

O/254/12

**TRADE MARKS ACT 1994**

**TRADE MARK REGISTRATION 2541171**

**ACTIVISCOPE**

**IN THE NAME OF STEPHANE DERONE TRADING AS LINGUASCOPE**

**AND**

**APPLICATION 83901**

**BY PROMETHEAN LIMITED**

**FOR THE INVALIDATION OF THE ABOVE REGISTRATION**

1. The trade mark Activiscope was registered on 18 June 2010 for on-line educational software in class 9. The application for registration was made on 8 March 2010, which is the legally relevant date for the purposes of these proceedings (“the relevant date”).

2. The registration stands in the name of Stephane Derone, trading as Linguascope (“the registered proprietor”).

3. On 8 November 2010, Promethean Limited (“the applicant”) applied for the registration to be declared invalid. The grounds for the application are, in summary, that:

- i) The applicant is the proprietor of a number of earlier Community trade marks with the prefix ACTIV-. These are ACTIVBOARD, ACTIVEXPRESSION, ACTIVOTE, ACTIVENGAGE, ActivInspire & ACTIVOSOUND.<sup>1</sup>
- ii) The applicant is an established manufacturer of interactive teaching apparatus, including electronic white boards, educational software and related accessories and has used the above marks in relation to such goods since 2003.
- iii) The registered proprietor’s mark is likely to be taken as a member of the applicant’s ‘family’ of ACTIV- marks and is registered in respect of identical goods.
- iv) Further, the registered proprietor’s mark is able to “free ride” on the promotion of the applicant’s ACTIV- based marks in the educational sector and thereby obtain an unfair advantage.
- v) Further still, use of the registered proprietor’s mark will be detrimental to the reputation and distinctiveness of the earlier marks because the presence of another ACTIV- mark in the market will dilute the distinctiveness of the earlier marks such that they will no longer arouse immediate association with the applicant. This loss of consumer recognition will result in loss of sales.
- vi) Registration of Activiscope was therefore contrary to sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act.

4. The registered proprietor filed a counterstatement in which it:

- i) Admitted that the applicant is a manufacturer of interactive teaching apparatus, in particular electronic white boards and that the applicant has a reputation for such goods under the name PROMETHEAN.

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<sup>1</sup> The relevant part of the lists of goods for which the earlier marks are registered and the dates of filing, publication and registration of those marks are set out in Annex A.

- ii) Contended that the word/prefix ACTIVE or ACTIV is commonplace in the English language and widely used in the educational sector in the UK.
- iii) Argued that some of the applicant's marks, for example ACTIVOTE, will be perceived by the public as ACTI- marks rather than ACTIV-.
- iv) Denied that the applicant had used its marks in relation to software.
- v) Denied that the applicant had any goodwill or reputation in respect of its ACTIV- marks, either individually or collectively.
- vi) Claimed that it had a reputation in the educational sector under the name LINGUASCOPE, which reduces the likelihood of the public believing that a mark ending in -SCOPE is associated with the applicant.
- vii) Asserted that it had used the mark ACTIVIHUB from June 2007 to July 2010 without any apparent confusion.
- viii) Denied the grounds for invalidation and put the applicant to proof of the precise goods or services for which the earlier marks have been used.

5. Both sides seek an award of costs.

## THE HEARING

6. The matter came to be heard on 11 May 2012 when the applicant was represented by Ms Jessie Bowhill, instructed by Page White & Farrer, and the registered proprietor was represented by Mr Robert Onslow, instructed by Ellisons, Solicitors.

7. Ms Bowhill rightly conceded that the s.5(4)(a) ground for invalidation stood or fell with the s.5(2)(b) ground.

## THE FACTS

8. The applicant's evidence comes mainly from two witness statements by Andrew Bachelor, who is the Company Secretary of Promethean Limited. Mr Bachelor says that his company "*is a world leader in the global market for interactive learning technology*" with customers in around 100 countries. According to Mr Bachelor, the applicant introduced an interactive whiteboard product in the UK "*at least as early as 2003*" under the mark ACTIVBOARD. He provides examples of the way in which the product was packaged and promoted.<sup>2</sup> These show that Promethean was used as the name of the manufacturer of the product and ACTIVBOARD was used as the product name. The product is aimed at the educational sector, particularly for

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<sup>2</sup> See exhibits AB7-AB9

classroom learning. According to Mr Bachelor, the product was very successful. The applicant sold over £40m pounds worth of ACTIVBOARD whiteboards in the UK in 2007. This represents over 20k whiteboards. Sales since then have declined somewhat, but the applicant still sold over 10k ACTIVBOARD products in 2009. The applicant has 28% of the UK market. Although Mr Bachelor does not say so expressly, I assume that the market in question is the market for interactive electronic whiteboards. The product appeared in the BBC drama, Waterloo Road in 2007 apparently to give authenticity to the classroom setting.<sup>3</sup>

9. Mr Bachelor says that the applicant introduced an ACTIVOTE product around the same time that it introduced ACTIVBOARD. The ACTIVOTE product is a 'learner response system'. An example of how the mark is used is provided,<sup>4</sup> which shows that Promethean is used as the maker's name and ACTIVOTE is used as the product name. The product is a hand held set of 32 devices (enough for one per pupil in most classes) through which pupils can answer questions or vote without needing to raise their hands. According to a press release that the applicant issued in 2007,<sup>5</sup> the ACTIVOTE product "*actively encouraged*" pupils to participate in lessons. Mr Bachelor says that the product is compatible with all makes of electronic whiteboards. In 2008, the applicant sold over £400k worth of ACTIVOTE products in the UK. The average cost of each set of products is around £850, so this accounts for around 450 sets. Sales since then have declined somewhat: around half as many ACTIVOTE sets were sold in 2009. No market share information is provided for the ACTIVOTE product.

10. The ACTIVEXPRESSION product is also a learner response system. The product resembles a mobile phone through which pupils can make a wide range of responses to questions. The product was first introduced "*at least as early as 2008*". In 2008 the applicant sold over £2m worth of the products in the UK. A similar level of sales occurred in 2009. According to an invoice dated 28 May 2009,<sup>6</sup> a set of 32 ACTIVEXPRESSION handsets cost £1704, indicating a unit price of around £50 and sales of around 1200 sets in 2009. Mr Bachelor claims that the ACTIVEXPRESSION product holds 34.5% of the relevant UK market. I take this to mean the market for electronic learner response systems for use in classrooms.

11. The ActivInspire software product was launched in September 2009 at the Scottish Learning Festival in Glasgow.<sup>7</sup> The product provides "*browsers that can move easily between different pages, actions and objects, and quick lesson building using themed templates*". The software is designed to work with interactive

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<sup>3</sup> See exhibit AB5.

<sup>4</sup> See exhibit AB12.

<sup>5</sup> See exhibit AB9, page 2.

<sup>6</sup> See exhibit AB4, page 14.

<sup>7</sup> See exhibit AB9, page 13.

whiteboards and provides *“full integration of ActivClassroom solutions, including Promethean’s ActiVote and ActivExpression learner response systems”*.<sup>8</sup>

12. The sales figures for ActivInspire in the UK are modest: just £50k in 2010. This may be partly because the software was provided free to customers purchasing the ACTIVBOARD, ACTIVOTE or ACTIVEXPRESSION products.<sup>9</sup> According to Mr Bachelor, the *“quantity of ACTIVINSPIRE products for 2009-2010”* was over 10k in each year. However, it is not clear whether this represents software provided just to customers in the UK or the EU.

13. The ACTIVOSOUND product was introduced in 2008. It is an amplification system intended to help the teacher to be heard more easily. Sales in 2009 amounted to £50k.

14. The ACTIVENGAGE product is another learner response system, but it was not introduced until 2010 and it is not clear whether this was before or after the relevant date. Use of this mark is therefore irrelevant.

15. The applicant has won numerous national and international awards for its products.<sup>10</sup>

16. Mr Bachelor says that the applicant spent more than £1m to £2m per annum in 2007-2009 promoting the products described above. It is not clear whether this means ‘in the UK’ or ‘globally’. No attempt has been made to break down the promotional expenditure in relation to individual marks.

17. Mr Bachelor’s second witness statement is simply a vehicle to draw attention to the following information on the website of the registered proprietor about its software product.

“What is Activiscope?

Are you bored with PowerPoint? Would you like to create flashy, engaging and competitive activities to support learning in your classes?

.....Activiscope allows you to create an on-line bank or quiz and question lists, which you can use in a range of fun interactive activities.

.....You can use them on a whiteboard, give your students access to them online to play at individual computers, or even use them to build your own interactive website.”

18. This shows that the registered proprietor’s product is aimed at teachers and others in the educational sector and that the product is promoted as being suitable for use with electronic whiteboards.

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<sup>8</sup> See AB16, page 1.

<sup>9</sup> See AB9, page 19 and AB16, page 1.

<sup>10</sup> See AB2.

19. The registered proprietor also provided a witness statement. Mr Derone explains that after he came to England from France he taught in a number of schools and found that children were hard to interest in lessons, but were interested in computers. So he built a website for his own students to use as a teaching aid with interactive activities and games. Other teachers subsequently used his website and it became so popular that in 2004 Mr Derone gave up teaching and started running the website as a business. The business was called Linguascope, partly reflecting its purpose, which was to assist with language learning. The Linguascope product was entirely web-based. Schools paid a fee to use it. The product was a success. By the date of Mr Derone's witness statement in November 2011, 80% of all secondary schools in the UK used it and it had won several awards.

20. The success of Linguascope led to calls from teachers to create interactive teaching aids for other subjects. So Mr Derone developed a 'spin-off' product which he called ACTIVIHUB. The product was again web-based. Access to the product was first provided in June 2007 and continued on a trial basis until February 2010 when it started to attract more attention from teachers. Around that time the applicant's lawyers contacted the registered proprietor and objected to the use of ACTIVIHUB on the basis that it would cause confusion with another of the applicant's trade marks – ActivHub. So Mr Derone changed the name of his product to Activiscope.

21. The registered proprietor also claims to also have a 'family' of marks, in his case characterised by the suffix –SCOPE, of which Activiscope forms a part. I have already mentioned the principal mark – LINGUASCOPE. According to Mr Derone, MATHSCOPE was launched in February 2010 (a month before the relevant date) and LEARNINGSCOPE was used from January 2010 "*to bring all our activities under one umbrella*". No further information is provided about the extent of the use of MATHSCOPE, and as this product was not launched until February 2010 (and Activiscope was not adopted until later that year) it is not clear what else there was to "bring together" (with LINGUASCOPE) in January 2010. In my view, the registered proprietor has not shown that he had a 'family' of – SCOPE marks at the relevant date.

22. According to Mr Derone, the website through which the Activiscope product is sold makes it clear that it is "*operated by Learningscope*". He says he is not aware of any instances of confusion with Promethean or its products. Mr Derone exhibits<sup>11</sup> eleven letters from users of the Activiscope product, some of whom say they also know of the Promethean products and are not confused. I note that most of the letters are from language teachers who came across Activiscope through using the LINGUASCOPE website. I also note that one of the letters is from Jamie Hirst, who is the ICT Services Director at St. George's Academy, Sleaford.

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<sup>11</sup> See SD10.

23. Mr Derone also provides evidence<sup>12</sup> of third parties using ACTIV/ACTIVE in support of his claim that this term is not distinctive of the applicant. The applicant filed a witness statement by Taryn Byrne, a Trade Mark Attorney, in response to this evidence. Mr Byrne visited some of the websites cited by Mr Derone and seeks to explain why what they show is not relevant. I have summarised the respective evidence in the following table.

Mr Derone's evidence	Mr Byrne's reply
ActivSolutions & Activ-elearning UK websites have been active since 2007 and 2009, respectively. Both appear to be used in relation to computer skills training by a firm trading as ACTIV.	None.
ActiveEducation has been used on a website established in 2002 in relation to a trade in educational puzzles.	The party concerned sells old fashioned wooden puzzles and toys for children. The goods at issue are quite different.
ActivPhysics & ActivChemistry educational books and software published 2000.	No evidence of use of these products in the UK.
ActiveTeach. Educational CD-ROMs for interactive whiteboards by Pearson. Since February 2009.	Extract from the IPO's website showing a response from The Publisher's Association to a consultation in 2009 about copyright matters. The response includes a reference to ActiveTeach which is described as " <i>a facility which is available to teachers to support some of Pearson's Education's key secondary school courses.....at the heart of which is the ActiveBook, a digital version of the pupil book allowing a teacher to zoom into any part of a page to focus students' attention.</i> " Mr Byrne states that there is no evidence of actual use of this mark in the UK.
Use of InterActiveWhiteboards for electronic whiteboards via the website <a href="http://activewhiteboards.co.uk">activewhiteboards.co.uk</a>	None.
Use of Whiteboard Active by Pearson in relation to CD-Rom packs for whole class teaching via a whiteboard.	Active is used as a suffix.
Active-education.co.uk in relation to educational software from a website established in 1998.	None.

<sup>12</sup> See SD11.

Use of Activelearningresources.co.uk in relation to a website established in 2006.	The company provides printed materials, outfits and toys, i.e. different goods.
Use of Active Worlds Educational Resources from a website established in 1998.	The company offers 3D interactive technology. The references to 'education' appear to relate to a 3D educational 'universe' created by participants, i.e. different goods/services.
Use of Active Learning in relation to a website established in 2000.	The website is in Texas and is therefore irrelevant.
BBC Active in relation to educational products, including interactive educational products, from a website established in 2005.	None.
Activehistory.co.uk in relation to history games, interactive lessons and quizzes from a website established in 2001.	None.
Active-maths.co.uk in relation to interactive activities for use on an interactive whiteboard from a website established in 2003.	None.
Activelanguages.co.uk from a website launched in 2005.	Provides translation services, i.e. different services.
ActiveDesigns in relation to educational resources from a website established in 1999.	None.

24. As regards the allegation of free-riding on the applicant's reputation, Mr Derone provides<sup>13</sup> an extract from Google which he says shows that his website has been twice as popular as that of the applicant since 2004. Consequently, he has no need to ride on the applicant's reputation.

### **The Grounds for Invalidation**

25. The relevant parts of Section 47 of the Act are as follows.

"47(1) -

- (2) The registration of a trade mark may be declared invalid on the ground-
- (a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or
  - (b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied, unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

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<sup>13</sup> See SD13.

(2A) But the registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless -

- (a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the declaration,
- (b) the registration procedure for the earlier trade mark was not completed before that date, or
- (c) the use conditions are met.

(2B) The use conditions are met if -

- (a) within the period of five years ending with the date of the application for the declaration the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
- (b) it has not been so used, but there are proper reasons for non-use.

(2C) For these purposes -

- (a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and
- (b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(2D) In relation to a Community trade mark or international trade mark (EC), any reference in subsection (2B) or (2C) to the United Kingdom shall be construed as a reference to the European Community.

(2E) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.

(2F) -

(3) -

(4) -

(5) Where the grounds of invalidity exists in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made: Provided that this shall not affect transactions past and closed.”

26. Section 100 is also relevant. It states that:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made it.”

27. The Community Trade Mark registrations for ACTIVBOARD (No. 2198414) and ACTIVOTE (No. 3491991) were completed on 2 May 2002 and 4 March 2005, respectively. As this is more than 5 years prior to the date of the application for

invalidation, the applicant can only rely on these marks to the extent that it can show genuine use of the marks in the period 8 November 2005-7 November 2010.

28. There is no doubt that the applicant has used the ACTIVBOARD mark in relation to interactive whiteboards and the ACTIVOTE mark in relation to learner response systems. The only question is how this use should be reflected in notional specifications for the purposes of s.47(2E).

29. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*<sup>14</sup>, Mr Geoffrey Hobbs QC as The Appointed Person summed up the law on partial revocation like this:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.”

30. Ms Bowhill contended that the use shown justified protecting the marks for the following lists of goods in class 9.

#### ACTIVBOARD

Teaching apparatus and instruments; electronic apparatus for processing, storage, input or output of images, data or text; interactive teaching apparatus; display apparatus; computers.

#### ACTIVOTE

Electronic apparatus and instruments; wireless apparatus and instruments; wireless feedback apparatus; teaching apparatus and instruments; electronic apparatus for processing, storage, input or output of images, data or text; receivers; transmitters; interactive teaching apparatus; display apparatus; computers.

31. With the possible exception of “computers” and “receivers” (in the second list), I accept that the goods shown in the evidence could fall under all the other descriptions of goods. However, that is not the test. Although both products are ‘teaching apparatus’ and ‘electronic apparatus for processing, storage, input or output of images, data or text’, they do not, as single products, exemplify those general product categories. I accept that where use has been shown in relation to a range of individual products that fall within a category of goods, the name of the category of goods may be a fair description of the use shown, even though there are some items within that category for which no use has been shown.<sup>15</sup> However, in this case the marks have been used in relation to just one type of teaching product.

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<sup>14</sup> BL O/345/10

<sup>15</sup> See *Animal Trade Mark* [2004] FSR 19.

32. It is necessary to characterise the goods by reference to recognisable categories or sub-categories that accord with the likely perception of an average consumer of the goods in question. On this basis, I consider that a fair notional specification for ACTIVBOARD would be:

Interactive teaching apparatus; display apparatus for teaching purposes.

33. I consider that a fair notional specification for ACTIVOTE would be:

Interactive teaching apparatus.

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

34. Section 5(2)(b) is as follows:

“5 (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.”

35. In my consideration of whether there is a likelihood of confusion, I take into account the guidance from the settled case law of the CJEU in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77, *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, and *Shaker di L. Laudato & C. Sas v OHIM C-334/05 P (Limoncello)*. 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*.

(b) the matter must be judged through the eyes (and ears) of the average consumer of the services in question; *Sabel BV v Puma AG*, 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: *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*

(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*.

(d) 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: *Sabel BV v Puma*

AG.

(e) 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: *Limoncello*.

(f) 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 Kaisha v Metro-Goldwyn-Mayer Inc.*

(g) 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*.

(h) 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*.

36. Further, as the applicant contends that the existence of a likelihood of confusion exists with its 'family' of ACTIV- trade marks, it is necessary to take account of the case law of the CJEU in this regard, which is set out in the judgment of the court in *Ponte Finanziaria SpA v OHIM*.<sup>16</sup> The relevant part of the judgment is as follows.

"62. While it is true that, in the case of opposition to an application for registration of a Community trade mark based on the existence of only one earlier trade mark that is not yet subject to an obligation of use, the assessment of the likelihood of confusion is to be carried by comparing the two marks as they were registered, the same does not apply where the opposition is based on the existence of several trade marks possessing common characteristics which make it possible for them to be regarded as part of a 'family or series' of marks.

63. The risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 (see *Alcon v OHIM*, paragraph 55, and, to that effect, *Canon*, paragraph 29). Where there is a 'family or series' of trade marks, the likelihood of confusion results more specifically from the possibility that the consumer may be mistaken as to the provenance or origin of goods or services covered by the trade mark applied for or considers erroneously that that trade mark is part of that family or series of marks.

64. As the Advocate General stated in point 101 of her Opinion, no consumer can be expected, in the absence of use of a sufficient number of trade marks capable of constituting a family or a series, to detect a common element in such a family or series and/or to associate with that family or series another trade mark containing

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<sup>16</sup> Case 234/06P, paragraphs 62-64, reported at [2008] ETMR 13.

the same common element. Accordingly, in order for there to be a likelihood that the public may be mistaken as to whether the trade mark applied for belongs to a 'family or series', the earlier trade marks which are part of that 'family' or series' must be present on the market."

37. It follows that it is also necessary to consider whether, and to what extent, the ACTIV- marks on which the applicant relies were present on the market at the relevant date, and whether together they form a family of marks with particular characteristics. I have already found that the ACTIVBOARD and ACTIVOTE marks were present on the market. The ACTIVBOARD mark was well established in the education market for electronic whiteboards. The ACTIVOTE mark was also established for learner response systems for use with such boards.

38. The ACTIVEXPRESSION mark was also on the market for educational goods at the relevant date and was in use in relation to learner response systems for use with electronic whiteboards. It was newer to the market (compared to ACTIVOTE) but appears to have acquired a significant share of the admittedly niche market in question.

39. The ActivInspire mark was also present on the same market at the relevant date, but was quite new to the market having been introduced only 6 months earlier. This mark was in use in relation to educational software, specifically software for use with interactive whiteboards. Goods sold under the mark do not appear to have acquired a significant market share by the relevant date.

40. The ACTIVOSOUND mark was also present in the market at the relevant date in relation to sound amplification systems. However, it appears to have been used on only a modest scale and for this reason adds little to the applicant's case for having a 'family' of ACTIV- marks of which the relevant public would be aware.

41. The use of the ACTIVENGAGE mark is irrelevant for the reason given above.

42. Does the use of the applicant's marks constitute use of a 'family' of marks and, if so, what are the characteristics that define the marks as being members of the 'family'?

43. The applicant argues that its family is defined by marks beginning with ACTIV-. It points out that each of its mark shares this feature and it is therefore the distinctive element of its marks. In this connection, the applicant points out that the beginnings of marks generally make more impression than the ends.<sup>17</sup>

44. It is argued on behalf of the registered proprietor that ACTIV is too descriptive to constitute a distinctive prefix and that where a prefix is descriptive the consumer pays more attention to the suffix of the mark(s).<sup>18</sup> In any event, the registered

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<sup>17</sup> See, for example, Case T-112/03, *L'Oreal v OHIM (FLEXI AIR)*, [2005] ECR II-949, paragraph 64.

<sup>18</sup> In this respect the registered proprietor compares the applicant's marks to the prefix MEDI- in Case R 2421/2010-2, *Medibond v Medipore*, a decision of the OHIM Second Board of Appeal.

proprietor submits that it is the house mark PROMETHEAN which really distinguishes the applicant's collection of products.

45. I find that the applicant was the user of a family of marks at the relevant date. However, I do not accept that the 'family' was identifiable simply as marks with the prefix ACTIV- . This is because, firstly, marks beginning with ACTIV- includes marks beginning with ACTIVE, which the dictionaries show<sup>19</sup> means, inter alia, "*characterized by energetic work, participation etc.*" In essence, it is the opposite of 'passive'. ACTIVE is therefore descriptive of a characteristic of products whose intended purpose is active learning. Secondly, ACTIV appears to be a mis-spelling or contraction of ACTIVE. In these circumstances, I am not prepared to accept that any mark beginning with ACTIV- is distinctive of the applicant.

46. However, I find that the use of marks with a) the prefix ACTIV (as opposed to ACTIVE), combined with b) a second word which describes or is semi-descriptive of the goods, such as –BOARD (for whiteboards), --VOTE/ -EXPRESSION (for systems through which students give their responses to questions), and -Inspire (for educational software intended to engage students in lessons) creates a set of marks with recognisable 'family' features in relation to interactive teaching apparatus and associated software. I find that the number of members and distinctive identity of the 'family' is relatively weak, but the relevant public (as defined below) would probably recognise the family relationship between marks with these features and associate them with the applicant.

47. In this connection, I reject the registered proprietor's argument that ACTIVOTE will be seen as an ACTI- mark rather than as an ACTIV- mark. I accept that if used in isolation it may be seen this way (because VOTE is an easily recognised word), but viewed in the context of the applicant's other marks it is likely to be seen as a combination of the prefix ACTIV- coalesced with the word VOTE, and therefore recognisable as a member of the applicant's small 'family' of marks.

48. I also reject the registered proprietor's submission that the prefix ACTIV- is too descriptive to be a feature that helps to identify a family of marks and/or that the applicant's marks have been used in a way that would not be seen as trade marks.

49. However, I do not consider that the use of the applicant's marks has resulted in any of them acquiring more than an average degree of distinctive character. In this respect it is necessary to take account of the inherent characteristics of the marks, including that ACTIV is an obvious mis-spelling or contraction of the descriptive word ACTIVE, the market share held by the marks, how intensive, widespread and long-standing use of the marks has been, and the amount spent promoting the marks.<sup>20</sup>

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<sup>19</sup> See the excerpt from Dictionary.com submitted under cover of the applicant's letter of 11 September 2011.

<sup>20</sup> See *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 at paragraph 23.

50. The applicant's best case is based on the marks ACTIVBOARD and ACTIVEXPRESSION for which market share information has been provided. I accept that the use of ACTIVBOARD since 2003 would have elevated the distinctive character of that mark by the relevant date, but the distinctiveness of the mark (for interactive whiteboards) would have started from quite a low base and sales were actually declining in the years leading up to the relevant date. The length of use of ACTIVEXPRESSION before the relevant date was quite short, just a couple of years. Further, although the applicant appears to have spent a substantial amount promoting its marks, it is not clear how much was spent promoting any particular mark in the UK or the EU, and the specific types of promotion undertaken are difficult to gather from Mr Batchelor's evidence.

### **Comparison of goods and services**

51. In comparing the respective goods, I take account of the judgment of the CJEU in *Canon* where 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”.

52. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T- 325/06, the General Court restated 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”.

53. I find that ‘on-line educational software’ covered by the registered proprietor's Activiscope mark is identical to ‘computer software for use in education and training’ covered by applicant's ActivInspire mark. This is because the latter description of goods is wide enough to cover the former. In any event, on-line educational software is similar in nature and purpose to educational software sold on other media, such as discs. Further, as the media through which the goods are sold is simply a matter of convenience, the same software can often be purchased through a choice of media. Such goods are therefore frequently in direct competition. Consequently, even if the respective specifications were interpreted as covering slightly different goods, these goods would have to be regarded as very highly similar.

54. The evidence indicates that the applicant's ‘interactive teaching apparatus’ and ‘display apparatus for teaching purposes’ (covering electronic whiteboards and learner response systems) and ‘computer software for education and training’ (covering software for use with whiteboards) are complementary goods in the sense that the software and response systems are important for the use of the whiteboards

and vice versa. Further, the applicant makes all of these products and there is nothing to suggest that the relevant public regards this as unusual or exceptional. These goods are therefore complementary in the sense required by the case law.

55. It follows from these findings that 'on-line educational software', as covered by the registered proprietor's registration of Activiscope, must also be regarded as covering goods that are complementary to the applicant's 'interactive teaching apparatus' and 'display apparatus for teaching purposes' (covering electronic whiteboards and learner response systems). This is consistent with the evidence that the software actually sold under the registered proprietor's mark is promoted as being suitable for use, inter alia, with electronic whiteboards. These goods are therefore also reasonably similar.

56. I do not consider that 'on-line educational software' has been shown to be important or indispensable (and therefore complementary) to sound amplification apparatus for which the ACTIVSOUND mark was present on the market at the relevant date (and covered by the registration of that mark for, inter alia, 'amplifiers; speakers; microphones; headsets; cables'). These goods are clearly different in nature and purpose and do not appear to be in competition. They may be sold through similar trade channels to similar users, but this is not enough, without more, to justify a conclusion that these goods are similar to even a low degree. I therefore find that these goods are dissimilar.

57. As some degree of similarity between the goods or services is an essential requirement for any case brought under s.5(2),<sup>21</sup> my finding that the ACTIVSOUND mark was not present on the market at the relevant date for goods which are even similar to the goods for which the registered proprietor's mark is registered makes it unnecessary to consider the ACTIVSOUND mark any further as part of the applicant's 'family of marks' case. However, as the ACTIVSOUND mark is not subject to the proof of use requirements, it is still necessary to consider that mark individually for the goods for which it is registered against the Activiscope mark and the goods for which it is registered.

### **Comparison of the marks**

58. The applicant's case is based primarily on the similarity between Activiscope and its ACTIV- marks. From a visual perspective, the applicant's marks start with ACTIV- and end with (or in the case of ACTIVOTE, is coalesced with) a recognisable dictionary word: -BOARD, -VOTE, -EXPRESSION, -Inspire, -ENGAGE and -SOUND. The applicant submits that the ACTIV- element is the dominant element of its marks. However, the marks in question consist of just one element, albeit made up of a part of one word and the whole of another. In these circumstances it is

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<sup>21</sup> *Waterford Wedgwood plc v OHIM* – C-398/07 P (CJEU)

artificial to isolate either the prefix or the suffix as the 'dominant' element of the applicant's marks because the public normally views mark as wholes. However, this is not to say that relevant consumers won't recognise the different integers which make up the whole marks. The same is true of the registered proprietor's mark. The well known word SCOPE is recognisable as the suffix of that mark. This makes it likely that the prefix of that mark will be seen as ACTIVI- rather than as ACTIV, at least by those who pay a reasonably high level of attention to the mark. The visual similarity between ACTIV and ACTIVI is nevertheless self evident. There is little visual similarity between the suffix of the registered proprietor's mark and those of any of the applicant's marks.

59. Comparing the marks as wholes, the most that can be said is that, like Activiscope, ACTIVOTE starts with ACTIV and ends with a letter 'E' and has the letter 'O' as the third last letter. It could also be said that, like Activiscope, ActivInspire begins with the letters A,C,T,I,V and I (although the prefix is clearly ACTIV- not ACTIVI), ends with a letter 'E', and also contains a letter 'S'. And, again like Activiscope, ACTIVSOUND begins with ACTIV- and also contains the letters 'S' and 'O', although not in the same places as in the registered proprietor's mark. I find that these similarities result in only a moderate level of overall visual similarity between the respective marks. The visual similarity between Activiscope and the applicant's other three earlier marks – ACTIVBOARD, ACTIVEXPRESSION and ACTIVENGAGE – is even less. At most, there is only a low degree of visual similarity between these marks and Activiscope.

60. The registered proprietor's mark is likely to be pronounced ACTIV-E-SKOPE. This does not sound much like any of the applicant's marks. The closest is probably ActivInspire, which is likely to be pronounced as ACTIV-IN-SPIRE. I conclude that the registered proprietor's mark has only a low degree of aural similarity to any of the applicant's marks.

61. It is submitted on behalf of the registered proprietor that there is some conceptual difference between the marks because ACTIV is an obvious contraction or mis-spelling of ACTIVE, which is plainly a reference to the interactive nature of the applicant's goods and/or active learning, whereas ACTIVI in the registered proprietor's mark is likely to be seen as a reference to the activities provided through its educational software. I accept that ACTIVI in Activiscope may be seen by some consumers as hinting at 'activities' and, in the context of the applicant's goods, the prefix ACTIV will be seen by relevant consumers as an (indirect) reference to 'interactive' or as a (direct) reference to 'active [learning]'. However, the average consumer is not likely to carefully compare and contrast the meanings of just the prefixes of these marks, ACTIV- versus ACTIVI-.

62. Viewed as a whole, the registered proprietor's mark Activiscope has no discernible meaning. By contrast, when viewed as a whole, the applicant's ACTIVBOARD mark is likely to be seen as alluding to the type of teaching apparatus

(interactive whiteboards) for which it used. The ACTIVOTE, ACTIVEXPRESSION, ActivInspire, ACTIVOSOUND ACTIVENGAGE marks have no overall conceptual meaning, even though the meanings of the suffixes are fairly evident (less so for ACTIVOTE because the letter 'V' serves as part of the prefix and of the suffix). I conclude that, apart from ACTIVBOARD, none of the applicant's marks have a sufficiently strong conceptual meaning so as to create a clear cut conceptual distinction from the (as a whole) meaningless Activiscope. However, the meanings of the well known words that are recognisable as the suffixes of the marks - VOTE, INSPIRE, SOUND, ENGAGE and EXPRESSION on the one hand, and SCOPE on the other, helps to create some small degree of conceptual distinction between Activiscope and the rest of the applicant's marks.

63. Overall, I find that there is a low degree of similarity between Activiscope and ACTIVBOARD, ACTIVENGAGE and ACTIVEXPRESSION and a moderate degree of similarity between Activiscope and ACTIVOTE, ActivInspire and ACTIVOSOUND.

### **The Average Consumer**

64. The registered proprietor says that it is significant that his customers are teachers who download his software directly from the internet, whereas the applicant's customers tend to be administrators responsible for purchasing IT equipment for educational establishments. I do not accept this for two reasons. Firstly, the list of goods for which the registered proprietor's mark is registered is not (and could not be) restricted as to the channels through which the 'on-line educational software' covered by the registration reaches the end consumer. Consequently, it is necessary to consider all of the ways in which the Activiscope mark could be used in relation to on-line educational software.<sup>22</sup> That would include downloadable software sold to teachers and to IT departments of schools etc. Secondly, the registered proprietor's own evidence shows that his goods are also bought by IT Departments.<sup>23</sup> I conclude the average consumer is an education professional or an administrator responsible for purchasing IT products for educational purposes.

65. It was common ground at the hearing that relevant consumers of the goods at issue are likely to pay an above average (although not the highest) level of attention when selecting the goods.

### **Likelihood of Confusion**

66. Compared as just single marks, I find that the low or moderate degree of similarity between the marks, combined with the slightly higher than usual level of attention paid by relevant consumers and the only-average level of distinctiveness of

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<sup>22</sup> *O2 Holdings Limited, O2 (UK) Limited vHutchison 3G UK Limited* – C-533/06 (CJEU) at paragraph 66.

<sup>23</sup> See paragraph 22 above.

the earlier marks, is sufficient to exclude the likelihood of direct or indirect confusion, even where the respective marks are registered for identical goods.

67. As regards the claim based on the applicant's 'family' of marks (which I remind myself does not include ACTIVOSOUND or ACTIVENGAGE because those marks were not present on the market at the relevant date for similar goods to those covered by the Activiscope mark), I find that there is no likelihood of direct or (more relevantly to the 'family' claim) indirect confusion. I have reached this conclusion because of the following combination of factors:

- i) The applicant's 'family' is small in number: only three of the marks (ACTIVBOARD, ACTIVOTE & ACTIVEXPRESSION) were present on the market in any substantial way at the relevant date;
- ii) The characteristic which is said to identify the applicant's 'family' of marks – the prefix ACTIV – is not strongly distinctive for the goods at issue;
- iii) The goods for which the family of marks were known was primarily interactive whiteboards and learner response systems (which are similar, but not identical to the registered proprietor's goods), and only to a lesser extent for associated software (which is identical);
- iv) The characteristics which I have found to identify the applicant's small 'family', the prefix ACTIV- and a suffix consisting of a word which describes or alludes to a quality of the goods, are not entirely present in the registered proprietor's mark, the suffix of which consists of the well known word SCOPE, which conveys no meaning for educational software, and the prefix ACTIVI, which although similar to ACTIV, is not the actual prefix said to characterise the applicant's 'family' of marks;
- v) The above average (even if not the highest) level of attention paid by relevant consumers when selecting the goods at issue, and the professional nature of those consumers, makes it more likely than not that the above factors will be noticed and taken into account by the relevant average consumer, who will not then believe that the registered proprietor's mark is a member of the applicant's 'family'.

68. In reaching this conclusion, I have attached no weight to the letters from 11 users of the registered proprietor's software included in Mr Derone's evidence,<sup>24</sup> which tell me nothing about what an average consumer would think if encountering the Activiscope mark in circumstances where a) the consumer was aware of the applicant's 'family' of marks, and b) came across the Activiscope mark for on-line educational software without, c) first having come across the registered proprietor's

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<sup>24</sup> See paragraph 22 above.

LINGUASCOPE mark, and d) encountered the Activiscope mark on a website which made it clear that it was “operated by Learningscope”. This is relevant because there is nothing to prevent the registered proprietor using Activiscope in future (or selling the mark to someone else who uses it) in a way that does not connect it to any other trade mark, established business or trading name.

69. I have also taken account of Ms Bowhill’s submission, on behalf of the applicant, that initial interest confusion should also be considered<sup>25</sup>. However, I find that the factors listed above are also sufficient to exclude the likelihood of initial interest confusion. In any event, it is now clear from the case law of the CJEU that objections to the registration and use of later trade marks are only valid to the extent that they have the potential to affect the functions of the earlier mark.<sup>26</sup> It is easy to see how initial interest confusion could affect the essential function of an earlier mark where it results in so-called “bait and switch” behaviour. However, the nature of the goods and consumers at issue in this case make that sort of switching very unlikely. Therefore, even if there was some small degree of fleeting confusion, it is hard to see what effect that would have on the economic behaviour of the consumers at issue or on the capacity of the applicant’s marks to perform their essential function of distinguishing the applicant’s goods in the course of trade.

70. I accept the applicant’s submission that the absence of evidence of confusion to date does not mean that there is no likelihood of confusion going forward.<sup>27</sup> However, for the reasons given above, I have decided that there is no such likelihood.

71. The opposition under s.5(2) therefore fails.

72. In the light of the concession (rightly) made at the hearing, it follows that the opposition under s.5(4)(a) also fails.

### **Section 5(3)**

73. Section 5(3) is as follows:

“5(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.”

74. The relevant case law can be found in the following judgments of the ECJ: Case C-375/97, *General Motors*, [1999] ETMR 950, Case 252/07, *Intel*, [2009] ETMR 13,

<sup>25</sup> See the judgment of Arnold J. In *Och-Ziff v Och Capital* [2010] EWHC 2599 (Ch) at paragraph 101.

<sup>26</sup> See, by analogy, *Budejovicky Budvar v Anheuser-Busch Inc.* case C-482/09, at paragraphs 71-74.

<sup>27</sup> Per Millet L.J. in *The European* [1998] FSR 283.

Case C-408/01, *Addidas-Salomon*, [2004] ETMR 10 and Case C-487/07, *L'Oreal v Bellure* [2009] ETMR 55. The law appears to be as follows.

(a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors, paragraph 24*.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors, paragraph 26*.

(c) It is necessary, but not sufficient, for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman, paragraph 29* and *Intel, paragraph 63*.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks, the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel, paragraph 42*

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel, paragraph 68*: whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel, paragraph 79*.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious likelihood that this will happen in future; *Intel, paragraphs 76 and 77*.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an advantage taken unfairly by that third party where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by

the proprietor of the mark in order to create and maintain the mark's image;  
*L'Oreal v Bellure, Court's answer to question 1.*

75. Before I turn to the specific grounds for the opposition under s.5(3) it is necessary to decide whether, as a matter of law, the applicant's reputed marks must be considered one by one, or whether as under s.5(2), it is appropriate to consider the effect of the junior mark on the applicant's senior marks as a 'family'. It is self evident that in order to bring a case under s.5(3) based either wholly or partly on an earlier trade mark, that trade mark must have had a qualifying reputation at the relevant date. Subject to that proviso, I can see no reason why, in principle, the applicant cannot ask for the effects of the use of the registered proprietor's mark to be assessed against its interest as the owner of a 'family' of relevant marks.

76. Ms Bowhill drew my attention to a brief comment by Arnold J. In the *Och-Ziff* case<sup>28</sup> that the requirement for a 'reputation' is not particularly demanding. The judge cited the case law of the CJEU from the *General Motors* case. I think all he meant by his subsequent comment was that the requirement for a reputation did not mean that the reputed mark had to be famous or a household name. The requirement for a 'reputation' under s.5(3) should not be confused with the requirement for goodwill and reputation for passing off purposes. The latter has its origins in English common law whereas the former comes from EU law. The CJEU has held that in order to benefit from the protection afforded by articles 4(3) and 4(4)(a) of the Directive (on which s.5(3) is based) the reputed mark must be known to "a significant part of the relevant public" [for the goods or services for which the senior mark is registered and has been used]. I accept that the applicant's ACTIVBOARD, ACTIVOTE and ACTIVEXPRESSION marks met this requirement at the relevant date. I am doubtful that the ActivInspire mark, which had been in use for less than one year prior to the relevant date and achieved sales of only around £50k, or the ACTIVOSOUND mark, which had been on the market for only two years prior to that date and achieved sales of only £85k, would have been known to a significant part of the relevant public for educational software and amplification equipment, respectively. These modest sales can account for only a tiny fraction of the relevant markets for these goods, which in the case of educational software must run into many millions per annum. Further, the applicant's evidence about the amount it spent promoting its marks does not distinguish between the different marks and therefore makes it impossible to say how much was spent promoting these particular marks.

77. As regards the qualifying marks, I find that the factors listed at paragraph 67 above, which I found meant that there was no likelihood of confusion with Activiscope, also mean that use of that mark in relation to on-line educational software will not bring to mind the applicant's marks (either singly or collectively). This

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<sup>28</sup> See paragraph 126 of the judgment.

is not to suggest that the test for confusion and ‘bringing to mind’ is the same, but in this case the result is the same. And as the strength of the earlier marks’ reputations (or in this case the lack of it) is a factor to be taken into account in deciding whether the necessary ‘link’ is present, this would still be the case even if the applicant’s ActivInspire and ACTIVOSOUND marks were also taken into account.

78. If I am wrong about this, I would nevertheless reject the applicant’s case for dilution because, for the reasons already given, I do not find it likely that the registered proprietor’s mark will be taken as a member of the applicant’s ‘family’. Use of the later mark will not therefore weaken the distinctive identity of that ‘family’. Further, the modest degree of similarity between Activiscope and any of the applicant’s individual marks, combined with the other factors listed at paragraph 67 above, means that the use of the registered proprietor’s mark will not weaken the distinctive character of any of them individually. Further still, I consider that if (contrary to my primary finding) Activiscope causes any ‘bringing to mind’ of the applicant’s reputed marks, it is likely to be of the ‘occasional fleeting thought’ variety, and not such that has affected the economic behaviour of relevant consumers or is seriously likely to do so in future.

79. If I had been persuaded that the parties’ marks are or will be linked, I would also have rejected the applicant’s unfair advantage claim. This is because, in the absence of direct or indirect confusion, it is not obvious what advantage the registered proprietor would gain even if the use of Activiscope for on-line educational software did cause some consumers to think about the applicant’s marks. Those marks are primarily known for interactive whiteboards and learner response systems, and the applicant’s use of ActivInspire (which is closer to the applicant’s other marks than they are to the registered proprietor’s Activiscope mark) does not appear to have brought the educational software sold under that mark commercial success on a scale that obviously exceeds normal expectations for a new product. There is therefore no reason to believe that the registered proprietor has gained any advantage.

80. Further, following the CJEU’s judgment in *L’Oreal v Bellure*, it appears that it is a requirement for any advantage gained to be both unfair and without due cause. In order to be unfair some additional factor appears to be required. In *Whirlpool v Kenwood*<sup>29</sup>, the Court of Appeal analysed the CJEU’s judgment in *L’Oreal v Bellure* and Lloyd L.J. concluded that:

“It is not sufficient to show (even if Whirlpool could) that Kenwood has obtained an advantage. There must be an added factor of some kind for that advantage to be categorised as unfair. It may be that, in a case in which advantage can be proved, the unfairness of that advantage can be demonstrated by something other than intention, which was what was shown in *L’Oréal v Bellure*”.

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<sup>29</sup> [2009] R.P.C. 2

81. L.J. Rix and L.J. Wilson agreed with this. If an additional factor is necessary, then it is not present here. In this connection, I note that the registered proprietor has promoted its goods on its website as being suitable for use with electronic whiteboards, but this is listed as just one of three possible ways to use the software. I do not consider that this establishes an attempt to deliberately link the registered proprietor's mark and goods with those of the applicant.

82. The Section 5(3) ground therefore fails.

### **Overall Outcome**

83. The application for invalidation fails.

### **Costs**

84. The parties are agreed that costs should be assessed against the normal scale and should follow the event. The application has failed, therefore the registered proprietor is entitled to a contribution towards his costs. I order Promethean Limited to pay Stephane Derone the sum of £2400. This is made up of:

£400 for considering the application and filing a counterstatement.

£1000 for considering the applicant's evidence and filing evidence in reply.

£1000 towards the cost of the hearing, including the preparation of the skeleton argument.

85. This sum to be paid within 7 days of the end of the period allowed for appeal.

**Dated this 28<sup>th</sup> Day of June 2012**

**Allan James  
For the Registrar**

## **ANNEX A**

### **CTM 2198414 – ACTIVBOARD**

**Filing date:** 24 April 2001

**Publication date:** 11 May 2011

**Registration date:** 02 May 2002

#### **List of goods or services**

##### **Class 09:**

Teaching apparatus and instruments; electronic apparatus for recording, processing, storage, input or output of images, data or text; interactive teaching apparatus; light projectors, display apparatus; computers and computer software

### **CTM 6917991 – ACTIVEXPRESSION**

**Filing date:** 02 May 2008

**Publication date:** 22 March 2011

**Registration date:** 23 January 2009

#### **List of goods**

##### **Class 09:**

Hand held educational devices; hand held voting devices

### **CTM 3491991- ACTIVOTE**

**Filing date:** 29 October 2003

**Publication date:** 22 March 2011

**Registration date:** 04 March 2005

#### **List of goods**

##### **Class 09:**

Electronic apparatus and instruments; wireless apparatus and instruments; wireless feedback apparatus; teaching apparatus and instruments; electronic apparatus for recording, processing, storage, input or output of images, data or text; receivers; transmitters; interactive teaching apparatus; light projectors; display apparatus; hardware tablets; computers, computer hardware and peripherals therefor; keypads; computer programmes; computer software; parts and fittings for all the aforesaid goods

### **CTM 8919359 – ACTIVENGAGE**

**Filing date:** 01 March 2010

**Publication date:** 22 March 2011

**Registration date:** 24 August 2010

#### **List of goods**

##### **Class 09:**

Wireless apparatus and instruments; wireless feedback apparatus; teaching apparatus and instruments; electronic apparatus for recording, processing, storage, input or output of images, data or text; receivers; transmitters; interactive teaching apparatus; display apparatus; hardware tablets; graphic tablets; computer monitors; computers, computer hardware and peripherals therefor; keypads; electronic pens; electronic input devices for use with computers; input devices for use with interactive teaching apparatus; computer

programmes; computer software; educational software; digital projectors; flat panel display screens; video conferencing apparatus; databases; downloadable publications; discs, tapes, cartridges, cassettes and other memory or data carriers; pre-recorded memory carriers; prerecorded data carriers; pre-recorded memory carriers bearing educational material or material for learning; pre-recorded data carriers bearing educational material or material for learning; parts and fittings for all the aforesaid goods.

## CTM 7587892 – ActivInspire

**Filing date:** 02 February 2009

**Publication date:** 22 March 2011

**Registration date:** 21 October 2009

### List of goods

#### Class 09:

Wireless apparatus and instruments; wireless feedback apparatus; teaching apparatus and instruments; electronic apparatus for recording, processing, storage, input or output of images, data or text; receivers; transmitters; interactive teaching apparatus; display apparatus; hardware tablets; computers, computer hardware and peripherals therefor; keypads; computer programmes; computer software; computer software for use in preparing corporate presentations; computer software for use in education and training; training software; presentation software; compact discs and data carriers carrying software; graphics tablets; electronic mice; electronic apparatus for providing input to computers; publications in electronic form supplied on electronic data carriers, online from databases, or from facilities on the Internet, all for use in teaching or for education or training; electronic apparatus for providing input to interactive teaching apparatus; parts and fittings for all the aforesaid goods; instructional manuals in electronic format sold with the aforementioned goods

## CTM 6262075 – ACTIVSOUND

**Filing date:** 22 August 2007

**Publication date:** 22 March 2011

**Registration date:** 18 August 2008

### List of goods

#### Class 09:

Teaching apparatus and instruments; education apparatus and instruments; electronic apparatus for recording, processing, transmission, storage, input or output of images, sound, data or text; receivers; transmitters; interactive teaching apparatus; display apparatus; hardware tablets; graphic tablets; computer monitors; computers, computer hardware and peripherals therefor; keypads; electronic pens; electronic input devices for use with computers; input devices for use with interactive teaching apparatus; computer programmes; computer software; educational software; databases; downloadable publications; discs, tapes, cartridges, cassettes and other memory or data carriers; pre-recorded memory carriers; pre-recorded data carriers; pre-recorded memory carriers bearing educational material or material for learning; pre-recorded data carriers bearing educational material or material for learning; amplifiers; speakers; microphones; headsets; cables; parts and fittings for all the aforesaid goods.