BL O/0399/26

TRADE MARKS ACT 1994
ON APPEAL TO THE APPOINTED PERSON

IN THE MATTER OF
Trade Mark Application No. 3757433 in the Name of Macro-Video Technologies Co Ltd.

AND

Opposition No. OP000435422 thereto by Xiaomi INC.

DECISION

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1. I shall refer to Xiaomi Inc. as the Appellant and Macro-Video Technologies Co Ltd as the Respondent.

2. The Respondent is the proprietor of UK Trade Mark Application No. 3757433 for the mark shown below ("the **Mark**"):

It seeks registration of the Mark in relation to the following goods in class 9:

Camcorders; Video recorders; Electronic monitoring instruments, other than for medical use; Baby monitors; Computer programs, downloadable; Downloadable mobile applications; Monitors [computer programs]; Facial recognition apparatus; Radios; Chips [integrated circuits]; Theft prevention installations, electric.

3. This is an Appeal from the decision of the Hearing Officer, Mr. James Hopkins ("the **Decision**"). The Decision addressed the Appellant's opposition to the registration of the Mark. That opposition was brought pursuant to sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994, and was made with reliance upon two earlier trade marks both covering a range of goods in class 9 (the **"Earlier Marks"**):

   a. UK Trade Mark no. 3489301 XIAOMI
   b. the UK designation of international registration no. 1650229 for

   xiaomi.

4. The Hearing Officer dismissed opposition in its entirety and ordered costs in the sum of £300, payment of which was stayed in the usual way pending the outcome of this appeal.

5. The Appellant seeks to overturn the Hearing Officer's findings in relation to sections 5(2)(b), 5(3) and 5(4)(a).

STANDARD OF APPEAL

6. There was no dispute as to the principles which guide how I should approach this appeal. These principles are well understood and are discussed in detail in *Axogen v Aviv Scientific* [2022] EWHC 95 (Ch), *Lifestyle Equities v Amazon* [2024] UKSC 8 and *Iconix v Dream Pairs* [2025] UKSC 25. For present purposes it is sufficient for me to remind myself of the summary of the approach given by Mr. Thomas Mitcheson KC, sitting as the Appointed Person, in SOCIAL WORK NEWS (O/00/50/24) at [13]:

> *To paraphrase, an appeal should only be allowed where the decision of the lower court was "wrong". Absent an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge's conclusion was "outside the bounds within which reasonable disagreement is possible". In the case of a multifactorial assessment and in the absence of a distinct error of principle, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere.*

GROUNDS OF APPEAL

7. In its skeleton the Appellant summarized its submissions on appeal as follows:

    a. the Hearing Officer erred in his assessment of the relevant consumer's degree of attention and the nature of the purchasing act;

    b. the Hearing Officer erred in principle and was clearly wrong in his approach to their assessment of the likelihood of confusion between the respective marks, particularly when considering the findings in relation to the visual and aural similarity, the consideration given to the stylisation of the letter X, and the principle of imperfect recollection;

    c. the Hearing Officer wrongly assessed the reputation in the earlier marks, given the finding that the Opponent's UK market share was "not insignificant"; and

    d. the Hearing Officer applied his flawed conclusion in relation to confusing similarity to his assessment in relation to misrepresentation, rather than carrying out a separate reasoned assessment.

8. I shall address each of these submissions in the order taken by the Appellant.

The Average Consumer's Degree of Attention and the Purchasing Act

9. On this aspect of the appeal the Appellant made two submissions. Namely:

    a. the Hearing Officer erred by failing to find that the degree of attention of the average consumer was "no more than medium", and
    b. the Hearing Officer erred by failing to give sufficient weight to aural purchasing.

10. The Hearing Officer's findings in relation to the average consumer's purchasing act and his degree of attention was explained at paragraph 30 follows:

> 30. *The average consumer of the goods at issue is likely to comprise members of the general public and business/professional users (particularly considering goods such as chips [integrated circuits] and facial recognition apparatus). The goods range from inexpensive, more frequent purchases, such as downloadable mobile applications, to more expensive, less frequent purchases, such as facial recognition apparatus. Whilst it follows that the average consumer's level of attention is likely to vary, overall, I find that a medium level of attentiveness will be paid during the purchasing process. This is because, even in relation to the inexpensive, more frequent purchases, the average consumer will consider factors such as cost, compatibility and content when selecting the goods. I accept that business users will be alive to the potentially negative consequences of making the wrong selection on their own business; therefore, they are likely to exhibit a slightly higher level of attention (but not the highest). The goods will be purchased from retail establishments, suppliers, and their online equivalents. It is my view that the purchasing process is likely to be predominantly visual, with the goods being purchased after viewing the products or information on shelves, websites, 'app stores' or in brochures. However, I do not discount aural considerations entirely as the average consumer may receive word-of-mouth recommendations or discuss the products with sales assistants.*

Degree Of Attention

31. The Appellant submitted that the Hearing Officer should have found that the degree of attention paid to all goods should be regarded as no more than medium. It submitted that the Hearing Officer should have made this finding because, it said, goods such as "chips [integrated circuits]" and "facial recognition apparatus" would be purchased by members of the general public and not just business and professional users.

32. There is an obvious difficulty with this submission: the Hearing Officer, in my view, <u>did</u> make his decision based on an assumed medium level of attention. Thus:-

    a. Per para 30: "*Whilst it follows that the average consumer's level of attention is likely to vary, overall, I find that a medium level of attentiveness will be paid during the purchasing process*"
    b. Per para 65: (when assessing the likelihood of confusion): "*Taking all of the above*

*factors into account, it is my view that the differences between the competing marks are likely to be sufficient for the average consumer, **paying at least a medium level of attention**, to distinguish between them and avoid mistaking them for one another. Consequently, notwithstanding the principles of imperfect recollection and interdependency, I find that there is no likelihood of direct confusion, even in relation to identical goods".*

33. The Hearing Officer was entitled, for any given set of goods and services, to ascribe different levels of attentiveness to consumers of different natures. It would then normally be the case that where there are two classes of consumer with different levels of attention, the Hearing Officer's decision would be based on consideration of the class with the lower degree of attention. That is what happened here.

34. I therefore find there to be no error of principle in this aspect of the Hearing Officer's Decision.

Aural Methods of Purchase

35. The Appellant submitted that the Hearing Officer erred in his assessment of the importance and prevalence of aural reproduction of the mark and aural methods of purchase.

36. The Hearing Officer expressly made reference to aural considerations and ascribed to those considerations the weight he saw fit (see paragraph 30 above). The Appellant, submitted that there were good reasons why aural considerations were more important than was found by the Hearing Officer. Thus, in its skeleton the Appellant submitted:

> *Products are often recommended verbally by others, will be referenced by their name by sales/store personnel, and will be referred to by their name in video reviews and when discussed on radio shows or podcasts, with podcasts being particularly prevalent for recommending and reviewing products in the tech sector. Smart speakers are owned by 38.2% of the UK adult population, and products can be directly purchased using these smart speakers. Similarly, voice assistants such as Siri and Alexa are becoming more powerful "on device" following the increased adoption of AI technology, meaning that consumers can discover and download e.g. "Downloadable mobile applications" solely using voice prompts.*

These are all cogent arguments that could, and doubtless were, presented to the Hearing

Officer. But they are not arguments that reveal an error of principle. In my view, the decision reached by the Hearing Officer was one that fell with the ambit of decisions reasonably open to him. I therefore find there to be no error of principle in this aspect of the Hearing Officer's Decision.

Visual Comparison

37. The Hearing Officer addressed the visual comparison of the marks in paragraphs 57 and 58 of the Decision as follows (footnotes removed):

> *58. The opponent's first mark and the applicant's mark are visually similar in that they are both six-letter words which share four letters in the same order, i.e. 'XIAO'/'xiao'. This similarity appears at the beginning of the competing marks, a position which tends to have more impact. The difference in letter case is not significant, since the registration of word-only marks provides protection for the words themselves, irrespective of whether they are presented in upper, lower or title case. Moreover, given that it provides protection for use of the words in any font type, I do not consider the difference created by the font used in most of the applicant's mark to be significant. However, the letter 'x' in the applicant's mark is heavily stylised and does constitute a material point of difference. In addition, the ends of the competing marks are different; the opponent's mark ends with the letters 'MI', whereas the applicant's ends in the letters 'vv'. Bearing in mind my assessment of the overall impressions, I find that there is a medium degree of visual similarity between the competing marks.*
>
> *59. The opponent's second mark and the applicant's mark also coincide in the shared letters 'xiao' at their respective beginnings. The competing marks are visually different in the letters which follow; 'mi' in the opponent's mark and 'vv' in the applicant's mark. The competing marks also diverge in their use of different fonts. However, the only real point of significance in this is the presentation of the letter 'x'; the other letters in the marks are presented in basic fonts. Taking all of this into account, I find that there is a medium degree of visual similarity between the competing marks.*

38. The Appellant's submission on appeal, as set out in its skeleton, was as follows:

> *24. ....while the Hearing Officer correctly concluded that the marks are visually similar as they are "both six-letter words which share four letters in the same order, i.e. 'XIAO'/'xiao'", the Hearing Officer erred in their assessment of the letter X at the beginning of the Subject Mark.*
>
> *25. While the element is stylised, the stylisation of the letter X is not sufficient for it*

to be perceived as anything other than the letter X, meaning that regardless of whether the consumer notices the stylisation of this element, they will still perceive the mark as XIAOVV, and the shared XIAO element falling at the beginning of the mark, which is the part given the most weight by consumers. In addition, the Hearing Officer has failed to give any weight to the fact that the remainder of the font used by the Subject Mark is actually very similar to the Opponent's earlier stylised mark.

26. It is also perplexing that the Hearing Officer held that there will be at least a significant proportion of consumers who see the mark as the letter X, but also that the stylisation of this letter is such that it constitutes a material point of difference. Logically, if the stylisation is so minimal that a significant number of consumers can readily perceive the letter X (and therefore the mark as XIAOVV), then the stylisation cannot realistically be regarded as a significant point of difference for those same consumers.

39. These points are all, in my view, arguments directed to the fine detail of the Hearing Officer's evaluative decision. They are arguments which, in effect, invite me to apply a different weight to various considerations and, as such, they do not disclose a point of principle on which the Hearing Officer erred. In the absence of an error of principle, the Hearing Officer was, in my view, entitled to come to the view that he did.

Aural Comparison

27. The Appellant's submission on appeal was as follows:

27. In relation to the aural assessment, the Hearing Officer correctly asserts that the comparison is between the words 'xiaomi' and 'xiaovv' (which further corroborates the fact that at least a significant portion of consumers will interpret the mark as XIAOVV). Nevertheless, despite the marks sharing the same XIAO elements and number of letters, the Hearing Officer contrives to make a pronunciation where the earlier marks have four syllables, but the Subject Mark only has three ("ZY-AH-OH-MI" and "ZY-AH-OV"). This assessment is clearly incorrect, and the Hearing Officer has erred on this point, as the XIAO elements would undoubtedly be pronounced identically in both marks as they are identical. In addition, at least a significant portion of consumers encountering the marks would pronounce the end of the marks as the similar MEE and VEE, with the result of a correct overall aural assessment of the respective marks being a finding of at least a high level of similarity.

28. Again, these submissions disclose, in my view, no point of principle on which the Hearing Officer erred. In the absence of such an error, the Hearing Officer was entitled to come to

the view that he did.

Likelihood of Confusion, Overall Impression

29. There was no dispute that the Hearing Officer reminded himself correctly of the principles to be applied. These principles included the requirement that he must consider the average consumer to perceive the mark as a whole.

30. The relevant part of the Hearing Officer's findings is set out in paragraph 65 of the Decision (footnotes removed) as follows:

> *65 I acknowledge that the competing marks are both six letters long and that the first four of these are identical. I also accept that the marks do not convey different meanings (or any meanings, for that matter). Nevertheless, there are visual and aural differences between the marks which are not negligible. Although the beginnings of marks tend to have the most impact, this is not necessarily decisive. The word elements of the competing marks end with different letters, and these letters contribute to the overall impressions thereof as part of the single words. As such, these letters are unlikely to be overlooked. Moreover, the applicant's mark begins with a heavily stylised letter 'x'; the heavy stylisation of this letter provides a significant contribution to the overall impression of the mark and is unlikely to be overlooked. This stylisation is markedly different from how the letter 'x' is presented in the opponent's second mark, and normal and fair use of the opponent's first mark would not allow for the letter 'x' to be presented in this way. Taking all of the above factors into account, it is my view that the differences between the competing marks are likely to be sufficient for the average consumer, paying at least a medium level of attention, to distinguish between them and avoid mistaking them for one another. Consequently, notwithstanding the principles of imperfect recollection and interdependency, I find that there is no likelihood of direct confusion, even in relation to identical goods.*

31. The Appellant submitted that this analysis demonstrated that the Hearing Officer had fallen into error by engaging in a more granular analysis than he was permitted to. In regard to this, the Appellant also submitted that:

> *33. The starting point in the wider sense is that the parties' marks are both XIAO-formative marks, or at least share this same element at the beginning of the marks, which is effectively accepted earlier in the Decision where it is stated that "The overall impression of the mark is dominated by the word 'xiaovv'". Despite this assertion, the Hearing Officer diverts from the overall impression of the mark being the words XIAOVV, instead asserting that "the heavy stylisation of this letter provides a significant contribution to the overall impression of the mark".*

> *34. When correctly assessing the mark as a whole, the Hearing Officer reached the conclusion that (at least a significant portion of consumers) would view perceive it as a XIAOVV mark. Nevertheless, when going in to overly granular detail and diverting from the principal of imperfect recollection, the Hearing Officer effectively conducts an artificial reassessment of the overall impression of the mark, which is contrary to the "impression or instinctive reaction" assessment which would be conducted by the relevant consumer. The Hearing Officer also indicates that the aural considerations have not been excluded but fails to mention any aural factors in their overall assessment.*

32. I start by noting that the decision of the CJEU in *Bimbo SA v OHIM* at [34] makes clear, a decision on the overall impression necessarily includes an analysis of the components of the marks being compared:

> *"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 the 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"*

33. It follows that fact that a decision sets out detailed similarities and differences when comparing marks does not necessarily lead to the conclusion that the Hearing Officer has fallen into error. Furthermore, as the Hearing Officer is to have regard to the distinctive and dominant features of the marks, it is difficult (if not impossible) to see how he could explain his decision without reference to at least some of the constituent parts of the marks.

34. In this case, I do not believe the Hearing Officer failed to assess the overall impression properly. Insofar as paragraph 65 descends into detail, it is clear in my view that it is detail that the Hearing Officer needed to refer to in order to explain his decision. This can be seen by the way that the Hearing Officer relates the features he discusses to their effect on the overall impression.

Likelihood of Confusion: Indirect Confusion

35. There was no dispute that the Hearing Officer addressed himself to the correct legal principles (see paragraphs 66 and 67 of the Decision). Having done so he reached the following conclusion:

68. Applying these principles, and taking into account all the above factors, I do not believe that the average consumer, having noticed the differences between the competing marks, will assume that the opponent and the applicant are economically linked undertakings. I am not convinced that the average consumer would assume a commercial association or licencing agreement between the parties, or sponsorship on the part of the opponent, merely because of the four shared letters. Although the opponent's marks are highly distinctive, *this lies in the totality of the word element. The average consumer would not dissect this distinctive word and separate the first four letters. The letters form part of different words in the competing marks. There is no sharing of an independent distinctive element which could give rise to indirect confusion. Moreover, the differences between the competing marks are not simple additions or removals of non-distinctive elements. Further, the differences are not consistent with any logical brand extensions with which the average consumer would be familiar. Although adopting a variant mark with heavier stylisation or a different font may be, I can see no reason why an undertaking would remove two letters from a highly distinctive invented word and add different letters, resulting in a different mark. Whilst acknowledging that the above categories are not exhaustive, I can see no basis for concluding that the average consumer, even paying no more than a medium level of attention, would assume an economic connection between the parties. Taking all of this into account, I find that there is no likelihood of indirect confusion, even for identical goods.*

36. The Appellant made two basic submissions on indirect confusion. These are set out at paragraphs 37-39 of its skeleton as follows:

37. Turning to the assessment on indirect confusion, the Appellant submit that the Hearing Officer is incorrect in their assessment that the Subject Mark could not be a natural brand extension of the opponent's marks. For example, the addition of a new stylised X to the Opponent's mark, and the minor tweak from the phonetically highly similar MI to VV could easily be a brand extension to refer to a new line of products, and the confusion shown in YouTube videos provided at Exhibit 6 of the Witness Statement filed alongside this appeal evidence that consumers already erroneously believe there is a link between the parties.

38. The Appellant also submits that the Hearing Officer has misapplied the test from Category C of L.A. Sugar, when they state:

> *"Further, the differences are not consistent with any logical brand extensions with which the average consumer would be familiar." and "I can see no reason why an undertaking would remove two letters from a highly distinctive invented word and add different letters, resulting in a different mark".*

39. This is clearly inconsistent with practice in the market, where entities often amend their mark to refer to new products (easyjet, easyhotel/iPad, iPhone, iMac, iPod/McFlurry, McNuggets, McSpicy etc.) and there is no reason why a new range of XIAO products could not exist, particularly given the distinctiveness in this XIAO element, which is pronounced separately from the rest of the mark.

39. Again, these submissions do not in my view disclose any error of principle. The point made by the Appellant at paragraph 37 relates solely to an evaluative judgment by the Hearing Officer (noting that it is not suggested he did not consider the evidence referred to). Likewise, the second point (see paragraphs 38 and 39) raises no point of principle. The matters raised in it are arguments (doubtless put to the Hearing Officer) which he was entitled to weigh with all other matters before him.

40. I therefore reject this aspect of the Appeal.

Section 5(2)(b)

41. The matters addressed above dispose of the appeal in relation to section 5(2)(b) of the Act.

Section 5(3)

42. The Hearing Officer's decision on section 5(3) was as follows:

> "*76. I have already assessed the opponent's evidence above. Although I do not doubt that the opponent was commercially active prior to the relevant date, for the same reasons given at paragraph 51, I am unable to conclude that the opponent's marks had qualifying reputations in the UK at the relevant date.*
>
> *77. Even if that is not correct and a qualifying reputation ought to be found, I consider it unlikely that the opponent's marks would be brought to mind by the applicant's mark. This is on the basis of the same reasons given at paragraphs 65 and 68. If any link was made, it is my view that this would be too fleeting to result in any damage arising. The evidence could, at best, support a finding of only a weak reputation. I say this because of the deficiencies in the opponent's evidence as well as a 2% share (whilst not insignificant) representing a small proportion of the smartphone market. In such circumstances, there would be no material change in economic behaviour, even in relation to identical goods."*

43. The Appellant submitted, by reference to paragraphs 76 and 77 of the Decision, that:

> *Assessing the reputation in the earlier marks, the Hearing Officer states that the Opponent's 2% market share in the smartphone marketplace is "not insignificant" [77]. Logically, if the Hearing Officer has reached the*

conclusion that the Opponent's UK market share is "not insignificant", then it must be regarded as significant, thereby meeting the required degree for the finding of reputation as per General Motors C-375/97.

44. The problem with that submission is it fails to take into account what the Hearing Officer actually stated when addressing the question of reputation. That was set out at paragraph 51 of the Decision where, after reviewing the evidence of reputation, the Hearing Officer stated as follows:

> *51 …… It is my impression that the smartphone market in the UK must be extremely large, given that a large majority of the UK population uses one. Whilst a 2% share of such a market is unlikely to be economically insignificant, it is my view that it still reflects a small proportion of the market as a whole. I also note that no information has been provided about advertising expenditure in relation to the UK market. There is no evidence of exposure on social media in the UK. The opponent has not given any indication as to how many goods were sold through its UK store, or through third party UK retailers, and the presence of one store in London is not indicative of geographically widespread use. Taking all of the evidence into account, I am not satisfied that the evidence establishes that the inherent distinctiveness of the opponent's marks had been enhanced through use at the relevant date. I should add that, even if it did, this would not be to such an extent that it would have any material effect on the outcome of these proceedings (the opponent's marks both being highly distinctive inherently).*

45. The Appellant did not materially criticise the findings of fact made by the Hearing Officer in paragraph 51. It is clear given what was said in paragraph 51 that the reference to not being "insignificant" is clearly a reference to the fact that a 2% share of an extremely large market is not economically insignificant (i.e. amounts to a considerable sum of money). It is not a finding that the reputation is not insignificant (or indeed a finding at all in relation to reputation). It follows that I reject these criticisms of the Hearing officer's decision and the appeal insofar as it relates to section 5(3) fails.

Section 5(4)

46. The Appellant submitted that the Hearing Officer's decision in relation to section 5(4)(a) was fundamentally flawed for the following reason:

45. In assessing misrepresentation, the Hearing Officer simply refers to their incorrect assessment on confusing similarity at paragraphs 65 and 68 of the Decision, rather than correctly applying the principals relating to misrepresentation. ……

47. I disagree that the Hearing Officer failed to apply the principles relating to misrepresentation. His analysis starts by setting out the test for misrepresentation accurately. Having done so he then goes on as follows:

90. In Marks and Spencer PLC v Interflora [2012] EWCA (Civ) 1501, Lewison LJ cast doubt on whether the test for misrepresentation for passing off purposes came to the same thing as the test for a likelihood of confusion under trade mark law. He pointed out that it is sufficient for passing off purposes that "a substantial number" of the relevant public are deceived, which might not mean that the average consumer is confused. However, considering the Court of Appeal's later judgment in Comic Enterprises Ltd v Twentieth Century Fox Film Corporation [2016] EWCA Civ 41, it seems doubtful whether the difference between the legal tests will (all other factors being equal) produce different outcomes. This is because they are both normative tests intended to exclude the particularly careless or careful, rather than quantitative assessments.

91. I note that the goods for which the opponent has established goodwill are slightly different from the goods relied upon under the 5(2)(b) ground. However, the goods relied upon under section 5(2)(b) were all identical; the goods in which the opponent has goodwill are no more similar. Having found no likelihood of direct or indirect confusion based upon the opponent's best case, i.e. identical goods, I do not consider that a substantial number of members of the relevant public will be misled into purchasing the applicant's goods in the mistaken belief that they are the goods of the opponent. This is on the basis of the same reasons outlined at paragraphs 65 and 68, combined with the low level of goodwill.

48. These paragraphs show that the Hearing Officer had clearly in mind that the tests for misrepresentation and likelihood of confusion should be treated as separate tests with separate requirements. Given the Hearing Officer had this differentiation firmly in mind, there can be no error simply by referring back to his earlier factual findings made in the context of confusion when considering misrepresentation. Something more is required. The Appellant could not point to anything else – as is made clear by the second part of paragraph 45 of its skeleton which is no more than an assertion that the facts show there must be misrepresentation:

Given the finding of visual and phonetic similarity to at least a medium degree, with the conceptual assessment being neutral, the Hearing Officer erred in their assessment, as it is without question that a substantial number of members of the public will be misled into purchasing products under the Subject Mark on the assumption that they are products of the Appellant.

49. I therefore dismiss the appeal insofar as it relates to section 5(4)(a).

Conclusion

50. For the reasons I have given above this appeal is dismissed. The Respondent made no submissions on the appeal. I therefore make no order in relation to the costs of the appeal. As I have dismissed this appeal the Hearing Officer's order that the Appellant pays the Respondent the sum of £300 comes into effect, with payment being required within 21 days of the date of this decision.

GEOFFREY PRITCHARD
The Appointed Person
3 May 2026