O/0270/26

TRADE MARKS ACT 1994

IN THE MATTER OF UK TRADE MARK APPLICATION NUMBER 4034406

BY

NINGBO ZHIHUI NETWORK TECHNOLOGY CO., LTD.
TO REGISTER THE FOLLOWING TRADE MARK:

SODA

IN CLASS 9

AND

IN THE OPPOSITION THERETO

UNDER NUMBER 449282

BY SODA.AUTO UK LTD

BACKGROUND & PLEADINGS

1. On 3 April 2024, Ningbo Zhihui Network Technology Co., LTD. ("the applicant") applied to register the trade mark shown on the cover page of this decision in the UK ("the contested mark"). The contested mark was published for opposition purposes in the Trade Marks Journal on 24 May 2024, and the applicant seeks protection for the following goods:

   Class 9: Telecommunication machines and apparatus; Wearable computers; Smart phones; Headphones; Headsets; Earphones; Personal digital assistants in the shape of a speaker; Loudspeakers; Smartglasses; Smartwatches; Smart wristbands; Personal digital assistants in the shape of a watch, wristband; Tablet computer; operating systems for smartphones, headphones, smart watches, smart glasses, tablet computers, notebook computers, smart televisions and smartspeakers; application software for smartphones, headphones, smart watches, smart glasses, tablet computers, notebook computers, smart televisions and smartspeakers, namely, software for the retrieval, download, storage, transmission, processing and display of digital content, application software, audio works, visual works, audiovisual works, electronic publications, books, movies, and music; <u>application software for machine-learning based language and speech processing software; none of the aforementioned being game software, video games, social games, games for use on mobile phones, tablets or other mobile devices.</u>

2. On 23 August 2024, the contested mark was partially opposed by SODA.AUTO UK LTD ("the opponent"). The opposition is brought under section 5(2)(b) of the Trade Marks Act 1994 ("the Act") and, specifically, the opponent sought to challenge the applicant's registration of the contested mark for the goods underlined in paragraph 1 of this decision.

3. It is noted that the opponent initially sought to challenge the applicant's registration of the contested mark for a wider range of goods, and without the limitation "none of the aforementioned being game software, video games, social games, games for use on mobile phones, tablets or other mobile devices".

However, the applicant filed a form TM21B on 26 August 2025 seeking to amend its specification. The TM21B was accepted by the Registry and the class 9 goods in the contested mark's specification were amended accordingly, resulting in the above referenced goods forming the basis of the opposition. It is also noted that the Registry wrote to the opponent on 10 September 2025 asking whether it wished to withdraw the opposition in light of the amendments to the contested mark's specification. As no response to this letter was received, the Registry wrote to the parties by way of official letter dated 1 October 2025 to confirm that the opposition would be maintained.

4. For the purpose of its opposition, the opponent relies upon the following series of marks (together "the earlier marks"):

Trade mark number: UK00003994710
Filing Date: 21 December 2023
Registration Date: 22 March 2024

5. The opponent relies upon some of the goods for which its earlier marks are protected, namely:

Class 9: Computer software; Computer hardware; Firmware; Software development tools; Software testing software; Platform software for automotives; Cloud computing software for automotives; Computer applications for automotive control; Autonomous driving control systems for automotives; Cruise control systems for automotives; Mobile apps and mobile application software in relation to automotives; Accessories, parts and fittings in relation to the aforementioned goods.

6. The opponent submits that the marks in issue are phonetically and conceptually identical, and visually similar to a high degree, and that the goods in issue are also similar to a high degree. Consequently, the opponent submits that "there is a strong likelihood of confusion" between the marks in issue.

7. The applicant filed a counterstatement denying the claims made against it. Specifically, the applicant submits that the opposition is "unfounded" and denies that there is a degree of similarity between the marks in issue, or between the respective marks' goods. Consequently, the applicant submits that the opposition should be "dismissed" and requests that a costs order be made in its favour.

REPRESENTATION

8. The opponent is represented by Briffa.

9. The applicant is represented by D Young & Co LLP.

EVIDENCE AND SUBMISSIONS

10. Only the applicant filed evidence in the form of a witness statement by Rachel Pellatt, dated 7 July 2025, which is accompanied by three exhibits (exhibits RP1 to RP3), and which I have discussed in further detail in paragraphs 46 to 51 below.

11. No hearing was requested, and only the applicant filed written submissions in lieu of a hearing. This decision is therefore taken following a careful consideration

of the papers that have been filed by the parties, which will not be summarised but will be referred to as and where appropriate during this decision.

DECISION

12. 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.

13. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

    "(6)(1) In this Act an "earlier trade mark" means –

    (a) a registered trade mark or international trade mark (UK) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

14. The marks identified in paragraph 4 qualify as earlier trade marks under the above provisions. As the earlier marks had not completed their registration process more than five years before the relevant date, they are not subject to proof of use requirements. Consequently, the opponent may rely on all of the goods highlighted in paragraph 5 of this decision for the purposes of this opposition.

DECISION

Section 5(2)(b)

15. This opposition is based upon section 5(2)(b) of the Act which stipulates the following:

"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".

16. Section 5A of the Act stipulates that 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."

17. 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*:[1]

    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;

[1] [2025] UKSC 25

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 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; 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.

Comparison of Goods

18. The competing goods are as follows:

The opponent's goods	**The applicant's goods**
Class 9: Computer software; Computer hardware; Firmware; Software development tools; Software testing software; Platform software for automotives; Cloud computing software for automotives; Computer applications for automotive control; Autonomous driving control systems for automotives; Cruise control systems for automotives; Mobile apps and mobile application software in relation to automotives; Accessories, parts and fittings in relation to the aforementioned goods.	Class 9: Application software for machine-learning based language and speech processing software; none of the aforementioned being game software, video games, social games, games for use on mobile phones, tablets or other mobile devices.

19. As a preliminary point, it should be noted that section 60A of the Act provides that goods and services are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification,[2] or dissimilar on the ground that they appear in different classes under the Nice Classification.

[2] "Nice Classification" means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957.

20. In *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc ("Canon")*,[3] the Court of Justice of the European Union ("CJEU") stated (at paragraph 23) that, when making the comparison:

> "…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".

21. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case,[4] for assessing similarity were:

    a. The uses of the respective goods;

    b. The users of the respective goods;

    c. The physical nature of the goods;

    d. The respective trade channels through which the goods 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 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 in the same or different sectors.

[3] Case C-39/97
[4] [1996] R.P.C. 281

Application software for machine-learning-based language and speech processing software; none of the aforementioned being game software, video games, social games, games for use on mobile phones, tablets or other mobile devices.

22. The opponent's term "computer software" is not limited in any way, so can cover any type of computer software. It is noted that this is acknowledged by the applicant, but the applicant also submits that "it is clear that from the majority of the goods protected in and relied on under the Opponent's Registration, the Opponent's interest is in the automative sector which, as shown above, is very different to the sector of interest to the Applicant." Whilst I note the reference made by the applicant to *SkyKick UK Ltd & Anor v Sky Ltd & Ors* in its submissions,[5] I also note that in *Gérard Meric v OHIM*, the General Court ("GC") confirmed that even if goods are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa)[6]:

> "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 fur 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."

23. I also do not accept the applicant's submission that the presence of other narrower terms within the specification would suggest an intention by the opponent to limit the broad term "computer software" to "use within the automotive sector". If such a limitation was intended, such a limitation would have been included in the opponent's specification. Further, even if it were the case that this is how the opponent actually operated on the market place, it would have no bearing on my decision because my assessment must be based, in fact, on the concept of notional and fair use which involves carrying out the comparison

[5] *(Rev1)* [2024] UKSC 36
[6] Case T-133/05

of the goods based on the specifications before me, not the goods effectively provided by the parties.[7]

24. In the light of the above, I find that the applicant's above referenced term falls within the opponent's wider term (computer software), and that they are therefore identical in accordance with the principle outlined in *Meric*.

Average consumer and the purchasing act

25. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which the goods and services are likely to be selected by the average consumer. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods and services in question (see *Lloyd Schuhfabrik Meyer*[8]).

26. 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:

    a. Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;

    b. The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;

    c. The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average

[7]. See O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited, Case C-533/06 at [66] and Compass Publishing BV v Compass Logistics Ltd [2004] RPC 41 at [22]
[8] Case C-342/97

consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;

d. Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by and enabling courts and tribunals to determine such issues so far as possible without the need for evidence;

e. The average consumer's level of attention varies according to the category of goods or services in question; and

f. the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

27. As discussed above, I consider the average consumer for the goods in issue to be members of the general public. The price of the goods and the frequency of purchase is likely to vary considerably because the opponent's term is sufficiently broad to cover downloadable applications for mobile phones that may be provided for free, and the applicant's goods can cover more expensive (though not considerably so) AI software tools. The goods in issue may be purchased online from software companies, or their licenced retailers, or from those retailer's physical premises. In either instance, consumers will either select the goods from shelves, or from perusing images of those goods displayed on a webpage. In any event, the selection process will be a predominantly visual one, although aural considerations will play their part, for example, as a result of word-of-mouth recommendations or after consulting with a sales assistant. Factors such as price, suitability of the goods and client reviews are likely to dominate the purchasing process. Considering all of the above, I consider that the average

consumer is likely to pay a medium level of attention during the purchasing process.

Comparison of marks

28. 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 at paragraph 34 of its judgment in *Bimbo SA v OHIM*,[9] 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 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."

29. 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 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.

30. The respective trade marks are shown below:

[9] Case C-591/12P

Earlier marks	Contested mark
SODA First Earlier Mark SODA Second Earlier Mark	SODA

31. As discussed above, the opponent submits that the marks in issue are phonetically and conceptually identical, and visually similar to a high degree.

32. By contrast, the applicant submits that the marks differ in “visual impression” and in “semantic feature”.

Overall Impression

33. The contested mark is a word only mark. There are no other elements in the mark which contribute to its overall impression, so the overall impression lies in the word “SODA” itself.

34. The earlier marks are both figurative marks. I note that the opponent submits that they both contain the word “SODA”, and the applicant accepts that “it is possible that some consumers may decipher the [earlier marks] as ‘SODA’”, but the applicant also submits that “the extent of geometric distortion is such that many will not immediately do so”. Considering both parties’ submissions, I am of the view that at least a significant proportion of consumers, if not all consumers,

would identify the earlier marks as containing the word "SODA" in a highly stylised, bold typeface.

35. In that regard, I note that in *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*,[10] the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)*,[11] where he pointed out that a finding of infringement may properly be made if the court considers that a significant proportion of the relevant public is likely to be confused. Whilst I appreciate that this matter related to trademark infringement proceedings, the principles established applies equally under section 5(2)(b) of the Act. It follows, therefore, that this opposition may succeed under section 5(2)(b) if, having fully considered the matter, I find that there exists a likelihood of confusion between the marks in issue on the part of the proportion of the relevant public who I have determined will identify the word "SODA" in the earlier marks. Consequently. I will proceed to make the remainder of my determinations in this opposition on the basis of that proportion of consumers.

36. Whilst I am conscious that consumers tend to be drawn to elements of marks that can be read,[12] I do also consider the stylisation of the earlier marks to be significant. Consequently, I am of the view that the word "SODA" and the stylisation will play an equally dominant role in the overall impression of the earlier marks.

37. I note that, save for the fact that one of the earlier marks is presented on a white background and the word "SODA" is presented in a black typeface, and the other is presented against a black background with the word "SODA" presented in a white typeface, the earlier marks are presented identically. I do not consider that the opposing colouring of the earlier marks will have any material impact upon the outcome of my comparison of the marks in issue. Consequently, for the purpose of this opposition, all of my findings in that respect will apply equally to both of the earlier marks.

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[10] [2025] UKSC 25
[11] [2024] EWCA Civ 262
[12] Migros-Genossenschafts-Bund v EUIPO, T-189/16, [52].

Visual Comparison

38. As outlined above, I consider that average consumers will identify the earlier marks as containing the word "SODA". The marks in issue therefore overlap in their use of that word. There is also some additional stylisation in the earlier marks, which is not present in the contested mark, and I note my finding that the stylisation of the earlier marks plays an equal role in the overall impression of the earlier marks. Overall, I consider the marks in issue to be visually similar to a medium degree.

Aural Comparison

39. Noting my finding that the average consumer will identify the earlier marks as containing the word "SODA", I am of the view that the only element of the marks in issue that will be pronounced is the word "SODA". I also see no basis for finding that the word "SODA" would be pronounced differently in any of the marks. Consequently, I find the marks to be aurally identical.

Conceptual Comparison

40. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU, including *Ruiz Picasso v OHIM*.[13] The assessment must, therefore, be made from the point of view of the average consumer.

41. I am also conscious of the findings of the GC in *Usinor SA v OHIM,*[14] that:

> *"…*as regards the conceptual comparison, it must be noted that while the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (*Lloyd Schuhfabrik Meyer*, paragraph 25), he will nevertheless, perceiving a verbal sign, break it down into verbal

[13] [2006] ECR I-643; [2006] E.T.M.R

[1414] Case T-189/05

elements which, for him, suggest a concrete meaning or which resemble words known to him".

42. As discussed above, I have found that the average consumer would consider that all of the marks in issue consist of the word "Soda", which is an English dictionary word referring to a carbonated drink. I do not consider that the additional stylisation in the earlier marks provides any additional conceptual meaning. Accordingly, I consider the marks to be conceptually identical.

Distinctive character of the earlier trade mark

43. 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 C108/97 and C-109/97 Windsurfing Chiemsee v Huber and Attenberger [1999] ECR I-0000, paragraph 49)
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> 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)."

44. Whilst the distinctiveness of a mark may be enhanced as a result of it being used in the market, in this instance the opponent has filed no evidence of its use of the earlier marks. Consequently, I have only the inherent position of the earlier marks to consider.

45. Distinctiveness is a scale along which marks of various types sit. A mark which is allusive of the goods/services will have less distinctive character than one that is not; dictionary words will also be less distinctive than words which are entirely fanciful. However, all will turn on the particular facts. For example, there are "invented" words which are really just composites of two allusive words and only distinctive as a result, and dictionary words which are more or less common than others.

46. As discussed above, the applicant has filed a witness statement signed by Rachel Pellatt, in her capacity as Senior Associate and Chartered Trade Mark Attorney at the applicant's representative firm. The applicant submits in its corresponding submissions that the evidence shows "the proliferation of SODA marks in use in commerce for computer software-related goods in the UK". The witness statement was accompanied by exhibits RP1, RP2 and RP3, which can be summarised as follows:

   (i) Exhibit RP1 contained a Corsearch Search Report identifying 19 active trade marks (including the earlier marks) incorporating the word "SODA" that are registered in Class 9.

   (ii) Exhibit RP2 contained excerpts from the UK Trade Marks Register for the 19 active marks identified in the Corsearch Report in Exhibit RP1, which Rachel Pellat stated illustrates "the current state of the Register and co-existences thereto, of "SODA" marks" in class 5.

   (iii) Exhibit RP3 contains screenshots taken by the applicant's legal representative between 29 January 2025 and 5 February 2025 which the applicant submits evidence use of various marks incorporating the word "SODA".

47. Evidence that third parties use similar signs may reduce distinctiveness of a trade mark. In *Lifestyle Equities CV & Ors v Royal County of Berkshire Polo Club Ltd & Ors*,[15] Arnold LJ stipulated that "experience shows that third party use of similar signs does tend to diminish the distinctiveness of a trade mark. In a crowded market it is harder for one mark to stand out". However, it is not sufficient to just show that there are marks registered for goods in the relevant field, evidence of use of those marks in the relevant field is necessary.

48. In this instance, the applicant has filed evidence relating to 13 of the 19 marks contained in exhibit RP1. As a preliminary issue, three of the marks for which evidence has been submitted do not appear to be registered in respect of any of the goods in issue (being computer software or application software goods).[16] It is also noted that exhibit RP3 includes evidence of use of the opponent's earlier marks. Given that these marks are the subject of these opposition proceedings, I do not consider this evidence to be relevant to this issue.

49. Further, as discussed above, the contested mark's specification was amended following the filing of a TM21b by the applicant on 26 August 2025. This resulted in, amongst other things, the class 9 goods in the contested mark's specification being limited to exclude "game software, video games, social games, games for use on mobile phones, tablets or other mobile devices". In that regard, it is noted that three of the marks for which evidence of use has been submitted relate to the mobile gaming application the "Candy Crush Soda Saga" (together referred to as the "Candy Crush Marks"). Given that game software is not in issue in this opposition, this evidence also does not assist the applicant in establishing that the distinctive character of the word "Soda" has been weakened in this instance. In any event, the Candy Crush Marks are not just examples of use of "SODA" solus. Instead, the word "SODA" in the Candy Crush Marks sits within a longer mark with additional words and distinctive elements, so they are not of any real assistance here.

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[15] [2024] EWCA Civ 814
[16] UK Trade Mark Numbers 3815680, 3971475 and 917065194

50. In light of the above, it is noted that the applicant has only filed evidence relating to 6 active marks utilising the word “Soda”, and which are registered in respect of the goods in issue. Having fully considered all of this evidence, it is also noted that the evidence provided relating to UKTM No. 913034004 only appears to evidence its use in the Japanese market, and the evidence provided relating to UKTM No. 917065194 makes no reference to computer or application software goods. This evidence appears to be limited to use of UKTM No. 917065194 in relation to the sale of alcoholic goods/hospitality services.

51. Of the evidence submitted in exhibit RP3, I only consider there to be evidence of 4 marks being used for computer software or application software goods which contain the word “soda”,[17] and even in respect of this evidence, the extent to which use has been made of these marks in the United Kingdom, as opposed to globally, is unclear. In the context of the software market, which is undoubtedly a significant market, I do not consider this evidence to be sufficient to reach a finding that the distinctive character of the word “Soda” has been weakened on the basis of its use for the goods in issue.

52. I note that the earlier marks are made up of the word “Soda” which, as discussed above, is an English dictionary word referring to a carbonated drink. I do not consider the word “Soda” to be descriptive or allusive of the opponent’s goods in issue. However, use of a well-known word is not particularly remarkable for a trade mark. Consequently, I find the word “Soda” to have a medium level of inherent distinctive character. Whilst I appreciate that the stylisation of the earlier marks is quite striking, I note that it is the distinctiveness of the common element which is key in these proceedings. In *Kurt Geiger v A-List Corporate Limited*,[18] Mr Iain Purvis KC as the Appointed Person pointed out that the level of ‘distinctive character’ is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

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[17] UKTM No. 3596653, 3596630, 909161845 and 915979727
[18] BL O/075/13

> "38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that 'the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion'. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.
>
> 39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it."

53. In other words, simply considering the level of distinctive character possessed by the earlier marks is not enough. It is important to ask 'in what does the distinctive character of the earlier marks lie?' Only after that has been done can a proper assessment of the likelihood of confusion be carried out.

Likelihood Of Confusion

54. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, whilst 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/services down to the responsible undertakings being the same or related.

55. 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 (see *Sabel*[19]). 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 services and vice versa (see *Canon*). It is necessary for me to keep in mind the distinctive character of the earlier marks, the average consumer for the goods, and the

[19] C-251/95, para 22

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.

56. I have found the goods in issue to be identical. I have also found that the marks are visually similar to medium degree, and aurally and conceptually identical, and that the word "Soda" has a medium level of inherent distinctive character.

57. I have identified that the average consumers are members of the general public, who will demonstrate a medium level of attention during the purchasing process, and that the purchasing process will be primarily visual, though aural considerations will still play a part.

58. Weighing up all of the above, noting the principle of imperfect recollection, and that consumers rarely have the opportunity to compare marks side by side, I am satisfied that the similarities between the marks in issue may result in the average consumer mistaking one mark for the other. This is particularly the case given my finding regarding the identity between the goods in issue, and the marks (aurally and conceptually). As the word "SODA" is the only verbal element in the earlier marks, and the sole element in the contested mark, the average consumer will seek to pin their recollection of the marks on the word "SODA", therefore misremembering which mark was which. Whilst I note my finding that the stylisation plays an equal role to the word "SODA" in the overall impression of the earlier marks, there is no clear conceptual hook in the earlier marks' stylisation to fasten it in the average consumer's recollection. As such, overall, I am of the view that the presentational differences between the marks will be misremembered. Consequently, I consider there to be a likelihood of direct confusion between the marks.

59. I now turn to consider whether there is a likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis KC, sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*:[20]

> "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 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.).

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[20] BL O/375/10

(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)."

60. These three categories are not exhaustive; rather, they were intended to be illustrative of the general approach, as has been confirmed by the Court of Appeal.[21] I recognise that a finding of indirect confusion should not be made merely because the competing marks share a common element. In this connection, it is not sufficient that a mark merely calls to mind another mark; this is mere association not indirect confusion.[22] The Court of Appeal has also emphasised that, where there is no direct confusion, there must be a "proper basis" for finding indirect confusion.[23]

61. In this instance, I consider that, when confronted with all of the marks in issue, the consumer will identify "SODA" as the indicator of the origin of the mark, with the only differences coming in the stylisation of the earlier marks and, if this is recalled, it will be viewed as a different version of the same mark. Consequently, I also find there to be a likelihood of indirect confusion between the marks in issue.

CONCLUSION

62. The opposition succeeds in its entirety, and the contested mark is, subject to any successful appeal of my decision, hereby refused registration for the following goods:

Class 9: application software for machine-learning based language and speech processing software; none of the aforementioned being game software, video games, social games, games for use on mobile phones, tablets or other mobile devices.

[21] Liverpool Gin Distillery and others v Sazerac Brands, LLC and others [2021] EWCA Civ 1207
[22] Duebros Limited v Heirler Cenovis GmbH, BL O/547/17
[23] Liverpool Gin Distillery and others v Sazerac Brands, LLC and others [2021] EWCA Civ 1207

63. That being said, the contested mark may proceed to registration for the goods that were not opposed, namely:

Class 9: Telecommunication machines and apparatus; Wearable computers; Smart phones; Headphones; Headsets; Earphones; Personal digital assistants in the shape of a speaker; Loudspeakers; Smartglasses; Smartwatches; Smart wristbands; Personal digital assistants in the shape of a watch, wristband; Tablet computer; operating systems for smartphones, headphones, smart watches, smart glasses, tablet computers, notebook computers, smart televisions and smartspeakers; application software for smartphones, headphones, smart watches, smart glasses, tablet computers, notebook computers, smart televisions and smartspeakers, namely, software for the retrieval, download, storage, transmission, processing and display of digital content, application software, audio works, visual works, audiovisual works, electronic publications, books, movies, and music; none of the aforementioned being game software, video games, social games, games for use on mobile phones, tablets or other mobile devices.

COSTS

64. As the opponent has been successful it is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Note 1/2023. In the circumstances, I award the opponent the sum of £950 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Official fee:	£100
Preparing a Notice of Opposition & Statement of Grounds:	£250
Considering Evidence	£600[24]
Total:	**£950**

[24] Whilst the opponent did not elect to file its own evidence, it was still required to consider the applicant's evidence and, therefore, I consider it appropriate to award costs in respect of that task.

65. I therefore order Ningbo Zhihui Network Technology Co., LTD to pay SODA.AUTO UK LTD the sum of £950. The above 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 27th day of March 2026

B Hartland
For the Registrar