6] Case BL O/404/13

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

> [24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

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

21. Accordingly, whilst there is no requirement to produce any specific form of evidence, I must consider what the evidence as a whole shows me and whether on this basis, I can reasonably be satisfied that there has been genuine use of the mark.

Form of the mark

22. Before I move on to assess if the opponent has shown genuine use, I must first consider if I find the use of the mark as shown in the evidence to be use of the mark as registered or acceptable variants.

23. The opponent's registration is for the word mark 'MIKE'. Where the opponent has used its earlier mark as registered, that will clearly be use on which the opponent can rely.

24. However, it is noted from the evidence that the opponent's mark has also been used in the following ways:

MIKE by DHI	MIKE Cloud	MIKE+
MIKE Powered by DHI	MIKE Data Link	MIKE API
MIKE for Developers	MIKE Eco Lab	MIKE IO
MIKE 3	MIKE Engine API	MIKE Core SDK
MIKE 21	MIKE Operations	MIKE GitHub
MIKE 21-3	MIKE SHE	MIKE Workbench
MIKE Hydro Basin Hotfix	MIKE Customised	MIKE URBAN
MIKE Zero	MIKE PLANNING	MIKE INFO
MIKE Mesh Builder	MIKE 2021	MIKE FLOOD

25. In *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22, Phillip Johnson, sitting as the Appointed Person, considered the correct approach to the test under section 46(2). He said:

“13. […] While the law has developed since *Nirvana* [BL O/262/06], the recent case law still requires a comparison of the marks to identify elements of the mark added (or subtracted) which have led to the alteration of the mark (that is, the differences) (see for instance, T-598/18 *Grupo Textil Brownie v EU*IPO*, EU:T:2020:22, [63 and 64]).

14. The courts, and particularly the General Court, have developed certain principles which apply to assess whether a mark is an acceptable variant and the following appear relevant to this case.

15. First, when comparing the alterations between the mark as registered and used it is clear that the alteration or omission of a non-distinctive element does not alter the distinctive character of the mark as a whole: T-146/15 *Hypen v EUIPO*, EU:T:2016:469, [30]. Secondly, where a mark contains words and a figurative element the word element will usually be more distinctive: T-171/17 *M & K v EUIPO*, EU:T:2018:683, [41]. This suggests that changes in figurative elements are usually less likely to change the distinctive character than those related to the word elements.

16. Thirdly, where a trade mark comprises two (or more) distinctive elements (eg a house mark and a sub-brand) it is not sufficient to prove use of only one of those distinctive elements: T-297/20 *Fashioneast v AM.VI. Srl*, EU:T:2021:432, [40] (I note that this case is only persuasive, but I see no reason to disagree with it). Fourthly, the addition of descriptive or suggestive words (or it is suppose figurative elements) is unlikely to change the distinctive character of the mark: compare, T-258/13 *Artkis*, EU:T:2015:207, [27] (ARKTIS registered and use of ARKTIS LINE sufficient) and T-209/09 *Alder*, EU:T:2011:169, [58] (HALDER registered and use of HALDER I, HALDER II etc sufficient) with R 89/2000-1 CAPTAIN (23 April 2001) (CAPTAIN registered and use of CAPTAIN BIRDS EYE insufficient).

17. It is also worth highlighting the recent case of T-615/20 *Mood Media v EUIPO,* EU:T:2022:109 where the General Court was considering whether the

use of various marks amounted to the use of the registered mark MOOD MEDIA. It took the view that the omission of the word "MEDIA" would affect the distinctive character of the mark (see [61 and 62]) because MOOD and MEDIA were in combination weakly distinctive, and the word MOOD alone was less distinctive still".

26. In conjunction with the above case law, I remind myself that Section 6A(4)(a) of the Act enables an opponent to rely on use of a mark "in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered". With regards to the above marks, I acknowledge that where a registered mark is used as part of another mark or with additional matter, this may still constitute acceptable use of the mark as registered, where this element continues to act independently as an indicator of origin.[7]

27. Further, as the earlier registered mark 'MIKE' is a word mark, I note that the registration of a word mark gives protection irrespective of capitalisation, colour and stylisation.[8]

28. Accordingly, I am of the view that use of the marks shown in the above table do constitute use of the earlier mark 'MIKE', as I find that the additional text and/or device elements make no material difference to the distinctiveness of the 'MIKE' mark as registered, because I consider that this element in all of the above versions continues to play an independent, dominant role and therefore continues to indicate origin. Consequently, I find that use of the above stated marks is use upon which the opponent can rely.

29. Even if I am wrong in my finding, I am of the view that the additional text, colour and devices added to the registered word 'MIKE', does not sufficiently alter the distinctive character of the earlier mark, and therefore use of the marks shown above, constitute as acceptable variant use of the earlier mark upon which the opponent can rely.

[7] *Colloseum Holdings AG v Levi Strauss & Co.,* Case C-12/12
[8] *Bentley Motors Limited v Bentley 1962 Limited*, BL O/158/17

Use of the mark

30. Whether the use shown of the earlier mark is sufficient to establish genuine use will depend on whether there has been real commercial exploitation of the same, in the course of trade, sufficient to create or maintain a market for the goods at issue, in the relevant territories, during the relevant five-year period.

31. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.[9] As indicated in the case law above, use does not need to be quantitively significant to be genuine.

32. The opponent claims to have used its earlier mark 'MIKE' during the relevant period, in relation to the goods relied upon, namely:

Class 9 Computer software.

33. With regards to use of the earlier mark, the following has been deduced from Ms Schmiegelow's witness statement and exhibits:

- The opponent's name, 'DHI' stands for Dansk Hydraulisk Institut (Danish Hydraulic Institute) and was founded in 1964 by the Technical University of Denmark. Whilst the opponent's headquarters are based in Denmark it also has a global presence with approximately 30 offices throughout the world, along with software development centres in Singapore and Denmark.[10]

- The opponent provides software, software development and software engineering with regard to, inter alia, addressing challenges in water environments; it employs 1,100 (approx.) engineers and specialists who provide water software development and engineering consultancy with regards to projects involving water in more than 115 countries.

[9] *New Yorker SHK Jeans GmbH & Co KG v OHIM*, Case T-415/09.
[10] Exhibit MES1.

- The opponent first began developing numerical modelling software in 1985 which came to be branded ‘MIKE’, named after Professor Michael Abbott, the creator of the MIKE software suite.

- Sales of the MIKE software were globalised in 1996 and consolidated under the name MIKE in 2015.

- The MIKE suite of software products are predominantly aimed at tackling issues within water environments, namely, oceans and coastlines, rivers and reservoirs, ecology, groundwater, water distribution, and wastewater, etc. The software products facilitate water modelling and simulation and are used by inter alia, water authorities, such as, utility companies, wastewater plant operators, port authorities, coast and marine engineers, mining professionals, civil engineers, geotechnical and geothermal engineers.

- In 2023 the opponent’s UK subsidiary, DHI Water Environment (UK) Ltd, made sales in the region of £1.2 million. It is estimated that 50% of this figure, i.e. £600,000, can be attributed to the MIKE brand and its products.[11] However, it is noted that this 2023 turnover figure has not been broken down into the software goods at issue and their unit costs, etc. Given the specialised nature of the software goods at issue, it would have been helpful to know the cost per unit, on the basis that it could range between hundreds of pounds to thousands of pounds, for example.

- Further, this revenue has not been supported by any invoices, purchase orders, customer orders, or delivery notes, etc. Accordingly, based on the turnover figure before me, it is impossible to ascertain how many units (of the software products) were sold in 2023, and whilst the evidence indicates that ‘MIKE’ branded software for water modelling and simulation were globalised in 2015, there is no indication of how many software products were sold in the UK and EU prior to 2023 and during the relevant period. Additionally, there is nothing to indicate that the UK and EU are the opponent’s major markets which could enable some reasonable assumptions to be made.

[11] Witness statement of Ms Schmiegelow – paragraph 9.

- I have not been provided with any turnover figures or invoices, etc., for the remaining relevant period, namely from 9 December 2018 to the end of 2022. As previously stated, the sales figures provided relate solely to 2023. Therefore, given the absence of information/evidence regarding the cost of the software and the number of units sold, etc., it is impossible to ascertain if any other software sales took place during the relevant period. Furthermore, it is not clear whether the 2023 turnover figure relates to the sale of software only, or whether it includes, for example, turnover generated by the sale of other goods or services provided by the opponent.

- Numerous versions of software products in the MIKE suite are currently and have historically been available for consumers in the UK (and EU) to download from the opponent's website.[12] However, whilst the website might be accessible from the UK or EU, there is no evidence to demonstrate that the website actually targeted the UK or EU. Further, whilst it is noted from exhibit MES2 that the earlier mark has been used in relation to various software products, the evidence contained in the exhibit is undated. Furthermore, figures have not been provided to show how many people viewed the website, downloaded the software or indeed the geographical location of such viewers/users.

- The 2024 Software catalogue for the MIKE suite of software products was published online in November 2023. Whilst I note that a full copy of the catalogue has been included in the evidence,[13] illustrating the broad range of MIKE software products offered to consumers by the opponent, it is not clear who the catalogue was accessed by, the volume of UK custom generated from the catalogue, or the extent to which the relevant UK consumer had been exposed to the mark through visiting the online catalogue. Furthermore, the catalogue is dated outside the relevant period. Therefore, this exhibit does not assist the opponent.

[12] Exhibit MES2.
[13] Exhibit MES3.

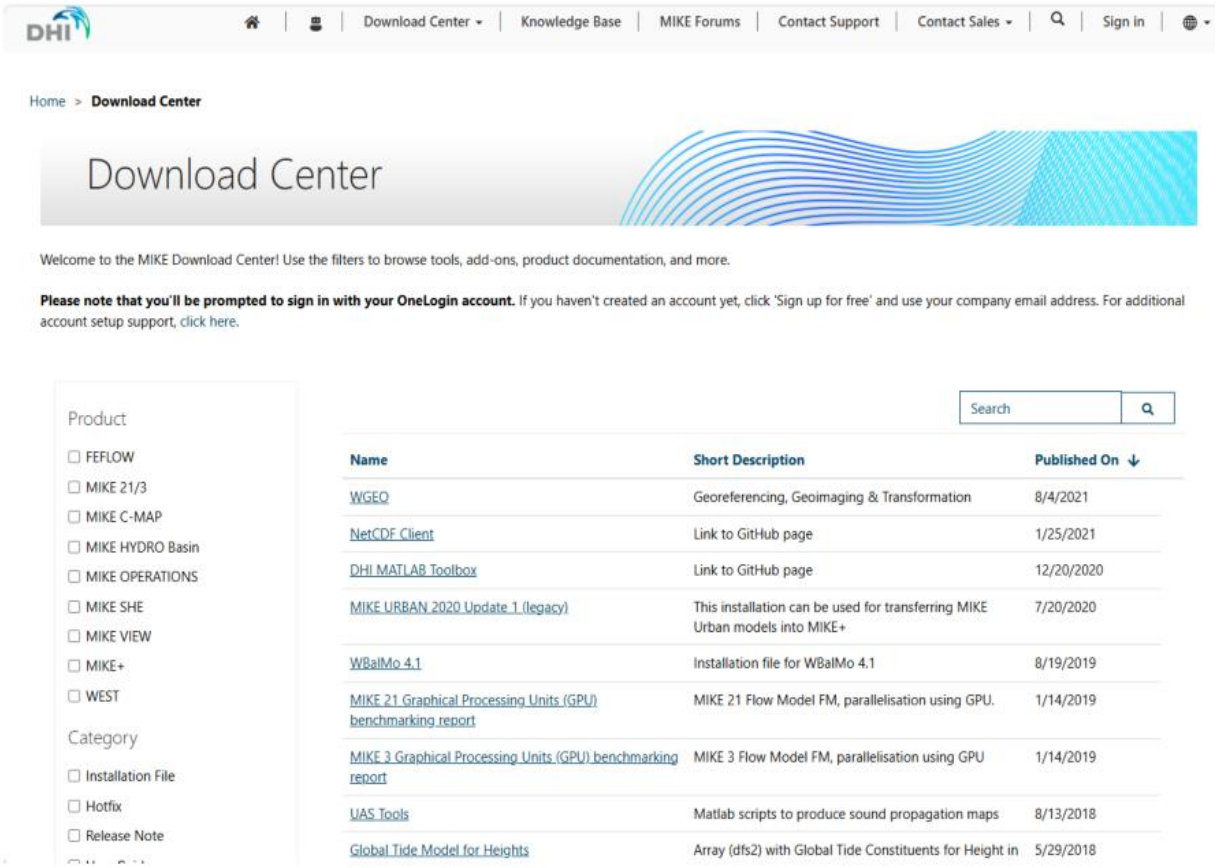
- In addition to the MIKE software suite, the opponent offers a 'MIKE for developers' portfolio, which includes a curated collection of application programming interfaces (APIs), scripting libraries, and software development kits (SDKs) for software developers to create bespoke pieces of software using MIKE assets.[14] However, whilst the opponent's trade mark is clearly present throughout the exhibit in connection with various software products, the evidence contained in the exhibit is undated. Furthermore, although the opponent's address (in Denmark) appears at the end of the portfolio, it is not clear how many consumers viewed/accessed the information, nor am I able to ascertain the geographical location of such viewers/users.

- The opponent offers clients the opportunity to download its MIKE suite of software products via its website at www.mikebydhi.com. This domain name was registered by the opponent in 2009.[15] However, there is no evidence to suggest that this website targeted the UK or EU.

- Extracts of historic versions of the opponent's website from between 2010-2023 are found in screenshots taken from 'The WayBackMachine',[16] demonstrating that MIKE was in use in respect of a broad range of software products both during the relevant period and at least as early as 2010. However, what is not clear from the exhibit is how many users accessed the website during the relevant period, or the geographical location of the users.

- The opponent publishes add-ons, tools and product documentation for its MIKE suite of software products.[17] A number of these software add-ons and tools were made publicly available during the relevant period, e.g. an installation used for transferring MIKE Urban models into MIKE+ was made available on 20 July 2020, as the following example shows:

[14] Exhibit MES4.
[15] Exhibit MES5.
[16] Exhibit MES6.
[17] Exhibit MES7.



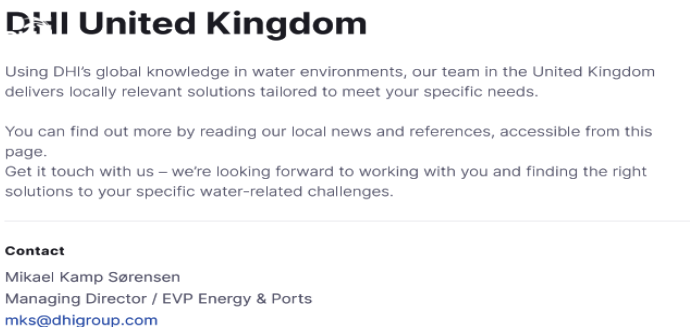
However, it is not clear from the exhibit who viewed, accessed or purchased the add-ons and tools, or the volume of EU/UK custom generated from the products.

- Briefing notes for UK and Irish water companies referencing the MIKE suite of software products, are included in the evidence.[18] The notes comprise twelve pages, seven of which are blurred and are therefore largely unreadable. From the pages that I can read I note that exhibitions, courses, and symposiums, were held in the UK in 2015 and 2016,[19] in relation to various MIKE software products. One of the briefing notes[20] states that the opponent *"has historically struggled against competition from local, incumbent software in the UK".* In my opinion, this statement reinforces my viewpoint that the UK does not appear to be one of the opponent's main markets. I also note the following statement from the same briefing note "...*we now feel that the time is right to promote truly*

[18] Exhibit MES8.
[19] Exhibit MES8 – pages 143, 144 and 148.
[20] Exhibit MES8 – page 140.

collaborative working practices...” this statement suggests to me that the opponent views their software as working alongside, rather than replacing other UK software available from other providers and confirms that consumers, namely UK water professionals, have used other software. Furthermore, as confirmed by Ms Schmiegelow in her witness statement,[21] the evidence predates the relevant period, and the exhibit does not appear to contain any evidence showing that the opponent’s plan to enter the UK market did actually happen, or to what extent.

- However, I note that activity in the UK market is evidenced via a three-page document,[22] which briefly demonstrates that the opponent has a presence in Southampton, where its UK team delivers locally relevant water environment solutions, tailored to meet specific needs, as the following shows:



DHI United Kingdom

Using DHI's global knowledge in water environments, our team in the United Kingdom delivers locally relevant solutions tailored to meet your specific needs.

You can find out more by reading our local news and references, accessible from this page.
Get it touch with us – we're looking forward to working with you and finding the right solutions to your specific water-related challenges.

Contact

Mikael Kamp Sørensen
Managing Director / EVP Energy & Ports
mks@dhigroup.com

That said, it is not clear where this undated evidence is derived from. Further, the opponent’s MIKE mark does not feature in the evidence. Accordingly, this evidence does not assist the opponent.

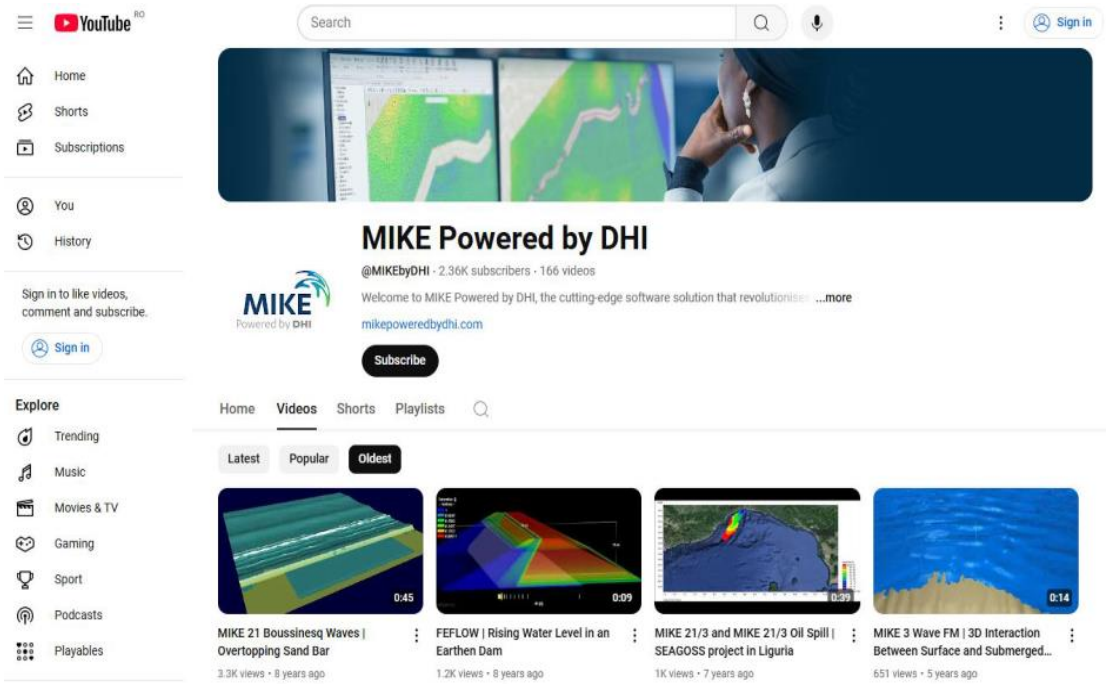
- An interview with Mark Bailes, the opponent’s Sales and Technical Support Specialist in the UK, sees him discuss his decade long career with the opponent.[23] In his interview Mr Bailes talks about his experiences working for the opponent in supporting and enhancing the MIKE software experience for clients across the UK and Ireland. However, the clients and the exact geographical location of these clients in the UK and Ireland are unknown.

[21] Witness statement of Ms Schmiegelow – paragraph 18.
[22] Exhibit MES9.
[23] Exhibit MES10.

Further, it is not clear from the undated evidence where the interview was published and how it was made available to consumers.

- Excerpts of a report, prepared for Scottish Sea Farms and Greig Seafood by the opponent, titled 'Shetland Aquaculture Modelling – Hydrodynamic Climatology Model – Model Setup Report', refers to hydrodynamic climatology models for Shetland which were established using the MIKE 3 modelling suite software package, developed by the opponent.[24] However, although the report talks about a model database that has been developed using MIKE software, it is not clear that this involves a UK customer or sale. Further, although the report is dated within the relevant period (May 2021), it is not clear where this information was made available and how many consumers had access to it.

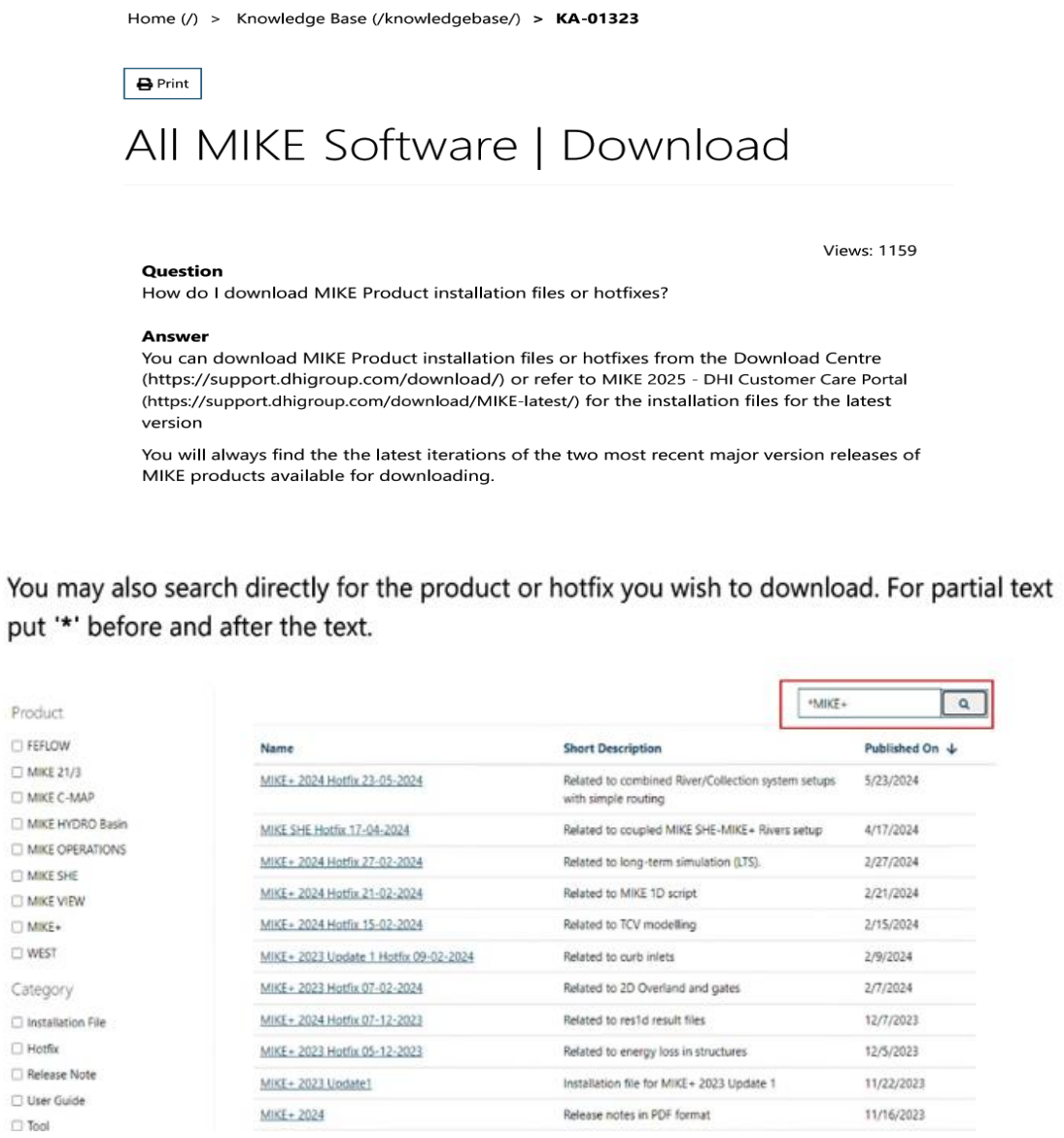
- The opponent's YouTube channel publishes training videos for users of the MIKE suite of software products. A selection of YouTube video screenshots are included in the evidence,[25] as the following example shows:



[24] Exhibit MES11.
[25] Exhibit MES12.

I note from the exhibit that numerous videos relating to MIKE software products have been viewed hundreds or thousands of times during the relevant period (I say this based on the assumption that the screenshots were obtained in February 2025 when the opponent's evidence was submitted). However, the source of those views has not been indicated. As such, the geographical location of those who accessed the videos is unknown.

- As can be seen from the following example, exhibit MES13 contains screenshots of online forums offered by the opponent for users to troubleshoot any questions they may have regarding the Mike software suite, as the following shows:



Home (/) > Knowledge Base (/knowledgebase/) > **KA-01323**

Print

All MIKE Software | Download

Views: 1159

Question
How do I download MIKE Product installation files or hotfixes?

Answer
You can download MIKE Product installation files or hotfixes from the Download Centre (https://support.dhigroup.com/download/) or refer to MIKE 2025 - DHI Customer Care Portal (https://support.dhigroup.com/download/MIKE-latest/) for the installation files for the latest version

You will always find the the latest iterations of the two most recent major version releases of MIKE products available for downloading.

You may also search directly for the product or hotfix you wish to download. For partial text put '*' before and after the text.

*MIKE+

Product
- FEFLOW
- MIKE 21/3
- MIKE C-MAP
- MIKE HYDRO Basin
- MIKE OPERATIONS
- MIKE SHE
- MIKE VIEW
- MIKE+
- WEST

Category
- Installation File
- Hotfix
- Release Note
- User Guide
- Tool

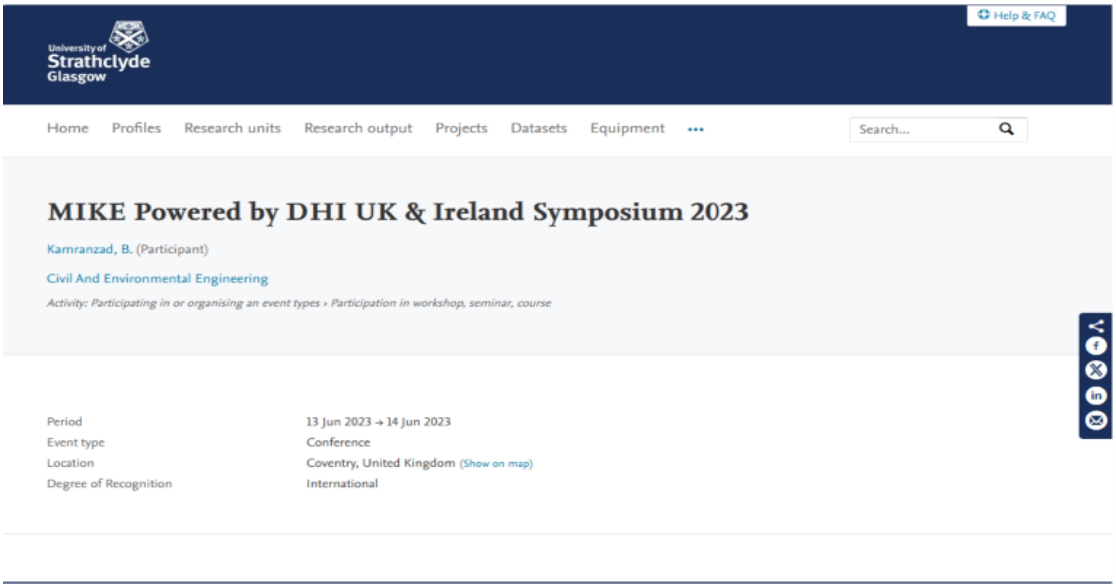
Name	Short Description	Published On
MIKE+ 2024 Hotfix 23-05-2024	Related to combined River/Collection system setups with simple routing	5/23/2024
MIKE SHE Hotfix 17-04-2024	Related to coupled MIKE SHE-MIKE+ Rivers setup	4/17/2024
MIKE+ 2024 Hotfix 27-02-2024	Related to long-term simulation (LTS).	2/27/2024
MIKE+ 2024 Hotfix 21-02-2024	Related to MIKE 1D script	2/21/2024
MIKE+ 2024 Hotfix 15-02-2024	Related to TCV modelling	2/15/2024
MIKE+ 2023 Update 1 Hotfix 09-02-2024	Related to curb inlets	2/9/2024
MIKE+ 2023 Hotfix 07-02-2024	Related to 2D Overland and gates	2/7/2024
MIKE+ 2024 Hotfix 07-12-2023	Related to res1d result files	12/7/2023
MIKE+ 2023 Hotfix 05-12-2023	Related to energy loss in structures	12/5/2023
MIKE+ 2023 Update1	Installation file for MIKE+ 2023 Update 1	11/22/2023
MIKE+ 2024	Release notes in PDF format	11/16/2023

The screenshots relate to dates between 2020 to 2024. The exhibit, retrieved from the opponent's Customer Care Portal (https://support.dhigroup.com/) appears to relate to MIKE software and some of the dates shown fall within the relevant period. However, I am not able to ascertain from the exhibit how many users accessed the online forums or their geographical location.

- Events have been run by the opponent in the UK to share its expertise with its clientele. For example, the opponent has run symposiums for its UK clients between 2017 to 2023, [26] for example:

VENUE
The Moat House, Acton Trussell, Stafford,
Staffordshire, ST17 0RJ, UK.
Please visit https://www.moathouse.co.uk/

[26] Exhibit MES14.

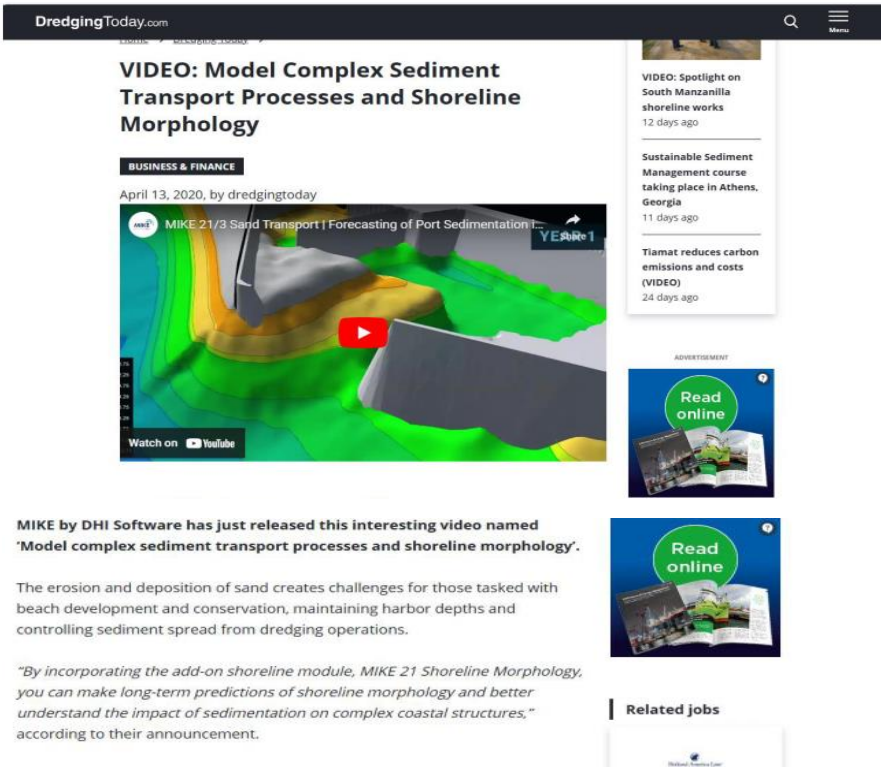


Ms Schmiegelow states that some of the talking points at the symposiums relate to the opponent's MIKE software suite of products. For example, at a 2018 symposium session the use of a 'MIKE oil spill software module' by the Orkney Islands Council (UK) was discussed. However, the evidence fails to include information regarding the number of attendees at these events, for example, the evidence does not include guest lists, invitations/joining instructions, etc. Therefore, it is impossible to ascertain how many people were exposed to the opponent and its MIKE software products during these events.

- A screenshot of a press release published by 'Open PR' on 6 January 2022, concerns new software updates for the opponent's MIKE suite of products.[27] The press release is written by the opponent's 'Jannifer Mathers', who gives her contact details as an address in Denmark. In her witness statement Ms Schmiegelow states that the press release has been viewed approximately 600 times since its publication to January 2025. However, this is not apparent from the exhibit, nor is it apparent whether any of the 600 stated viewers were based in the relevant territory, being the UK.

[27] Exhibit MES15.

- A screenshot of an article published in DredgingToday.com, dated April 2020, is shown below. The article provides information about the add-on shoreline module, 'MIKE 21' Shoreline Morphology:[28]



However, it is not clear how many people viewed the article, or their geographical location. Whilst I note from its advertising statistics,[29] that DredgingToday.com has approximately 33,000+ users, 5,736+ newsletter subscribers and 81,000 monthly page views, it is not clear how many of those users, subscribers or viewers, accessed the opponent's article.

Assessment of genuine use

34. With regard to the evidence of use submitted, I must now consider if it sufficiently demonstrates genuine use, whilst reminding myself that use does not have to be quantitively significant to be genuine.

[28] Exhibit MES16.
[29] Exhibit MES17.

35. The burden is on the opponent to prove that it has used its mark within the relevant period. Therefore, it was the opponent's responsibility to provide proof that the mark was used in the EU/UK during the five-year relevant period. In my analysis above, I have highlighted numerous shortcomings in the evidence.

36. Allowing for favourable assumptions, it is clear from the evidence that the opponent has used its earlier mark on software products. However, whilst the opponent has filed seventeen exhibits, some of which, show the earlier mark in use in relation to software goods, the majority of these exhibits are undated or are dated outside the relevant period.

37. Furthermore, the only turnover figures submitted in relation to use of the earlier mark in relation to software products relate to 2023, being the last year of the relevant period, and demonstrates a turnover figure of approximately £600,000. However, as previously stated, this 2023 turnover figure has not been broken down into the software goods at issue, or for that matter, their unit costs, etc., nor has this revenue been supported by any invoices, purchase orders or delivery notes, etc. Furthermore, I have not been provided with any turnover figures or invoices, etc., for the relevant period, between 2018 to 2022. Whilst I have not been provided with any details of the size of the relevant software market in the EU/UK, or the percentage share enjoyed by the opponent within the relevant niche market, I would expect such a market to be substantial. Therefore, in my view, the UK revenue generated by the opponent in 2023, seems quite low. Accordingly, evidence indicating the amount of sales generated within the relevant period remains inconclusive.

38. In addition, neither Ms Schmiegelow's witness statements, nor the exhibits provide any information with regards to the amount spent on the promotion and advertising of the relevant goods relied upon under the earlier mark, in the EU/UK during the relevant period. Whilst I note from the evidence that the opponent has held a number of symposium events in the UK, in relation to their MIKE software products, during the relevant period, the evidence lacks important details, such as the number of people attending the events.

39. Accordingly, taking all the above into account and bearing in mind not only section 100 of the Act but also the comments of Mr Alexander QC (as he then was) and Mr Hobbs QC (as he then was) in *Plymouth Life* and *Dosenbach*, I find that the evidence of use is insufficiently solid to adequately allow me to find that the opponent has demonstrated real commercial exploitation of the earlier mark in relation to the goods for which use is claimed in the EU/UK, during the relevant period. Put simply, the nature of the evidence and the issues discussed throughout my assessment of the same, do not, in my view allow me to make the reasonable inferences necessary in order to find in favour of the opponent.

40. Case law does not specify particular types of documentation that must be adduced in evidence. However, when considering the evidence, I am entitled "to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive": (see *PLYMOUTH LIFE CENTRE*, BL O/236/13, paragraph 22).

Conclusion

41. The opponent has failed to establish genuine use of its earlier mark within the relevant territories, during the relevant period. Where the proof of use provisions apply, an opponent cannot rely on its earlier mark unless those provisions are satisfied. Consequently, as the opponent has not proved genuine use of its mark, it cannot rely on its earlier mark for the purposes of this opposition. Accordingly, the opposition under Section 5(2)(b) of the Act falls at the first hurdle and is dismissed accordingly. Subject to appeal, the IR will proceed to protection for the full range of goods and services applied for.

Costs

42. The holder has been successful and is, therefore, entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the holder the sum of £250 as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Considering the notice of opposition and preparing the counterstatement	£250
Total	**£250**

43. I therefore order DHI A/S to pay Chengdu Yiduoke Technology Co., Ltd. the sum of £250. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 21st day of January 2026

Sam Congreve
For the Registrar

Annex

Class 9 Computer software applications, downloadable; downloadable e-wallets; integrated circuit cards [smart cards]; semiconductor memory devices; computer hardware; foldable smartphones; wireless headsets for smartphones; semiconductor wafers; electronic chips for the manufacture of integrated circuits; integrated circuits.

Class 38 Message sending; communications by cellular phones; provision of email services; communications by computer terminals; electronic bulletin board services [telecommunications services]; short message services; providing internet chatrooms; electronic transmission of data and documents via computer terminals; information transmission by telematic codes; transmission of electronic mail.

Class 42 Software as a service [SaaS]; providing information relating to computer technology and programming via a website; information technology [IT] consultancy; computer programming; creating and maintaining websites for others; hosting computer sites [web sites]; electronic data storage; conversion of computer programs and data, other than physical conversion; computer software consultancy; maintenance of computer software.