

O/114/20

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK APPLICATION NO. 3350738
BY REID ACOUSTIC DESIGNS LIMITED
TO REGISTER AS A TRADE MARK:**

RAD

IN CLASSES 9, 15, 38, 41 & 42

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 415878
BY RADIX DLT LIMITED**

BACKGROUND AND PLEADINGS

1. On 4 November 2018, Reid Acoustic Designs Limited (“the applicant”) applied to register the trade mark **RAD**, under number 3350738 (“the application”). It was accepted and published in the Trade Marks Journal on 30 November 2018 in respect of a range of goods and services in classes 9, 15, 38, 41 and 42.

2. On 23 February 2019, Radix DLT Limited (“the opponent”) filed a notice of opposition. The partial opposition is brought under Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) against the following goods and services in the application:

Class 9: Apparatus for recording, transmission or reproduction of sound or images; compact discs, DVDs and other digital recording media; data processing equipment, computers.

Class 38: Telecommunications.

Class 41: Entertainment; music and cultural activities.

Class 42: Scientific and technological services and research and design relating thereto; industrial analysis and research services; design and development of computer hardware.

3. Under s. 5(2)(b) of the Act, the opponent relies upon its European Union trade mark number 17894153, **RADS** (“the earlier mark”). The earlier mark was filed on 1 May 2018 and was registered on 19 February 2019 in respect of a range of goods and services in classes 9, 28, 35, 36, 37, 38, 41, 42 and 45. The goods and services in classes 9, 38, 41 and 42 relied upon for the purposes of opposition are included as an annex to this decision.

4. The opponent’s mark is an earlier mark, in accordance with s. 6 of the Act, but 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 as per s. 6A of the Act.

5. The opponent argues that the respective goods and services are identical or similar and that the marks are almost identical in nature. These factors, the opponent contends, will result in a likelihood of confusion.

6. The applicant filed a counterstatement denying the grounds of opposition. The applicant argues that they operate in a different industry to the opponent and, as such, denies that there is a likelihood of confusion. The applicant also contends that there are multiple variations of the word 'rad' that are registered as trade marks.

7. The opponent has been professionally represented since the counterstatement was filed by Marks & Clerk LLP. The applicant has not been professionally represented.

8. Both the opponent and the applicant filed evidence. Both parties filed written submissions in lieu of a hearing. These will not be summarised but will be referred to as and where appropriate during this decision. Both parties were given the option of a hearing but neither asked to be heard on this matter. Therefore, this decision is taken following a careful perusal of the papers, keeping all submissions in mind.

EVIDENCE

Opponent's evidence

9. The opponent's evidence consists of a witness statement of Piers Ridyard, CEO of Radix DLT Limited, together with Exhibits PR1 to PR6.

10. Exhibit PR1 comprises prints taken from the opponent's website homepage www.radixdlt.com. It is said to be dated 9 August 2019 (i.e. after the application date). The homepage outlines what the opponent's platform is, and the services offered by the opponent.

11. Exhibit PR2 is an extract from 'The Concise FINTECH COMPENDIUM' and includes a definition for the word 'cryptocurrency'.

12. Exhibits PR3 and PR4 consist of extracts from the opponent's Economic White Paper, which explains that the currency of the opponent's platform is the 'Rad'. The exhibits are also suggestive of the intended uses of the currency and that it is referred to in both singular and plural forms i.e. 'Rad' and 'Rads'.

13. Exhibits PR5 and PR6 comprise prints from the 'Bitcoin' website www.bitcoin.org and 'Ethereum' website www.ethereum.org, two other cryptocurrency platforms. They are said to be dated 8 August 2019 (i.e. after the application date). According to Mr Ridyard, the exhibits demonstrate that users of these platforms are accustomed to each platform operating its own currency, under its own name.

Applicant's evidence

14. The applicant's evidence comprises a witness statement of Laurence Reid, founder and sole director of the applicant company. No exhibits have been filed by the applicant.

15. In his witness statement, Mr Reid provides some background as to the history of the company, its interests, product developments and pending patent applications. Mr Reid contends that customers of the company have come to refer to it as 'RAD', hence the reason for the application. Mr Reid also outlines that the company has invested in new branding and website design at www.reidacousticdesigns.co.uk on this basis.

16. Mr Reid denies that there is a likelihood of confusion as he feels the parties operate in "entirely different fields". Moreover, in his statement, Mr Reid points to "multiple" other registered 'RAD' marks and contends that these are able to "co-exist". I will refer to these points below.

PRELIMINARY ISSUES

17. In its counterstatement, evidence and written submissions, the applicant describes the different industries it feels the opponent and the applicant operate within, asserting that this defeats any possibility of confusion. For reasons which I will now explain, the

applicant's points about the difference in the actual goods and services offered by the parties will, as a matter of law, have no bearing on the outcome of this opposition.

18. A trade mark registration is essentially a claim to a piece of legal property (the trade mark). Every registered trade mark is entitled to legal protection against the use, or registration, of the same or similar trade marks for the same or similar goods/services if there is a likelihood of confusion. Once a trade mark has been registered for five years, s. 6A of the Act is engaged and the opponent can be required to provide evidence of use of its mark. Until that point, however, the mark is entitled to protection in respect of the full range of goods/services for which it is registered.

19. The mark relied upon by the opponent had not been registered for five years at the date on which the application was filed. Consequently, the opponent is not required to prove use for any of the goods and services for which the earlier mark is registered. The earlier trade mark is entitled to protection against a likelihood of confusion with the applicant's mark based on the 'notional' use of that earlier mark for all the goods/services listed in the register.

20. The concept of notional use was explained by Laddie J. in *Compass Publishing BV v Compass Logistics Ltd* ([2004] RPC 41) 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".

21. So far as the applicant's claimed use of its applied for mark is concerned, in *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited* (Case C-533/06), the Court of Justice of the European Union ("CJEU") stated at paragraph 66 of its judgment that when assessing the likelihood of confusion in the context of registering a new trade mark it is necessary to consider all the circumstances in which the mark applied for might be used if it were registered. As a result, even though the applicant has suggested the ways in which the mark will be used, and the goods and services for which it will be used, my assessment later in this decision must take into account only the applied for mark – and its specification – and any potential conflict with the opponent's earlier mark. Any differences between the actual goods and services provided by the parties, or differences in their trading styles, are not relevant unless those differences are apparent from the applied for and registered marks.

22. In its counterstatement, evidence and submissions, the applicant also refers to "multiple pages of companies" with trade mark registrations for variations of the word 'RAD' that "co-exist within different areas of business". I must, at this early stage, clarify that the existence of other earlier registered marks, whether that be in the UK or EU, will not have any bearing on whether there exists a likelihood of confusion between the applied for mark and the opponent's earlier mark. This is because there is no evidence that the marks are in use and that consumers have become accustomed to differentiating between them.

23. In *Zero Industry Srl v OHIM*, Case T-400/06, the General Court ("GC") stated that:

"73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word 'zero', it should be pointed out that the Opposition Division found, in that regard, that '... there are no indications as to how many of such trade marks are effectively used in the market'. The applicant did not dispute that finding before the Board of Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word 'zero' is not enough to establish that the distinctive character of that element

has been weakened because of its frequent use in the field concerned (see, by analogy, Case T-135/04 GfK v OHIM – BUS(Online Bus) [2005] ECR II-4865, paragraph 68, and Case T-29/04 Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH) [2005] ECR II-5309, paragraph 71).”

24. The matter of whether parties are able to coexist, notwithstanding any similar trade mark registrations, is one for those relevant parties and not one which involves the Registrar. As previously explained, my assessment later in this decision must take into account only the applied for mark – and its specification – and any potential conflict with the opponent’s earlier trade mark. The existence of other earlier registered marks is not relevant for the purposes of this assessment.

DECISION

Section 5(2)(b): legislation and case law

25. Section 5(2)(b) of the Act reads 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.”

26. The following principles 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

27. In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, 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”.

28. 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.

29. Moreover, in *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

"... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

30. In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, Jacob J. (as he then was) stated that:

"In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They

should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

31. 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 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”.

32. 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 Q.C. noted as the Appointed Person 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.”

33. 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.”

34. For the purposes of considering the issue of similarity of goods and 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 *Albingia SA v Axis Bank Limited*, BL O/253/18, a decision of the Appointed Person, Professor Phillip Johnson, at paragraph 42).

35. The GC confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, that, even if goods are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

“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”.

Class 9

36. The term “apparatus for recording, transmission or reproduction of sound or images” in the application is considered identical to “wireless communication devices for voice, data or image transmission” in the earlier mark based upon the principle in *Meric*.

37. In relation to “compact discs, DVDs and other digital recording media”, the opponent has argued that these goods are highly similar to “apparatus for data storage” in the earlier mark. I note that this term was not included in its pleadings with those to be relied upon for the purposes of this opposition. Therefore, this comparison will be disregarded.

38. However, “compact discs” and “other digital recording media” in the application are considered similar to at least a low degree to “creation, production and distribution of entertainment content, namely images, movies, musical and audio-visual works and related merchandise” and “editing or recording of sounds and images” in class 41 of

the earlier mark. These goods and services share a close connection, common trade channels and are considered complementary to the extent that one is important to the other, such that consumers will assume that responsibility for the goods and services lies with the same or a linked undertaking. In my view, consumers are likely to believe that the compact discs and other digital recording media, including those that are pre-recorded, originate from the same economic undertaking as the services in the earlier mark.

39. Furthermore, “DVDs” in the application and “digital video disc players” in the earlier mark are similar to a low degree. While the nature of these goods may be different, they have a close connection in so far as they are often used concurrently. There is a degree of complementary as consumers would use a digital video disc player in order to view content on a DVD. In my view, a sufficient proportion of consumers are likely to assume that the responsibility for the respective goods lies with the same undertaking.

40. “Computers” appears in both the application and the earlier mark. These goods are identical. Moreover, “data processing equipment” in the application is considered identical to “computers” in the earlier mark based on the principle outlined in *Meric*.

Class 38

41. The term “telecommunications” in the application and “telecommunication services” in the earlier mark are identical.

Class 41

42. The terms “entertainment” and “cultural activities” in the application are identical to “entertainment services” and “cultural activities” in the earlier mark. “Music” within the application is considered identical to “entertainment services” in the earlier mark based upon the principle in *Meric*.

Class 42

43. The terms “scientific and technological services and research and design relating thereto” and “industrial analysis and research services” appear in both the application and the earlier mark. These services are identical.

44. “Consultancy in the design and development of computer hardware” in the earlier mark is highly similar to “design and development of computer hardware” in the application. These services would have the same users and share common trade channels. Moreover, the services share a common purpose as part of the hardware designing and developing process. I feel that the services are closely connected and complementary. The former is considered extremely important to the latter in so far as one would expect consultation to take place prior to, or alongside, the designing and developing of computer hardware. In my view, consumers are likely to think that the responsibility for the respective services lies with the same undertaking.

The average consumer and the nature of the purchasing act

45. 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.

46. 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.”

47. The contested services in class 42 are considered specialist in nature and will be used for scientific, technological and industrial purposes. While many of the other goods and services at issue are more ordinary purchases, it is likely that the contested services in class 42 would be purchased or commissioned by businesses by means of specialist providers. Therefore, it is necessary to identify two groups of relevant consumers in this instance, namely, the general public and business users.

48. In relation to the goods and services in classes 9 and 41, there is potential for these goods and services to be purchased quite frequently by the general public for the purposes of entertainment. The cost of such goods and services may vary but would not typically be a significant outlay. Purchasing of goods and services related to entertainment is likely to be led by interest, not need, and is therefore not considered to be a dramatically important choice for the consumer. Similarly, I feel that the purchasing of these goods and services are likely to be more casual than careful. In my view, the purchasing process for these goods and services would predominantly be visual in nature; these goods and services are likely to be purchased after perusing shelves in retail outlets, viewing information on the internet or visual promotional materials. However, I cannot discount aural considerations such as word of mouth recommendations. For goods and services purchased for entertainment purposes, I maintain that the level of attention of the general public would be average.

49. “Data processing equipment” and “computers” are general consumer electronics, though would be less frequent purchases that are likely to require a greater outlay in terms of cost. The act of purchasing these goods would require a relatively high level of attention and would follow a more considered thought process. While they are general consumer goods, I do not consider the purchasing act to be merely casual; it would be a comparatively important choice for the consumer, led by the nature and specifications of the products. For these goods, I feel that the purchasing process would be a combination of visual and aural; some consumers are likely to view product information on the goods themselves or seek information from the Internet, while

others will engage in conversation with store assistants for advice prior to purchasing the goods.

50. Telecommunication services would be occasional purchases. The cost of these services is likely to vary, depending on their nature. However, they are likely to attract an above average outlay overall. In my view, the act of purchasing these services is not merely casual but is likely to follow a measured thought process. It would be a relatively important choice for the consumer, led by the specifications of the services offered and the service needs of the consumer. I consider the level of attention of the general public for these services to be higher than average. The purchasing process would be a combination of visual and aural; some consumers would seek information from brochures or the internet, whereas others would receive verbal advice from sales representatives.

51. The specialist nature of the contested services in class 42 renders them infrequent purchases. Businesses would approach providers of these services when necessary in order to obtain scientific, technical or industrial data, or to have computer hardware designed and developed. There is potential for the outlay for these services to be significant. I feel that the act of purchasing these services would follow a considerable thought process as it would be an important choice for the consumer. Therefore, it is likely that the purchasing act of these services would be careful. In my view, the attention level of consumers purchasing these services would be heightened to ensure that the service is appropriate to their needs. I consider the purchasing process for these services to be a combination of visual and aural. Some consumers would first seek information from printed matter and materials on the Internet. However, it is likely that the purchasing act of these specialist services would also incorporate verbal consultations with relevant experts.

Comparison of trade marks

52. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions

created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

53. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

54. The respective trade marks are shown below:

Opponent's trade mark	Applicant's trade mark
RADS	RAD

55. The opponent has submitted that the marks are “very highly similar” when compared visually and aurally, drawing attention to the fact that the marks differ in only one letter, namely, the letter “S” at the end of the earlier mark. The opponent has also asserted that the marks are conceptually similar, however, has not provided comment as to why this might be the case. The applicant has not disputed similarity between the marks, though, I have no explicit submissions from the applicant on this matter.

56. The earlier mark is a plain word consisting of the word “RADS”. As this is the only element of the mark, the overall impression is dominated by the word “RADS”. The applicant's mark is a plain word mark comprising the word “RAD” with no other

elements. Therefore, the overall impression of the mark is dominated by the word itself.

57. Visually, the marks are similar because they share three letters in the same order; the word “RAD” is the entirety of the applicant’s mark and appears, in full, within the earlier mark. There is a visual difference between the marks, namely, that the earlier mark ends with the letter ‘S’. However, bearing in mind my assessment of the overall impressions, I consider there to be a high degree of visual similarity between the marks.

58. Aurally, the competing marks both consist of a one-syllable word, i.e. (“RADS”) and (“RAD”). It is noted that the (“S”) sound does not appear at the end of the applicant’s mark, as it does the earlier mark; however, the first three letters of each mark will be pronounced the same, with the soft (“S”) sound at the end of the earlier mark. I consider the marks aurally similar to a high degree.

59. Conceptually, neither marks have any obvious meaning per se and, as such, would likely be understood by the average consumer as invented terms. On this basis, I find the marks conceptually neutral.

Distinctive character of the earlier trade mark

60. 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).”

61. The opponent has submitted that the earlier mark is “highly distinctive” and has argued that the earlier mark has no direct meaning in respect of the goods and services for which it is protected. I have no submissions from the applicant regarding the distinctiveness of the earlier mark. As the registration process for the earlier mark was not completed 5 years or more before the application date of the application, the opponent has not been required to provide proof of use. Although the opponent has filed evidence in this matter, none of it demonstrates that the mark enjoys an enhanced level of distinctive character. Consequently, I have only the inherent position to consider. As the earlier mark consists of one plain word, the distinctive character lies indivisibly in the word itself. Invented words usually have the highest degree of distinctive character; words which are descriptive of the goods or services relied upon typically have the lowest. The word “RADS” is neither descriptive nor allusive of the goods and services but, rather, appears to be an invented word. I find that the earlier mark has a high degree of inherent distinctive character.

Likelihood of confusion

62. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods, and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier trade mark,

the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

63. In *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, the GC noted that the beginnings of word tend to have more visual and aural impact than the ends. The court stated:

“81. It is clear that visually the similarities between the word marks MUNDICOLOR and the mark applied for, MUNDICOR, are very pronounced. As was pointed out by the Board of Appeal, the only visual difference between the signs is in the additional letters ‘lo’ which characterise the earlier marks and which are, however, preceded in those marks by six letters placed in the same position as in the mark MUNDICOR and followed by the letter ‘r’, which is also the final letter of the mark applied for. Given that, as the Opposition Division and the Board of Appeal rightly held, the consumer normally attaches more importance to the first part of words, the presence of the same root ‘mundico’ in the opposing signs gives rise to a strong visual similarity, which is, moreover, reinforced by the presence of the letter ‘r’ at the end of the two signs. Given those similarities, the applicant’s argument based on the difference in length of the opposing signs is insufficient to dispel the existence of a strong visual similarity.

82. As regards aural characteristics, it should be noted first that all eight letters of the mark MUNDICOR are included in the MUNDICOLOR marks.

83. Second, the first two syllables of the opposing signs forming the prefix ‘mundi’ are the same. In that respect, it should again be emphasised that the attention of the consumer is usually directed to the beginning of the word. Those features make the sound very similar.”

64. Earlier in this decision I concluded:

- Where not identical or highly similar, the goods and services of the competing marks are similar to at least a low degree;
- There are two potential groups of average consumers, namely, the general public and business users. The attention level of consumers would vary, depending on the good or services being purchased. However, both groups of consumers would pay at least an average degree of attention;
- The purchasing process for the contested goods and services would be a combination of visual and aural in nature;
- As the competing marks both comprise one word with no other elements, the overall impressions they convey will be dominated by those words alone;
- The competing trade marks are visually and aurally similar to a high degree, while the competing trade marks are both conceptually neutral;
- The earlier mark possesses a high level of inherent distinctive character due to it comprising an invented word.

65. I appreciate that some of the contested goods and services would be purchased with a higher level of attention and I accept that I have found the marks to be conceptually neutral. However, I must bear in mind the identical or similar nature of the goods and services, as well as the visual and aural similarities previously outlined. Moreover, I must also pay due regard to the distinctiveness of the earlier mark.

66. I also accept that the competing marks are relatively short in length and that, in some cases, consumers may be more likely to notice differences between shorter marks. Nevertheless, the caselaw outlined above suggests that the attention of the consumer is usually directed to the beginning of the word and that similarity at the beginning of the marks can be decisive. I note that the difference between the competing marks is, in fact, at the end of the marks. Therefore, I do not consider the inclusion of the letter “S” at the end of the earlier mark to be a significant variance. Additionally, consumers are accustomed to brand names being used or referred to in

both singular and plural formats, whether that be formally or colloquially. The “S” at the end of the earlier mark may be viewed in this way by consumers, further diminishing the importance of the only difference between the marks.

67. In my view, the minor difference between the marks is insufficient to distinguish the goods and services of the applicant from those of the opponent. Given the similarities between the overall impressions of the marks, as well as the goods and services, the average consumer may not recall the competing marks with sufficient accuracy to differentiate between them and they may misremember one for the other, assuming they are one and the same. In my view, it is likely that some consumers would misread or mishear ‘RAD’ as ‘RADS’, and vice versa. Taking the principle of imperfect recollection and all the above factors into account, I consider there to be a likelihood of direct confusion.

CONCLUSION

68. The partial opposition under Section 5(2)(b) of the Act has succeeded. Subject to any successful appeal, the application will be refused in respect of the following goods and services:

Class 9: Apparatus for recording, transmission or reproduction of sound or images; compact discs, DVDs and other digital recording media; data processing equipment, computers.

Class 38: Telecommunications.

Class 41: Entertainment; music and cultural activities.

Class 42: Scientific and technological services and research and design relating thereto; industrial analysis and research services; design and development of computer hardware.

69. The mark will be registered in relation to the following goods which were not opposed:

Class 9: Teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; magnetic data carriers, recording discs; amplifiers, live sound amplifiers, guitar effects processors, audio effects processors, radio receivers, radio transceivers, radio receiver equipment, radio transceiver equipment.

Class 15: Computer controlled musical instruments, Devices for tuning musical instruments, Drum machines, Electric and electronic musical instruments, Electric keyboards [musical instruments], Electric pianos, electric organs, electronic organs and pianos, synthesizers, electronic musical instruments.

COSTS

70. The opponent has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016. Although the opponent filed evidence, it was of no assistance to me in making this decision and I make no award in respect of it. In the circumstances I award the opponent the sum of £600 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Preparing a statement and considering the applicant's counterstatement	£200
Preparing written submissions in lieu of an oral hearing	£300
Official fee	£100
Total	£600

71. I therefore order Reid Acoustic Designs Limited to pay Radix DLT Limited the sum of £600. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 24th day of February 2020

**James Hopkins
For the Registrar,
The Comptroller General**

Annex

Goods and services relied upon for opposition (EU017894153)

Class 9: Computer programs; computers; intercommunication apparatus; computer software to enable uploading, downloading, accessing, posting, displaying, editing, tagging, blogging, vlogging, streaming, linking, sharing or otherwise providing electronic media, information or data via computers, mobile devices, electronic devices or communication networks; software for sending and receiving transmission of text, electronic documents, databases, data, graphics, images, audio or visual information via computer, mobile, electronic device or communication networks; computer software for the collection, editing, organising, modifying, transmission, storage and sharing of transmission of text, electronic documents, databases, data, graphics, images, audio or visual information; application software for collecting, editing, organising, modifying, transmitting, storing and sharing of transmission of text, electronic documents, databases, data, graphics, images, audio or visual information; computer software for streaming audio-visual media content via computer, mobile, electronic device or communication networks; electronic communication equipment and instruments; telecommunications apparatus and instruments; wireless communication devices for voice, data or image transmission; digital video disc players.

Class 38: Telecommunication services; computer aided transmission of messages and images; electronic mail; rental of telecommunication equipment; providing telecommunications connections to a global computer network; transmission of digital files; secure data transmission services; communications by computer terminals and by fibre optic networks; transmission of information by data transmission; data transmission, in particular packet transmission of information and images; multimedia data transmission; electronic and computer messaging and mail; exchange of computerised documents; transfer, transmission and/or reception of data, data documents, messages, images, sounds, voices, text, audio, video, electronic communications and data and information by electronic, computer, cable, radio, electronic mail, communications satellite, microwave link, terrestrial means, cable, wireless or wirelink system or other communications means; peer-to-peer data sharing

services, namely, electronic transmission of digital files; providing of access to the uploading or downloading of data; information dissemination services by electronic means; provision of access to search engines; broadcasting and reception of data, signals and information processed by computers or by telecommunications apparatus and instruments; providing access time to databases and computerised database servers; providing of access to multimedia content on electronic communications networks; video messaging services; provision and operation of electronic conferencing, discussion group and chat rooms; secure transmission of text, data, sound, images and moving images, and messages; leasing access time to a computer database server, among other for world-wide (Internet) or private access (intranet) telecommunications networks; rental of access time to global computer networks and other computer networks; television broadcasting; radio broadcasting; broadcasting of information and programmes via radio, television, cable and radio wave, transmission and reception of data, signals and information processed by computers or by telecommunications apparatus and instruments; electronic transmission of invoices; rental services of time access to a computing data base; providing of access to an electronic online network for searching for information; streaming of data; providing user access to global computer networks; data transmission; electronic data interchange services; transferring information and data via computer networks and the Internet; transferring and disseminating information and data via computer networks and the Internet; provision of communications facilities for the interchange of digital data; provision of access to computer networks and the Internet; electronic transmission of computer programs via the Internet; broadcasting programs via a global computer network; providing global computer network access; providing access to a global computer information network; providing multiple-user access to a global computer information network; data transmission services between networked computer systems; information, advisory and consultancy services relating to the aforesaid services including the provision of such services online from a computer database or via the Internet or extranets.

Class 41: Entertainment services; cultural activities; providing computer, electronic and online databases in the field of entertainment and cultural activities; creation, production and distribution of entertainment content, namely images, movies, musical and audio-visual works and related merchandise; providing online audio-visual

entertainment information via computer, mobile, electronic device or communication networks; providing information via computer, mobile, electronic device or communication networks in the field of entertainment, training or recreation; ticketing services for entertainment, cultural, leisure or educational events; editing or recording of sounds and images; providing computer, electronic and online databases for educational, recreational and amusement use; educational, cultural and entertainment services, in particular, organising and conducting conferences, courses, seminars, and online training in the fields of advertising, marketing, social networking, the Internet and social media, and distribution of course material in connection therewith; organising exhibitions in the field of interactive entertainment, virtual reality, consumer electronics and video game entertainment industries for cultural or educational purposes; organising exhibitions and events in the field of software development for educational and entertainment purposes; providing digital music [not downloadable] for the internet; selection and compilation of pre-recorded music for broadcasting by others; providing digital music (not downloadable) from the internet; providing digital music (not downloadable) from MP3 Internet web sites; music production; music production services.

Class 42: Computer system analysis; computer system design; consultancy in the design and development of computer hardware; development, design, management and maintenance of websites; creating, managing, developing, designing, maintaining and hosting of websites; development, design, management and maintenance of mobile apps; development, design, management and maintenance of computer software for logistics, supply chain management and e-business portals; development, design, management and maintenance of computer software for delivery route optimisation, vehicle tracking, industrial automation and robotics; graphic design services; scientific and technological services and research and design relating thereto; industrial analysis and research services; software research, research projects and studies; technical research, research projects and studies; preparation, design, installation, updating, maintenance and rental of computer programs and software for operating machines, apparatus and third party computer systems; research and development of new products for others; scientific research; technical research; technical project studies; telecommunications technology consultancy; design and development of computer systems for the collection, storage and

transmission of data; computer programming, research, design and development of interactive computer software and computer hardware for providing financial services, currency valuation services and electronic and crypto currencies, providing currency exchange rates for foreign, domestic, electronic and crypto currencies; provision of scientific information.