

O-231-08

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 2418920 IN THE NAME OF
THE GEEK PATROL INC

AND

OPPOSITION THERETO UNDER NO 94653 BY GEEKS-ON-WHEELS LTD

TRADE MARKS ACT 1994

IN THE MATTER OF application
No. 2418920 in the name of
The Geek Patrol Inc
and opposition thereto under No 94653
by Geeks-on-Wheels Ltd

Background

1. Application No. 2418920 is for the mark Geeks On The Way and has a filing date of 7 April 2006. Registration is sought in respect of:

Class 42: Onsite computer diagnostic services, onsite updating of computer software for others, onsite technical support services, namely, onsite troubleshooting of computer hardware and software problems, onsite computer consultation services, onsite computer network design for others, onsite computer system analysis, onsite computer services, namely, creating and maintaining web sites for others, database development services, onsite computer services, namely, onsite data recovery services and onsite computer virus removal and protection services.

2. The application stands in the name of The Geek Patrol Inc (“the applicant”) who indicated on the application form “We disclaim exclusive use of the word “Geek”. I shall return to this later in this decision.

3. Notice of Opposition to the registration was filed by Frank B Dehn & Co on behalf of Geeks-on-Wheels Ltd (“the opponent”). The grounds of opposition are founded on section 5(2)(b), 5(3) and 5(4)(a) of the Act. The opponent is the proprietor of Community trade mark no. 3920774 for the following trade mark:



4. The mark, which the opponent states it has used since November 2003, is registered subject to a claim for the colours red, white and black and in respect of the following services:

Class 37

Installation, maintenance and repair of computers and computer hardware; network support services; information, advice and consultancy in relation to the aforesaid services.

Class 38

Telecommunications; communications via computer terminals; computer-aided transmission of data and images; providing access to a global computer network; providing access to the Internet; e-mail services; online instant messaging; information, advice and consultancy in relation to the aforesaid services.

Class 42

Computer programming; design, creation, maintenance and updating of computer software; design, creation, maintenance and updating of websites; computer consultancy and technical support; design and implementation of IT, Internet and broadband solutions; troubleshooting of computer hardware and software problems; computer virus diagnosis, screening and treatment services; information, advice and consultancy relating to the aforesaid services.

5. Under section 5(4)(a) it relies on two unregistered marks. These are:



6. All the earlier marks are said to have been used throughout Sussex and London.

7. The applicant filed a counter-statement in effect denying each of the grounds of opposition. It also stated that “the colors of the Applicant is yellow, black and white”. I take this to mean the applicant uses its mark in these colours, however I note that the application as filed is not the subject of any claim to colour.

8. Both sides filed evidence. Neither side requested to be heard. The opponent filed written submissions. After a careful consideration of all the papers, I give this decision.

Evidence

9. Evidence, in the form of witness statements, was filed on behalf of the opponent by Jamie Shaw, the opponent’s Managing Director and Simon Fox, CEO of HMV UK & Ireland. The applicant filed a witness statement made by its president, John Leishman. Much of the evidence from both parties is, in fact, submission which I do not intend to

summarise but have considered in reaching my decision and will refer to as necessary later in this decision.

10. The following agreed facts emerge from the evidence.

11. The opponent company was set up in November 2003. The opponent was initially based and offered its services in Brighton and had two employees. It moved to larger premises in the city in April 2005, with an office in London being opened in November that same year. Since then it has provided its services throughout the county of Sussex and within that area of London bordered by the M25. At the time the evidence was prepared (August 2007), it employed 21 people.

12. Details of the opponent's turnover under the earlier rights are given as follows:

November 2003-November 2004	£58,000
November 2004-November 2005	£436,000
November 2005-November 2006	£500,000

During 2005 and 2006 the opponent spent some £30,000 on advertising and promoting its services under the earlier rights. No breakdown is given which enables me to apportion the turnover figures to any particular mark relied on by the opponent nor is any indication given of what proportion of the 2005/2006 figures (turnover and advertising) relate to a period before the relevant date.

13. The opponent's earlier mark is promoted on its fleet of cars, appears on its business stationery and on the shirts worn by its technicians. Advertising has been carried in local magazines and telephone directories, on buses and at London Underground stations, on cinema screens and in conjunction with Sussex County Cricket Club. The company has also featured on television and radio programmes as well as in national newspapers.

14. In addition to the above agreed facts, the opponent says that since it was formed it has been involved in the provision of a wide range of information technology and computer services, including installation, maintenance and repair of computer hardware, network support services, design and creation of computer software, computer consultancy and troubleshooting services to professional and domestic computer users. These services are provided to business and domestic users by technicians who visit the customer at the business or residential address.

15. For its part, the applicant says it has not yet used its mark in the UK but has plans to expand into the UK market and put its mark into use.

Decision

The objection under section 5(2)(b)

16. Section 5(2)(b) of the Act states:

“5.- (1)

- (2) A trade mark shall not be registered if because-
- (a)
- (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.”

17. There is no dispute that Community trade mark No 3920774 relied on by the opponent under this section is an earlier mark. It is not subject to requirements of section 6(A) of the Trade Marks (Proof of Use, etc.) Regulations 2004.

18. In determining the question under Section 5(2), I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel v Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] R.P.C. 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R 77 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R.723. It is clear from these cases that:

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors: *Sabel BV v Puma AG*, paragraph 22;
- (b) the matter must be judged through the eyes of the average consumer of the goods/services in question: *Sabel BV v Puma AG*, paragraph 23, 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 he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen B. V.* paragraph 27;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details: *Sabel BV v Puma AG*, paragraph 23;
- (d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG*, paragraph 23;
- (e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki v Metro-Goldwyn-Mayer Inc*, paragraph 17;
- (f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v Puma AG*, paragraph 24;

- (g) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*, paragraph 26;
- (h) further, 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; *Marca Mode CV v Adidas AG & Adidas Benelux BV*, paragraph 41;
- (i) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, paragraph 29.

19. In essence the test under Section 5(2) is whether there are similarities in marks and goods which would combine to create a likelihood of confusion. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those different elements and taking into account the degree of similarity in the goods and services, the category of goods and services in question and how they are marketed whilst bearing in mind their distinctive and dominant components.

Comparison of services

20. There is no dispute that identical services are involved.

Relevant consumer and the purchasing process

21. Despite the services of the application being specified as “onsite” services, each of the respective services are such as would be used by those who own or use computers whether in a domestic environment by a member of the general public or homeworker or in an office by a company as part of their business. Given the widespread use of computers there is likely to be a wide variance in the level of knowledge amongst users. Some consumers are likely to make more frequent use of the services than others but, given the nature of the services and the potential costs involved (both in terms of the inconvenience of having a faulty system and the cost of repair (exhibit JS8 refers to prices for home visits starting at £75 per hour)), I consider they are likely to be purchased with a fair degree of care.

Distinctive and dominant components of the respective marks

22. Under section 5(2)(b) the opponent relies on Community trade mark no 3920774 set out above at paragraph 3. The earlier mark is a composite one and consists of a number of elements: the colours red, white and black; the lower case and somewhat italicised words “geeks on wheels”, with the words “geeks on” appearing in red, the word “wheels” in black and with the initial letter g stylised to suggest movement and having small device elements within it; and the upper case words “WE FIX COMPUTERS” in a smaller font.

23. I consider the words WE FIX COMPUTERS appearing in the earlier mark to be clearly descriptive of the services offered and therefore unlikely to be given any weight in terms of the overall distinctiveness of the mark by the average consumer. Similarly, I consider the circle device and what I take to be part of a pair of spectacles which both appear within initial letter g will also be largely disregarded. In my view it is the words “geeks on wheels” which are visually prominent, being larger and stylised. In his evidence Mr Shaw states that ““geeks” is a term in common use in the UK in relation to computer nerds” (para 3) and that nerds are “people often obsessed with computer technology” (para 13). He says the word geek “is not commonly used in company names in the same type of way it is used in my Company’s name.” (paras 3 and 13) though he gives no further explanation of what he means by this. He says that the words “Geeks on Wheels” is the “most distinctive element” of the mark (para 3) but also says, somewhat contradictorily, that these words “immediately convey the image of mobile computer technicians who are ready and waiting to solve any kind of IT emergency” (para 3).

24. For the applicant, Mr Leishman states “The word “Geek” in association with a trade mark or business name is understood and recognized as a designate of computer repairs”. (para 16). Although dated a few months after the relevant date, he exhibits an article from The Daily Telegraph (JS-8) which describes the already ongoing and growing popularity of “Rent-a-geek” services provided by mobile technicians and I have no reason to suspect the known meaning of the word had changed significantly since the relevant date. Mr Leishman says that the word geek has “long been used by numerous parties in the relevant marketplace” (para 15) and provides evidence from Companies House records to show other companies use it as part of their company name (Exhibit D).

25. In its written submissions the opponent says it “appreciates that there might be other companies operating in the computer industry which trade under names containing the word GEEK” but submits that registration of a company name does not of itself prove that those companies are “trading or are in competition with each other”. He says that the word is not one which is “commonly used to describe professional IT experts” and is not a word “commonly used in a professional context”.

26. I do not think there can be any doubt that the word GEEK is well known as describing someone with technical computer skills. Given its meaning in the context of the services at issue, I do not consider the word GEEK will be seen as a distinctive and dominant component in its own right but rather will read into the expression “Geeks on Wheels”. I further consider that this expression will be seen by the relevant consumer as a clear and direct reference that the services available under the mark are mobile computer repair services.

27. It follows that I consider the distinctive and dominant components of the earlier mark are the composite expression Geeks On Wheels and the way the mark as a whole is presented, with the larger word “geeks” and smaller word “on” being presented in red and the word “wheels” presented in black and with the relative size and “movement trail” of the initial (red) letter g.

28. The mark applied for consists of the four words Geeks On The Way. For the same reasons as stated in paragraph 26 above, I do not consider that the word Geeks will be seen as a distinctive or dominant component in its own right. The words read into each other and the distinctiveness of the mark lies in the composite expression rather than any individual words within it.

Comparison of marks

29. For ease of reference I set out the marks to be compared:

Applicant's mark	Opponent's mark
Geeks On The Way	

30. I referred at the start of this decision to the fact that the applicant has disclaimed the word “Geek”. I note that the mark applied for contains the pluralised form of the word rather than the singular form as disclaimed though I do not attach any particular significance to this point. Neither side has commented on the legal effect of the disclaimer. I need to deal with it briefly in case the matter arises on any appeal.

31. The effect of a disclaimed element in an earlier trade mark relied on in opposition proceedings was considered in *General Cigar Co Inc v Partegas Y Cia SA* [2005] F.S.R. 45. That judgment broadly confirmed the position reached in an earlier Registry decision (*Paco/Paco Life In Colour Trade Marks* [2000] R.P.C. 451) that a disclaimed element in an earlier trade mark had effect (in the sense of being an admission that the disclaimed element was not itself to be regarded as distinctive) in opposition proceedings involving Section 5 of the Act as well as in infringement actions under Section 10.

32. It does not follow, however, that by parity of reasoning, a disclaimed element in a later filed mark should be treated in the same way when that mark is the subject of objection in opposition proceedings. An applicant’s offer to disclaim exclusive rights to a component of his (later) trade mark will not in itself assist in overcoming an earlier conflicting trade mark because an admission made by the applicant cannot, of itself, be deemed to affect the scope of protection of the earlier trade mark.

33. On the other hand, if the applicant can show that the feature shared by the marks is in fact non-distinctive, that is a factor that is likely to have a bearing on the issue of similarity of marks. A finding as to the distinctive and dominant components of the respective marks is a factor to be taken into account as part of the process of comparing marks.

34. In *Medion AG v Thomson multimedia Sales Germany and Austria GmbH*, [2006] ETMR 13 the ECJ held:

“In the context of consideration of the likelihood of confusion, assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components (see *Matratzen Concord*).

However, beyond the usual case where the average consumer perceives a mark as a whole, and notwithstanding that the overall impression may be dominated by one or more components of a composite mark, it is quite possible that in a particular case an earlier mark used by a third party in a composite sign including the name of the company of the third party still has an independent distinctive role in the composite sign, without necessarily constituting the dominant element.

In such a case the overall impression produced by the composite sign may lead the public to believe that the goods or services at issue derive, at the very least, from companies which are linked economically, in which case the likelihood of confusion must be held to be established.”

35. In Case C-334/05P, *OHIM v Shaker di Laudato and C. Sas*, the ECJ reaffirmed the need to examine marks as wholes whilst acknowledging that individual elements may have a predominant effect. It stated:

“It is important to note that, according to the case-law of the Court, in the context of consideration of the likelihood of confusion, assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components (see order *Matratzen Concord v OHIM*, paragraph 32 and *Medion*, paragraph 29).

However,

“...it is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant elements.”

36. The marks to be compared are composite word or word and device marks. The mark applied for consists of the four words Geeks On The Way which read into each other to make a readily understandable phrase. The mark is not stylised in any way other than each of the four words that make up the mark has an initial capital letter. I do not think anything rests on the initial capitalisation. It shares the words Geeks On with the earlier mark. The earlier mark, as I described above, has several other elements. Visually, there is some similarity between the respective marks in that the

words “geeks on” are common to and begin both marks. There are, however, visual differences in respect of the other words included within the marks although I acknowledge that the words “Way” and “wheels” share an initial letter w. There are further, stronger differences in respect of the stylisation of the letter g and the use and particular arrangement of the colours red and black in the earlier mark (as I indicated earlier although the applicant claims to use its mark in yellow, black and white, the application as filed makes no claim to colour). In terms of aural comparison, there is also some similarity given that each of the respective marks begins with the same two words. Again however, there are aural differences given the remaining words in the respective marks.

37. There is no dispute between the parties that the word “Geek” is a vernacular synonym for a computer nerd or anorak—a technically oriented person. It may be an informal word, but the evidence shows clearly that it is one used by others to describe professionals in the field. The words “on the way” and “on wheels” both allude to mobility and the provision of a call-out service but the evidence shows the concept itself is not a novel one in the relevant area of trade. Furthermore, the conceptual message delivered by each of the respective words is somewhat different: the words “On The Way” suggesting imminent arrival but being rather more abstract than the words “on wheels” which conjure up a physical/visual image involving wheeled transport.

38. I consider there is a low level of similarity between the respective marks.

Distinctive character of the earlier trade mark

39. I have analysed the earlier trade mark above. On the basis of that analysis, the earlier mark can be considered to enjoy a reasonable degree of distinctive character. I go on to consider whether the earlier mark has become more distinctive through the use made of it. In *Steelco Trade Mark* (BL O/268/04) David Kitchen Q.C. sitting as the Appointed Person concluded, at paragraph 17 of his decision:

“The global assessment of the likelihood of confusion must therefore be based on all the circumstances. These include an assessment of the distinctive character of the earlier mark. When the mark has been used on a significant scale that distinctiveness will depend upon a combination of its inherent nature and its factual distinctiveness. I do not detect in the principles established by the European Court of Justice any intention to limit the assessment of distinctiveness acquired through use to those marks which have become household names. Accordingly, I believe the observations of Mr. Thorley Q.C. in *DUONEBS* should not be seen as of general application irrespective of the circumstances of the case. The recognition of the earlier trade mark in the market is one of the factors which must be taken into account in making the overall global assessment of the likelihood of confusion. As observed recently by Jacob L.J. in *Reed Executive & Ors v. Reed Business Information Ltd & Ors*, EWCA Civ 159, this may be particularly important in the case of marks which contain an element descriptive of the goods or services for which they have been registered. In the case of marks which are descriptive, the average

consumer will expect others to use similar descriptive marks and thus be alert for details which would differentiate one mark from another. Where a mark has become more distinctive through use then this may cease to be such an important consideration. But all must depend upon the circumstances of each individual case.”

40. The opponent states that it began commercial activities in November 2003. In its first year of trading it had a turnover of some £58,000 which rose to £436,000 the following year. In its third year of trading the turnover hit £500,000 but it is likely that a significant proportion of this relates to a period after the relevant date in these proceedings. I have no evidence before me of the value of the relevant UK market, though I expect it to be substantial. Neither do I know what percentage share of that market the opponent’s sales may reflect. The turnover figures provided to me are given as a total in respect of the three earlier rights relied on in these proceedings. And although advertising and promotional costs of some £30,000 were spent during 2005 and 2006, I am again unable to apportion these figures between the respective marks relied on in these proceedings nor am I able to say how much of that figure relates to a period before the relevant date. The opponent initially provided its services only in the Brighton area expanding at a later date into Sussex as a whole, before opening an office in London in November 2005, a few months before the relevant date. On the basis of the evidence before me, I am unable to find that the trade mark relied on under this ground has accrued an enhanced level of distinctiveness through use.

Likelihood of confusion

41. This is a matter of global appreciation taking all relevant factors into account. There is no dispute that the respective specifications include identical services. In my view the shared word GEEK is a clear reference to skilled computer technicians and there is some evidence that it is a word used by others in the relevant market. The conceptual link between the respective marks is not, in my view, sufficiently strong to override my other findings. I consider that there is no likelihood of confusion even where identical services are involved and allowing for imperfect recollection.

42. The opposition based on section 5(2)(b) of the Act fails.

The objection under section 5(3)

43. Section 5(3) of the Act, as amended, now states:

“3) A trade mark which-

(a) is identical with or similar to an earlier trade mark,

shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark or international trade mark (EC), in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

44. A useful summary of the factors to be considered in relation to an objection under this ground can be found in *Mango Sport System S.R.L. Socio Unico Mangone Antonio Vincenzo v Diknah S.L.* [2005] E.T.M.R.5.

45. The relevant date at which the question of reputation must be assessed is the filing date of the application (7 April 2006). The reputation the opponent is required to show is set out in *General Motors Corporation v Yplon SA* [1999] E.T.M.R. 950. This states:

“24. The public amongst which the earlier trade mark must have acquired a reputation is that concerned by that trade mark, that is to say, depending on the product or service marketed, either the public at large or a more specialised public, for example traders in a specific sector.

25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.”

46. The opponent again relies on its community trade mark no. 3920774 under this ground. It has provided a number of exhibits but many of them date from a period after the relevant date in these proceedings. The opponent began trading in November 2003 and, although turnover and advertising figures are provided, the evidence does not allow me to judge what the position was at the relevant date in relation to the earlier mark relied upon. Neither am I able to place the business into any sort of context as regards the relevant market. I have also found there to be a low level of similarity between the respective marks. For all these reasons, the objection founded under section 5(3) also fails.

The objection under section 5(4)(a)

47. The relevant part of the statute states:

“(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented

- (a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or
- (b)

A person thus entitled to prevent the use of a trade mark is referred to in the Act as the proprietor of an “earlier right” in relation to the trade mark.”

48. The requirements for a passing off action to succeed can be summarised as being:

- (1) That the opponent’s services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;
- (2) That there is a misrepresentation by the applicant (whether or not intentional) leading or likely to lead the public to believe that services offered by the applicant are services of the opponent; and
- (3) That the opponent has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the applicant’s misrepresentation.

49. In *Reef Trade Mark* [2002] RPC 19, Mr Justice Pumfrey observed:

“27. There is one major problem in assessing a passing off claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent’s reputation extends to the goods comprised in the applicant’s specification of goods. The requirements of the objection itself are considerable more stringent than the enquiry under s.11 of the 1938 Act (see *Smith Hayden & Co. Ltd’s Application (OVAX)* (1946) 63 RPC 97 as qualified by BALI TRADE MARKS [1969] RPC 472). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied: and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur.”

50. Clearly there is an evidential burden on an opponent who relies on a passing off claim. The opponent also has to establish the claim at the relevant date. The Act does not set out the relevant date at which the matter must be judged. Article 4.4(b) of First Council Directive 89/104, however, makes the position clear:

(b) rights to a non-registered trade mark or to another sign used in the course of trade were acquired prior to the date of application for registration of the subsequent trade mark, or the date of the priority claimed for the application for registration of the subsequent trade mark and that non-registered trade mark or other sign confers on its proprietor the right to prohibit the use of a subsequent mark;”

51. In the event that an applicant is not shown to have used his mark in advance of the filing date of his trade mark application, the relevant date will be the filing date. In these proceedings, the applicant has not claimed to have used its mark. I therefore take the relevant date to be the date of application for registration.

52. Under this ground, the opponent relies on the two unregistered marks set out at paragraph 5 above. In respect of the plain word only mark “Geeks-on-Wheels”, use is claimed since November 2003. In respect of the other mark relied on, the opponent claims in its Notice of Opposition that the mark was first used as its company logo in March 2003 but elsewhere in the Notice states that it was first used in respect of the services offered by the opponent in November 2003. Whether the difference in dates is due to a typographical error or not I am unable to say but as exhibit JS1 shows the opponent to have been incorporated in November 2003, this is the date I shall take into account.

53. The observations in the *Reef* case emphasise the nature of the evidence that is to be supplied and indicates that it must be directed to the relevant date if the opponent is to establish a prima facie case.

54. In respect of the opponent’s earlier right Geeks-on-Wheels, the evidence is sparse but shows it to be used in the context of part of the opponent’s company name or where the opponent’s stylised mark is heavily featured. The evidence before me does not therefore persuade me that the opponent has any independent goodwill in relation to the plain word mark.

55. The evidence shows the opponent to rely heavily on the use of its registered earlier mark in its business. That mark is not relied on under this ground. That said, the opponent is relying on a stylised mark which is identical to the earlier registered mark save that it does not contain the words We Fix Computers. I do not find the applicant to have any additional goodwill in respect of the stylised earlier mark relied on under this ground.

56. Whilst it may be that the opponent has the necessary goodwill to satisfy the first leg of the test for passing off in respect of the stylised mark it relies on under this ground, my comments above at paragraph 41 apply equally to this ground of objection. There would not, in my view, be a misrepresentation likely to lead the relevant consumer to believe that the services offered by the applicant are the services of the opponent. Consequently, the opponent would not suffer damage. The opposition therefore fails on this ground.

Costs

57. The applicant has succeeded and is entitled to a contribution towards its costs. I order Geeks-on-Wheels Ltd to pay The Geek Patrol Inc the sum of £650. This sum is calculated as follows:

Considering notice of opposition	£150
Filing statement of case in reply	£200
Filing evidence	£200

Considering evidence	£100
Total	£650

58. In reaching this figure I have taken into account the fact that the applicant has not been legally represented and I bear in mind the guidance given by the Appointed Persons (see *Adrenalin* (BL O/040/02) and *South Beck* (BL O/160/08)). This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 11th day of August 2008

**Ann Corbett
For the Registrar
The Comptroller-General**