O//0628/23

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. 429081

BY APOLLO INTELLIGENT DRIVING 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:[1]

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-

[1] 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, Apollo Intelligent Driving Technology (Beijing) Co., Ltd. ("the opponent") filed a notice of opposition. The opposition is brought under section 5(2)(b)[2] of the Trade Marks Act 1994 ("the Act") and is directed against all the goods and services of the application. To support its claim the opponent relies upon its following registered marks which are all UK comparable trademarks:[3]

Apollo Computing Unit

UK registration number: **917453804**[4]

Filing date: 9 November 2017

Registration date: 17 May 2018

("the first earlier mark")

UK registration number: **918024370**[5]

Filing date: 18 February 2019

Registration date: 9 November 2019

("the second earlier mark")

[2] 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.

[3] 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 EUTMs being registered as at the end of the Implementation Period, comparable UK trade marks were automatically created. The comparable UK marks now recorded on the UK trade mark register have the same legal status as if they had been applied for and registered under UK law, and the original EUTM filing dates remain.

[4] Original EUTM number 17453804

[5] Original EUTM number 18024370

byapollo

UK registration number: **917887075**[6]

Filing date: 12 April 2018

Registration date: 20 September 2018

("the third earlier mark")

Apolloneer

UK registration number: **917589623**[7]

Filing date: 13 December 2017

Registration date: 27 March 2018

("the fourth earlier mark")

Apollong

UK registration number: **917928346**[8]

Filing date: 9 July 2018

Registration date: 8 December 2018

("the fifth earlier mark")

Ultrapollo

UK registration number: **917813247**[9]

Filing date: 14 February 2018

Registration date: 24 July 2018

("the sixth earlier mark")

[6] Original EUTM number 17887075
[7] Original EUTM number 17589623
[8] Original EUTM number 17928346
[9] Original EUTM number 17813247

Comapollo

UK registration number: **917887071**[10]
Filing date: 12 April 2018
Registration date: 20 September 2018
("the seventh earlier mark")

3. For the purpose of the opposition, the opponent relies upon the goods and services set out in the Annex to this decision.

4. Given the respective filing dates, the opponent's marks are earlier marks, in accordance with section 6 of the Act. However, as they had not been registered for five years or more at the filing date of the application, they are 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 and services for which the earlier marks are registered without having to establish genuine use.

5. In its notice of opposition, the opponent contends in respect of section 5(2)(a) 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

[10] Original EUTM number 17887071

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.

My approach

9. Having considered the similarity between the applicant's mark and the seven earlier marks, I consider the opponent's best case lies with its reliance upon the first earlier mark. Consequently, I will initially focus on the first earlier mark, returning to consider the remaining earlier marks only if it becomes necessary to do so.

Decision

Section 5(2)(b)

10. 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

11. 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

12. 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."

13. 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.

14. 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".

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

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

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

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

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

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

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

16. In *Gérard Meric v Office for Harmonisation in the Internal Market ('Meric'),*[11] the General Court (GC) stated that:

"29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut 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".

17. 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).

18. 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:

[11] Case T-133/05

> "[...] 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".

19. 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".

20. The goods and services to be compared are outlined at paragraph 1 and the Annex to this decision.

21. I note that in relation to the first earlier mark the applicant states, "It is clear from the Opponent's name (Apollo Intelligent Driving Technology (Beijing) Co., Ltd) and the overall tone and wording of the specification of the goods and services for its registration for this trade mark that the Opponent is active in the fields of vehicles, navigation, and transportation. By contrast, the Applicant's goods and services do not

relate to these fields."[12] Pausing here, it is important to clarify that during my assessment, I must take into account each term within the specification as expressed, rather than inferring that a broad term is limited to a field that might be implied by the wording of other terms found within the specification. Particularly as where a trade mark has been registered for less than five years, as is the case here, it is entitled to protection in relation to all the goods and services for which it is registered. As such, the opponent's first earlier mark is entitled to protection against a likelihood of confusion with the applicant's mark based on the 'notional' use of that first earlier mark for all the goods and services as they are expressly listed on the register, rather than in those fields currently in use.

22. The concept of notional use was explained by Laddie J. in *Compass Publishing BV v Compass Logistics Ltd*[13] like this:

> "22. […] It must be borne in mind that the provisions in the legislation relating to infringement are not simply reflective of what is happening in the market. It is possible to register a mark which is not being used. Infringement in such a case must involve considering notional use of the registered mark. In such a case there can be no confusion in practice, yet it is possible for there to be a finding of infringement. Similarly, even when the proprietor of a registered mark uses it, he may well not use it throughout the whole width of the registration or he may use it on a scale which is very small compared with the sector of trade in which the mark is registered and the alleged infringer's use may be very limited also. In the former situation, the court must consider notional use extended to the full width of the classification of goods or services. In the latter it must consider notional use on a scale where direct competition between the proprietor and the alleged infringer could take place."

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

[12] Applicant's written submissions, paragraph 8
[13] [2004] RPC 41

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.

23. The applicant's above software terms are encompassed by the opponent's broad term "computer software applications" which include computer software applications for the uses and fields identified in the applicant's specification. Consequently, the applied-for goods are *Meric* identical to the opponent's "computer software applications" goods. However, if I am wrong in relation to the identity of the goods, there still remains a level of similarity between the applicant's software goods and the opponent's services "computer software design" and "software as a service (SaaS)". For instance, when comparing the applied for goods against the opponent's broad class 42 term "computer software design", I acknowledge that software design services are essential to software, as without the services to design software, it would not exist. Accordingly, the relationship between the software and its design is therefore complementary, with the average consumer believing one undertaking is responsible for providing both the goods i.e. software, and the design services for the computer software. However, I accept that goods and services are fundamentally different in nature. The method of use and intended purpose will also differ with the services requiring the user to consult providers to agree and specify the software type they require so that it can be created, whereas the goods allow users to interact with the functionality of the software once designed. The trade channels will overlap, as companies that design software may also provide the opponent's software in class 9. Users will also be the same. As a result, overall, I consider the goods and services to be similar to a medium degree. In relation to the opponent's term "software as a service (SaaS)", whilst I recognise that services are not the same in nature as goods, there is some overlap in method of use as given the opponent's broad term the software could be the same and therefore used in the same way. However, I accept that there is a difference in the method of use insofar as software as a service refers to centrally hosted software which is generally licensed on a subscription basis, whereas software in class 9 would be downloadable or installed on the initial computer set up. The intended purpose could overlap as the holder's "software as a service" could relate to

the same type of software, and therefore have the same intended purpose as the opponent's software in class 9, although accessed by slightly different methods. Users would be the same, and there is likely to exist a competitive relationship between the goods and services on the basis that users may choose to buy the software to own themselves, or they may choose instead to access it through an online licence/subscription for a monthly or annual fee. The trade channels will overlap as they may be produced by the same undertakings and sold via the same providers. Overall, I am of the view that these goods and services are similar to a medium degree.

Class 42

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.

24. The applicant's above services are all terms for software as a service with specific types of uses. However, despite the limitation within the applicant's specification these terms would be encompassed by the opponent's broad term "Software as a service (SaaS)" which covers all types of software as a service. As a result, these services are *Meric* identical.

Non-downloadable software for use in cloud infrastructure management and automation; Non-downloadable 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.

25. These are both services for non-downloadable software for specific functions/purposes. In my view, services relating to the use of non-downloadable software, which is software that would be kept in a centralised location for users to access, is simply another way of expressing the term “software as a service”. Therefore, it follows that the opponent’s broad term “software as a service (SaaS)” would cover the applicant’s various types of non-downloadable software services. Accordingly, I find that these services are *Meric* identical.

Average consumer and the nature of the purchasing act

26. 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 or services in question: *Lloyd Schuhfabrik Meyer,* Case C-342/97.

27. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited,* [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

28. I find that the relevant consumers of the goods and services at issue will most likely be businesses or professional users.

29. In respect of the goods and services, for businesses and professional users the cost and frequency at which they are purchased is likely to vary, depending on their nature and type, but overall, they are likely to be purchased relatively frequently to meet ongoing business needs and at an average outlay. The selection of the goods and services would be relatively important for businesses and professional consumers as they will wish to ensure that the products meet their professional requirements, i.e. on a large scale with high demands, and they would be alert to the potentially negative impacts of choosing the wrong product. Further, businesses and professional users are likely to assess the ease of use, speed and efficiency, as well as the reliability of the provider's offerings. In light of the above, I find that the level of attention of businesses and professional users would be higher than average. The goods and services are likely to be advertised at tradeshows or business events where they can be purchased directly from the provider, or alternatively, purchased after viewing information in specialist magazines, brochures or on the internet. In these circumstances, visual considerations would dominate, however, I do not discount aural considerations entirely as it is possible that the purchasing of these kinds of goods and services would involve discussions with sales representatives (either in person or over the telephone), or word of mouth recommendations.

Distinctive character of the first earlier mark

30. The distinctive character of a trade mark can be measured only, first, by reference to the goods or services in respect of which registration is sought and, second, by reference to the way it is perceived by the relevant public. In Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV, Case C-342/97, the CJEU stated that:

> "22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular

undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 WindsurfingChiemsee v Huber and Attenberger [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see Windsurfing Chiemsee, paragraph 51)."

31. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. Dictionary words which do not allude to the goods and services will be somewhere in between. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion, the more distinctive the earlier mark, the greater the likelihood of confusion.

32. Further, although the distinctiveness of a mark can be enhanced by virtue of the use that has been made of it, the opponent has not filed any evidence of use. Consequently, I have only the inherent position to consider.

33. The first earlier mark is a word-only mark which comprises the words "Apollo Computing Unit". The word "Apollo" in Greek mythology means a god who is connected with many things including music, poetry, medicine, and the sun.[14] In my

[14] https://dictionary.cambridge.org/dictionary/english/apollo

view, this will be understood by a significant proportion of consumers. However, it is equally likely that a significant proportion of consumers will perceive the word as referring to the Apollo space missions. This section of consumers will view the word as mildly allusive of science and technology. The words "Computing Unit" will be viewed by consumers as strongly suggestive of the goods and services at issue. As a result, the distinctive character of the first earlier mark lies predominantly in the word "Apollo", irrespective of whether it is understood to mean a god in Greek mythology or is viewed as referring to the space missions. Overall, I consider that the first earlier mark possesses a medium degree of inherent distinctive character.

Comparison of the marks

34. It is clear from *Sabel BV v. Puma AG*[15] that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM,* Case C-591/12P, that:

> "34. […] 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."

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

[15] Case C-251/95, paragraph 23

due weight to any other features which are not negligible and therefore contribute to the overall impressions they create.

36. The respective trade marks are shown below:

First earlier mark	Contested mark
Apollo Computing Unit	APOLLO

Overall impressions

37. The first earlier mark is a word-only mark that comprises the words “Apollo Computing Unit”. The words “Computing Unit” will have little trade mark significance given the words are strongly suggestive of the type of goods and services that may be provided under the mark. Therefore, they will play a minimal role in the overall impression.[16] Consequently, the overall impression of the mark predominantly lies in the first word “Apollo”.

38. The contested mark is also a word-only mark comprising the word “APOLLO”. As there are no other components to the mark, the overall impression lies in the word “APOLLO”.

Visual comparison

39. The first earlier mark and the contested mark are similar as they both contain the word “Apollo” at the beginning of the mark, a position which is generally considered to have more of an impact on UK consumers.[17] However, the marks differ due to the additional words “Computing Unit” found in the first earlier mark that are not replicated

[16] *Metamorfoza d.o.o. v EUIPO*, Case T-70/20, paragraph 57
[17] *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

in the contested mark. Further, I do not consider the distinction in letter case between the earlier mark and the contested mark to be a point of significant difference between them. This is because the registration of word-only marks provides protection for the words themselves, irrespective of whether they are presented in upper or lower case. Taking into account the overall impressions, I find that the competing marks are visually similar to at least a medium degree.

Aural comparison

40. The contested mark encompasses three syllables “AP-OL-LO”, whilst the first earlier mark contains eight syllables “AP-OL-LO-COM-PU-TING-UN-IT”. The first three syllables are identical, with the difference arising from the additional words in the first earlier mark. Overall, these marks are aurally similar to a medium degree.

Conceptual comparison

41. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer.[18] The word “Apollo” in the competing marks will be understood by a significant proportion of consumers as referring to the god of Greek mythology, and by another significant proportion as referring to the Apollo space missions. The words “Computing Unit” in the first earlier mark will be perceived, in combination, as either a computer part needed to run software, for example, the central processing unit, or as the section of a company responsible for delivering computing goods and services to consumers. Either way, these words are strongly suggestive of the goods and services at issue, given that they relate to computing. Consequently, there is conceptual identity in the word “Apollo” and, although the additional words in the first earlier mark create a point of conceptual difference, I acknowledge that they are strongly suggestive. Bearing in mind my assessment of the overall impression, I find that there is between a medium and high degree of conceptual similarity between the marks.

[18] *Ruiz Picasso v OHIM* [2006] E.T.M.R 29.

Likelihood of confusion

42. Whether there is a likelihood of confusion must be assessed globally, taking into account a number of factors. One such factor 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. It is also necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be aware of 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 they have retained in their mind.

43. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and goods down to the responsible undertakings being the same or related.

44. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C. (as he then was), as the Appointed Person, explained that:

> "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 recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: "The later mark is different from the earlier mark, but also has something in common with it. Taking account

of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

> (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ("26 RED TESCO" would no doubt be such a case).
>
> (b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as "LITE", "EXPRESS", "WORLDWIDE", "MINI" etc.)
>
> (c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ("FAT FACE" to "BRAT FACE" for example)."

45. These examples are not exhaustive but provide helpful focus.

46. I bear in mind that a finding of indirect confusion should not be made merely because the two 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.[19]

[19] *Duebros Limited v Heirler Cenovis GmbH,* BL O/547/17

47. Furthermore, in *Liverpool Gin*,[20] Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion". Arnold LJ agreed, pointing out that there must be a "proper basis" for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

48. I have found that the applicant's goods and services are either identical or similar to a medium degree to the goods and services of the first earlier mark. I have found that the average consumer of the goods and services will be businesses or professional users who will pay a higher-than-average level of attention. I have found that the purchasing process will be largely visual, however, I have not discounted aural considerations. The overall impression of the respective marks is dominated by the word "Apollo/APOLLO". I have found that the competing marks are visually similar to at least a medium degree, aurally similar to a medium degree, and conceptually similar to between a medium and high degree. I have also found that the first earlier mark possesses a medium degree of inherent distinctive character.

49. The competing marks differ due to the additional words "Computing Unit" found within the first earlier mark. However, these words have less impact given they are strongly suggestive of the goods and services at issue. Moreover, the marks coincide in the identical word "Apollo/APOLLO" found at the beginning of the mark, as discussed above, a position where consumer's attention is usually drawn. This shared word dominates the overall impression and distinctiveness of the respective marks. In my opinion, taking into account the overall levels of similarity between the marks, the differences are likely to be insufficient to distinguish between the competing marks, especially as the difference appears at the end of the respective marks. Furthermore, in relation to the difference in letter case, as discussed above, registration of word-only marks provides protection for the words themselves, irrespective of whether they are presented in upper or lower case, therefore no distinction arises on this basis. Further, the corresponding first word i.e. "Apollo/APOLLO" is aurally and conceptually

[20] *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207

identical. In my judgement it is highly likely that consumers, even paying a higher-than-average level of attention during the purchasing process, would misremember the marks for one another and fail to recall the difference created by the additional words "Computing Unit", particularly as they are strongly suggestive of the goods and services of the mark. Consequently, in my view there is a likelihood of direct confusion.

50. In the event I am wrong about direct confusion, I will now go on to consider indirect confusion in respect of the second earlier mark.

51. Where consumers recognise the difference in the additional words in the first earlier mark, they will also notice the common word "Apollo" which is the dominant and most distinctive element of the competing marks. It is my view that the difference will be seen as a logical sub-brand or brand extension with the additional words relating to either the types of products sold under the mark i.e. goods and services in the field of computing, or denoting the section of the 'Apollo' brand that is engaged with computing and provides computing goods and services i.e. the 'Computing Unit' of 'Apollo'. Therefore, I am satisfied that consumers, paying even a higher-than-average level of attention, would assume a commercial association between the parties, or sponsorship on the part of the opponent. Consequently, I consider there to be a likelihood of indirect confusion.

52. As I have found a likelihood of confusion in relation to all of the applied-for goods and services based upon the first earlier mark, it is not necessary to go on to consider the opponent's reliance on the other earlier marks. In the circumstances, consideration of the remaining earlier marks will not take the opponent's claim any further.

Conclusion

53. The opposition under section 5(2)(b) of the Act has succeeded in its entirety. Subject to any successful appeal, the application will be refused.

Costs

54. The opposition has been successful. The opponent is, therefore, entitled to a contribution towards its costs based on the relevant scale published in Annex A of Tribunal Practice Notice 2 of 2016. In the circumstances, I award the opponent the sum of **£300**, which is calculated as follows:

Official fee:	£100
Preparing a statement and considering the applicant's counterstatement:	£200
Total:	**£300**

55. Accordingly, I hereby order Palantir Technologies Inc. to pay Apollo Intelligent Driving Technology (Beijing) Co., Ltd. the sum of **£300**. 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 3rd day of July 2023

Sarah Wallace
For the Registrar

Annex

Goods and Services of UKTM no. 917453804

(The first earlier mark)

Class 9: Car navigation computers; electronic navigational and positioning apparatus and instruments; navigational instruments; computer applications for vehicle navigation apparatus; multimedia navigation systems for vehicles; downloadable electronic maps; navigation, guidance, tracking, targeting and map making devices; augmented reality software for use in mobile devices for integrating electronic data with real world environments for the purpose of locating vehicles, creating maps, navigating; humanoid robots with artificial intelligence; downloadable image files; computer software applications, downloadable; electronic publications, downloadable; camcorders; computer programs (downloadable software); computer game software; network communication apparatus; global positioning system (GPS) apparatus; data processing apparatus; computer peripheral devices; portable media players; sound recording carriers; video telephones; intercommunication apparatus; cash registers.

Class 38: Providing web site links to geographic information, map images, and trip routing.

Class 39: Vehicle rental services; vehicle location services; vehicle-driving services; rental of parking places and garages for vehicles; navigation services; navigational advisory services; rental of GPS equipment for navigational purposes; vehicle breakdown assistance (towing); providing customized driving directions; vehicle routing by computer on data

networks; transportation services; transportation information; providing a web site on trip routing.

Class 42: Design and development of vehicles, vehicle parts and components and navigation systems, none of the aforesaid in relation to bicycles and their parts and fittings; creation of GPS maps; mapping; providing a web site on geographic information; providing a website on mapping; vehicle roadworthiness testing; safety technology services relating to land vehicles; engineering services relating to robotics; computer software design; updating of computer software; consultancy in the design and development of computer hardware; creating and maintaining web sites for others; computer virus protection services; providing search engines for the internet; software as a service (SaaS); electronic data storage; providing information on computer technology and programming via a web site; cloud computing; computer software consultancy; computer technology consultancy; computer system design; computer security system monitoring services; research and development of new products for others.

Goods and Services of UKTM no. 918024370

(The second earlier mark)

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 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.

Goods and Services of UKTM no. 917887075

(The third earlier mark)

Class 9: Car navigation computers; electronic navigational and positioning apparatus and instruments; navigational instruments; computer applications for vehicle navigation apparatus; multimedia navigation systems for vehicles; downloadable electronic maps; navigation, guidance, tracking, targeting and map making devices; humanoid robots with artificial intelligence; downloadable image files; computer software applications, downloadable; electronic publications, downloadable; camcorders; computer programs (downloadable software); computer game software; network communication apparatus; global positioning system (GPS) apparatus; data processing apparatus; computer peripheral devices; portable media players; sound recording carriers; video telephones; intercommunication apparatus; cash registers.

Class 12: Driverless cars (autonomous cars); remote control vehicles, other than toys; electric vehicles; automatic guided vehicles; robotic cars; civilian drones; trolleys; tires for vehicle wheels; air vehicles; water vehicles; anti-theft alarms for vehicles; cars; upholstery for vehicles.

Class 42: Design and development of vehicles, vehicle parts and components and navigation systems (none of the aforesaid in relation to bicycles and their parts and fittings); creation of GPS maps; mapping; vehicle roadworthiness testing; safety technology services relating to land vehicles; engineering services relating to robotics; computer software design; updating of computer software; consultancy in the design and development of computer hardware; creating and maintaining web sites for others; computer virus protection services; providing search engines for the internet; software as a service (SaaS); electronic data storage; providing information on computer technology and programming via a web site; cloud computing; computer software consultancy; computer technology consultancy; computer system design; computer security

system monitoring services; research and development of new products for others.

Goods and Services of UKTM no. 917589623

(The fourth earlier mark)

Class 9: Computer software applications, downloadable; Electronic publications, downloadable; Camcorders; Computer programs; Computer game software; Network communication apparatus; Global positioning systems (GPS); Data processing apparatus; Computer peripheral devices; Portable media players; Sound recording carriers; Video telephones; Intercommunication apparatus; Cash registers; Car navigation computers; Electronic navigational and positioning apparatus and instruments; Navigational instruments; Computer applications for vehicle navigation apparatus; Multimedia navigation systems for vehicles; Downloadable electronic maps; Navigation, guidance, tracking, targeting and map making devices; Augmented reality software for use in mobile devices for integrating electronic data with real world environments; Humanoid robots with artificial intelligence; Downloadable image files.

Class 12: Bodies for vehicles; Camera drones; Cars; Civilian drones; Driverless cars; Electric vehicles; Electrically powered motor vehicles; Motors for land vehicles; Remotely controlled land vehicle; Tires for vehicle wheels; Anti-theft devices for vehicles.

Class 38: Communication services; Wireless broadcasting; Voice mail services; Electronic exchange of data stored in databases accessible via telecommunication networks; Providing on-line forums for transmission of messages among computer users; Providing access to databases; Providing online facilities for real-time interaction with other computer

users; Electronic transmission of voices (Services for the -); Electronic transmission and retransmission of sounds, images, documents, messages and data; Transmission of sound, picture and data signals; Network transmission of sounds, images, signals and data; Transmission of data by means of telecommunications networks; Providing online forums; Provision of telecommunications links to computer databases and websites on the Internet.

Class 39: Transportation services; Transportation information; Vehicle rental services; Vehicle location services; Vehicle-driving services; Rental of parking places and garages for vehicles; Navigational advisory services; Rental of GPS equipment for navigational purposes; Vehicle breakdown assistance [towing]; Providing customized driving directions; Vehicle routing by computer on data networks; Navigation services.

Class 42: Computer software design; Updating of computer software; Consultancy in the design and development of computer hardware; Creating and maintaining web sites for others; Computer virus protection services; Providing search engines for the internet; Software as a service [SaaS]; Electronic data storage; Providing information on computer technology and programming via a web site; Cloud computing; Computer software consultancy; Computer technology consultancy; Computer system design; Computer security system monitoring services; Research and development of new products for others; Creation of GPS maps; Mapping; Vehicle roadworthiness testing; Safety technology services relating to land vehicles; Engineering services relating to robotics; Design and development of navigation systems; Design and development of route planning software; Design of vehicles and vehicle parts and components, none of the aforesaid in relation to bicycles.

Goods and Services of UKTM no. 917928346

(The fifth earlier mark)

Class 9: Car navigation computers; electronic navigational and positioning apparatus and instruments; navigational instruments; computer applications for vehicle navigation apparatus; multimedia navigation systems for vehicles; downloadable electronic maps; navigation, guidance, tracking, targeting and map making devices; humanoid robots with artificial intelligence; downloadable image files; computer software applications, downloadable; electronic publications, downloadable; camcorders; computer programs (downloadable software); computer game software; network communication apparatus; global positioning system (GPS) apparatus; data processing apparatus; computer peripheral devices; portable media players; sound recording carriers; video telephones; intercommunication apparatus; cash registers.

Class 12: Driverless cars (autonomous cars); remote control vehicles, other than toys; electric vehicles; automatic guided vehicles; robotic cars; civilian drones; trolleys; tires for vehicle wheels; air vehicles; water vehicles; anti-theft alarms for vehicles; cars; upholstery for vehicles.

Class 35: Retail services and wholesale services in relation to vehicles; retail services and wholesale services in relation to navigation devices; advertising services relating to the motor vehicle industry; on-line advertising on a computer network; systemization of information into computer databases; presentation of goods on communication media, for retail purposes; advertising; sales promotion for others; providing business information via a web site; business appraisals; business investigations; professional business consultancy; advisory services for business management; personnel recruitment; sponsorship search; business statistical information services.

Class 37: Vehicle servicing; vehicle service stations; vehicle repair and maintenance; vehicle repair consultancy; vehicle tyre fitting and repair; automobile washing; installation of vehicle security devices; installation of vehicle simulator units; vehicle battery charging; updating of computer networking and telecommunications hardware.

Class 38: Providing telecommunications connections to a global computer network; communications by computer terminals; computer aided transmission of messages and images; electronic bulletin board services (telecommunications services); providing internet chatrooms; providing online forums; transmission of electronic mail; message sending; television broadcasting; providing telecommunication channels for teleshopping services.

Class 39: Vehicle rental services; vehicle location services; vehicle-driving services; rental of parking places and garages for vehicles; navigation services; navigational advisory services; rental of GPS equipment for navigational purposes; vehicle breakdown assistance [towing]; providing customized driving directions; vehicle routing by computer on data networks; transportation services; transportation information.

Class 41: Vehicle driving instruction; vehicle maintenance instruction; organization of competitions relating to motor vehicles; educational services; arranging and conducting of conferences; instruction services; providing on-line electronic publications, not downloadable; layout services, other than for advertising purposes; entertainment; production of shows; arranging and conducting of symposiums; health club services (health and fitness training); mobile library services.

Class 42: Design and development of vehicles, vehicle parts and components and navigation systems, none of the aforesaid in relation to bicycles and their parts and fittings; creation of GPS maps; mapping; vehicle

roadworthiness testing; safety technology services relating to land vehicles; engineering services relating to robotics; computer software design; updating of computer software; consultancy in the design and development of computer hardware; creating and maintaining web sites for others; computer virus protection services; providing search engines for the internet; software as a service (SaaS); electronic data storage; providing information on computer technology and programming via a web site; cloud computing; computer software consultancy; computer technology consultancy; computer system design; computer security system monitoring services; research and development of new products for others.

Goods and Services of UKTM no. 917813247

(The sixth earlier mark)

Class 9: Car navigation computers; electronic navigational and positioning apparatus and instruments; navigational instruments; computer applications for vehicle navigation apparatus; multimedia navigation systems for vehicles; downloadable electronic maps; navigation, guidance, tracking, targeting and map making devices; humanoid robots with artificial intelligence; downloadable image files; computer software applications, downloadable; electronic publications, downloadable; camcorders; computer programs (downloadable software); computer game software; network communication apparatus; global positioning system (GPS) apparatus; data processing apparatus; computer peripheral devices; portable media players; sound recording carriers; video telephones; intercommunication apparatus; cash registers.

Class 12: Driverless cars (autonomous cars); remote control vehicles, other than toys; electric vehicles; automatic guided vehicles; robotic cars; civilian drones; trolleys; tires for vehicle wheels; air vehicles; water vehicles; anti-theft alarms for vehicles; cars; upholstery for vehicles.

Class 42: Design and development of vehicles, vehicle parts and components and navigation systems (none of the aforesaid in relation to bicycles and their parts and fittings); creation of GPS maps; mapping; vehicle roadworthiness testing; safety technology services relating to land vehicles; engineering services relating to robotics; computer software design; updating of computer software; consultancy in the design and development of computer hardware; creating and maintaining web sites for others; computer virus protection services; providing search engines for the internet; software as a service (SaaS); electronic data storage; providing information on computer technology and programming via a web site; cloud computing; computer software consultancy; computer technology consultancy; computer system design; computer security system monitoring services; research and development of new products for others.

Goods and Services of UKTM no. 917887071

(The seventh earlier mark)

Class 9: Car navigation computers; electronic navigational and positioning apparatus and instruments; navigational instruments; computer applications for vehicle navigation apparatus; multimedia navigation systems for vehicles; downloadable electronic maps; navigation, guidance, tracking, targeting and map making devices; humanoid robots with artificial intelligence; downloadable image files; computer software applications, downloadable; electronic publications, downloadable; camcorders; computer programs (downloadable software); computer game software; network communication apparatus; global positioning system (GPS) apparatus; data processing apparatus; computer peripheral devices; portable media players; sound recording carriers; video telephones; intercommunication apparatus; cash registers.

Class 12: Driverless cars (autonomous cars); remote control vehicles, other than toys; electric vehicles; automatic guided vehicles; robotic cars; civilian drones; trolleys; tires for vehicle wheels; air vehicles; water vehicles; anti-theft alarms for vehicles; cars; upholstery for vehicles.

Class 42: Design and development of vehicles, vehicle parts and components and navigation systems (none of the aforesaid in relation to bicycles and their parts and fittings); creation of GPS maps; mapping; vehicle roadworthiness testing; safety technology services relating to land vehicles; engineering services relating to robotics; computer software design; updating of computer software; consultancy in the design and development of computer hardware; creating and maintaining web sites for others; computer virus protection services; providing search engines for the internet; software as a service (SaaS); electronic data storage; providing information on computer technology and programming via a web site; cloud computing; computer software consultancy; computer technology consultancy; computer system design; computer security system monitoring services; research and development of new products for others.