

O-314-10

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2505347
BY NU INSTRUMENTS LTD TO REGISTER THE TRADE MARK**

ASTRUM

IN CLASS 9

**AND IN THE MATTER OF OPPOSITION
THERE TO UNDER NO 99059
BY ASTRUM SAS**

TRADE MARKS ACT 1994

**IN THE MATTER OF Application No. 2505347
By Nu Instruments Ltd to register the trade mark**

ASTRUM

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**IN THE MATTER OF Opposition thereto under No. 99059
by Astrium SAS**

BACKGROUND

1. On 24th December 2008, Nu Instruments Ltd of Unit 74, Clywedog Road South, Wrexham Industrial Estate, Wrexham, North Wales, LL13 9XS (hereafter “Nu”) applied to register the mark “ASTRUM” in Class 9 for the following goods:

Class 9

Scientific instruments; mass spectrometers; sample introduction apparatus; parts and fittings for all the aforesaid goods; computer software.

2. The application was published on 6th February 2008 and on 6th May 2009 Astrium SAS of 6 rue Laurent Pichat, 75016 Paris, France (hereafter “Astrium”) lodged an opposition against the goods specified above.
3. Astrium has an earlier Community mark, 3260056, the relevant details of which are as follows:

Mark and relevant dates	Goods and services relied upon under section 5(2)(b)
	<p><i>Class 9</i></p> <p>Scientific apparatus and instruments, namely scientific equipment for measuring inertial altitude based on fibre optic gyrometric sensors, intended exclusively for space systems, in particular satellites, space vehicles, space launchers and space platforms; software, scientific apparatus and instruments, namely navigation and positioning equipment for space systems, in particular satellites,</p>

<p>Filing and registration dates:</p> <p>8th July 2003 and 25th June 2008</p>	<p>space vehicles, space launchers and space platforms; information processing apparatus for the supply of technical information and logistical services relating to space systems, in particular satellites, space vehicles, space launchers and space platforms; measuring, checking (supervision), observation and communications apparatus; earth observation apparatus and instruments, encoding and transmission of data via satellites, apparatus and instruments for checking the altitude and orbit of satellites; ground-based systems for controlling satellites; satellite management programs; radio transceivers; telescope mirrors; infrared cameras; equipment cases for satellites and space vehicles; satellite altitude-checking and position-maintaining devices</p> <p><i>Class 42</i></p> <p>Professional consultancy and construction drafting, non-business, namely; construction consultancy, technical project studies; engineering; conducting surveys, projects and technical consultancy regarding satellites, space vehicles, space launchers and space platforms; scientific, physical and technical analyses and surveys for the manufacture, operation and maintenance of satellites, space vehicles, space launchers and space platforms; consultancy with regard to computers, construction drafting; legal consultancy; personal letter writing; services provided by a franchiser, namely transfer (provision) of know-how, licensing, copyright management, construction, design and development of legal data banks and databases; programming of electronic apparatus and instruments, computers, remote processing and data communication systems, multi-media equipment, programming of multi-media materials; rental of computers, computer software, scanners, writers, printers, printer peripheral devices and modems; leasing of access time to a computer data base server centre; integration services on satellite</p>
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	launchers and positioning and remote control of satellites and space vehicles.
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4. I should mention that Astrium’s specification also includes certain telecommunications services in Class 38, but as their statement of case at para 4, as well as their evidence and submissions refer only to Classes 9 and 42, it is to these classes only that I have restricted my analysis. Astrium has based its opposition solely upon section 5(2)(b) of the Trade Marks Act 1994 (hereafter “the Act”). They say the respective marks are visually and phonetically close, differing by only one letter, being an insignificant or concealed letter in the middle of the dominant and distinctive verbal element. The goods are identical or similar and there is a clear likelihood of confusion.
5. Nu filed a counterstatement denying the ground of the opposition. They say there is no likelihood of confusion as the respective marks are aurally, visually and conceptually dissimilar. They further deny that the goods covered by the respective marks are the same or similar. For the record, they also took issue that Astrium were the proprietor of the earlier mark, but this matter has been addressed in the evidence filed by Astrium and I do not understand Nu to be pursuing this matter and I will say no more about it.
6. Evidence has been filed by both parties which, insofar as it is factually relevant, I shall summarise below. Neither party has requested a hearing and instead, both parties are content for a decision to be issued based on the papers and both have provided submissions. Both parties request costs.

Opponent’s evidence

7. This takes the form of a witness statement, dated 4th November 2009, by Ian Bartlett who is registered trade mark attorney and partner with Beck Greener, Astrium’s trade mark attorneys in these proceedings. He notes that the specification of the earlier trade mark includes the broad and unlimited term, “measuring, checking (supervision), observation and communication apparatus”. He then provides a dictionary definition of “mass spectrometer” and “mass spectography” from The New Shorter Oxford English Dictionary, which describes a “mass spectrometer” as “an apparatus which ionizes material, forms the ions into a beam, separates the ions according to the ratios of their mass to their net electric charge (eg by deflecting them in a magnetic field or accelerating them in an electric field) and detects them, usually electrically, displaying them in a mass spectrum”. On the basis of this definition he says Nu’s specification

comes within the broad term and unlimited term as above included in Astrium's specification.

Applicant's evidence

8. This takes the form of a witness statement, dated 27th January 2010, by Dr John G Williams who is a director of Nu. He says he is experienced in the sale of the companies' products, including mass spectrometers. He says these are expensive pieces of equipment. Exhibit JGW1 is a list of mass spectrometers sold by the company and other companies. There are five such instruments listed and five companies, including Nu. This he says is the sum of the companies producing these products in competition with his company. The prices are all expressed in the hundreds of thousands of pounds, ranging from 100-300k for the Stable Isotope Ratio Mass Spectrometer, up to 400-600k for the Multiple Collection Inductively Coupled Plasma Mass Spectrometer and the Glow Discharge Mass Spectrometer. He says that the prices are approximate as most mass spectrometers are to a greater or lesser extent, finished according to the customer's specifications and exclude VAT. Consequently, he says the purchase of such products is not entered into lightly; there is considerable negotiation and discussion prior to actual purchase to determine precise requirements. There is simply no room for ambiguity.
9. He concludes by saying that he was not aware of the opponent's existence and since Nu adopted the mark ASTRUM he has not been aware of any instances where a customer or potential customer has thought that his company is in any way associated with the opponent.
10. There is also a witness statement, dated 28th January 2010, by Antony Gallafent, a registered trade mark attorney and partner with Gallafents LLP, acting for Nu. The bulk of this takes the form of legal submission but several facts are worth extracting. He notes that ASTRUM has a Latin meaning, namely that of "sky, heaven, star, heavenly body, planet/sun/moon or constellation". This is taken from an online Latin Dictionary 'LATdict'. He denies that a mass spectrometer falls within the broad category of goods contained in Astrium's specification and instead, based upon a definition of "mass spectrometer" taken from The Collins Dictionary, says that such an instrument is "an analytical instrument". The sale of such items is usually direct from the manufacturer, of which there are a limited number. Finally he notes from the webpage of one of Nu's competitors, Thermo Fisher Scientific, that mass spectrometers are identified in a separate area of the site, away from other types of product. They are not, as a matter of practical reality in trade, confused with or included within the term "measuring, checking (supervision), observation and communications apparatus" or goods similar thereto.

DECISION

11. With a filing date of 8th July 2003 and registration date of 25th June 2008, it is clear that under Section 6(1) of the Act, Astrium's mark is an earlier trade mark. Further, as it completed its registration procedure within five years prior to the publication of the contested mark (being 6th February 2009), it is not subject to the proof of use requirement set out in section 6A of the Act.

12. The opposition is founded upon Section 5(2) (b) of the Act. This reads:

“(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.”

13. In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the European Court of Justice (“ECJ”) 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 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (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 of the average consumer of the goods/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 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*,

(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 Kaisha v Metro-Goldwyn-Mayer Inc.*,

(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*,

(g) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(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*,

(i) 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 and Adidas Benelux BV*,

(j) 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.*,

(k) 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; 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; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*;

(l) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM*.

The average consumer and nature of the purchase

14. The average consumer for both parties' products will, predominantly and undoubtedly, be highly specialised. Astrium's goods appear to be, in the main (and excluding the broad term), space or satellite related equipment, whilst Nu's contain the broad terms "scientific instruments" and "computer software", as well as more specific terms relating to mass spectrometry instruments. Neither parties' goods are everyday consumer items, purchased by the general public. As far as the goods described by both parties in rather broader terms such as, in Astrium's case, "measuring, checking (supervision), observation and communications apparatus", and in Nu's case, "scientific instruments" and "computer software", are concerned, whilst they may be sold to the general public in certain circumstances and with respect to certain items, it will also be the case that with many other applications the average consumer will be highly specialised and not the general public.
15. As far as the purchasing process is concerned, the evidence from Dr Williams is informative in terms of the manner in which mass spectrometry instruments specifically are sold, but I must also bear in mind the other terms in the respective parties' specification, and the notional nature of my analysis. Dr Williams says, in respect of mass spectrometry items, that a great deal of attention will be paid to the customer's precise requirements and lengthy negotiations may ensue. There will be little scope for "ambiguity" and this will include, I presume, any ambiguity in the identity of the supplier. Furthermore, I accept the Dr Williams' evidence that the number of suppliers in the relevant market is very limited as regards mass spectrometry items. On the face of it, and although I have no evidence in relation to Astrium's goods, I think it more than likely that again, the market will be supplied by only a limited number of specialised suppliers who supply, in some cases, bespoke products. It goes without saying that satellite related equipment is unlikely to be available through general channels of trade. Mass spectrometry items and space related items apart, other items contained in the respective specifications may well be purchased with less care, such as eg computer software and the more mundane instruments that may be classed as "scientific instruments". That said, I believe all items listed in the respective specifications, by their very nature, lend themselves to careful selection in the purchasing process, even computer software, which requires compatibility checks to be made. I

will accordingly factor these comments into my overall conclusions on likelihood of confusion.

Comparison of marks

16. The case law makes it clear that I must undertake a full comparison of both marks in their totalities, taking account of all differences and similarities. The comparison needs to focus on the visual, aural and conceptual identities of both marks.
17. Visually, Astrium's mark presents as a word and device mark where the single word, comprising seven letters in lower case, a-s-t-r-i-u-m, is at a slight angle. Visually, this word dominates and is centrally placed in the mark. Above and below the word is a device comprising three rows of dots of differing sizes. Nu's mark consists of a single word in upper case of six letters' length, A-S-T-R-U-M. There is only one letter difference in the respective word elements, and that letter is in the middle of each word and accordingly somewhat obscured or lost. In sum, although Astrium's mark contains the device element, it is the word 'astrium' which assumes the central position in the mark and on that basis, visually I would conclude that the marks share a high degree of similarity.
18. Phonetically, Astrium's mark will be pronounced AST-REE-UM or , less likely, AST-RYE-UM. It is impossible to enunciate the device element. Nu's mark will be pronounced AST-RUM. Despite the additional syllable in Astrium's mark, I would consider the marks to share a high degree for phonetic similarity on the basis that the "i" or "ee" sound in the middle can easily be lost or misheard in pronunciation, given the emphasis that will be placed on the letters and sounds that precede and follow it.
19. Conceptually, I need to consider the argument that ASTRUM is a known Latin word, having the meaning of some form of heavenly or astronomical body. Whilst it is conceivable that the average consumer may view the word ASTRUM as possibly having some vague derivation from Latin, sharing, eg the same 'root' or origin as the word 'astronomy', I am not convinced by the submission that the average scientific consumer, sophisticated though they may be, will be aware of the precise meaning of the word 'ASTRUM'. Latin is not routinely taught in most schools these days. Mr Gallafent's evidence as to the meaning of the word comes from an online Latin Dictionary, rather than a standard English one. On that basis I am inclined to the view that both verbal elements of the respective marks will be seen by their respective average consumers as invented words. I should just mention that, as regards Astrium's mark, I do not believe the device element will clearly impart any particular meaning or concept to the verbal element. Moreover, I regard the device element, whilst clearly visible and not negligible, in terms of its contribution to the overall composite mark, it would nonetheless not be seen as being the distinctive, dominant (in trade mark terms) element. In this regard, I have in mind the relevant ECJ authorities referred to above in para

13, and in particular the *Medion* and *Shaker* cases which urge a comparison of the respective marks as wholes, but also allow for the identification of elements which may operate as more 'distinctive and dominant' than others. The words "distinctive and dominant" in this context are not understood to engage a purely forensic size or position analysis, but rather to relate to the question as to what, in a composite mark, operates to indicate origin, whether that element may be physically small or large or positioned centrally or elsewhere ? In my view, in Astrium's mark it will inevitably be the word "ASTRIUM" which will act as the dominant and distinctive *identifying* element, as opposed to the device. As invented words, ASTRUM and ASTRIUM cannot be said to be conceptually dissonant, but nevertheless given their constructions they can be said to share a high degree of conceptual similarity.

20. Taking the visual, aural and conceptual elements together I find that the respective marks share a high degree of similarity.

Comparison of the goods and services

21. In assessing the similarity of the goods, it is necessary to apply the approach advocated by case law and to take account of all the relevant factors relating to the services in the respective specifications. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the ECJ stated at paragraph 23 of the Judgment:

'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 end users and their method of use and whether they are in competition with each other or are complementary.'

22. Other factors have been identified in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281, such as the nature of the users and the channels of trade.

23. Three further cases on the way that specifications ought to be interpreted should be borne in mind. In *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd ("Thomson")* [2003] RPC 32, at para 31, Aldous LJ, says

"In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use."

24. Although this was in the context of arriving at a fair specification consequent to an attack of revocation on the grounds of non-use, the principle that it is the public and circumstances of the relevant trade that

should underpin consideration as to the terms used in a specification nonetheless holds good. Secondly, there is the case of *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd* (“*Beautimatic*”) [2000] FSR 267, in which the principle of giving words their ordinary (rather than an unnaturally narrow) meaning was enshrined. In summary, the *Beautimatic* case urges an approach that is not unnaturally narrow, whilst the *Thomson* case stresses that the exercise is not one of lexical analysis in a vacuum, but by reference to how the average consumer may perceive matters in the relevant trade.

25. I should also mention a further case in terms of the application of legal principle, and that is the European Court of First Instance (“CFI”) in *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) (“Meric”)* Case T-133/05¹, where, at para 29, it is stated:

“In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).”

26. The respective goods and services to be compared are as follows:

Astrium’s goods	Nu’s goods
<p><i>Class 9</i></p> <p>Scientific apparatus and instruments, namely scientific equipment for measuring inertial altitude based on fibre optic gyrometric sensors, intended exclusively for space systems, in particular satellites, space vehicles, space launchers and space platforms; software, scientific apparatus and</p>	<p><i>Class 9</i></p> <p>Scientific instruments; mass spectrometers; sample introduction apparatus; parts and fittings for all the aforesaid goods; computer software.</p>

¹ See also the Appointed Person’s decision in *Galileo* BL O-269-04 paras 13ff

<p>instruments, namely navigation and positioning equipment for space systems, in particular satellites, space vehicles, space launchers and space platforms; information processing apparatus for the supply of technical information and logistical services relating to space systems, in particular satellites, space vehicles, space launchers and space platforms; measuring, checking (supervision), observation and communications apparatus; earth observation apparatus and instruments, encoding and transmission of data via satellites, apparatus and instruments for checking the altitude and orbit of satellites; ground-based systems for controlling satellites; satellite management programs; radio transceivers; telescope mirrors infrared cameras; equipment cases for satellites and space vehicles; satellite altitude-checking and position-maintaining devices</p> <p><i>Class 42</i></p> <p>Professional consultancy and construction drafting, non-business, namely; construction consultancy, technical project studies; engineering; conducting surveys, projects and technical consultancy regarding satellites, space vehicles, space launchers and space platforms; scientific, physical and technical analyses and surveys for the manufacture, operation and maintenance of satellites, space vehicles, space launchers and space platforms; consultancy with regard to</p>	
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<p>computers, construction drafting; legal consultancy; personal letter writing; services provided by a franchiser, namely transfer (provision) of know-how, licensing, copyright management, construction, design and development of legal data banks and databases; programming of electronic apparatus and instruments, computers, remote processing and data communication systems, multi-media equipment, programming of multi-media materials; rental of computers, computer software, scanners, writers, printers, printer peripheral devices and modems; leasing of access time to a computer data base server centre; integration services on satellite launchers and positioning and remote control of satellites and space vehicles.</p>	
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27. As I understand Nu's position, it is arguing, firstly, that Astrium's specification is for the most part limited to satellite related equipment. With the exception of the term "measuring, checking (supervision), observation and communications apparatus" all other terms are limited to satellite related applications. Concerning the broader term, Nu's position seems to be that, (a) their own goods are not, "measuring, checking (supervision), observation and communications apparatus", but instead are, based upon The Collins Dictionary definition, "analytical" instruments instead, and as a matter of practical trade, generally sold apart from other equipment that may come within the broader category above, and/or, (b) that the broader term should in any event be construed or interpreted in the light of the specific goods indicated elsewhere. The latter point is raised in the context of the requirement that a specification must be legally certain. On submission (b) above, so far as I am aware there is no legal authority that requires me to construe any broad term in an earlier mark by reference to more specific terms which may be included. The comparison before me is a notional one based on the terms of the respective specifications as they stand, and in respect of which I am not entitled to cast any doubt or interpretation, in particular as to what a party's exact sphere of interest

may be, or to expressly limit broad terms by reference to more specific terms which may surround the broad terms.

28. It could also be the case under (b) above that Nu's attorneys are saying that the broad term is, of itself, too vague, irrespective of the specific items that surround it. I will simply observe in this regard that 'measuring apparatus' and 'observation instruments', being the critical descriptors, are accepted terms (contained within the alphabetical list) established under the Nice Agreement².
29. Furthermore, the problem with Nu's arguments under (b) above is that they run counter to the *Meric* case, to which I have referred earlier and which states that there is identity, *either* where the goods of the earlier mark are included in a more general category than specified in the application, or *vice versa*. In other words, for there to be identity there is no requirement that the respective specifications are co-extensive. Plainly, whilst the bulk of Astrium's goods are limited to satellite application, they are all nevertheless stated to be 'scientific instruments' (and would be understood as such by the average consumer), being the broader general category covered in Nu's specification. For these reasons I have no need to consider the submission from Astrium's attorneys to the effect that similarity exists in any event in relation to their services in Class 42. Applying *Meric*, Nu's "scientific instruments" in Class 9 are identical to the "scientific apparatus and instruments" included in Astrium's specification, notwithstanding that their nature is limited to satellite application. By the same token, "parts and fittings" for scientific instruments are also considered to be identical to the term "scientific instruments" in Astrium's specification, on the basis that they cannot be assumed to have an independent existence apart from the main equipment of which they are a part.
30. By the same token, Astrium has a specific type computer software described by the phrase, "software, scientific apparatus and instruments, namely navigation and positioning equipment for space systems, in particular satellites, space vehicles, space launchers and space platforms", and this effectively renders the general term "computer software" in Nu's specification identical, applying the *Meric* principle.
31. The question then arises as to the items "mass spectrometers; sample introduction apparatus; parts and fittings for all the aforesaid goods" included in Nu's specification. Here the *Meric* principle operates in the reverse to the way I have indicated above. Namely, the general category of goods are covered in the earlier mark by the term "measuring, checking (supervision), observation and communications apparatus" and the specific category by the application. At this point I should say I am

² See <http://www.wipo.int/classifications/nivilo/nice/index.htm?lang=EN>.

unconvinced by Nu's attorney's arguments under (a) in para 27 above that a 'mass spectrometer or sample introduction apparatus' is anything other than, on the ordinary meaning of the words, 'measuring' or 'observation' apparatus. The fact that one dictionary uses the word 'analytical' in its definition of a mass spectrometer cannot mean that the word 'analytical' in this context has a clear and distinct meaning other than, or apart from, 'measuring' or 'observation'. The evidence of 'separation' in trade supplied from one of NU's competitors does not persuade me that mass spectrometers or closely allied equipment are not, in a trading context, anything other than 'measuring or observation' apparatus.

32. As Astrium's attorneys note in their submissions at para 3.4, there are many other items on that particular exhibited webpage mentioned in para 10 above (that of Thermo Fisher Scientific, one of Nu's competitors), in close proximity to 'mass spectrometers' and 'elemental analysis' which would fall within the general term, eg material testing, radiation measurement, density flow and measurement. So, rather than establish that 'mass spectrometers' and closely allied equipment are, distinctively 'analytical', rather than 'measuring or observation' apparatus, in fact the evidence serves to establish that, as far as the trade is concerned, no material difference or distinction can be drawn. In other words, the terms "analytical equipment" is not used in the trade in contra-distinction to apparatus described as "measuring or observation" apparatus.

33. I should say that I understand "sample introduction apparatus" are used in a closely allied way, with "mass spectrometers". Introduction apparatus are used to place the sample of whatever material is being measured into the spectrometer. In that sense I see no grounds under which I can safely conclude that such apparatus has an independent existence of its own, still less (as with scientific instruments in para 29 above), the "parts and fittings" for such equipment, including for the mass spectrometers themselves of course. On that basis, the findings I shall make for mass spectrometers will hold good for the sample introduction apparatus, as well as parts and fittings for both types of apparatus.

34. Given my analysis above, I conclude that all the goods in Nu's Class 9 specification are identical to those of the Astrium's Class 9 specification.

Likelihood of confusion

35. Before bringing all my findings together in an overall global assessment I need to make an assessment of the distinctive character of the earlier mark. An invented word having no derivation from known words is, in its inherent characteristics, high on the scale of distinctiveness. Such is the case here, and the word ASTRIUM (along with the device element) to the UK consumer will be regarded as highly distinctive. As no use has been

shown in the UK I do not have to consider the question whether the inherent distinctiveness of the mark has been enhanced through use. In the circumstances, given the extremely high inherent distinctiveness of the earlier mark, it is questionable that use would or could have enhanced this in any event.

36. I have found above that the respective marks share a high degree of similarity and that the goods are identical. I have also found the earlier mark to be highly distinctive. These findings are tempered somewhat by the evidence of Dr Williams which goes to the precise nature of the mass spectrometry purchases, as well as being of assistance in describing the limited number of manufacturers in the relevant market. But as I have said, Dr Williams confines his evidence to mass spectrometry instruments; my task is a notional analysis of all goods in the relevant specifications.
37. In all the circumstances, taking into account *all* the relevant factors, in particular the highly distinctive nature of the earlier mark, and the concept of 'imperfect recollection' by which a side by side analysis of the marks is not necessarily considered to be an appropriate reflection of exposure in trade, I find there is a likelihood of confusion as regards the application in its entirety.
38. Having made that finding I need to test whether the applicant's concurrent or parallel use prior to the filing date, and as referred to by Dr Williams, may have any impact on the assessment. Although it is well established that evidence of what is often referred to as "parallel trading" may be a factor which could potentially assist in deciding whether there exists a likelihood of confusion, such evidence needs to establish that the respective marks have actually been put to use in the same market (as opposed to the notional use which is normally considered), without the consumer being confused regarding economic origin. If such evidence is forthcoming then this can inform the tribunal's decision. Alan Steinfield QC, sitting as a deputy judge of the High Court, in *Fiorelli Trade Mark* [2007] RPC 18 gave weight to an absence of confusion in the marketplace, however, this should be tempered by a number of decisions which express caution about the circumstances in which it is appropriate to give these factors weight (see the Court of Appeal in *The European Ltd v. The Economist Newspaper Ltd* [1998] FSR 283 at page 291, Laddie J in *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 at 809 and the Court of Appeal in *Phones 4U Ltd v Phone 4u. co. uk Internet Ltd* [2007] RPC 5 at paras 42 to 45.) In the first of the above cases Millet LJ stated:

"Absence of evidence of actual confusion is rarely significant, especially in a trade mark case where it may be due to differences extraneous to the plaintiff's registered trade mark."

39. In the circumstances of this case the evidence does not establish that the respective marks have been put to use in the same market. It follows that parallel or concurrent use does not disturb my findings on likelihood of confusion.

40. The opposition succeeds in respect of all the goods opposed.

Costs

41. Astrium SAS has been totally successful in its opposition. Accordingly, it is entitled to a contribution towards its costs. I take account of the fact that that the decision has been reached without a hearing taking place. In the circumstances I award Astrium SAS the sum of £1200 as a contribution towards the costs of the proceedings. The sum is calculated as follows:

1. Filing fee for opposition - £200
2. Preparing a statement and considering counterstatement - £200
3. Preparing evidence and considering and commenting on other sides evidence - £500
4. Preparing submissions - £300

Total £1200

42. I order Nu Instruments Ltd to pay Astrium SAS the sum of £1200. The sum should 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 7th day of September 2010

**Edward Smith
For the Registrar,
the Comptroller-General**