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**TRADE MARKS ACT 1994
AND IN THE MATTER OF TRADE MARK APPLICATION NO. 3159450
vivo IN CLASS 41
IN THE NAME OF VIVO INTERNATIONAL LTD**

**AND IN THE MATTER OF OPPOSITION NO. 407110
BY TiVo BRANDS LLC**

**APPEAL BY TiVo BRANDS LLC
FROM THE DECISION OF MRS ANN CORBETT
BL O/218/17
DATED 8 MAY 2017**

DECISION

1. This is an appeal from a decision of Mrs Ann Corbett on behalf of the Registrar, in which she rejected the opposition by TiVo Brands LLC (“the Opponent”) to a trade mark application in the name of Vivo International Limited (“the Applicant”) on the basis that the Opponent had failed to prove use of its earlier marks.

Background

2. The Applicant filed its trade mark application on 14 April 2016 seeking registration for the word VIVO for the following services:

Class 41
Production and distribution of television shows and movies; production of television programs; provision of non-downloadable films and television programmes via video-on-demand services.
3. The Opponent filed its opposition on 6 May 2016, pursuant to sub-sections 5(2)(b) and 5(3) of the Act, relying on two earlier EU trade marks:

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- a) EUTM 1006014 **TiVo**, filed on 27 November 1998 and registered on 1 February 2001 for

Class 9

Computer hardware, software and peripherals for personalized, interactive television programming; televisions; television peripheral remote controls; communication devices; transmitters; receivers and controls, and software for use therewith.

Class 16

Manuals for use with computer hardware, software and peripherals for personalized, interactive television programming, televisions, television peripheral remote controls, communication devices, transmitters, receivers and controls and software for use therewith.

Class 35

Advertising; business management; business administration; office functions; the promotion and sale of goods and services for others.

Class 38

Telecommunications; subscription television services; transmission of cable television and interactive audio and video services; personalized and interactive television transmission services.

Class 41

Education; providing of training; entertainment; sporting and cultural activities; entertainment services, namely, personalized and interactive entertainment services; online guide to personalised and interactive television programming.

- b) 8493587 **TIVO**, filed on 17 August 2009 and registered on 17 February 2010 for:

Class 9

Computer hardware; computer software; computer peripherals; remote controls; apparatus for receiving, transmitting, storing and managing audio, video and other digital media; software for use therewith; digital video recorders; parts and fittings for use with all the aforesaid goods; manuals sold as a unit with all the aforesaid goods; downloadable music, films and television programs.

Class 38

Telecommunication services; broadcasting services; transmission of video and audio content; providing access to databases and directories via communications networks; transmission of information through communications networks for purposes of programming and operating appliances and electronics; advisory, consultancy, and information services in relation to the aforesaid services.

Class 41

Entertainment and education services; entertainment services in the nature of audio and television programming; providing guides, directories, databases, reviews, ratings and recommendations in the field of entertainment; advisory, consultancy, and information services in relation to the aforesaid services.

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4. For the purposes of the s 5(2)(b) objection, the Opponent relied only upon the services in Classes 38 and 41 of its earlier marks. For the objection under section 5(3), it relied upon the whole of its specifications.
5. The Applicant put the Opponent to proof of use of the marks. The Opponent's evidence of use consisted of a single witness statement made by its solicitor, Mr Bolter. The Hearing Officer commented:

"9. Mr Bolter states that he is authorised to make the statement on behalf of the opponent. He states that some of the content of his statement is from his own knowledge whereas other parts are from documents he has read or information he has been given though he does not give the source of any specific information. Despite the guidance provided in Tribunal Practice Notice 5/2004, evidence of fact is sadly lacking in Mr Bolter's witness statement; much of it is submission ..."

6. The Hearing Officer analysed the evidence and made the following comments and findings:

"10. Mr Bolter states:

"...the products and services provided by the Opponent in the UK are offered through Virgin Media but under the Opponent's Marks. The Opponent has an exclusive partnership with Virgin Media in the UK under which the Opponent provides Virgin Media customers with a TiVo branded high definition digital video recorder, or set top box. Virgin Media is therefore the exclusive distributor of the Opponent's products and technology in the United Kingdom but notably the products and services are still provided under the Opponent's TiVo mark".

11. Attached to Mr Bolter's witness statement are a number of exhibits (Exhibits 1 to 12). None of them include any evidence of any "exclusive partnership" nor is there any evidence in the form of e.g. a distribution agreement. Mr Bolter states that he relies on Exhibits 1 to 3 in support of the claim that genuine use of the marks have been made in the relevant period, which is 7 May 2011 to 6 May 2016. I go on to consider this evidence in more detail.

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12. Exhibit 1 consists of some 40 articles downloaded from the LexisNexis® database and originally published in a variety of newspapers or other publications, whether physical editions or those published via a website. None of these appear to have been published by the opponent or Virgin Media. Whilst all date from within the relevant period and all mention TIVO or TiVo, many do so only in passing.

... Other articles within this exhibit refer to Virgin/Virgin Media as a supplier of broadband, telephone (landline and mobile) and TV services. In relation to TV services, some of the articles provide a little more detail. For example, at page 11 is an article which states: “Virgin packages also come with a TiVo box so you can pause, record and rewind live TV”. At page 21 the article refers to the “TiVo digital TV service”. ...

...

15. Whilst Mr Bolter has indicated his reliance only on Exhibits 1 to 3 as proof of use of the marks, for the sake of completeness I have reviewed the remaining exhibits. As with the material at Exhibit 1, all have been downloaded from the LexisNexis database.

...

Exhibit 4: ... There is also a three page article published on the campaignlive.co.uk website and which is dated 30 June 2011. It is entitled “Virgin Media launches multimedia campaign for TiVo” and refers to the impending launch of a “first advertising campaign for TiVo [which] includes TV, digital, print, retail, experiential and social media, and aims to highlight the “positive reception” the Virgin Media TiVo set-top box service has enjoyed since it launched in December 2010”. With the exception of what appears to be a still from a planned TV advertisement (which does not show either earlier mark nor indeed any text), no examples of that advertising have been exhibited and no details are provided to show what may have been seen, where, by whom or when.

...

Exhibit 9: an article from the Telegraph published on 12 February 2014. It refers to the two millionth Virgin Media TiVo customer having been connected to the

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service which allows them to record, pause, rewind and watch TV and “access 3rd party apps.”

...

17. There is no evidence to show any sales of any of the goods as are specified in class 9 (both earlier marks) or class 16 (EUTM1006014) at any time and certainly not within the relevant period. The only specific goods Mr Bolter refers to in his witness statement is a “high definition video recorder or set top box” with related software. I pause to note that these are goods proper to class 9 and therefore outside the scope of the opposition under section 5(2)(b) which is based on services in classes 38 and 41. A number of the articles within Exhibit 1 refer variously to digital video recorders, set top boxes, smartphone apps, TiVo hardware, TiVo platforms, TiVo-powered set top boxes and zapper boxes though the latter appears to have only been available in the US. No sales or turnover figures for any specific goods, whether individually or not, have been provided and there is no evidence of e.g. any marketing in relation to the supply of goods as standalone products.

..

19. In relation to the services for which both earlier marks are registered in classes 38 and 41, I am prepared to accept that Virgin or Virgin Media is a supplier of TV, broadband and other telecommunications services and that it has relied, at least in part, on a set-top box to deliver some of its services. The evidence shows there have been a number of references in the media throughout the relevant period to TiVo or TIVO in connection with Virgin or Virgin Media, however, none of it is evidence of use by the proprietor or a third party with the authority to use those marks and the source of much of the “information” contained within the articles is not given. Some of it appears to be contradictory: ... There is no evidence which informs me as to what specific services may have been provided under the earlier marks and what figures are given are not broken down in any way to show how much, if any, might have derived from e.g. subscription TV services as opposed to, say, telecommunication services being telephone services or broadband services (should such services have been supplied under the marks).”

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7. The Hearing Officer concluded:

“23. The evidence which has been filed is not from an officer from the opponent company nor from Virgin/Virgin Media and I have already commented on the lack of detail regarding the source of the content of some of Mr Bolter’s witness statement although the overwhelming majority of the exhibits are taken from published articles downloaded from a commercial database. No turnover or sales figures for any of the specific goods or services as registered have been provided and, with the exception of the single still from the planned television advertisement described above, no evidence of what advertising or marketing material may have been presented to potential purchasers of the opponent’s (or any distributor’s) goods or services during the relevant period has been filed. There is no evidence to show how any goods and services were presented to (potential) customers whether in terms of the goods and services themselves or the earlier marks as relied upon. All of this is material which should have been relatively easy for the opponent to supply given the length and extent of claimed use. As set out above, the onus under section 100 of the Act is on the proprietor (in this case the opponent) to show what use has been made of its marks. Taking all relevant factors into account and considering the evidence as a whole as I am required to do, I find that the evidence filed is not sufficient to discharge that onus. The opponent has not shown genuine use of either mark within the relevant period in relation to any of the goods or services for which they are registered.”

In the circumstances, the Hearing Officer did not go on to consider the merits of the opposition.

8. The Opponent filed this appeal, submitting that there had been adequate evidence before the Hearing Officer to show genuine use of the earlier marks, but also asking to file further evidence on the appeal. That evidence was not filed with the Grounds of Appeal and it became clear that it had not been drafted at that stage. I gave directions for the evidence to be filed, in order that I could consider the merits of the application. The Opponent then filed a witness statement dated 25 August 2017 of Pablo Rojas, who is Senior Vice President of International Finance and Operations at Rovi Europe Ltd, a company which he describes as “a TiVo company” and as having

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acquired TiVo Inc in 2016. He also says that the Opponent rebranded as TiVo Inc in 1999. I take him to mean that he is not an officer of the Opponent, TiVo Brands LLC, but of a connected company.

9. The Opponent had submitted that any inadequacy in the original evidence was due to company re-organisation at the relevant time, but whilst Mr Rojas referred to an acquisition in 2016, he did not give any explanation as to why the evidence was late. Instead, he concentrated upon seeking to improve Mr Bolton's evidence of use.

Standard of review

11. This appeal is by way of review. The principles applicable on an appeal of this kind were considered in detail by Daniel Alexander QC sitting as the Appointed Person in *TT Education Ltd v Pie Corbett Consultancy Ltd* (BL O/017/17) at [14]-[52] and his conclusions were approved by Arnold J in *Apple Inc V Arcadia Trading Limited* [2017] EWHC 440 (Ch). I do not need to set them out here, but I shall bear those principles in mind.

Merits of the application to adduce fresh evidence

12. The circumstances in which fresh evidence will be admitted on appeal are well-established and should have been clear to the Opponent through its professional representatives, as well as in the light of the directions I gave relating to the application. I set them out quite recently myself in my decision in *Bamboo Garden* BL O/185/17. Any such application must be considered in the light of the guidance of May LJ in *Du Pont De Nemours & Company v S.T. Dupont* [2003] EWCA Civ 1368, [2004] FSR 15, [2006] 1 WLR 2793 at [95], that on an appeal by way of review

“the court will not receive evidence which was not before the lower court unless it orders otherwise. There is an obligation on the parties to bring forward all the evidence on which they intend to rely before the lower court, and failure to do this does not normally result in indulgence by the appeal court.”

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13. In *Ladd v Marshall* (1954) 1 WLR 1489, [1954] 3 All ER 745, [1954] EWCA Civ 1, three considerations were identified as relevant to the merits of admitting fresh evidence on appeal. These apply equally to trade mark appeals. As May LJ also recognised in *Du Pont* at [103-4], additional factors may be relevant to trade mark appeals, but the three *Ladd v. Marshall* requirements remain central to the exercise of the discretion. The three considerations are: (1) the evidence could not have been obtained with reasonable diligence for use at the hearing below, (2) the further evidence is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive, and (3) the evidence is such as is presumably to be believed. The additional/overlapping considerations relevant to trade mark appeals are:
1. Whether the evidence could have been filed earlier and, if so, how much earlier.
 2. If it could have been, what explanation for the late filing has been offered to explain the delay.
 3. The nature of the mark.
 4. The nature of the objections to it.
 5. The potential significance of the new evidence.
 6. Whether or not the other side will be significantly prejudiced by the admission of the evidence in a way which cannot be compensated, e.g. by an order for costs.
 7. The desirability of avoiding multiplicity of proceedings.
 8. The public interest in not admitting onto the register invalid marks.
14. In addition, where an application is made to adduce fresh evidence on appeal it should be supported by a witness statement dealing at the very least with the first two points on the list above, so that the appellate tribunal has the necessary facts upon which to reach appropriate conclusions. The application should also be made at the earliest possible opportunity. In this case, it was extremely unsatisfactory that the witness statement was not even served along with the Grounds of Appeal. Mr Rojas gave no explanation for the late submission of his evidence and it plainly could have been obtained with reasonable diligence for the hearing below, even if it might have been necessary to seek an extension of time given the company reorganisation.

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15. I am not persuaded that Mr Rojas' evidence would have an important influence in terms of proving use by the Opponent. In my judgment, his evidence suffered from a number of significant defects, and I discuss them alongside my consideration of the merits of the appeal on particular points.
16. Moreover, in the light of the decision which I reach below, admitting Mr Rojas' evidence is not likely to avoid a multiplicity of proceedings.
17. For these reasons, I will not grant permission for the Opponent to rely on the evidence of Mr Rojas on the appeal.

Basis of the appeal

16. The Grounds of Appeal were sketchy in the extreme as to the complaints made about the decision below, merely claiming that the Hearing Officer had erred in her assessment of the "substantial evidence of use" provided by the Opponent.
17. In its skeleton argument on the appeal, the Opponent submitted that the Hearing Officer had made fundamental errors in her assessment of the evidence before her, even though she had cited appropriate cases giving guidance as to the way in which evidence of genuine use is to be assessed, such as *London Taxis* (at first instance) [2016] EWHC 52, *Plymouth Life Centre* BL O/236/13 and *Dosenbach-Ochsner AG Schuhe und Sport v Continental Shelf 128 Ltd ("Catwalk")* BL O/404/13. It submitted that the Hearing Officer erred in
 - a) disbelieving or discounting unchallenged evidence of the Opponent,
 - b) failing to take relevant evidence into account and
 - c) failing to assess the evidence as a whole, but viewing items in isolation.The Opponent claimed use across most of its specifications but accepted that it had not shown any use of its marks for its Class 35 services.
18. The relevant period for proof of use was from 7 May 2011 until 6 May 2016.

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19. The Hearing Officer was unimpressed by the Opponent's failure to provide evidence from one of its own officers or employees; she was concerned that Mr Bolter did not explain whether (and if so how) he had direct knowledge of the use of the Opponent's marks. Her concerns reflected the comments made by Henry Carr QC (as he then was) sitting as a Deputy High Court Judge in *Healey Sports Cars Switzerland Ltd v Jensen Cars Ltd*, [2014] EWHC 24 (Pat), [2014] E.T.M.R. 18 at [10] that evidence of fact given by a party's legal representatives is likely to be given little weight, on the basis that the person giving it has no knowledge of the relevant facts.
20. Mr Bolter said that "the Opponent provides Virgin Media customers with a TiVo branded high definition digital video recorder, or set top box. Virgin Media is therefore the exclusive distributor of the Opponent's products and technology in the United Kingdom." He described the expansion of the Opponent's business at paragraphs 80-85 of his witness statement. In particular,
 - a. he stated that the Opponent had a partnership with Virgin Media which released a "TiVo co-branded product" in 2010;
 - b. he referred to the number of customers for the Virgin TiVo services at various relevant dates, culminating in there being 3.7 million TiVo subscribers in the UK on 25 April 2016; and
 - c. he said that in the third quarter of 2011, Virgin had spent £10 million marketing the TiVo 'set top box.'
21. The Hearing Officer took the view that those rather bald statements were not supported by the sort of 'solid and specific' evidence which would normally be available to a party which had made genuine and serious use of its marks, and the lack of such documents entitled the tribunal to be sceptical, as indicated by Mr Alexander QC in *Plymouth Life Centre* (BL O/236/16) which the Hearing Officer cited at paragraph 21 of her decision.
22. The Hearing Officer nevertheless accepted at paragraph 19 that Virgin Media had relied on set-top boxes to deliver some of its television services and that the

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evidence showed a number of references in the relevant periods to the mark TiVo in connection with those services. Her concern was that none of the evidence showed that this was use of the TiVo mark made by the Opponent or with its authority. Again, there is a good deal of force in the Hearing Officer's criticism of the evidence, but in the absence of any challenge to the veracity of Mr Bolter's evidence, I see no reason to doubt his evidence that the Opponent had entered into an agreement of some kind with Virgin Media in relation to the set top boxes or to its TiVo services. Even without a copy of the written agreement between them, it seems to me reasonable to accept Mr Bolter's evidence that there was such an agreement in place, as it would seem wholly unlikely that Virgin's high-profile use of the Opponent's mark would have been made pursuant to some agreement between Virgin and the Opponent.

23. The questions remained: what was the nature of any such agreement and was there adequate evidence as to the goods or services in relation to which the marks had been used?

24. The Opponent sought to deal with the issue of the agreement with Virgin in the witness statement of Mr Rojas. He said that in November 2009, the Opponent entered into a "distribution relationship" with Virgin Media under which "the Opponent is the exclusive middleware and user interface software deployed by Virgin Media on its next generation platforms including both digital video recorder ("DVR") and non-DVR set-top boxes." It is not at all clear to me what that sentence means, and the position was not clarified by the heavily redacted copies of two agreements between TiVo Inc and Virgin Media which Mr Rojas exhibited. The documents are both entitled "Strategic Alliance Agreement". Apart from the heading, only the recitals are in evidence. These make no reference to the Opponent's mark or to any trade mark. One recital in the first agreement refers to the parties' wish to launch "certain products with TiVo technology." Similarly, the later agreement refers to such products having been launched. The products are not identified, nor is the technology. Hence, it is not possible to tell whether

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these agreements amounted to trade mark licences, nor is it possible to identify the products (goods or services) to which they relate.

25. In the circumstances, it does not seem to me that Mr Rojas' narrative and the redacted agreements amount to significant evidence clarifying the nature of the relationship between the Opponent and Virgin Media; they do no more than confirm the point which I am prepared to accept from Mr Bolter's statement, that there was *an* agreement between them.

26. Moving on the question of the nature of the goods or services in relation to which the Opponent's mark may have been used, I have a good deal of sympathy for the Hearing Officer's views about the adequacy of the evidence. Whilst Mr Bolter made a number of points in his witness statement, most of them appear only to set out the contents of the documents exhibited rather than reflecting his own knowledge of the facts. As the Hearing Officer pointed out, those documents were not provided by the Opponent, but were publicly available documents, such as newspaper articles, mainly found on-line. The evidence was generally unsatisfactory in identifying what goods or services had apparently been provided under the mark to Virgin Media's customers.

Class 9 'Set-top boxes'

27. The Opponent claimed first of all that there was use of the marks on the hardware in its Class 9 specification. Mr Bolter stated that the Opponent provided Virgin Media customers with a TiVo branded high definition digital video recorder, or 'set-top box' (although that term is something of an anachronism for modern televisions). Certainly, there are numerous references in the newspaper articles which he exhibited to Virgin's "TiVo set-top box subscribers," the "TiVo set-top box" or just the "TiVo box." It is clear that Virgin Media was supplying significant numbers of its customers during the relevant period with hardware enabling them to access a variety of services, such as live TV or television on demand services, and to record television transmissions individually or by a "series link". Those facts were, it seems to me, adequately established by Mr Bolter's evidence and the

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exhibits which he produced, despite the fact that many of the exhibits are third party newspaper articles, and the manuals slightly postdate the relevant period.

28. Initially, it seemed to me that the evidence established that the Opponent's marks had been used in relation to set-top boxes if nothing else, as specifically claimed by Mr Bolter. However, looking at the evidence with more care, I have concluded that the Hearing Officer was right to find that there was no evidence (or no adequate evidence) of the supply of any hardware by the Opponent to Virgin Media, nor evidence showing that the set-top boxes bore the TiVo mark or were co-branded with both the TiVo and the Virgin marks. Much of the evidence referred somewhat colloquially to the boxes necessary to access Virgin's TiVo services (the nature of which I consider below) rather than referring to any equipment marked TiVo. The only documents showing the products supplied by Virgin to its customers were some user manuals dating from June and August 2016, a little after the relevant period. Whilst the text refers, for instance, to "your TiVo box," the boxes and remote controls shown in the manuals do not bear the name TiVo. On the contrary, the goods are prominently marked with Virgin's name and device. One manual relates to a "Virgin TV V9 box, powered by TiVo."
29. Mr Rojas similarly referred in his witness statement to "Sales of TiVo branded set-top boxes." However, he seems to have used that term more or less interchangeably with references to "the Opponent's TiVo branded services" and he did not provide any documentary evidence that the hardware was branded TiVo, nor any evidence of the sale of such devices. He exhibited three stills from 'help videos' available on YouTube which used the mark TiVo but did not show that the box itself bore the mark. I do not consider that the fresh evidence is of such significance on this point that I should give permission for it to be adduced on the appeal.
30. After careful consideration, I consider that I should not interfere with the Hearing Officer's conclusion that there was insufficient evidence to prove use of the Opponent's marks on any Class 9 hardware, and I do not consider that Mr Rojas's

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evidence clearly demonstrates that there was use of the mark in relation to hardware.

Class 9 Software

31. The Opponent's Class 9 specifications also include software, in both general and more specific terms. The newspaper articles and user manuals exhibited by Mr Bolter give a reasonable picture of some ways in which Virgin Media's customers could use the set-top boxes, for example to record television programmes or a series of programmes. In my view it is self-evident that software will have been required for that purpose. The question is whether that software was sold or supplied under the TiVo mark. Counsel for the Opponent submitted that the manuals exhibited by Mr Bolter proved that the TiVo marks had been used in relation to that software, and I accept that on close inspection it is possible to see that some pages of the manuals show images of on-screen navigation menus which would be displayed to a user, which show the TiVo name as well as Virgin's marks.
32. The Hearing Officer was concerned at paragraph [17] at the lack of any clear evidence of any sales of software within the relevant period, and she concluded at paragraph [23] that there was no evidence as to how such goods were presented to customers, although such evidence should have been readily available to the Opponent. She was undoubtedly right to be concerned at the lack of specificity in the evidence, and the lack of supporting documentation of the usual kind. However, it seems to me that there was some evidence before the Hearing Officer of use the mark in relation to software, first, because software will obviously have been necessary to operate the set-top boxes, secondly because the references to a "TiVo box" or box "powered by TiVo" seem to me to be references to the software rather than to the hardware, and lastly because the mark is shown on the menu screens used to operate the set-top box.
33. Mr Rojas explained in his witness statement that Virgin Media had paid significant fees to the Opponent for use of its software, which is consistent with the small parts of the agreements with Virgin which were in his evidence. Unfortunately, it

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does not seem to me that his evidence adequately proved use of the mark in relation to software, because he did not say that the software was provided under the mark, and the invoices which he exhibited had been redacted to delete the description of the subject of the invoice. Whilst one might guess that the mark was used in relation to the software, use is not proved by 'probabilities or suppositions.' Again, as a result, I consider that the fresh evidence is not of such significance on this point that I should give permission for it to be adduced at this stage.

34. Nevertheless, I have concluded that the Hearing Officer ought to have found on the evidence before her that the Opponent had proved use of the earlier mark in relation to some software, namely "Software for personalized, interactive television programming" in Class 9. This seems to me to reflect the scope of the evidence of use for both earlier marks.

Class 16 goods

35. The Opponent suggested that the two user manuals which I have already mentioned proved use for the Class 16 goods. I do not agree. These documents referred to TiVo but appeared to be documents emanating from Virgin Media. I do not think it right to reverse the Hearing Officer on this point either.

Services in Classes 38 and 41

36. I move on to consider the question of proof of use of the earlier marks in relation to services. Class 35 was not pursued.
37. In paragraph [19] of her decision, the Hearing Officer identified some possible contradictions in the evidence as to the dates when various services were provided, and a lack of clarity as to what services may have been provided at any one point (whether subscription television services, telecommunications services or broadband services).

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38. It seems to me that the evidence taken as a whole supported Mr Bolter's claim that millions of Virgin Media's customers had subscribed to its TiVo services during the relevant period. Further, I think it fair to assume in the light of the body of the evidence as a whole that the 2016 manuals reflected the nature of the services which had been offered at the very least in the earlier part of 2016, within the relevant period.
39. Nevertheless, I do not consider that such evidence proved use of the earlier marks in relation to any particular services within the Opponent's specifications, whether the core services identified by counsel at the appeal, such as subscription television services, or the much wider services in the specifications, such as entertainment services. The exhibits show use of 'Virgin' or other Virgin marks to identify the source of all the services described in the exhibits, and the references to TiVo in the exhibits seem to me equally consistent with the mark being used only in relation to the software already discussed. I think it quite possible that the mark was used on some services, but that does not show that the Hearing Officer was wrong to find that such use had not been proved to the requisite standard by the Opponent. The evidence is ambivalent on many points and to my mind it is inconclusive.
40. The same criticism can in my view be made of Mr Rojas' witness statement in so far as he deals with use in relation to services. It is not clear whether the TiVo mark has been used in relation to any specific services relating to Virgin's television subscriptions. There is no evidence proving use on the wide range of services for which the TiVo marks are registered in Classes 38 and 41, especially those in broad terms, such as entertainment and education services, sporting and cultural activities, telecommunications or transmission services, or online guide services.
41. For these reasons, it seems to me that the Hearing Officer did not err in finding that the Opponent had failed to prove use of its marks for any part of the specifications in Classes 35, 38 or 41.

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Conclusion

42. As I have found that the earlier marks have been used to some extent, the opposition must be remitted to the UKIPO for another Hearing Officer to consider the merits of the opposition. For the avoidance of doubt, I have not made any finding beyond the simple findings of use set out above, and it will be for the Hearing Officer hearing the opposition to consider whether the evidence proves a reputation for the purposes of the s 5(3) objection.

43. The Opponent has had a limited measure of success on the appeal. The Respondent took no part in the appeal. In the circumstances, I consider that it is appropriate to make no order as to the costs of the appeal. The costs of the hearing below should be dealt with as part of the opposition remitted to the UKIPO.

Amanda Michaels
The Appointed Person
16 March 2018

Sam Carter (instructed by Cooley (UK) LLP) appeared for the Appellant.

The Respondent did not appear and was not represented.