

**O/0620/23**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF  
TRADE MARK APPLICATION NO. 3615963  
BY PALANTIR TECHNOLOGIES INC.  
TO REGISTER THE TRADE MARK:**

**APOLLO**

**IN CLASSES 9 AND 42**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 429058  
BY BAIDU ONLINE NETWORK TECHNOLOGY (BEIJING) CO., LTD.**

## **Background and pleadings**

1. On 25 March 2021, Palantir Technologies Inc. (“the applicant”) applied to register the trade mark **APOLLO** in the UK, under number 3615963 (“**the contested mark**”). The contested mark was published in the Trade Marks Journal for opposition purposes on 10 September 2021. Registration is sought for the following goods and services:<sup>1</sup>

Class 9: Software for use in cloud infrastructure management and automation; Software for use in automating software installation, management and configuration; all of the foregoing relating to or being for use in the national security, financial, healthcare, and supply chain sectors; none of the foregoing relating to or being for use in the fields of vehicles, driverless cars, autonomous driving, intelligent driver assistance, and/or intelligent transportation; none of the aforesaid in the field of gambling and none of the aforesaid including software for software application development.

Class 42: Non-downloadable software for use in cloud infrastructure management and automation; Non-downloadable software for use in automating software installation, management and configuration; Software-as-a-service (SaaS) featuring software for use in cloud infrastructure management and automation; Software-as-a-service (SaaS) featuring software for use in automating software installation, management and configuration; all of the foregoing relating to or being for use in the national security, financial, healthcare, and supply chain sectors; none of the foregoing relating to or being for use in the fields of vehicles, driverless cars, autonomous driving, intelligent driver assistance, and/or intelligent transportation; none of the aforesaid in the field of gambling and none of the aforesaid including software-as-a-

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<sup>1</sup> The applicant sought to restrict its goods and services by filing Form TM21B on 1 February 2023

service and platform-as-a-service applications in the field of software application development.

2. On 10 December 2021, Baidu Online Network Technology (Beijing) Co., Ltd. (“the opponent”) filed a notice of opposition. The opposition is brought under section 5(2)(b)<sup>2</sup> of the Trade Marks Act 1994 (“the Act”) and is directed against all the goods and services of the application.

3. The opponent relies upon its comparable UK trade mark number 918024377<sup>3</sup>, (“the earlier mark”) to support its claim. The registered mark was filed on 18 February 2019 and became registered on 9 November 2019 in respect of the following goods and services, all of which are relied upon for the purpose of this opposition:

Class 9: Computer operating systems in the field of automobiles, namely, an operating system for use in autonomous vehicles and vehicles with intelligent driver assistance system, for turning standard vehicles into autonomous vehicles and vehicles with intelligent driver assistance system, and for the operation of autonomous and vehicles with intelligent driver assistance system; computer software in the field of automobiles, namely, software for use in vehicles to facilitate the transmission of data between vehicles and between vehicles and another application; open platforms, computer software systems and application programming interface (API) software for use in the development of computer operating systems for driving, navigating, parking and monitoring autonomous cars and driverless cars with intelligent driver

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<sup>2</sup> The opponent originally indicated that it also relied upon section 5(3) of the Act. However, this ground requires evidence and as no evidence was provided to the Tribunal, the opponent was informed in correspondence dated 12 September 2022 that this ground would be withdrawn unless the opponent provided reasons why this action should not be taken. No response was received from the opponent, consequently this ground was withdrawn from the proceedings.

<sup>3</sup> On 1 January 2021, the UK left the EU. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UKIPO created comparable UK trade marks for all right holders with an existing EUTM. As a result of the opponent’s EUTM number **18024377** being registered as at the end of the Implementation Period, a comparable UK trade mark was automatically created. The comparable UK mark is now recorded on the UK trade mark register, has the same legal status as if it had been applied for and registered under UK law, and the original EUTM filing date remains.

assistance systems; downloadable computer software platforms and recorded computer software platforms for use in computer operating systems for driving, navigating, parking and monitoring autonomous cars and driverless cars; artificial intelligence software, virtual assistant software and computer systems for driverless cars with intelligent driver assistance system; artificial intelligence and machine learning software in the field of autonomous driving and intelligent driver assistance; computer software for voice, speech, facial, image, motion and gesture recognition and for data collection, processing, conversion and output for use in automated and autonomous driving assistance systems.

Class 12: Autonomous cars and structural parts therefor; smart cars with intelligent driver assistance system and structural parts therefor.

Class 42: Platform as a service (PAAS) providing access to source codes and software in the fields of autonomous vehicles, smart vehicles, Internet of vehicles and intelligent transportation; platform as a service (PAAS) providing a platform for the development of source codes and software in the fields of autonomous vehicles, smart vehicles, Internet of vehicles and intelligent transportation; research, design, development, engineering, installation, updating, maintenance and consulting of open platforms, computer software systems, application programming interface (API) and operating systems in the field of autonomous driving, of artificial intelligence software and computer systems for driverless cars and of computer operating systems for driving, navigating, parking and monitoring driverless cars; development of computer software application solutions in the field of autonomous driving and driving assistance; none of the aforesaid in relation to bicycles and their parts and fittings.

4. Given the respective filing dates, the opponent's mark is an earlier mark, in accordance with section 6 of the Act. However, as it had not been registered for five years or more at the filing date of the application, it is not subject to the proof of use requirements specified within section 6A of the Act. As a consequence, the opponent may rely upon all of the goods for which the earlier mark is registered without having to establish genuine use.

5. In its notice of opposition, the opponent contends that the competing trade marks are highly similar and that the respective goods and services are either identical or similar, giving rise to a likelihood of confusion.

6. The applicant filed a counterstatement denying the ground of opposition. It claims that the competing marks are dissimilar, as are the goods and services, and on this basis, the applicant denies that there is a likelihood of confusion.

7. The opponent is professionally represented by Appleyard Lees IP LLP, whereas the applicant is professionally represented by Taylor Wessing LLP. Both parties were given the option of an oral hearing, though neither asked to be heard on this matter. Only the applicant filed written submissions in lieu of an oral hearing. Whilst I do not intend to summarise these, I have taken them into consideration and will refer to them as and where appropriate during this decision. This decision is taken following a careful perusal of the papers.

8. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark case law.

## **Decision**

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

9. Sections 5(2)(b) and 5A of the Act read as follows:

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

[...]

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

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

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

### **Case law**

10. I am guided by the following principles which are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind,

and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

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

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

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

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

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

## Comparison of goods and services

11. Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

(a) 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.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the “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, which was last amended on 28 September 1975.”

12. Put simply, this means that whether the goods and services are in the same or different classes is not decisive in determining whether they are similar or dissimilar. Therefore, what matters is the actual goods at issue and whether they are similar or not having regard to the case law that follows.

13. In *Canon*, Case C-39/97, the Court of Justice of the European Union (“CJEU”) stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, [...] 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”.

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

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

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

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

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

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

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

15. For the purposes of considering the issue of similarity of goods or services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

16. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court (“GC”) stated that ‘complementary’ means:

“[...] there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.

17. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. chicken against transport services for chickens. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander K.C., sitting as the Appointed Person, noted in *Sandra Amelia Mary Elliot v LRC Holdings Limited*, BL O/255/13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes”,

whilst on the other hand:

“[...] it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together”.

18. The goods and services to be compared are outlined at paragraphs 1 and 3.

*Software for use in cloud infrastructure management and automation; Software for use in automating software installation, management and configuration; all of the foregoing relating to or being for use in the national security, financial, healthcare, and supply chain sectors; none of the foregoing relating to or being for use in the fields of vehicles, driverless cars, autonomous driving, intelligent driver assistance, and/or intelligent transportation; none of the aforesaid in the field of gambling and none of the aforesaid including software for software application development.*

19. The above terms are different types of software goods, as are the opponent's class 9 goods. However, the opponent's software products are exclusively for use in the automotive field, whilst the applicant's software goods are for use in the fields of national security, financial, healthcare, and supply chain sectors. Furthermore, the applicant's terms also specifically exclude use in the field of vehicles, driverless cars, autonomous driving, intelligent driver assistance, and/or intelligent transportation. Consequently, the nature, use, and intended purpose differ. The trade channels are also likely to differ as the specific types of opposing software are unlikely to be provided by the same company. Users will also differ. Further, there is no obvious complementarity between the respective goods as use of the applicant's software, which specifically restricts use in the field of vehicles, and driverless cars, is not required to enable the functionality of the opponent's software goods for use in the automotive field. Equally the goods do not have a competitive role as the applicant's software terms explicitly exclude software under the opponent's specification resulting in the opposing software terms having different specific purposes. As such, overall, I find that the goods are dissimilar.

*Non-downloadable software for use in cloud infrastructure management and automation; Non-downloadable software for use in automating software installation, management and configuration; Software-as-a-service (SaaS) featuring software for use in cloud infrastructure management and automation; Software-as-a-service (SaaS) featuring software for use in automating software installation, management and configuration; all of the foregoing relating to or being for use in the national security, financial, healthcare, and supply chain sectors; none of the foregoing relating to or being for use in the fields of vehicles, driverless cars, autonomous driving, intelligent driver assistance, and/or intelligent transportation; none of the aforesaid in the field of gambling and none of the aforesaid including software-as-a-service and platform-as-a-service applications in the field of software application development.*

20. The above applied-for services are all related to downloadable software and software as a service.<sup>4</sup> Like with the applied-for goods in class 9, these services are for the use in national security, financial, healthcare, and supply chain sectors. The services also exclude use in relation to the fields of vehicles, driverless cars, autonomous driving, intelligent driver assistance, and/or intelligent transportation. As a result, the nature, method of use and intended purpose differ. The trade channels will differ as, given their respective specialist natures, they will be supplied by different companies. The services are not complementary, as they are not essential or important to one another, and consumers will not assume that they are sold by the same undertakings. Neither are the services competitive in nature as the applicant's services are specifically prevented from use in the same field as the opponent, leading the respective services to have their own unique uses. Consequently, the services are dissimilar.

21. For completeness, I have also considered the other goods and services relied upon by the opponent. However, as they share no obvious points of similarity with the applicant's goods and services, they do not put the opponent in a more favourable position.

22. As some degree of similarity between the goods and services is necessary to engage the test for likelihood of confusion,<sup>5</sup> my findings above (i.e. that the respective goods and services are all dissimilar) mean that the opposition must fail.

### **Conclusion**

**23.** The opposition under section 5(2)(b) of the Act has failed. Subject to any appeal, the application will proceed to registration in the UK.

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<sup>4</sup> In relation to "Non-downloadable software for use in cloud infrastructure management and automation; Non-downloadable software for use in automating software installation, management and configuration", even though these terms read as goods, as they are within a service class they will be treated in the same manner as software as a service.

<sup>5</sup> *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, paragraph 49.

## **Costs**

24. As the applicant has been successful, it is entitled to a contribution towards its costs based upon the scale published in Annex A of Tribunal Practice Notice 2 of 2016. Applying this guidance, I award the applicant the sum of **£500**, which is calculated as follows:

Preparing a statement and considering the proprietor's counterstatement	£200
Preparation of written submissions	£300
<b>Total<sup>6</sup></b>	<b>£500</b>

25. Accordingly, I hereby order Baidu Online Network Technology (Beijing) Co., Ltd. to pay Palantir Technologies Inc. the sum of **£500**. This sum is to be paid within twenty-one days of the expiry of the appeal period, or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 29<sup>th</sup> day of June 2023**

**Sarah Wallace  
For the Registrar**

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<sup>6</sup> I have not awarded costs for the filing of evidence as the evidence filed by the applicant had no bearing on the outcome of the case.